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15 UNITED STATES DISTRICT COURT  
16 CENTRAL DISTRICT OF CALIFORNIA

17 VERISIGN, INC., a Delaware  
corporation,

18 Plaintiff,

19 v.

20 INTERNET CORPORATION FOR  
21 ASSIGNED NAMES AND  
22 NUMBERS, a California corporation;  
DOES 1-50,

23 Defendants.

Case No. CV 04-1292 AHM (CTx)

**VERISIGN, INC.'S MEMORANDUM IN  
OPPOSITION TO DEFENDANT  
ICANN'S SPECIAL MOTION TO  
STRIKE VERISIGN'S SECOND, THIRD,  
FOURTH, FIFTH, AND SIXTH CLAIMS**

Date: May 17, 2004  
Time: 10:00 a.m.  
Courtroom: 14 - Spring Street Bldg.  
Hon. A. Howard Matz

[Evidentiary Objections; Appendix of Exhibits; Declarations; and [Proposed] Order concurrently filed and lodged herewith]

26 Plaintiff VeriSign, Inc. ("VeriSign") hereby opposes the Special Motion to  
27 Strike pursuant to California Code of Civil Procedure § 425.16 (the "Motion") filed  
28 by defendant Internet Corporation for Assigned Names and Numbers ("ICANN").

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1    **I. INTRODUCTION**

2           ICANN’s Motion to Strike constitutes an abuse of California’s so-called “anti-  
3 SLAPP statute.” It seeks to use the statute to immunize ICANN from liability for its  
4 wrongful acts merely because it chose to publish evidence of its wrongful acts in the  
5 course of committing them.<sup>1</sup> This is simply not the law. The anti-SLAPP statute was  
6 enacted to combat frivolous “lawsuits brought primarily to chill the valid exercise of the  
7 constitutional rights of freedom of speech and petition,” not to provide a safe harbor for  
8 private corporations who use commercial statements or bad faith threats of litigation in  
9 the course of committing an independent tort or breach of contract. CCP § 425.16(a).

10           The anti-SLAPP statute applies only to actions that arise from, or are based on,  
11 protected activity. As alleged in the Complaint, the gravamen of VeriSign’s claims is a  
12 pattern of unjustified acts and omissions by ICANN, over a three-year course of dealing  
13 between the parties, violating express terms of the written contract between them.  
14 ICANN nonetheless asserts that the anti-SLAPP statute applies because of an  
15 October 3, 2003 “demand letter” and certain public statements by ICANN regarding the  
16 parties’ private contract disputes. ICANN’s letter and statements, however, are not the  
17 basis for VeriSign’s claims or the source of VeriSign’s injury. Rather these  
18 communications, at most, are *evidence* of ICANN’s breaches of contract and tortious  
19 wrongdoing, or, in the language of the case law, the “trigger” to VeriSign filing its  
20 Complaint. Thus, the anti-SLAPP statute has no application in this case.

21           Even assuming, *arguendo*, that the anti-SLAPP statute applies (which it does  
22 not), the Motion must be denied because VeriSign has presented *prima facie* evidence  
23 in support of its claims, thereby satisfying the statutory requirements. *Navellier v.*  
24 *Sletten*, 29 Cal. 4th 82, 89, 124 Cal. Rptr. 2d 530 (2002) (a plaintiff may defeat an anti-  
25 SLAPP motion by demonstrating that his claims have “minimal merit”). As set forth

26           <sup>1</sup> (Mot. at 1:21-22.) See also CCP § 427.17(a) (“the Legislature finds and declares  
27 that there has been a disturbing abuse of Section 425.16. . . . which has undermined  
28 the constitutional rights of . . . petition for the redress of grievances”).

1 herein and in VeriSign's supporting declarations, ICANN has repeatedly breached its  
2 contractual obligations to VeriSign, by blocking or delaying new services that VeriSign  
3 has attempted to offer, including at the same time that it has permitted VeriSign's  
4 competitors to offer such services. Similarly, ICANN intentionally interfered with  
5 VeriSign's contract with a third party, resulting in a termination of the agreement.

6 Therefore, the Motion to Strike should be denied both because the anti-SLAPP  
7 statute does not apply to VeriSign's claims and because, in any event, VeriSign has  
8 made the evidentiary showing that would be required by the statute.

9 **II. STATEMENT OF FACTS**

10 A. The .com Registry Agreement Between VeriSign and ICANN.

11 VeriSign and ICANN are private, *non-governmental* companies. They executed  
12 the operative Registry Agreement on or about May 25, 2001. Neither party has *any*  
13 authority over the other beyond what their contract provides. (*See generally* App. Ex. 7.)

14 Under a Memorandum of Understanding with the Department of Commerce  
15 ("DOC"), ICANN provides certain technical coordination functions for the domain  
16 name system, including accreditation of certain domain name registrars and registries.  
17 (Sbarbaro Decl. ¶ 13; Turner Decl. ¶¶ 14-17.)

18 Pursuant to the Registry Agreement, VeriSign operates the domain name  
19 registries for the .com top level Internet domain. (Turner Decl. ¶ 8.) The Registry  
20 Agreement calls for VeriSign to follow certain technical guidelines in its performance  
21 of "Registry Services," but otherwise does not govern VeriSign's business operations  
22 with respect to the Registry. (*See* Sbarbaro Decl. ¶¶ 2-35.) Under the Registry  
23 Agreement, Registry Services are defined as follows:

24 "Registry Services" means services provided as integral part of the  
25 Registry TLD, including all subdomains. These services include: receipt

26 ///

27 ///

28 ///

1 of data concerning registration of domains and nameservers from  
2 registrars; provision to registrars of status information relating to the  
3 Registry TLD zone servers, dissemination of TLD zone files, operation of  
4 the Registry zone servers, dissemination of TLD zone files, operation of  
5 the Registry zone servers, dissemination of contact and other information  
6 concerning domain and nameserver registrations in Registry TLD, and  
7 such other services required by ICANN through the establishment of  
8 Consensus Policies as set forth in Definition I of this Agreement.

9 (App. Ex. 7.) This definition of Registry Services does not cover the services forming  
10 the basis for the Complaint.

11 The Agreement also sets forth ICANN's obligations under the Agreement,  
12 including the obligations (i) not to single VeriSign out for "disparate treatment;" (ii) to  
13 exercise its responsibilities in an "open and transparent manner;" (iii) to "not  
14 unreasonably restrain competition;" and (iv) to ensure "adequate appeal procedures" for  
15 VeriSign, to the extent it is adversely affected by ICANN's policies. (*Id.*)

16 **B. ICANN's Breaches of the .com Registry Agreement.**

17 As described more fully *infra* in Section III.D., and in the accompanying  
18 declarations, during the three years following the execution of the Registry Agreement,  
19 ICANN has repeatedly violated the express terms of the contract, including by  
20 (i) consistently blocking, delaying and/or restricting VeriSign's efforts to provide new  
21 services to its customers; (ii) repudiating its obligations under the agreement by  
22 conditioning further performance on VeriSign's agreement to inequitable and unjust  
23 conditions; and (iii) repeatedly failing to conduct its operations with transparency or  
24 accountability as required by the agreement.

25 As a result of this course of conduct, ICANN has blocked the introduction of the  
26 Wait Listing Service ("WLS") for almost 3 years.<sup>2</sup> ICANN also has delayed the  
27 introduction of the International Domain Names service ("IDN").<sup>3</sup> ICANN forced

28 <sup>2</sup> WLS is a service that would allow prospective domain name registrants to submit a  
subscription for currently registered domain names, allowing the subscription holder  
to become the registrant of the domain name in the event that it is deleted from the  
registry. WLS is discussed in detail, along with ICANN's conduct breaching the  
contract, in the Turner declaration (¶¶ 20-68).

<sup>3</sup> IDN would allow Internet users to use non-ASCII (non-English) characters to  
register and use domain names in the .com TLD. (*See* Turner Decl. ¶¶ 99-130).

1 VeriSign to shut down Site Finder following its introduction.<sup>4</sup> And ICANN forced  
2 VeriSign to re-formulate in mid-stream a marketing program designed to promote the  
3 .com registry to its registrar customers.<sup>5</sup>

4 **III. ARGUMENT.**

5 A. The Anti-SLAPP Statute.

6 ICANN has moved to strike the Second through Sixth Claims for Relief alleged  
7 in VeriSign's Complaint pursuant to California Code of Civil Procedure ("CCP")  
8 § 425.16 (the "anti-SLAPP statute"). Section 425.16(b)(1) provides that "[a] cause of  
9 action against a person arising from any act of that person in furtherance of the person's  
10 right of petition or free speech<sup>6</sup> . . . in connection with a public issue shall be subject to  
11 a special motion to strike." The purpose of the anti-SLAPP statute is to deter "lawsuits  
12 brought primarily to chill the valid exercise of the constitutional rights of freedom of  
13 speech and petition for redress of grievances." CCP § 425.16(a).

14 To prevail on its Motion, ICANN must demonstrate that (1) it has engaged in acts  
15 in furtherance of its right of petition or free speech, and (2) VeriSign's claims "arise  
16 from" that protected activity. The "critical consideration" in determining whether the  
17 anti-SLAPP statute applies is "whether the cause of action is *based on* the defendant's  
18 protected free speech or petitioning activity." *Navellier*, 29 Cal. 4th at 89 (emphasis in  
19

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20 <sup>4</sup> Site Finder assisted Internet users that typed a web address in error with a list of  
21 alternative addresses to which the user may choose to navigate. It is discussed in  
22 detail, along with ICANN's conduct breaching the contract, in the Turner and  
23 Hollenbeck declarations. (Turner Decl. ¶¶ 69-98; Hollenbeck Decl. ¶¶ 4-43.)

24 <sup>5</sup> The marketing program is discussed in detail, along with ICANN's conduct in  
25 breaching the contract, in the Desjardins Decl. (¶¶ 3-10) and Gomes Decl. (¶¶ 15-19).

26 <sup>6</sup> Section 425.16(e) sets forth four categories of acts "in furtherance of a person's right  
27 of petition or free speech . . . in connection with a public issue": "(1) any written or  
28 oral statement or writing made before a legislative, executive or judicial proceeding, or  
any other official proceeding authorized by law; (2) any written or oral statement or  
writing made in connection with an issue under consideration by a legislative,  
executive, or judicial body, or any other official proceeding authorized by law; (3) any  
written or oral statement made in a place open to the public or a public forum in  
connection with an issue of public interest; (4) or any other conduct in furtherance of  
the exercise of the constitutional right of petition or the constitutional right of free  
speech in connection with a public issue or an issue of public interest."



1 original). ICANN bears the burden of demonstrating “that the subject cause of action is  
2 in fact one ‘arising from’ the defendant’s protected speech or petitioning activity.”  
3 *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 66, 124 Cal. Rptr. 2d 507  
4 (2002). In other words, to fall within the statute, ICANN must “demonstrate that the  
5 defendant’s conduct *by which plaintiff claims to have been injured*” is protected.<sup>7</sup> *Id.*  
6 (emphasis added). In deciding whether this initial requirement is met, a court should  
7 consider “the pleadings and supporting and opposing affidavits stating the facts upon  
8 which the liability or defense is based.” *Navellier*, 29 Cal. 4th at 89 (citing CCP  
9 § 425.16(b)). If the defendant does not meet this threshold burden, the motion must be  
10 denied without going further. *Equilon Enterprises*, 29 Cal. 4th at 67; CCP § 425.16(b).

11 ICANN’s Motion identifies two acts that it contends constitute protected activity  
12 under the anti-SLAPP statute and which purportedly form the basis for VeriSign’s  
13 claims. First, ICANN asserts that VeriSign’s Second, Third and Fourth Claims are  
14 exclusively based, and that the Fifth and Sixth Claims are partially based, on ICANN’s  
15 October 3, 2003 letter demanding suspension of Site Finder. ICANN alleges that this  
16 letter is a “pre-litigation” demand letter in furtherance of its right to petition pursuant to  
17 CCP § 425.16(e)(2). (Mot. at 7.) Second, ICANN contends that VeriSign’s Fifth and  
18 Sixth Claims also are based on two public statements the Complaint alleges were made  
19 by ICANN regarding its contract with VeriSign: (i) ICANN’s issuance of “false public  
20 statements that VeriSign was violating its obligations as a registry operator;” and (ii)  
21 ICANN’s announcement that “WLS is a Registry Service within the meaning of the  
22 2001 .com Registry Agreement” (“ICANN’s Statements”). (*Id.* at 11:3-7.) ICANN  
23 asserts that these statements fall within CCP § 425.16(e)(3) as statements made in a  
24 “public forum” regarding an “issue of public interest.” (*Id.* at 10.)

25 <sup>7</sup> It is “logical” and “fundamentally fair” to require a defendant to make a prima facie  
26 showing that the statute applies before “putting the plaintiff to the burden of  
27 establishing probability of success on the merits.” *Wilcox v. Superior Ct.*, 27 Cal.  
28 App. 4th 809, 821, 33 Cal. Rptr. 2d 446 (1994), *overruled on other grounds, Equilon  
Enterprises*, 29 Cal. 4th 53. If the defendant fails to meet this burden, the anti-  
SLAPP motion should be “summarily denied.” *Id.*

1 ICANN has failed to meet its burden of showing that VeriSign's claims "arise  
2 from" the October 3 letter or ICANN's Statements, or that these acts constitute  
3 protected activity under the anti-SLAPP statute. Moreover, even if ICANN could meet  
4 its burden to show that the anti-SLAPP statute applies, the Motion still must be denied  
5 because VeriSign's claims have the "minimal merit" necessary to withstand ICANN's  
6 Motion. *See Navellier*, 29 Cal. 4th at 89 (a plaintiff may defeat an anti-SLAPP motion  
7 by demonstrating that his claims have "minimal merit").

8 B. ICANN Has Not Met Its Burden with Respect to the October 3 Letter.

9 1. VeriSign's Claims Do Not "Arise From" the October 3 Letter.

10 ICANN contends that the claims at issue in its Motion "arise from" the October 3  
11 letter. (Mot. at 9-10.) ICANN misstates the basis for VeriSign's claims. As the  
12 Complaint makes clear, VeriSign's claims are based on ICANN's contractual dealings  
13 with VeriSign over the three-year course of the parties' agreement, not from any act in  
14 furtherance of ICANN's right of petition or free speech. *See Kajima Eng. & Constr.,*  
15 *Inc. v. City of Los Angeles*, 95 Cal. App. 4th 921, 929, 116 Cal. Rptr. 2d 187 (2002).

16 In *Kajima*, the California Court of Appeals affirmed the trial court's  
17 reinstatement of contract and tort cross-claims by the City of Los Angeles (the "City")  
18 against Kajima, based on Kajima's bidding and construction work for the City. The  
19 trial court originally had struck the claims under the anti-SLAPP statute, on the ground  
20 that the claims had been filed in retaliation for Kajima's filing suit against the City, but  
21 reinstated the claims upon re-consideration. *Id.* at 925-926. Kajima appealed, asserting  
22 that the City's entire cross-complaint had been filed "in retaliation for Kajima's  
23 exercise of its constitutional right to petition" as demonstrated by, *inter alia*, allegations  
24 in the City's cross-complaint that Kajima had made improper threats to file suit,  
25 including an allegation that "Kajima extort[ed] money by the filing of lawsuits or  
26 threatening to file lawsuits." *Id.* at 926, 930-31.

27 The Court of Appeals rejected Kajima's argument, finding that the cross-  
28 complaint's references to Kajima's threats to file lawsuits were "simply part of the

1 City's allegations regarding Kajima's general pattern and practice of bidding and  
2 collecting on" construction projects. *Id.* at 931. Nothing in the City's cross-complaint  
3 sought to impose liability on Kajima's right to petition. *Id.*; *see also Santa Monica Rent*  
4 *Control Bd. v. Pearl St., LLC*, 109 Cal. App. 4th 1308, 1318, 135 Cal. Rptr. 2d 903  
5 (2003) (reversing decision granting motion to strike brought by rent control board  
6 following landlord's filing of vacancy registrations; even assuming that the landlord's  
7 filing constituted protected activity, defendants were sued for non-compliance with the  
8 rent control law, not "for their conduct in exercising such constitutional rights"); *City of*  
9 *Cotati v. Cashman*, 69, 78, 124 Cal. Rptr. 2d 519, 29 Cal. 4th (2002) (mere fact that an  
10 action was filed *after* a protected activity occurred, or *triggered* by such an activity,  
11 does not establish that it "arose from" free speech or petitioning).

12 Similarly, in *Gallimore v. State Farm Fire and Casualty Insurance Co.*, 102 Cal.  
13 App. 4th 1388, 1399, 126 Cal. Rptr. 2d 560 (2002), the plaintiff alleged that State Farm  
14 had engaged in the mishandling of insurance claims, and based such allegations on an  
15 investigation of the defendant insurer conducted by the California Department of  
16 Insurance. The insurer asserted it was being sued for its having communicated  
17 information to the department in furtherance of its right of petition or free speech. The  
18 Court of Appeal rejected this argument "out of hand," finding that the insurer was  
19 confusing its allegedly wrongful acts with the evidence the plaintiff might use to prove  
20 misconduct. *Id.* at 1399. The mere fact that the suit was filed shortly after a Department  
21 report containing defendant's information became public did not mean that the suit arose  
22 from the defendant's speech in supplying the information in the report. *Id.* at 1400.

23 As in *Kajima* and *Gallimore*, VeriSign does not seek to impose liability on  
24 ICANN based on any petitioning activity. Instead, VeriSign's Complaint is based on  
25 ICANN's three-year history of repeated violations of the .com Registry Agreement,  
26 including conditioning its continuing performance of the contract on VeriSign's  
27 concession to terms not within the parties' agreement. (Compl. ¶¶ 30, 31, 45-47, 62-65;  
28 *see generally* Gomes Decl.; Sbarbaro Decl.; Desjardins Decl.; Hollenbeck Decl.); *see*

1 also *Kimberly Assocs. v. United States*, 261 F.3d 864, 870 (9th Cir. 2001) (“The  
2 archetypical repudiation . . . occurs when one party to a contract attempts to unilaterally  
3 alter the contract or to condition his performance on terms that were not part of the  
4 bargain.”). The October 3 letter merely evidences ICANN’s repudiation of its  
5 contractual obligations. VeriSign, however, seeks no damages based on the content of  
6 the letter itself or the threat of legal proceedings. Nor does VeriSign seek to stifle  
7 ICANN’s speech or access to the courts. Thus, VeriSign’s claims do not arise out of  
8 “protected activity.” *Kajima*, 95 Cal. App. 4th at 931.

9 Cases cited by ICANN do not hold otherwise. Each of ICANN’s cases involves  
10 a suit that challenged a protected act of petitioning by claiming that *the petitioning act*  
11 *itself* caused damage to the plaintiff. See *Equilon Enterprises*, 29 Cal. 4th at 67  
12 (seeking a declaration that plaintiff’s Proposition 65 notice letter failed to comply with  
13 applicable regulations); *Navellier*, 29 Cal. 4th at 89 (challenging defendant’s filing of  
14 litigation which was explicitly prohibited by a contractual release); *Briggs v. Eden*  
15 *Council for Hope & Opportunity*, 19 Cal. 4th 1106, 1115, 81 Cal. Rptr. 2d 471 (1999)  
16 (seeking damages for defamatory statements made in connection with issues currently  
17 under review by administrative bodies and the courts); *Dove Audio, Inc. v. Rosenfeld,*  
18 *Meyer & Susman*, 47 Cal. App. 4th 777, 783, 54 Cal. Rptr. 2d 830 (1996) (claiming that  
19 letter protected by litigation privilege was defamatory).

20 2. ICANN Has Not Shown that the Litigation Privilege Applies to the  
21 October 3 Letter.

22 Even if VeriSign’s claims “arose from” the October 3 letter, which they do not,  
23 ICANN has not met its evidentiary burden of showing that the October 3 letter  
24 constitutes protected activity under the anti-SLAPP statute. According to ICANN, the  
25 October 3 letter is protected under the anti-SLAPP statute because it constitutes a  
26 communication protected by California’s litigation privilege.<sup>8</sup> (Mot. at 7.) Thus, to

27 <sup>8</sup> ICANN does not allege that the October 3 letter concerns a “public issue” or was  
28 made in a “public forum.” See CCP § 425.16(a) & (e). Thus, its argument that the

1 satisfy its threshold burden that the anti-SLAPP statute applies to VeriSign's claims,  
2 ICANN *must first demonstrate*, through admissible evidence, that its October 3 letter  
3 falls within California's litigation privilege. *Shropshire v. Fred Rappaport Co.*, 294 F.  
4 Supp. 2d 1085, 1099, 1100 (N.D. Cal. 2003) (to determine the applicability of the anti-  
5 SLAPP statute to pre-litigation demand letter, the court must first decide if the letter is  
6 protected by California's litigation privilege); *see also Dove Audio*, 47 Cal. App. 4th at  
7 784 (applying anti-SLAPP statute after determining the litigation privilege protected the  
8 communication at issue). ICANN, however, has not met its evidentiary burden of  
9 proving that this letter is in fact protected by the anti-SLAPP statute.

10 For *pre-litigation* communications, such as the October 3 letter, the litigation  
11 privilege applies only when an anticipated lawsuit, based on a legally viable claim, was  
12 seriously contemplated in good faith.<sup>9</sup> *Aronson v. Kinsella*, 58 Cal. App. 4th 254, 266,  
13 68 Cal. Rptr. 2d 305 (1997). "[T]he question of whether . . . communications . . . were  
14 made in anticipation of litigation for purposes of California's litigation privilege, *and*  
15 *thus also for the purposes of the anti-SLAPP statute*, depends upon whether  
16 [d]efendant's statements were made 'with a good faith belief in a legally viable claim  
17 and in serious contemplation of litigation.'" *Shropshire*, 294 F. Supp. 2d at 1100  
18 (quoting *Aronson*, 58 Cal. App. 4th at 266) (emphasis added). In the context of an anti-  
19 SLAPP motion, whether or not the litigation privilege applies to pre-litigation  
20 communications is an issue of fact.<sup>10</sup> *Id.*; *see generally Edwards v. Centex Real Estate*

21 \_\_\_\_\_  
22 (Footnote Cont'd From Previous Page)

23 October 3 letter constitutes protected activity stands or falls on the application of the  
24 litigation privilege to that communication.

25 <sup>9</sup> In determining the applicability of section 425.16, in addition to cases addressing the  
26 statute, courts also "look[] to the case law addressing California's litigation privilege to  
27 determine whether [d]efendant's activity is protected under the anti-SLAPP statute."  
28 *Shropshire*, 294 F. Supp. 2d at 1099 (quoting *Briggs*, 19 Cal. 4th 1106). This is  
because the protection afforded certain pre-litigation communications under the anti-  
SLAPP statute, such as those alluded to by ICANN, derives from California's litigation  
privilege contained in Civil Code section 47(b). *Id.*

<sup>10</sup> In its April 20 *Ex Parte* Application, VeriSign requested discovery on this issue.  
VeriSign renews that request, *infra*, page 23.

1 Corp., 53 Cal. App. 4th 15, 39, 61 Cal. Rptr. 2d 518 (1997) (application of litigation  
2 privilege to pre-litigation communications is a question of fact).

3 ICANN has failed to submit any admissible evidence that would support its  
4 contention that the October 3 letter was written “with a good faith belief in a legally  
5 viable claim in serious contemplation of litigation.” *Shropshire*, 294 F. Supp. 2d at  
6 1100. ICANN has not submitted evidence that it consulted with legal counsel prior to  
7 sending the October 3 letter, that any legal investigation had occurred regarding the  
8 viability of its alleged claims against VeriSign, or that it even communicated with its  
9 Board of Directors (who would need to authorize such a lawsuit) or officers prior to  
10 sending that letter. This type of *evidence* is essential to support ICANN’s claim of  
11 privilege, not just the “belief” of its counsel. *See Aronson*, 58 Cal. App. 4th at 268  
12 (delaying ruling on summary judgment motion invoking litigation privilege until  
13 discovery regarding the factual basis for the privilege had been taken); *Edwards*, 53  
14 Cal. App. 4th at 39 (communications “are unprotected by the privilege if there is no  
15 substantial evidence that, at the time [they were made], . . . litigation was seriously  
16 proposed and actually contemplated in good faith”). Instead, ICANN’s only reference  
17 to the dual requirements of “good faith belief in a legally viable claim” and “serious  
18 contemplation of litigation” is a single sentence in the Jeffrey declaration regarding *his*  
19 “belie[f]” after only three weeks with ICANN that “ICANN was seriously and in good  
20 faith contemplating” action against VeriSign. This bare opinion, however, is not  
21 admissible, nor is it supported by any facts. (*See VeriSign’s Objections to Jeffrey*  
22 *Decl.*) Moreover, Mr. Jeffrey’s declaration, like ICANN’s Motion, *is silent* on the topic  
23 of whether ICANN had a “legally viable” claim against VeriSign.

24 In short, nothing in the October 3 letter<sup>11</sup> or in Mr. Jeffrey’s declaration identifies  
25 any objective facts that would support a finding that the October 3 letter was based on

26 <sup>11</sup> In fact, the October 3 letter itself undermines any assertion by ICANN that, *at the*  
27 *time the letter was sent*, it was seriously contemplating a legal proceeding against  
28 VeriSign based on a good faith belief in a legally viable claim. Among other things, the  
letter demands suspension of VeriSign’s Site Finder service “pending further evaluation

1 ICANN's good faith belief in a legally viable claim against VeriSign or that ICANN  
2 was seriously contemplating pursuing legal action. (See Jeffrey Decl. ¶ 11; Turner  
3 Decl. ¶¶ 86-92; App. Ex. 37.) Accordingly, ICANN has not met its burden of showing  
4 that the anti-SLAPP statute applies.<sup>12</sup> See *Shropshire*, 294 F. Supp. 2d at 1100; see also  
5 *Edwards*, 53 Cal. App. 4th at 35 (rejecting application of litigation privilege to pre-  
6 litigation communication, in part, because "even a threat to file a lawsuit would be  
7 insufficient to activate the privilege if the threat is merely a negotiating tactic and not a  
8 serious proposal made in good faith contemplation of going to court").

9 C. ICANN Has Failed to Meet Its Burden with Respect to Statements  
10 Regarding the Parties' Contract.

11 1. VeriSign's Claims Do Not "Arise From" ICANN's Public  
12 Statements Regarding the Parties' Agreement.

13 ICANN alleges that VeriSign's Fifth and Sixth Claims arise from ICANN's  
14 exercise of its right of free speech. (Mot. at 12.) In support of this contention, ICANN  
15 identifies two public statements by ICANN alleged in VeriSign's Complaint that  
16 purportedly form the basis for the Fifth and Sixth Claims:<sup>13</sup> (i) ICANN's issuance of  
17 "false public statements that VeriSign was violating its obligations as a registry

18 (Footnote Cont'd From Previous Page)

19 and discussion between ICANN and VeriSign" regarding VeriSign's obligations under  
20 the registry agreements. (Turner Decl. ¶ 90; App. Ex. 37.)

21 <sup>12</sup> ICANN contended in its opposition to VeriSign's *ex parte* motion for discovery, that  
22 VeriSign has conceded the applicability of the litigation privilege to the Suspension  
23 Ultimatum. (ICANN's Opp'n to *Ex Parte* Appl. at 11.) This is not VeriSign's position  
24 and does not meet ICANN's burden. "In order . . . to take advantage of the [litigation]  
25 privilege by applying it to their *own* communications, [defendants] must establish that  
26 at the time they made the subject communications, they *themselves, actually*  
27 *contemplated prospective litigation seriously and in good faith.*" *Edwards*, 53 Cal.  
28 App. 4th at 39 (emphasis in original). These limitations on the application of the  
privilege to pre-litigation communications ensure that the privilege is not used "simply  
as a tactical ploy to negotiate a bargain" through baseless threats of instituting a lawsuit.  
*Id.* at 36. Thus, the key inquiry regarding the applicability of the litigation privilege in  
this pre-litigation context is *ICANN's* state of mind, not VeriSign's.

<sup>13</sup> ICANN also identifies, in its "Background Regarding VeriSign's Claims," six other  
examples of "speech" purportedly referred to in the Complaint. (Mot. at 4.) ICANN  
does not, because it cannot, allege that these other statements were made in a *public*  
forum and thus within the scope of the anti-SLAPP statute.

1 operator” and (ii) ICANN’s announcement that “WLS is a Registry Service within the  
2 meaning of the 2001 .com Registry Agreement.” Contrary to ICANN’s argument,  
3 neither of these allegations comprise the gravamen of VeriSign’s claims. (*Id.* at 11:3-  
4 7.) Both of these allegations are set forth in the background section of the Complaint  
5 describing the parties’ contractual relationship. (Compl. ¶¶ 37, 44.) Neither statement  
6 is made in VeriSign’s description of ICANN’s breaches (*id.* at ¶¶ 69-82, 92-104, 111-  
7 126 (causes of action for breach)), or in any claim for relief (*id.* at ¶¶ 92-104, 111-126).  
8 And VeriSign’s prayer for relief seeks no damages based on ICANN’s public  
9 statements regarding VeriSign or the parties’ contractual relationship.

10 California courts have held that a defendant may not prevail on an anti-SLAPP  
11 motion where, as here, speech is mentioned, but the “*principal thrust or gravamen of*  
12 *the plaintiff’s cause of action*” is based on unprotected conduct. *Martinez v. Metabolife*  
13 *Int’l, Inc.*, 113 Cal. App. 4th 181, 188, 6 Cal. Rptr. 3d 494 (2003). “[W]hen the  
14 allegations referring to arguably protected activity are only incidental to a cause of  
15 action based essentially on nonprotected activity, collateral allusions to protected  
16 activity should not subject the cause of action to the anti-SLAPP statute.” *Id.* Indeed,  
17 even if the alleged speech constitutes *evidence* of the wrong, that does not mean that the  
18 “speech” forms the *basis* of the wrong for which recovery is sought. *Id.*; *see also Scott*  
19 *v. Metabolife Int’l, Inc.*, 115 Cal. App. 4th 404, 417, 9 Cal. Rptr. 3d 242 (2004)  
20 (“Metabolife confuses the method of proof Scott will use to demonstrate its product is  
21 defective with Metabolife’s conduct from which these causes of action arise . . . Scott  
22 does not seek redress from Metabolife for its communicative conduct.”).<sup>14</sup>

23 The same reasoning applies here. The mere mention of “speech” by ICANN in  
24

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25 <sup>14</sup> *Vicki Roberts v. Los Angeles County Bar Ass’n*, 105 Cal. App. 4th 604, 129 Cal.  
26 Rptr. 2d 546 (2003), cited by ICANN, is inapposite. The *Roberts* decision was  
27 specifically premised on an earlier decision by the California Court of Appeal that the  
28 Bar Association’s evaluation of candidates for judicial office constitutes  
constitutionally-protected speech. *Id.* at 614. Here, in contrast, ICANN’s “speech” has  
not been determined to be constitutionally-protected. *See* discussion, *infra*, § III.C.2.



1 the Complaint does not transform VeriSign's breach of contract claims into an attempt  
2 to seek redress for such speech.

3 2. ICANN Has Not Met its Evidentiary Burden to Show that its  
4 Statements Concerned a Matter of Public Interest.

5 ICANN also has failed to demonstrate that its Statements were made "in  
6 connection with a matter of public interest" and, thus, are protected activity under the  
7 anti-SLAPP statute. CCP § 425.16(e)(3). The statements identified above, which  
8 ICANN contends are "speech" regarding a matter of public interest, actually concern  
9 ICANN's breach of its contract with VeriSign and interference with VeriSign's contract  
10 with a third party. Such private issues between contracting parties do not constitute  
11 matters of public interest to which the anti-SLAPP statute was intended to apply. *See*  
12 *MCSi, Inc. v. Woods*, 290 F. Supp. 2d 1030, 1034 (N.D. Cal. 2003) ("As commercial  
13 speech, Woods' postings are not a matter of public interest."); *Globetrotter Software,*  
14 *Inc. v. ElanComputer Group, Inc.*, 63 F. Supp. 2d 1127, 1130 (N.D. Cal. 199)  
15 (statements of one company regarding conduct of a competitor company do not meet  
16 the "issue of public interest test").

17 ICANN contends that its Statements constitute matters of public interest because  
18 (i) "[t]he Internet is currently used by tens of millions of people throughout the world"  
19 and (ii) "[t]he .com registry alone accounts for approximately 45% of all the Internet  
20 domain names that are registered in the world." (Mot. at 12:8-11.) ICANN's argument  
21 proves too much. According to ICANN, *everything* that it posts on the Internet  
22 regarding its private contractual relations, regardless of the contents of the posting,  
23 qualifies as an issue of public interest merely because millions of people use the  
24 Internet and/or the .com registry. This simply is not the law. ICANN may not  
25 transform the subject matter of its speech into a matter of public interest merely by  
26 posting it on a Web site. *See Rivero v. Am. Fed'n of State County and Muni.*  
27 *Employees*, 105 Cal. App. 4th 913, 926, 130 Cal. Rptr. 2d 81 (2003) ("If the mere  
28 publication of information . . . were sufficient to make that information a matter of  
public interest, the public-issue limitation would be substantially eroded, thus seriously

1 undercutting the obvious goal of the Legislature that the public-issue requirement have  
2 a limiting effect.”); *Weinberg v. Feisel*, 110 Cal. App. 4th 1122, 1133, 2 Cal. Rptr. 3d  
3 385 (2003) (“A person cannot turn otherwise private information into a matter of public  
4 interest simply by communicating it to a large number of people.”).

5 Similarly, ICANN’s allegation that the Internet is an issue of public interest does  
6 not transform the parties’ private contract involving the operation of the Domain Name  
7 System into a matter of public concern. For example, in *Consumer Justice Center v.*  
8 *Trimedica Int’l, Inc.*, 107 Cal. App. 4th 595, 132 Cal. Rptr. 2d 191 (2003), the plaintiff  
9 brought claims including false advertising and consumer fraud against an ephedra  
10 manufacturer. The defendant claimed that statements made regarding herbal  
11 supplements, and issues regarding ephedra, were subjects of public interest and,  
12 therefore, the complaint fell within the anti-SLAPP statute. The court rejected this  
13 argument, however, concluding that the lawsuit was not about herbal medicine in  
14 general, but rather about this manufacturer’s specific misrepresentations regarding its  
15 product. In reaching its decision, the court offered the following analogy:

16 Blackacre sells a house to Whiteacre, and Whiteacre sues, claiming the  
17 defendant misrepresented the square footage. Blackacre brings a special  
18 motion to strike, claiming his speech involves a matter of public interest,  
because millions of Americans live in houses and buy and sell houses.

19 *Id.* at 601. The *Consumer Justice* court concluded that application of the anti-SLAPP  
20 statute to Whiteacre’s suit would be “absurd.” *Id.* (“This case is no more about the  
21 general topic of herbal supplements than the [Whiteacre] hypothetical above is about  
22 the general topic of buying and selling houses.”).

23 ICANN’s argument would lead to a similar unfounded result. VeriSign’s  
24 Complaint identified no statements by ICANN regarding the Internet in general, or  
25 Internet users in general. Instead, the Complaint merely identifies statements made by  
26 ICANN regarding its contract with VeriSign. ICANN’s allegations do not establish that  
27 this specific issue, as opposed to the Internet in general, is a matter of public concern.  
28

1 D. VeriSign Has Shown a Probability of Prevailing on the Challenged Claims.

2 VeriSign has demonstrated a probability of prevailing on Claims Two through  
3 Six. Such a probability is established if plaintiff demonstrates the complaint is  
4 legally sufficient and supported by a “prima facie showing . . . of facts” to sustain a  
5 favorable judgment. *Beach v. Harco Nat’l Ins. Co.*, 110 Cal. App. 4th 82, 90, 1 Cal.  
6 Rptr. 3d 454 (2003); *accord Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832, 840 (9th  
7 Cir. 2001). The court, however, may not weigh the evidence in determining whether  
8 a plaintiff has demonstrated a probability of success on a SLAPP motion. *Wilcox*, 27  
9 Cal. App. 4th at 823-25. Provided that the plaintiff is able to show that the claims  
10 have “minimal merit,” the suit must be allowed to proceed. *Navellier*, 29 Cal. 4th at  
11 89. Both for the reasons set forth below, and as shown in VeriSign’s opposition to  
12 ICANN’s motion to dismiss (set for hearing concurrently herewith), VeriSign has  
13 made the required showing as to all of the challenged claims for relief.<sup>15</sup>

14 1. Claims Two, Three, Five, and Six: Breach of Contract.

15 VeriSign’s Second, Third, Fifth and Sixth Claims for Relief all allege breach of  
16 the 2001 .com Registry Agreement between VeriSign and ICANN. To establish a  
17 breach of contract, VeriSign must allege and prove: (i) the existence of a contract, the  
18 2001 .com Registry Agreement, between VeriSign and ICANN; (ii) that VeriSign duly  
19 and properly performed its obligations under the contract (except where excused from  
20 doing so as a result of ICANN’s breach); (iii) ICANN’s breach of the Registry  
21 Agreement; and (iv) resulting damages. *See Amelco Elec. v. City of Thousand Oaks*, 27  
22 Cal. 4th 228, 243, 115 Cal. Rptr. 2d 900 (2002) (elements of breach of contract claim).

23 As demonstrated herein, VeriSign’s contract claims are supported by sufficient  
24 evidence to sustain a favorable judgment. It is undisputed that each of VeriSign’s claims  
25 is based on a valid, existing contract between VeriSign and ICANN--the .com Registry

26  
27 <sup>15</sup> To the extent VeriSign has not presented evidence as part of this opposition with  
28 respect to any aspects of its claims, VeriSign does not waive those aspects of its  
claims or the right to present evidence concerning them in future proceedings herein.

1 Agreement. (App. Ex. 7.) Moreover, VeriSign has duly and properly performed, and  
2 continues to properly perform, its obligations under the contract. (Turner Decl. ¶ 18.)

3 In addition, as discussed below, VeriSign has evidence of breaches by ICANN  
4 that support each of VeriSign's claims for breach of contract.

5 a. ICANN's Express Breaches of the Registry Agreement.

6 • ICANN's Failure to Establish an Independent Review Panel.

7 The Registry Agreement obligates ICANN to "ensure, through its reconsideration  
8 and *independent* review policies, adequate appeal procedures for [VeriSign], to the  
9 extent that it has been adversely affected by ICANN standards, policies, procedures,  
10 and practices." (App. Ex. 7 (¶ II.4.D) (emphasis added).) ICANN failed to establish  
11 any procedure for review of its practices or policies, let alone an independent review.  
12 As set forth in the Turner declaration, (¶¶ 56-62, 106-125), filed concurrently herewith,  
13 VeriSign repeatedly has been adversely affected in its business by ICANN's standards,  
14 procedures and practices, or lack thereof, as applied to VeriSign. Had ICANN  
15 established an appeal procedure, as it was contractually required to do, VeriSign would  
16 have been able to utilize that procedure to seek relief from ICANN's actions and  
17 potentially prevent damages that have flowed from those actions. (*Id.*) ICANN's  
18 failure to establish appeal procedures breached the Registry Agreement.<sup>16</sup>

19 • ICANN's Failure to Enter into Agreements with New TLDs.

20 The Registry Agreement obligates ICANN to make "substantial progress towards  
21 having entered into agreements with competing registries." (App. Ex. 7 (¶ II.18.B).);  
22 Gomes Decl. ¶ 5.) There are approximately 250 top-level domains, each of which  
23 operates its own registry. These registries compete with all other TLD registries,  
24 including the .com Registry operated by VeriSign. (Gomes Decl. ¶¶ 5-10; Turner Decl.  
25 ¶¶ 5-8, 15.) The Registry Agreement obligates ICANN to make "substantial progress

26  
27 <sup>16</sup> In fact, ICANN did not take any steps until last week to establish any form of  
28 review panel. Notwithstanding that this panel may not accept ICANN's obligations,  
its "recent selection" proves ICANN's breach. (Pope Decl., ¶ 19; App. Ex. 66.)

1 towards having entered into agreements with competing registries.” (App. Ex. 7  
2 (¶ 18.B.); Gomes Decl. ¶ 5.) There are approximately 250 top-level domains, each of  
3 which operates its own registry. These registries compete with all other TLD registries,  
4 including the .com Registry operated by VeriSign. (Gomes Decl. ¶¶ 5-10; Turner Decl.  
5 ¶¶ 5-7, 19.) On May 25, 2001, in addition to its agreements with VeriSign, ICANN had  
6 entered into agreements with the registry operators for the following TLDs: .biz, .info,  
7 and .au. As of February 26, 2004, the date of filing of VeriSign’s Complaint, ICANN  
8 had entered into nine additional agreements. (Pope Decl. ¶¶ 11, 20; App. Ex. 59, 67.)  
9 Currently, less than 4 % of the total number of SLDs in the domain name system are  
10 administered by ccTLDs with whom ICANN has entered into agreements. (Gomes  
11 Decl. ¶¶ 9-10.) By any measure, ICANN has failed to make any progress, let alone  
12 “substantial progress” towards entering into agreements with competing registries.  
13 ICANN’s lack of progress is a breach of the Registry Agreement.

14 VeriSign has been harmed by ICANN’s failure to enter into agreements with  
15 competing registries. The purpose underlying ICANN’s obligation was to place all  
16 registries on equal footing, subject to equivalent operating guidelines. (*Id.* ¶ 5.)  
17 ICANN’s failure to enter into agreements with these registries has resulted in  
18 VeriSign’s being hindered by ICANN in its efforts to introduce new services, (*see id.* at  
19 ¶¶ 5-10, 12), while operators of ccTLD registries not under contract with ICANN have  
20 begun to introduce similar services (*id.* at ¶¶ 6-12, Turner Decl. ¶¶ 80, 126).

21 • ICANN’s Discriminatory Treatment of VeriSign.

22 ICANN agreed in the Registry Agreement that it would not “apply standards,  
23 policies, procedures and practices arbitrarily, unjustifiably or inequitably and not single  
24 out Registry Operator for disparate treatment.” (App. Ex. 7 (¶ II.4.C).) In derogation  
25 of this obligation, ICANN has repeatedly singled out VeriSign for disparate treatment  
26 and otherwise breached this obligation. ICANN insisted that VeriSign suspend Site  
27  
28

1 Finder<sup>17</sup> while permitting a competing registry under agreement with ICANN (the  
2 .museum registry) to offer similar services. (Turner Decl. ¶¶ 80, 86-98; Hollenbeck  
3 Decl. ¶¶ 17-29.) Site Finder was fully compliant with the relevant technical  
4 specifications for operation of such a service. (Turner Decl. ¶¶ 81-85, 90; Hollenbeck  
5 Decl. ¶¶ 13-16.) Nonetheless, ICANN insisted that Site Finder breached the Registry  
6 Agreement, and conditioned its further performance under the agreement on VeriSign's  
7 suspension of the service. (Turner Decl. ¶ 90; Hollenbeck Decl. ¶¶ 35-43.)

8 ICANN also breached this contractual obligation by imposing unwarranted  
9 conditions on VeriSign's offering of WLS while permitting registrars under contract  
10 with ICANN to offer similar services without any of the conditions, restrictions, and  
11 delays that ICANN has placed on approval of WLS.<sup>18</sup> (Turner Decl. ¶ 42.) ICANN's  
12 actions in other respects have persistently violated ICANN's obligations not to act  
13 arbitrarily or inequitably toward VeriSign, as outlined in the Turner and Hollenbeck  
14 declarations and *infra*.<sup>19</sup>

15  
16 <sup>17</sup> VeriSign's second and third claims for relief focus on ICANN's actions with respect  
to Site Finder, and the contractual breaches that resulted from that conduct.

17 <sup>18</sup> ICANN's conduct with respect to WLS and Site Finder also breaches ICANN's  
18 obligation to "not unreasonably restrain competition." (App. Ex. 7 (¶ II.4.B).) ICANN  
19 has restrained competition by preventing VeriSign from offering the same or similar  
20 services that other registries under contract with ICANN, and registries not under  
agreement, have begun to offer. (Sbarbaro Decl. ¶¶ 29-31; Turner Decl. ¶¶ 80, 126;  
Gomes Decl. ¶¶ 11, 15-19.)

21 <sup>19</sup> ICANN's actions with respect to WLS and Site Finder, among other conduct,  
22 constitute an actionable repudiation of the Registry Agreement. *See Steelduct Co. v.*  
23 *Henger-Seltzer Co.*, 26 Cal. 2d 634, 646, 160 P.2d 804 (1945) (repudiation occurs when  
24 a party clearly refuses to perform or "[a]nnex[es] an unwarranted condition to an offer  
25 of performance"). ICANN has no authority under the Registry Agreement to regulate,  
26 restrict or prohibit services that are not contractually defined registry services offered  
27 by VeriSign. (Sbarbaro Decl. ¶¶ 19-28.) Notwithstanding the specific contractual  
28 language delimiting the scope of "registry services," ICANN repeatedly has conditioned  
its continued performance under the contract on VeriSign's permitting ICANN to  
regulate, restrict and prohibit non-registry services. (Gomes Decl. ¶¶ 15-19; Sbarbaro  
Decl. ¶¶ 32-35; Turner Decl. ¶¶ 44-62, 86-92, 106-125; Desjardins Decl. ¶¶ 2-10.) For  
example, ICANN has threatened to declare a breach of the Registry Agreement, thereby  
threatening VeriSign with early termination and loss of right to operate the .com  
registry, if VeriSign did not agree to discontinue a non-Registry service – Site Finder.  
(Turner Decl. ¶ 90; App. Ex. 37.) ICANN similarly has conditioned its continued  
performance under the Registry Agreement on VeriSign's cessation of a marketing

1 • ICANN's Failure to Act in an "Open and Transparent Manner."

2 ICANN also agreed to exercise its contractual responsibilities "in an open and  
3 transparent manner." (App. Ex. 7 (¶ II.4.A).) ICANN has failed to comply with this  
4 obligation. For example, in connection with its decision to demand suspension of Site  
5 Finder, ICANN shut VeriSign out of any "deliberations" regarding Site Finder.  
6 ICANN's Security and Stability Advisory Committee ("SECSAC"), which submitted a  
7 report and recommendations to ICANN's Board of Directors regarding Site Finder,  
8 declined VeriSign's offer to provide relevant data before the report was published,  
9 including: (i) the methods and technologies used by VeriSign to implement Site Finder;  
10 (ii) operational data VeriSign had collected since launching Site Finder; and (iii) the  
11 feedback that VeriSign received from the Internet community regarding Site Finder.  
12 (Hollenbeck Decl. ¶ 42; Mandolia Decl. ¶ 3 & Ex. A.) SECSAC's report recommended  
13 that VeriSign be ordered to suspend Site Finder, a recommendation adopted by ICANN.  
14 To date, no evidence has been identified by ICANN to support its decision to call for  
15 suspension of Site Finder. (Hollenbeck Decl. ¶¶ 35-43; Turner Decl. ¶¶ 86-92.)  
16 ICANN's closed door "review" of Site Finder breached its obligation to perform its  
17 contractual responsibilities "in an open and transparent manner."

18 b. ICANN's Breaches of the Implied Covenant of Good Faith.

19 VeriSign has alleged that ICANN has breached the covenant of good faith and  
20 fair dealing implied in every contract under California law.<sup>20</sup> The declarations  
21

22 (Footnote Cont'd From Previous Page)

23 campaign, a matter wholly outside the scope of the Registry Agreement. (Gomes Decl.  
24 ¶¶ 15-19; Desjardins Decl. ¶¶ 2-10.)

25 <sup>20</sup> "A 'breach of a specific provision of the contract is not a necessary prerequisite' to a  
26 breach of [the] implied covenant . . ." *Marsu, B.V. v. Walt Disney Co.*, 185 F.3d 932,  
27 937 (9th Cir. 1999) (quoting *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal. Inc.*,  
28 2 Cal. 4th 342, 373, 6 Cal. Rptr. 2d 467 (1992)). That is because the covenant is implied  
"to prevent a contracting party from engaging in conduct which (while not technically  
transgressing the express covenant) frustrates the other parties' rights [to] the benefits of  
the contract." *Marsu, B.V.*, 185 F.3d at 937-38 (quoting *Los Angeles Equestrian Ctr.,  
Inc. v. City of Los Angeles*, 17 Cal. App. 4th 432, 447, 21 Cal. Rptr. 2d 313 (1993)). The  
covenant "finds particular application in situations where one party is invested with a

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1 submitted herewith detail precisely the type of conduct that has been found to violate  
2 the implied covenant. For example, ICANN has discretion to allow the use of tagged  
3 domain names with “hyphens in the third and fourth character positions.” (App. Ex. 7  
4 (App. K).) ICANN has exercised this discretion in bad faith by arbitrarily and  
5 unreasonably conditioning its consent on VeriSign’s assent to a host of restrictions on  
6 IDN. (Turner Decl. ¶¶ 106-25; Gomes Decl. ¶¶ 5-12.) ICANN’s conduct has delayed  
7 implementation of IDN and has frustrated VeriSign’s enjoyment of rights under the  
8 Registry Agreement, including the right to implement non-Registry services without  
9 interference or regulation by ICANN.<sup>21</sup> (Turner Decl. ¶¶ 44-62, 86-92, 106-125;  
10 Desjardins Decl. ¶¶ 2-10; Gomes Decl. ¶¶ 13-19.)

11 Furthermore, ICANN’s systematic efforts to “regulate” VeriSign’s business,  
12 through false contractual controversies, threats, delays and refusals to perform, violate  
13 the covenant of good faith and fair dealing. Such interference in VeriSign’s business  
14 has deprived VeriSign of benefits intended under the Agreement. (Sbarbaro Decl.  
15 ¶¶ 20, 28.)

16 c. VeriSign Has Suffered Damage Due to ICANN’s Breaches.

17 In responding to ICANN’s Motion, VeriSign is not required to calculate a  
18 specific amount of damage resulting from ICANN’s breaches. VeriSign need only  
19 make a prima facie showing that it has suffered damages as a proximate result of  
20 ICANN’s breach of the Registry Agreement. As set forth in the Turner Declaration,  
21 VeriSign has suffered monetary loss as a direct result of ICANN’s breaches. These

22 \_\_\_\_\_  
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23 discretionary power affecting the rights of another.” *Chodos v. W. Publ’g Co.*, 292 F.3d  
24 992, 99-97 (9th Cir. 2002) (quoting *Carma*, 2 Cal. 4th at 372).

25 <sup>21</sup> Other registries have begun to offer IDN-type services or have announced that they  
26 will launch such services in the near future. (Turner Decl. ¶ 126.) Instead of being the  
27 front-runner in offering IDN to domain name registrants, VeriSign now will be in the  
28 position of playing catch-up in the marketplace. ICANN’s unreasonable delay in  
approving VeriSign’s use of tagged domains in connection with IDN thus also violates  
ICANN’s obligation not to “unreasonably restrain competition,” as well as not to treat  
VeriSign differently. (App. Ex. 7 (¶ II.4.B).)



1 losses include, among others, loss of profits that would have been obtained from Site  
2 Finder, lost registration fees from domain names registered using VeriSign's IDN  
3 service, lost profits from the delay in WLS, and out-of-pocket costs incurred in  
4 developing these services. (Turner Decl. ¶¶ 63-68, 93-98, 126-130.)

5 Furthermore, Section 6 of the Registry Agreement explicitly provides that ICANN  
6 shall "indemnify . . . and hold harmless Registry Operator . . . against . . . damages,  
7 liabilities, costs, and expenses . . . arising solely from Registry Operator's compliance  
8 . . . with an ICANN specification or policy (including a Consensus Policy) established  
9 after the Effective Date . . . ." The losses from the suspension of Site Finder identified  
10 in the Turner Declaration result, in effect, from compliance with an ICANN  
11 "specification or policy" and are compensable under this provision.

12 To the extent that the harm VeriSign has suffered as a result of ICANN's breach  
13 of the Registry Agreement is not easily quantified, specific performance is the  
14 appropriate remedy.<sup>22</sup> Specific performance is available where the plaintiff shows  
15 "(1) the inadequacy of [its] legal remedy; (2) an underlying contract that is both  
16 reasonable and supported by adequate consideration; (3) the existence of a mutuality of  
17 remedies; (4) contractual terms which are sufficiently definite to enable the court to  
18 know what it is to enforce; and (5) a substantial similarity of the requested performance  
19 to that promised in the contract." *Tamarind Lithography Workshop, Inc. v. Sanders*,  
20 143 Cal. App. 3d 571, 575, 193 Cal. Rptr. 409 (1983). As discussed *supra* at page 16,  
21 VeriSign and ICANN entered into a contract that is both "reasonable" and "supported  
22 by adequate consideration," VeriSign performed its obligations under the contract,<sup>23</sup> and  
23 the contract's terms are definite and clear. Moreover, the specific performance  
24

25 \_\_\_\_\_  
26 <sup>22</sup> VeriSign's Second and Fifth Claims for Relief expressly request specific performance  
of ICANN's contractual obligations. (Compl. ¶¶ 96-97, 118, 21.)

27 <sup>23</sup> See Cal. Civ. Code § 3386(b) ("mutuality of remedy" means that the "agreed  
28 counterperformance has been substantially performed or its concurrent or future  
performance is assured").

1 requested by VeriSign in its Complaint is entirely consistent with ICANN's obligations  
2 under the Registry Agreement. (App. Ex. 7.)

3 Finally, VeriSign lacks an adequate remedy at law to compensate it for much of  
4 the harm it has suffered at the hands of ICANN. For example, VeriSign may not be  
5 able to quantify the harm it has suffered as a result of ICANN's failure to establish  
6 "independent review policies" and "adequate appeal procedures." Had these policies  
7 and procedures been available to VeriSign, as they should have been under the terms of  
8 the Registry Agreement, VeriSign could have utilized them to address ICANN's  
9 arbitrary and unjustified prevention of VeriSign's offering its new proposed services.  
10 (Turner Decl. ¶¶ 62, 119.) In addition, although ICANN's failure to act in an "open and  
11 transparent manner" and its failure to "promote and encourage robust competition"  
12 unequivocally injured VeriSign's business (Turner Decl. ¶¶ 63-68, 93-98, 126-130), the  
13 extent of the injury is, to some degree, difficult to quantify.

14 2. Claim Four: Intentional Interference with Contractual Relations.

15 The elements of a tortious interference claim are (i) a valid and existing contract  
16 between VeriSign and a third party; (ii) ICANN's knowledge of the existence of this  
17 contract; (iii) conduct by ICANN designed and intended to disrupt this contractual  
18 relationship; (iv) actual disruption; and (v) resulting damage. *See Quelimane Co. v.*  
19 *Stewart Title Guar. Co.*, 19 Cal. 4th 26, 55, 77 Cal. Rptr. 2d 809 (1998); *see also*  
20 *Sebastian Int'l, Inc. v. Russolillo*, 162 F. Supp. 2d 1198, 1203 (C.D. Cal. 2001).

21 VeriSign has presented sufficient prima facie evidence supporting its likelihood  
22 of success on the merits of its tortious interference claim. (*See Pl.'s Opp'n to Def.'s*  
23 *Mot. to Dismiss at 23-24.*) First, VeriSign has established that it had a valid and  
24 existing contract with a third party provider of Internet search services and other  
25 services for Site Finder. (Turner Decl. ¶¶ 94-96.) In addition, ICANN knew of the  
26  
27  
28

1 existence of this contract.<sup>24</sup> (*Id.* ¶ 97; App. Ex. 39.) Moreover, ICANN intended to  
2 interfere with VeriSign's contract with the third party by issuing the October 3 letter,  
3 the natural and intended consequence of which was the suspension of Site Finder by  
4 VeriSign.<sup>25</sup> (*Id.* ¶¶ 86-92, 97, 98; Hollenbeck Decl. ¶¶ 35-43.) ICANN's arbitrary and  
5 unjustified conduct in demanding suspension of Site Finder disrupted VeriSign's  
6 contract with the third party, whose services were necessary only if Site Finder was  
7 operational.<sup>26</sup> (*Id.* ¶¶ 93-98.) Finally, ICANN's interference with VeriSign's contract  
8 with the provider resulted in substantial loss of revenue and profits to VeriSign. (*Id.*)

9 E. VeriSign Requests Leave to Conduct Discovery Prior to Adjudication of  
10 the Anti-SLAPP Motion.

11 VeriSign believes that, given the early stage of this action, it has presented  
12 sufficient evidence to meet its burden in responding to the Motion. In the event the  
13 Court is inclined to grant ICANN's Motion, however, VeriSign requests leave to take  
14 discovery before a final ruling on the Motion. As this Court explained, "[w]hether a  
15 court should continue an anti-SLAPP motion to strike . . . to allow the opponent to take  
16 discovery may depend on whether the court and the opposing party need that discovery  
17 in order to determine if the claims arise out of protected activity or whether discovery is  
18 necessary to enable the nonmoving party to show a probability of prevailing on its  
19 claims." *VeriSign v. ICANN*, No. CV 04-1292 AHM (CTx), slip op. at 2 (C.D. Cal.  
20 Apr. 23, 2004) (citations omitted). Such is the case here, where *issues of fact* exist with  
21 respect to both the applicability of the anti-SLAPP statute to VeriSign's claims and

22 <sup>24</sup> See *Sebastian Int'l*, 162 F. Supp. 2d at 1203 (C.D. Cal. 2001) (knowledge element  
23 satisfied if the defendant knows "that contractual relations with a third party exist" even  
if the defendant "does not know the specific identity of the contractual party").

24 <sup>25</sup> This element is satisfied even if ICANN's "primary purpose" was not "disruption of  
25 the contract." *Quelimane*, 19 Cal. 4th at 56 (1998). It is sufficient if the disruption was  
26 "incidental to [ICANN's] independent purpose and desire but known to [it] to be a  
necessary consequence of [its] action." *Id.* (citation omitted); *Sebastian Int'l*, 162 F.  
Supp. 2d at 1205.

27 <sup>26</sup> See *Sebastian Int'l*, 162 F. Supp. 2d at 1205 (breach element satisfied if the plaintiff  
28 offers "credible evidence that Defendants['] intentional actions resulted in greater  
expense or burden on the performance of its contractual obligations with third parties").

1 VeriSign's prima facie burden to show that its claims have merit. As described in more  
2 detail in the Pope Declaration filed concurrently herewith, evidence relevant to  
3 ICANN's prima facie showing and the merits of VeriSign's claims is within ICANN's  
4 sole possession.

5 VeriSign has not taken any discovery to date, nor could it do so at this juncture  
6 without leave of Court.<sup>27</sup> Thus, VeriSign should be permitted leave to take discovery  
7 prior to a ruling on ICANN's Motion.<sup>28</sup> See Fed. R. Civ. P. 56(f) (on summary  
8 judgment, leave to pursue discovery is appropriate where the requesting party has not  
9 had an opportunity to obtain "facts essential to justify the party's opposition");  
10 *Burlington N. Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes of the Fort Peck*  
11 *Reservation*, 323 F.3d 767, 773 (9th Cir. 2003) ("Where . . . a summary judgment  
12 motion is filed . . . before a party has had any . . . opportunity to pursue discovery . . .  
13 district courts should grant any Rule 56(f) motion fairly freely.") (citing *Metabolife*  
14 *Int'l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001)); see also *Shropshire*, 294 F.  
15 Supp. 2d at 1099 (application of anti-SLAPP statute based on pre-litigation statements  
16 is a question of fact requiring discovery).<sup>29</sup>

17 VeriSign seeks discovery concerning issues of fact that may be critical to  
18 VeriSign's opposition and solely within ICANN's control. Specifically, with respect to  
19 the applicability of the anti-SLAPP statute to the October 3 letter, VeriSign seeks facts  
20 concerning: (i) ICANN's consultations with legal counsel prior to sending the  
21 Suspension Ultimatum; (ii) any legal investigation regarding the viability of its alleged  
22 claims against VeriSign prior to October 3; and (iii) communications with its Board of

23 <sup>27</sup> The parties have not held their Rule 26 meeting and, as such, no discovery has been  
24 or could be conducted. (See Pope Decl. ¶ 2.)

25 <sup>28</sup> This Court has held that it is not bound by any anti-SLAPP procedural requirements,  
26 "which would immediately put the plaintiff to his or her proof before the plaintiff could  
27 conduct discovery." (Apr. 23 Order at 1.)

28 <sup>29</sup> And "where . . . no discovery whatsoever has taken place, the party making the Rule  
56(f) motion cannot be expected to frame its motion with great specificity as to the kind  
of discovery likely to turn up useful information, as the ground for such specificity has  
not yet been laid." *Burlington Northern*, 323 F.3d at 774.

1 Directors and officers between September 15 and October 3 concerning a potential  
2 lawsuit against VeriSign.<sup>30</sup> (Pope Decl. ¶ 4.) Under *Aronson*, 58 Cal. App. 4th at 266,  
3 this information is not privileged and is discoverable.


4 VeriSign also seeks discovery regarding VeriSign's tortious interference claim, as  
5 well as its claim for breach of the implied covenant of good faith and fair dealing,  
6 incorporated into its Second, Third, Fifth, and Sixth claims for Relief. (Pope Decl. ¶¶ 5,  
7 6.) This discovery seeks facts concerning: (i) ICANN communications regarding the  
8 existence of a contract between VeriSign and a third party in connection with Site  
9 Finder; (ii) ICANN communications addressing the impact of ICANN's Site Finder  
10 suspension demand on this contract; (iii) ICANN's interpretation of the term "Registry  
11 Services," as defined in the parties' agreement; (iv) ICANN's refusal to authorize  
12 VeriSign's deployment of the IDNs; (v) ICANN's imposition of conditions on  
13 VeriSign's WLS service; (vi) ICANN's basis for demanding changes to VeriSign's  
14 Marketing Promotion Program; (vii) ICANN's basis for demanding amendments to the  
15 parties' registry agreement in connection with VeriSign's ConsoliDate service; and  
16 (viii) communications with third parties, including VeriSign's competitors, regarding the  
17 foregoing. (*Id.*) VeriSign anticipates that such discovery could be completed in 90 days  
18 and proposed discovery requests are attached as Exhibit 54 to the Appendix of Exhibits.

19 **IV. CONCLUSION**

20 For all of the foregoing reasons, VeriSign respectfully requests that ICANN's  
21 Special Motion to Strike be denied in its entirety.

22 DATED: April 29, 2004

ARNOLD & PORTER LLP

23  
24 By:   
25 James S. Blackburn  
Attorneys for Plaintiff VeriSign, Inc.

26 <sup>30</sup> This information is the proper subject of discovery where, as here, the litigation  
27 privilege is at issue. See *Fox v. California Sierra Financial Services*, 120 F.R.D. 520,  
28 530 (N.D. Cal. 1988) ("The general rule is that placing privileged communications at  
issue in a lawsuit waives the privilege for such communications.").