

1 RONALD L. JOHNSTON (State Bar No. 057418)
LAURENCE J. HUTT (State Bar No. 066269)
2 THADDEUS M. POPE (State Bar No. 200633)
ARNOLD & PORTER LLP
3 1900 Avenue of the Stars, 17th Floor
Los Angeles, California 90067-4408
4 Telephone: (310) 552-2500
Facsimile: (310) 552-1191
5

Of Counsel:
6 RICHARD L. ROSEN (Admitted *pro hac vice*)
ARNOLD & PORTER LLP
7 555 Twelfth Street NW
Washington, D.C. 20004-1206
8 Telephone: (202) 942-5000
Facsimile: (202) 942-5999
9

BRIAN A. DAVIS (Admitted *pro hac vice*)
10 VERISIGN, INC.
21355 Ridgetop Circle
11 Dulles, Virginia 20166
Telephone: (703) 948-2300
12 Facsimile: (703) 450-7326

13 Attorneys for Plaintiff
VERISIGN, INC.

14 UNITED STATES DISTRICT COURT
15 CENTRAL DISTRICT OF CALIFORNIA
16

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.
24
25
26
27
28

Case No. CV 04-1292 AHM (CTx)

**PLAINTIFF VERISIGN, INC.'S
EX PARTE APPLICATION TO
CONTINUE DEFENDANT
ICANN'S MOTION TO STRIKE
TO ALLOW FOR DISCOVERY**

Date: None Set
Time: None Set
Courtroom: 14 – Spring Street Bldg.
Hon. A. Howard Matz

[Memorandum of Points and
Authorities in Support thereof,
Declaration of Laurence J. Hutt, and
[Proposed] Order concurrently filed
and lodged herewith]

1 TO THE HONORABLE HOWARD MATZ :

2 Plaintiff VeriSign, Inc. (“VeriSign”) hereby applies *ex parte* for an Order
3 continuing the hearing on defendant Internet Corporation for Assigned Names and
4 Numbers’ (“ICANN’s”) Special Motion to Strike under the “anti-SLAPP” provision in
5 California Code of Civil Procedure § 425.16 until the close of discovery, or at least for
6 180 days, to allow VeriSign to conduct discovery regarding the applicability of the anti-
7 SLAPP statute, as well as information essential to the merits of its claims that is within
8 ICANN’s sole possession. Alternatively, if VeriSign’s request for time to pursue
9 discovery is denied, VeriSign requests that the hearing on ICANN’s motion to strike be
10 continued until 45 days after all motions to dismiss have been adjudicated and the
11 pleadings finalized.

12 This Application is made upon the grounds that ICANN’s anti-SLAPP motion is
13 premature because: (1) VeriSign has not been afforded any opportunity to pursue
14 discovery and such discovery is allowed as a matter of course in federal court; (2) the
15 anti-SLAPP statute’s procedural requirements regarding the filing and hearing of such a
16 motion do not apply in federal court; and (3) ICANN’s pending motion to dismiss
17 addresses all of the claims at issue in the special motion to strike and, as such, should
18 be resolved prior to a hearing on the motion to strike because a ruling on the motion to
19 dismiss will clarify the claims, arguments, and evidence at issue in connection with the
20 motion to strike.

21 This *ex parte* application is made in accordance with the Court’s procedures
22 requiring a request to continue a hearing to be made by stipulation or *ex parte*
23 application. *Ex parte* relief also is necessary in this instance because plaintiff’s
24 opposition to the motion will be due before this Application could be heard on regular
25 notice and, if the hearing is not continued, VeriSign will be denied the opportunity to
26 take discovery and present evidence concerning the applicability of the anti-SLAPP
27 statute to its claims and concerning the substantive merits of its claims that is in
28 ICANN’s sole control.

1 Good cause is shown for the relief sought for the reasons set forth in this
2 application, the accompanying Memorandum of Points and Authorities, and the
3 Declaration of Laurence J. Hutt. In addition, this application is based on all other files
4 and records in this action, and upon such other or additional showing as may be made at
5 any hearing that the Court shall convene hereon.

6 As required by Local Rule 7-19, VeriSign's counsel Laurence J. Hutt gave notice
7 of this Application via office voice mail to Jeffrey A. LeVee and Courtney Schaberg of
8 the law firm of Jones Day, counsel of record for defendant ICANN, by telephone on
9 Monday, April 19, 2004 at approximately 11:30 a.m. Mr. LeVee's and Ms. Schaberg's
10 address and telephone number are as follows:

- 11 1. Address: 555 West Fifth Street, Suite 4600, Los Angeles, CA 90013-
12 1025.
- 13 2. Telephone number: (213) 489-3939.

14 ICANN has not indicated that it would agree to any of the relief sought in VeriSign's *ex*
15 *parte* request for a continuance. In accordance with the Court's procedures, ICANN's
16 counsel was notified that any opposition to this application would be due not later than
17 24 hours after service on defendant's counsel.

18
19 DATED: April 20, 2004.

ARNOLD & PORTER LLP
RONALD L. JOHNSTON
LAURENCE J. HUTT
SUZANNE V. WILSON
JAMES S. BLACKBURN

20
21
22
23
24 By: _____
25 Laurence J. Hutt
26 Attorneys for Plaintiff
27 VeriSign, Inc.
28

1 LAURENCE J. HUTT (State Bar No. 066269)
2 THADDEUS M. POPE (State Bar No. 200633)
3 ARNOLD & PORTER LLP
4 1900 Avenue of the Stars, 17th Floor
5 Los Angeles, California 90067-4408
6 Telephone: (310) 552-2500
7 Facsimile: (310) 552-1191

8 Of Counsel:
9 RICHARD L. ROSEN (Admitted *pro hac vice*)
10 ARNOLD & PORTER LLP
11 555 Twelfth Street NW
12 Washington, D.C. 20004-1206
13 Telephone: (202) 942-5000
14 Facsimile: (202) 942-5999

15 BRIAN A. DAVIS (Admitted *pro hac vice*)
16 VERISIGN, INC.
17 21355 Ridgetop Circle
18 Dulles, Virginia 20166
19 Telephone: (703) 948-2300
20 Facsimile: (703) 450-7326

21 Attorneys for Plaintiff
22 VERISIGN, INC.

23 UNITED STATES DISTRICT COURT
24 CENTRAL DISTRICT OF CALIFORNIA

25 VERISIGN, INC., a Delaware
26 corporation,
27
28 Plaintiff,
29
30 v.
31
32 INTERNET CORPORATION FOR
33 ASSIGNED NAMES AND
34 NUMBERS, a California corporation;
35 DOES 1-50,
36
37 Defendants.

38 Case No. CV 04-1292 AHM (CTx)

39 **PLAINTIFF VERISIGN, INC.'S**
40 **MEMORANDUM OF POINTS AND**
41 **AUTHORITIES IN SUPPORT OF**
42 **EX PARTE APPLICATION TO**
43 **CONTINUE DEFENDANT**
44 **ICANN'S MOTION TO STRIKE**
45 **TO ALLOW FOR DISCOVERY**

46 Date: None Set
47 Time: None Set
48 Courtroom: 14 – Spring Street Bldg.
49 Hon. A. Howard Matz

50 [Ex Parte Application, Declaration of
51 Laurence J. Hutt, and [Proposed] Order
52 concurrently filed and lodged herewith]

1 Plaintiff VeriSign, Inc. (“VeriSign”) hereby applies *ex parte* (the
2 “Application”)¹ for an order continuing defendant Internet Corporation for Assigned
3 Names and Numbers’ (“ICANN’s”) special motion (the “Motion”) to strike, pursuant
4 to California Code of Civil Procedure § 425.16 (the so-called “anti-SLAPP statute”),
5 to allow VeriSign the opportunity to conduct discovery regarding the issues raised by
6 ICANN’s Motion.²

7 **I. INTRODUCTION**

8 Through this Application, VeriSign seeks an order from this Court continuing,
9 until the close of discovery, the hearing on ICANN’s special motion to strike pursuant
10 to California’s so-called “anti-SLAPP” statute. VeriSign requests the continuance to
11 permit it to pursue discovery essential to VeriSign’s defense of this motion. In the
12 event that this request is denied, VeriSign requests that the Court continue ICANN’s
13 anti-SLAPP motion until ICANN’s pending motion to dismiss has been adjudicated
14 and the pleadings finalized. Because ICANN’s motion to dismiss addresses all of the
15 claims at issue in its motion to strike, judicial economy weighs in favor of continuing
16 the motion to strike until issues relating to the underlying pleadings and claims at
17 issue are resolved.

18 ICANN has moved – prior to the taking of any discovery in this action and the
19 parties’ conference pursuant to Federal Rule of Civil Procedure 26(f) – to strike five
20 of the seven claims alleged in VeriSign’s Complaint. ICANN’s motion asserts that
21 these claims are based on conduct that constitutes “protected activity” under the anti-
22 SLAPP statute. Specifically, ICANN asserts, *inter alia*, that VeriSign’s claims are

23 ¹ VeriSign’s Application is properly brought on an *ex parte* basis. This Court’s
24 procedures state that a continuance of a scheduled court hearing must be requested by
25 stipulation or by *ex parte* application. See Procedures and Schedules for the Honorable
26 J. Hutt (“Hutt Decl.”), ¶¶ 11-12.

27 ² ICANN served, but did not file, its Motion on April 12, 2004. ICANN has advised
28 VeriSign that it intends to file its Motion today, April 20, 2004. Based on that filing
date, VeriSign’s opposition would be due on April 29, 2004. Hutt Decl., ¶ 5.

1 based on ICANN’s October 3, 2003 Suspension Ultimatum, which ICANN contends
2 is a pre-litigation demand protected by the litigation privilege. Based on this
3 assertion, ICANN requests that this Court strike five of VeriSign’s claims unless
4 VeriSign can demonstrate, at the notice pleading stage, a reasonable probability of
5 prevailing on the substantive merits of the challenged claims.

6 ICANN’s Motion is premature and should be continued to allow VeriSign to
7 conduct discovery both regarding issues raised by the Motion and regarding the
8 elements of VeriSign’s substantive claims, many of which implicate facts exclusively
9 within ICANN’s possession, custody or control. California’s anti-SLAPP statute
10 contains procedural requirements that an anti-SLAPP motion be filed and heard at the
11 beginning of an action, and bars discovery prior to the hearing of such a motion. The
12 Ninth Circuit, however, has rejected these procedural requirements, holding that they
13 “collide with the discovery-allowing aspects of Rule 56” and “cannot apply in federal
14 court.” *Metabolife Int’l, Inc. v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (emphasis
15 added) (citing with approval the holding of *Rogers v. Home Shopping Network, Inc.*,
16 57 F. Supp. 2d 973, 982 (C.D. Cal. 1999)). Accordingly, the anti-SLAPP statute
17 provides no support in this forum for ICANN’s attempt to require VeriSign to prove-
18 up its claims prior to conducting discovery.

19 Furthermore, in order to effectuate the “discovery allowing aspects” of the
20 Federal Rules of Civil Procedure, several federal courts have found it most
21 appropriate to continue anti-SLAPP motions until the close of discovery. *See e.g.*,
22 *Shropshire v. Fred Rappaport Co.*, 294 F. Supp. 2d 1085, 1100 (N.D. Cal. 2003).
23 Under the Federal Rules, discovery in connection with an anti-SLAPP motion is
24 “required” where “the non-moving party has not had the opportunity to discover
25 information that is essential to its opposition.” *Id.* (quoting *Anderson v. Liberty*
26 *Lobby, Inc.*, 477 U.S. 242, 250 n. 5 (1986)). ICANN’s Motion raises issues of fact as
27 to which discovery is essential prior to any hearing on the Motion.
28

1 Among other factual questions raised by ICANN’s Motion, ICANN asserts that
2 VeriSign’s claims are based on a pre-litigation demand letter and, thus, barred by the
3 litigation privilege. The applicability of the litigation privilege to a pre-litigation
4 demand letter, however, “depends upon whether Defendant’s statements were made
5 ‘with a good faith belief in a legally viable claim and in serious contemplation of
6 litigation.’” *Shropshire*, 294 F. Supp. 2d at 1100 (quoting *Aronson v. Kinsella*, 58
7 Cal. App. 4th 254, 266, 68 Cal. Rptr. 2d 305, 313 (1997)). ICANN’s state of mind is
8 a *factual question* as to which the relevant evidence is exclusively within ICANN’s
9 control. Accordingly, VeriSign should be permitted to conduct discovery with respect
10 to, among other things, ICANN’s “good faith belief” before a hearing on the Motion.
11 *See id.*

12 Finally, ICANN’s Motion should be continued at least until after ICANN’s
13 motion to dismiss has been adjudicated and the pleadings finalized. The motion to
14 dismiss currently is scheduled to be heard on the same day as ICANN’s anti-SLAPP
15 Motion. The Ninth Circuit has noted that motions on the pleadings should be
16 addressed prior to motions to strike under the anti-SLAPP statute. *Vess v. Ciba-Geigy*
17 *Corp. USA*, 317 F.3d 1097, 1110 (9th Cir. 2003). Resolution of the motions on the
18 pleadings in advance of the hearing on the motion to strike clarifies the claims at issue
19 on the motion to strike and allows the parties to avoid submitting evidence and
20 argument on claims not at issue. This is particularly true here, where ICANN’s
21 motion to dismiss addresses all of the claims at issue in its motion to strike.
22 Accordingly, ICANN’s Motion should be continued until at least 45 days after the
23 sufficiency of VeriSign’s complaint has been determined and the final pleadings are in
24 place.

25 In federal court, ICANN’s Motion is premature and VeriSign is entitled to
26 discovery prior to any hearing on the Motion. VeriSign, therefore, respectfully requests
27 that this Court continue ICANN’s special motion to strike until the close of discovery,
28 or for at least 180 days to allow VeriSign to conduct discovery. If this request is

1 denied, VeriSign requests a continuance of the special motion to strike until forty-five
2 days after ICANN's motion to dismiss has been adjudicated and the pleadings finalized.

3 **II. STATEMENT OF FACTS**

4 On February 26, 2004, VeriSign filed a Complaint against ICANN alleging seven
5 claims for relief, all of which stem from ICANN's course of performance under the
6 2001 .com Registry Agreement (the "Registry Agreement") between the parties.³
7 Specifically, VeriSign alleged: (i) violation of section 1 of the Sherman Act;
8 (ii) injunctive relief for breach of contract; (iii) damages for breach of contract;
9 (iv) interference with contractual relations; (v) specific performance and injunctive
10 relief for breach of contract; (vi) damages for breach of contract; and (vii) declaratory
11 relief.

12 On April 5, 2004, ICANN moved to dismiss six of the seven claims for relief
13 asserted by VeriSign. In particular, it moves against the First Claim for violation of
14 section 1 of the Sherman Act, the Second, Third, Fifth, and Sixth Claims for breach of
15 contract, and the Fourth Claim for interference with contractual relations. ICANN has
16 not moved against the Seventh Claim for Relief, in which VeriSign seeks a declaration
17 interpreting and applying essential terms of the Registry Agreement. VeriSign's
18 opposition to that motion is due on April 22. The hearing on the motion is set for
19 May 17. Hutt Decl., ¶ 6.

20 One week later, on April 12, ICANN served a special motion to strike VeriSign's
21 Second through Sixth Claims for Relief under California's anti-SLAPP statute.⁴ Hutt
22 Decl., ¶ 7. In that motion, ICANN contends that the anti-SLAPP statute applies to
23 VeriSign's claims for relief because these claims arise from protected speech or
24 petitioning activity. Motion at 3-5. In particular, ICANN asserts that VeriSign's claims
25

26 ³ Facts concerning the parties' relationship and the 2001 .com Registry Agreement are
set forth in paragraphs 17-31 of VeriSign's Complaint.

27 ⁴ ICANN advised VeriSign on April 20 that it intended to file its special motion to
28 strike later that day. Hutt Decl., ¶ 13.

1 are based on an October 3, 2003 Suspension Ultimatum issued by ICANN that
2 demanded that VeriSign suspend its “Site Finder” service. ICANN contends that this
3 communication was a pre-litigation demand that is protected activity under the anti-
4 SLAPP statute. *Id.* at 9.

5 However, contrary to ICANN’s assertion, VeriSign’s contract and tort claims do
6 not arise from any “protected activity.” Rather, they are based on a pattern of
7 unjustified acts and omissions by ICANN over the three year course of the parties’
8 agreement that constituted separate breaches of the Registry Agreement and interfered
9 with VeriSign’s contract with a third party. ICANN’s Suspension Ultimatum – which
10 is merely a notation in writing of the penultimate act of breach in a series of breaches
11 by ICANN as well as simply evidence of those breaches – cannot shield ICANN from
12 liability in contract or tort for the consequences of its years of acts and omissions and
13 performance, or lack thereof, under the Registry Agreement. The anti-SLAPP statute
14 does not require otherwise. *See Kajima Engineering & Constr., Inc. v. City of Los*
15 *Angeles*, 95 Cal. App. 4th 921, 929, 116 Cal. Rptr. 2d 187, 193 (2002); *Gallimore v.*
16 *State Farm Fire & Casualty Ins. Co.*, 102 Cal. App. 4th 1388, 1399, 126 Cal. Rptr. 2d
17 560, 569 (2002) (rejecting “out of hand” defendant’s attempt under anti-SLAPP to
18 confuse plaintiff’s *evidence* of wrongful conduct with the wrongful acts themselves);
19 *Beach v. Harco Nat’l Ins. Co.*, 110 Cal. App. 4th 82, 94, 1 Cal. Rptr. 3d 454, 463-464
20 (2003); *Bardin v. Lockheed Aeronautical Systems, Inc.*, 70 Cal. App. 4th 494, 504, 82
21 Cal. Rptr. 2d 726, 731 (1999) (“the litigation privilege was never meant to spin out
22 from judicial action a party’s performance and course of conduct under a contract.”).

23 The hearing on ICANN’s special motion to strike has been noticed for May 17,
24 the same day as ICANN’s motion to dismiss. Hutt Decl., ¶ 7. Given the early stage of
25 these proceedings, the parties have not held or scheduled a conference pursuant to
26 Federal Rule of Civil Procedure 26. Further, the parties have not entered into any
27 agreement to permit discovery in advance of the Rule 26 meeting. Accordingly, no
28

1 discovery has been served or responded to by either party, nor can discovery be
2 commenced at this point without leave of Court. *Id.* at ¶ 8.

3 **III. ARGUMENT**

4 A. ICANN’s Special Motion To Strike Should Be Continued Pending Discovery.

5 ICANN’s special motion to strike is premature. ICANN filed the Motion in the
6 mistaken belief that it was required by the anti-SLAPP statute to file within 60 days of
7 the filing of VeriSign’s Complaint. Hutt Decl., ¶ 5. Contrary to ICANN’s belief,
8 however, although California Code of Civil Procedure (“CCP”) § 425.16(f) requires a
9 party to file an anti-SLAPP motion “within 60 days of service of the complaint,” this
10 procedural provision, along with the statute’s mandatory stay on discovery, CCP
11 § 425.16(g), does not apply in federal court. *Metabolife*, 264 F.3d at 846.

12 In *Metabolife*, the Ninth Circuit determined that, if the anti-SLAPP statute’s
13 “expedited procedure[s] were used in federal court to test the plaintiff’s evidence before
14 the plaintiff has completed discovery,” those procedures would conflict with the
15 Federal Rules of Civil Procedure, which allow for liberal discovery. *Id.* (quoting
16 *Rogers*, 57 F. Supp. 2d at 982). Consequently, although the procedural requirements of
17 the anti-SLAPP statute were intended to foster early disposition of cases to which anti-
18 SLAPP applies, “[b]ecause the discovery-limiting aspects of § 425.16(f) and (g)
19 collide with the discovery allowing aspects” of the Federal Rules of Civil Procedure,
20 “these aspects of subsections (f) and (g) cannot apply in federal court.” *Id.* Based on
21 this determination, the Ninth Circuit reversed a district court’s decision granting an
22 anti-SLAPP motion without first allowing plaintiff discovery on evidence solely
23 available from the defendants and relevant to plaintiff’s defense of the anti-SLAPP
24 motion.⁵ *Id.* at 850.

25 ⁵ VeriSign understands that ICANN intends to rely on *Batzel v. Smith*, 333 F.3d 1018,
26 (9th Cir. 2003); *Ecash Tech. Inc. v. Guagliardo*, 210 F. Supp. 2d 1138 (C.D. Cal.
27 2001), and *Vess*, 317 F.3d 1097, apparently for the proposition that the procedural
28 requirements in 425.16 (f) and (g) apply in federal court. None of these cases alters the
conclusion that discovery is proper before resolution of an anti-SLAPP motion filed in
federal court. In *Batzel*, which addressed the timing of an appeal of an anti-SLAPP

(Footnote Cont’d on Following Page)

1 In addition to *Metabolife*, other federal courts have similarly determined that the
2 hearing of an anti-SLAPP motion should be continued to allow the plaintiff to pursue
3 discovery. *Rogers*, 57 F. Supp. 2d at 982 (granting *ex parte* application to continue
4 hearing on anti-SLAPP motion until after the close of discovery to allow plaintiff to
5 take discovery); *Shropshire*, 294 F. Supp. 2d at 1099 (denying anti-SLAPP motion
6 without prejudice to re-filing as a summary judgment motion because plaintiff needed
7 discovery). Indeed, such a continuance is not only appropriate but required where, as
8 here: (i) no discovery has been taken; (ii) factual questions exist concerning the
9 applicability of the anti-SLAPP statute to VeriSign’s claims; and (iii) essential evidence
10 relevant to the substance of VeriSign’s claims is within ICANN’s possession, custody,
11 or control. *Metabolife*, 264 F.3d at 847, 850.

- 12 1. VeriSign is entitled to discovery regarding the applicability of the
13 anti-SLAPP statute to its claims.

14 To prevail on its special motion to strike, ICANN must first demonstrate that the
15 anti-SLAPP statute applies to VeriSign’s claims for relief. *Globetrotter Software, Inc.*
16 *v. Elan Computer Group, Inc.*, 63 F. Supp. 2d 1127, 1129 (N.D. Cal. 1999). If ICANN
17 makes this showing, the burden then shifts to VeriSign “to demonstrate a probability of

18

19 (Footnote Cont’d From Previous Page)

20 motion, the Ninth Circuit simply summarized the text of the anti-SLAPP statute,
21 including its procedural provisions, as background. 333 F.3d at 1023-1024. *Batzel* did
22 not concern or address any request for discovery in connection with the anti-SLAPP
23 motion. Thus, the Court’s summary of the text of the anti-SLAPP statute has no
24 bearing on, nor does it alter or reverse, the Ninth Circuit’s holding that anti-SLAPP’s
25 stay on discovery and filing requirements do not apply in federal court. *Metabolife*,
26 264 F.3d at 846. Moreover, the *Batzel* court remanded the case precisely for “further
27 development of the facts.” *Id.* at 1035. In *Vess*, the Ninth Circuit again cited
28 *Metabolife*, noting with approval that “because the discovery-limiting aspects of
§§ 425.16(f) and (g) ‘collide with the discovery-allowing aspects of Rule 56, these
aspects of subsections 425.16 (f) and (g) cannot apply in federal court.’” 317 F.3d at
1108 (quoting *Metabolife*, 264 F.3d at 846). Finally, in *Ecash*, the court ultimately did
not rule on the anti-SLAPP motion because the claims at issue were dismissed prior to
resolution of the motion. The *Ecash* court also did not address whether discovery was
appropriate in advance of a hearing on an anti-SLAPP motion; no discovery requests
apparently had been made by either party. 210 F. Supp. 2d at 1144, 1154. Thus, none
of the cases ICANN has indicated it relies on for its opposition to this Application
supports its position.

1 prevailing on the challenged claims.” *Id.* ICANN attempts to meet its burden with
2 respect to VeriSign’s Second, Third and Fourth claims for relief by asserting that those
3 claims are based on the October 3, 2003 Suspension Ultimatum.⁶ According to
4 ICANN, the Suspension Ultimatum was sent in connection with pending or anticipated
5 litigation and, thus, is “a communication protected under section 416.25.” Motion at 7.

6 The protection afforded certain pre-litigation communications under the anti-
7 SLAPP statute – which is the basis ICANN asserts for application of the anti-SLAPP
8 statute to VeriSign’s Second, Third and Fourth claims – derives from California’s
9 litigation privilege contained in Civil Code § 47(b). *Shropshire*, 294 F. Supp. 2d at
10 1099 (where defendant’s anti-SLAPP motion is based on a pre-litigation demand,
11 courts “look[] to the case law addressing California’s litigation privilege to determine
12 whether [d]efendant’s activity is protected under the anti-SLAPP statute.”) (quoting
13 *Briggs*, 19 Cal. 4th 1106, 1123, 81 Cal. Rptr. 2d 471 (1999)). Thus, to satisfy its
14 threshold burden that the anti-SLAPP statute applies to VeriSign’s Second, Third, and
15 Fourth Claims, ICANN must first demonstrate that its Suspension Ultimatum letter falls
16 within California’s litigation privilege. *Id.*

17 In the context of an anti-SLAPP motion, the question whether the litigation
18 privilege applies to pre-litigation communications raises issues of fact requiring
19 discovery. *Shropshire*, 294 F. Supp. 2d at 1099. In *Shropshire*, the defendant moved to
20 strike under California’s anti-SLAPP statute arguing that plaintiff’s claims were based
21 on a letter it sent threatening litigation and that this letter was protected by Section
22 425.16 and the litigation privilege.⁷ *Id.* The *Shropshire* court found that the application

23 ⁶ ICANN’s Motion also asserts that VeriSign’s Fifth and Sixth claims for relief are
24 based, in part, on the October 3, 2003 Suspension Ultimatum, and thus within the scope
of the anti-SLAPP statute. Motion at 10.

25 ⁷ The plaintiffs countered that their claims did not “arise from” any protected activity,
26 asserting instead (based on *Kajima Engineering and Constr.*, 95 Cal. App. 4th 921, 116
27 Cal. Rptr. 2d 187) that their claims were premised on the parties’ course of performance
28 under their contract. *Id.* at 1100 As stated above, VeriSign also intends to rely on,
inter alia, the *Kajima* case to demonstrate that the anti-SLAPP statute does not apply to
this action.

1 of the litigation privilege to the defendant’s pre-litigation letter was a question of fact
2 that could not be resolved until the close of discovery. *Id.* at 1100, 1101. Specifically,
3 the *Shropshire* Court held that “the question of whether [defendant’s]⁸ . . .
4 communications . . . were made in anticipation of litigation for purposes of California’s
5 litigation privilege, *and thus also for the purposes of the anti-SLAPP statute*, depends
6 upon whether [d]efendant’s statements were made ‘with a good faith belief in a legally
7 viable claim in serious contemplation of litigation.’” *Id.* (quoting *Aronson*, 58 Cal.
8 App. 4th at 266, 68 Cal. Rptr. 2d at 314). (emphasis added).

9 The *Shropshire* court’s reasoning applies equally here. Relying in part on the
10 same case cited by the *Shropshire* defendant,⁹ ICANN claims that its Suspension
11 Ultimatum letter falls within the purview of California’s litigation privilege and, thus,
12 the anti-SLAPP statute. Motion at 7. Therefore, to meet its *prima facie* burden,
13 ICANN must show its statements were made “with a good faith belief in a legally
14 viable claim and in serious contemplation of litigation.” *Shropshire*, 294 F. Supp. 2d at
15 1100. “This is a factual question and . . . [plaintiffs] *must be permitted to conduct*
16 *discovery* before [d]efendant’s anti-SLAPP argument may be addressed.” *Id.* (citing
17 *Metabolife*, 264 F.3d at 846) (emphasis added). ICANN’s anti-SLAPP motion,
18 therefore, should be continued until discovery has been completed, just as the anti-
19 SLAPP motion was in *Shropshire*. *See id.* (denying anti-SLAPP motion “without
20 prejudice to raising the issues . . . on summary judgment”).

21 Moreover, discovery on the applicability of the anti-SLAPP statute and litigation
22 privilege is appropriate here because the underlying facts needed to support or refute
23 these allegations are solely within ICANN’s control. California courts have recognized
24

25 ⁸ The *Shropshire* court apparently inadvertently referred to the plaintiff, rather than the
26 defendant here. From the facts of the case and the context of the remainder of the
quotation, the reference to the plaintiff is a typographical error. *Shropshire*, 294 F.
Supp. 2d at 1099-1100.

27 ⁹ *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*, 47 Cal. App. 4th 777, 54 Cal. Rptr.
28 2d 830 (1996).

1 that the issues raised by the litigation privilege, and as to which discovery is
2 appropriate, include the “good faith” and “serious contemplation” of the party asserting
3 the privilege with respect to an anticipated lawsuit. *Aronson*, 58 Cal. App. 4th at 268,
4 68 Cal. Rptr. 2d at 314. For example, in *Aronson*, after the defendant invoked the
5 litigation privilege on summary judgment, the court denied defendant’s request for a
6 protective order and allowed the plaintiff discovery concerning defendant’s state of
7 mind regarding the potential lawsuit, advice the defendant received from his attorney
8 regarding the legitimacy of defendant’s potential claim, communications with legal
9 counsel concerning the party’s “good faith” and “serious contemplation,” and meetings
10 between defendant and his counsel regarding the potential claim.¹⁰ *Id.*

11 Accordingly, VeriSign seeks to conduct discovery to determine ICANN’s “good
12 faith belief in a legally viable claim” and “serious contemplation” of a lawsuit against
13 VeriSign. *Shropshire*, 294 F. Supp. 2d at 1100. Specifically, by way of illustration,
14 VeriSign requests the opportunity to discover facts concerning ICANN’s state of mind
15 with respect to a potential lawsuit against VeriSign. For example, among other things,
16 VeriSign seeks to discover what communications occurred among ICANN’s Board of
17 Directors that would support or contradict Mr. Jeffrey’s statement that ICANN was
18 considering a lawsuit against VeriSign. Jeffrey Decl., ¶ 11. VeriSign also seeks
19 information concerning ICANN’s assessment of the legitimacy of its potential claims
20 against VeriSign. All of this information is within ICANN’s control and is the proper
21 subject matter of discovery regarding the applicability of the litigation privilege and
22
23

24 ¹⁰ The discovery permitted in *Aronson* included depositions of the defendant and his
25 attorneys. *Aronson*, 58 Cal. App. 4th at 268, 68 Cal. Rptr. 2d at 314. ICANN, like the
26 defendant in *Aronson*, has submitted a declaration from its counsel in support of the
27 application of the litigation privilege. *Id.* Specifically, ICANN’s counsel asserted that
28 “ICANN was seriously and in good faith in contemplating” action against VeriSign.
Declaration of John Jeffrey (“Jeffrey Decl.”), ¶ 11. Thus, ICANN has squarely placed
the application of the litigation privilege, as well as communications with its counsel at
issue, making discovery appropriate. *Id.*

1 anti-SLAPP statute in this context. *Aronson*, 58 Cal. App. 4th at 268-269, 68 Cal. Rptr.
2 2d at 314; *Shropshire*, 294 F. Supp. 2d at 1100.

3 2. VeriSign is entitled to discover facts supporting its claims within
4 ICANN’s control.

5 If this Court were to determine that anti-SLAPP applies to VeriSign’s claims –
6 which it does not – VeriSign would then need to present sufficient evidence to
7 demonstrate a reasonable probability that it will prevail on its claims. *Rogers*, 57 F.
8 Supp. 2d at 976-977. Federal courts applying the anti-SLAPP statute have recognized
9 that this burden is similar to the burden imposed on parties opposing summary
10 judgment under Federal Rule of Civil Procedure 56 (“Rule 56”). *Id.* at 980-981. Rule
11 56, however, “discourage[s] motions for summary judgment based on evidence outside
12 the record until the nonmoving party has had the opportunity to conduct discovery.” *Id.*
13 at 981. For the identical reasons, federal courts have ordered that discovery proceed
14 before consideration of an anti-SLAPP motion. *Id.* at 985 (“The Court continues the
15 hearing on the special motion to strike to allow Rogers time to attempt to conduct
16 discovery. Only after discovery issues are resolved and discovery is complete will it be
17 appropriate for the Court to consider the special motion to dismiss.”); *Shropshire*, 294
18 F. Supp. 2d at 1099 (denying anti-SLAPP motion to allow discovery). VeriSign,
19 therefore, requests that this Court continue the anti-SLAPP motion until discovery is
20 completed so that it also may develop evidence to support its claims that is in the
21 possession, custody, and control of ICANN.

22 In support of this request, VeriSign specifically has identified certain discovery
23 and information it will seek to obtain relevant to its claims, which is in ICANN’s
24 possession. For example, in connection with its Fourth Claim, for intentional
25 interference with contractual relations, VeriSign must establish, among other elements,
26 ICANN’s knowledge of the contract between VeriSign and the third party provider that
27 supported VeriSign’s Site Finder service and that ICANN’s intentional acts were
28 designed to disrupt that contractual relationship. *See Quelimane Co. v. Stewart Title*

1 *Guaranty Co.* 19 Cal. 4th 26, 55 (1998); *Pacific Gas & Electric Co. v. Bear Stearns &*
2 *Co.* 50 Cal. 3d 1118, 1126 (1990). Consequently, by way of example, VeriSign will
3 seek discovery concerning ICANN’s knowledge of and intent to disrupt this contract.
4 This information is solely within ICANN’s control and necessary to VeriSign’s claim.

5 With respect to its Second, Third, Fifth, and Sixth Claims, VeriSign has, among
6 other things, alleged that ICANN has breached the implied covenant of good faith and
7 fair dealing of the Registry Agreement. To prove this claim, VeriSign must establish,
8 among other elements, that ICANN engaged in conduct separate and apart from the
9 performance of obligations under the agreement without good faith and for the purpose
10 of depriving VeriSign of rights and benefits under the agreement. *See* 1 Witkin,
11 *Summary of Cal. Law* (9th ed. 1987 & Supp. 2003) *Contracts*, §§ 742-43. As just one
12 example, VeriSign must show that ICANN had no good faith basis for refusing to
13 consent to “authorize” VeriSign’s use of tagged domain names as provided in Appendix
14 K of the .com Agreement unless VeriSign complied with burdensome obligations
15 outside ICANN’s authority. Consequently, VeriSign seeks discovery concerning
16 ICANN’s good faith in connection with its course of conduct under the Registry
17 Agreement. This information is within ICANN’s control and is necessary to VeriSign’s
18 claims.

19 B. Alternatively, ICANN’s Special Motion To Strike Should Be Continued Pending
20 Resolution Of Its Motion To Dismiss.

21 If the Court declines VeriSign’s request for a continuance to pursue discovery,
22 ICANN’s anti-SLAPP motion should be continued until after all motions to dismiss
23 have been resolved and the pleadings have been finalized. The Ninth Circuit has
24 recognized that motions on the pleadings should be addressed prior to motions to strike
25 under anti-SLAPP. *Vess*, 317 F.3d at 1110 (approving of district court’s decision to
26 rule on anti-SLAPP motions only after motions to dismiss had been adjudicated). In its
27 motion to dismiss, as in its anti-SLAPP motion, ICANN attacks VeriSign’s Second
28 through Sixth Claims for Relief. A resolution of that motion regarding the sufficiency

1 of VeriSign's Complaint necessarily will inform the parties' arguments with respect to
2 the anti-SLAPP motion. In particular, finalizing the operative pleadings in this action –
3 especially in light of ICANN's contention that the current Complaint is not one on which
4 this case should proceed – will determine the issues as to which VeriSign may need to
5 present evidence in opposition to ICANN's Motion. Consequently, continuing the anti-
6 SLAPP Motion until all motions to dismiss have been resolved and the operative
7 pleadings are finalized, will conserve the resources of the Court and the parties.
8 Moreover, contrary to ICANN's belief, there is no time limitation upon the filing or
9 resolution of such a motion in federal court and, consequently, no prejudice to ICANN
10 will result from such a continuance. *See Rogers*, 57 F. Supp. 2d at 980-981.

11 **IV. CONCLUSION**

12 For the foregoing reasons, VeriSign respectfully requests that ICANN's special
13 motion to strike be continued until discovery is completed, or for at least 180 days, to
14 allow VeriSign time to pursue discovery. In the alternative, if the Court declines to
15 allow VeriSign to conduct discovery, VeriSign requests that the hearing on the motion
16 to strike be continued until at least 45 days after all motions to dismiss have been
17 adjudicated and the pleadings finalized.

18
19 DATED: April 20, 2004.

ARNOLD & PORTER LLP
RONALD L. JOHNSTON
LAURENCE J. HUTT
SUZANNE V. WILSON
JAMES S. BLACKBURN

20
21
22
23
24 By: _____
Laurence J. Hutt
Attorneys for Plaintiff
VeriSign, Inc.

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	4
II. STATEMENT OF FACTS	10
III. ARGUMENT	15
A. ICANN’s Special Motion To Strike Should Be Continued Pending Discovery.	15
1. VeriSign is entitled to discovery regarding the applicability of the anti-SLAPP statute to its claims.	20
2. VeriSign is entitled to discover facts supporting its claims within ICANN’s control.	29
B. Alternatively, ICANN’s Special Motion To Strike Should Be Continued Pending Resolution Of Its Motion To Dismiss.	33
IV. CONCLUSION.....	34

1 **TABLE OF AUTHORITIES**

2
3 **FEDERAL CASES**

Page(s)

4 *Batzel v. Smith*,
5 333 F.3d 1018 (9th Cir. 2003)6

6 *Ecash Tech. Inc. v. Guagliardo*,
7 210 F. Supp. 2d 1138 (C.D. Cal. 2001)6

8 *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*,
9 63 F. Supp. 2d 1127 (N.D. Cal. 1999)7

10 *Metabolife Int'ernational, Inc. v. Wornick*,
11 264 F.3d 832 (9th Cir. 2001) 2, 6, 7

12 *Murphy v. Schneider Nat'l.*,
13 ___ F.3d ___, 2004 WL 547954 (9th Cir. Mar. 22, 2004)6

14 *Rogers*,
15 57 F. Supp. 2d at 976-977 7, 11, 13

16 *Shropshire v. Fred Rappaport Co.*,
17 294 F. Supp. 2d 1085 (N.D. Cal. 2003) 2, 3, 7, 8, 9,
18 10, 11

19 *Vess v. Ciba-Geigy Corp. USA*,
20 317 F.3d 1097 (9th Cir. 2003) 3, 6, 12

21 **STATE CASES**

22 *Aronson*,
23 58 Cal. App. 4th at 268, 68 Cal. Rptr. 2d at 314 10

24 *Bardin v. Lockheed Aeronautical Systems, Inc.*,
25 70 Cal. App. 4th 494, 82 Cal. Rptr. 2d 726 (1999)5

26 *Beach v. Harco Nat'l Ins. Co.*,
27 110 Cal. App. 4th 82, 1 Cal. Rptr. 3d 454 (2003)5

28 *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman*,
47 Cal. App. 4th 777, 54 Cal. Rptr. 2d 830 (1996)._9

Gallimore v. State Farm Fire & Casualty Ins. Co.,
102 Cal. App. 4th 1388, 126 Cal. Rptr. 2d 560 (2002)5

Kajima Engineering & Constr., Inc. v. City of Los Angeles,
95 Cal. App. 4th 921, 116 Cal. Rptr. 2d 187 (2002) 5, 8

Pacific Gas & Electric Co. v. Bear Stearns & Co.,
50 Cal. 3d 1118 (1990) 11

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Quelimane Co. v. Stewart Title Guaranty Co.,
19 Cal. 4th 26 (1998) 11

STATUTES AND RULES

California Code of Civil Procedure § 425.161
California Code of Civil Procedure ("CCP") § 425.16(f)6
Civil Code § 47(b)8
Federal Rule of Civil Procedure 26(f) 1, 5, 11

OTHER AUTHORITIES

1 Witkin, Summary of Cal. Law
(9th ed. 1987 & Supp. 2003) 12