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10 INTERNET CORPORATION FOR
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11

12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA

14
15 VERISIGN, INC., a Delaware
corporation,

16 Plaintiff,

17 v.

18 INTERNET CORPORATION FOR
19 ASSIGNED NAMES AND NUMBERS, a
California corporation; DOES 1-50,

20 Defendants.
21
22

Case No. 04 CV 1292 AHM (CTx)

**DEFENDANT INTERNET
CORPORATION FOR
ASSIGNED NAMES AND
NUMBERS' SPECIAL
MOTION TO STRIKE
VERISIGN'S SECOND, THIRD,
FOURTH, FIFTH, AND SIXTH
CLAIMS AS STRATEGIC
LAWSUITS AGAINST PUBLIC
PARTICIPATION (CAL. CIV.
PROC. CODE § 425.16);
MEMORANDUM OF POINTS
AND AUTHORITIES**

[Filed Concurrently with
Declaration of John O. Jeffrey]

Date: May 17, 2004
Time: 10:00 a.m.
Courtroom of the
Honorable A. Howard Matz

1 PLEASE TAKE NOTICE that the Special Motion to Strike VeriSign's
2 Second, Third, Fourth, Fifth, and Sixth causes of action will be heard on May 17,
3 2004, at 10:00 a.m. or as soon thereafter as counsel may be heard at the courtroom
4 of the Honorable A. Howard Matz, United States District Judge, located at 312
5 North Spring Street, Los Angeles, California.

6 Defendant Internet Corporation for Assigned Names and Numbers
7 ("ICANN") moves this Court for an order, pursuant to California Code of Civil
8 Procedure section 425.16, striking VeriSign's second, third, fourth, fifth, and sixth
9 claims for relief. This motion is based on the grounds that these claims, which arise
10 from a letter that ICANN sent to VeriSign and other ICANN statements about
11 VeriSign's operation of the ".com registry" of the Internet, impinge on ICANN's
12 rights of petition and free speech under the United States and California
13 Constitutions and are therefore subject to a special motion to strike. Pursuant to
14 California Code of Civil Procedure section 425.16(c), ICANN also seeks recovery
15 of its attorneys' fees.

16 This motion is made following the conference of counsel pursuant to Local
17 Rule 7-3, which took place on April 2, 2004.

18 This motion is based upon this Notice of Motion and Motion, the
19 Memorandum of Points and Authorities filed herewith, the Declaration of John O.
20 Jeffrey, ICANN's General Counsel, the pleadings that ICANN filed on April 5,
21 2004 in conjunction with its motion to dismiss pursuant to Federal Rule of Civil
22 Procedure 12(b)(6) (which are specifically incorporated by reference), the papers
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1 and records on file in this action, and upon all other matters and argument that may
2 appropriately be presented to the Court at or before the hearing.

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Dated: April __, 2004

JONES DAY

By: _____
Jeffrey A. LeVee

Attorneys for Defendant
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Pursuant to a May 2001 contract between VeriSign and ICANN, VeriSign
4 operates the "Internet registry" for the ".com" zone of the Internet. ICANN and
5 VeriSign disagree about several aspects of VeriSign's rights and obligations under
6 that contract. These disagreements have led ICANN to advise VeriSign that certain
7 VeriSign activities in its operation of the .com registry violate the contract. In the
8 past, VeriSign has alternately responded by proceeding in conformity with
9 ICANN's stated positions or by asserting its disagreement with ICANN's positions
10 and ignoring them. Until its seventh claim for relief in this lawsuit, VeriSign never
11 invoked the contractually agreed dispute-resolution mechanism.

12 But VeriSign's instant lawsuit goes well beyond seeking judicial resolution of
13 the contract interpretation dispute. VeriSign's complaint includes five other
14 contract and tort claims that seek to impose monetary and injunctive liability on
15 ICANN for merely stating its position. VeriSign's second, third, and fourth claims
16 for relief all arise completely from an October 3, 2003 "threat" to "initiate legal
17 proceedings." Compl., ¶ 37. VeriSign's fifth and sixth claims are also based on that
18 letter, as well as other instances in which ICANN made statements about
19 inconsistencies between VeriSign's operation of the .com registry of the Internet
20 and the parties' contract. Thus, these five claims seek to impose liability on
21 ICANN simply for adopting and stating contractual positions with which VeriSign
22 disagrees.

23 As shown in ICANN's motion to dismiss, dated April 5, 2004, VeriSign's
24 breach of contract and tort claims are legally unsupportable. But claims such as
25 VeriSign's, which seek to impose liability for simply stating a position, have an
26 additionally pernicious effect, especially in the context of a non-profit forum such
27 as ICANN, with respect to broad-based discussion about management of a public
28 resource (the Internet). Even in the context of purely private business affairs, the

1 common law presumes—and the state and federal constitutions ensure—that parties
2 are free to express positions about their legal rights, subject to judicial resolution in
3 case of disagreement. These rights of free speech and to petition the government
4 assume added importance in the context of ICANN, which relies on candid public
5 discussions as important inputs to its decisions about how certain features of the
6 Internet should be managed, and about how ICANN should enforce its contractual
7 rights to implement those decisions.

8 California's anti-SLAPP statute (Cal. Civ. Proc. Code § 425.16) was enacted
9 to mitigate the chilling effect of such lawsuits directed against free-speech and
10 petitioning activities. It establishes a procedure—followed by federal as well as
11 state courts in California—for prompt review and disposal of state law claims
12 against a person arising from acts "in furtherance of the person's right of petition or
13 free speech under the United States or California Constitution in connection with a
14 public issue." Because VeriSign's second, third, fourth, fifth, and sixth claims arise
15 from ICANN's free-speech and petitioning activities in stating its contractual
16 positions and indicating that it would seek judicial redress if necessary, those
17 claims should be stricken under the anti-SLAPP statute.

18 **BACKGROUND REGARDING ICANN**

19 ICANN is a not-for-profit corporation organized under California law.
20 Compl., ¶ 6; *see also* ¶ 7 of the concurrently-filed Declaration of ICANN's General
21 Counsel, John O. Jeffrey ("Jeffrey Decl."). ICANN's mission "is to coordinate, at
22 the overall level, the global Internet's systems of unique identifiers, and in particular
23 to ensure the stable and secure operation of the Internet's unique identifier systems."
24 *Id.* In 1998, ICANN entered into a Memorandum of Understanding (MOU) with
25 the United States Department of Commerce (attached as Exhibit C to ICANN's
26 RJN) in which they agreed to "jointly design, develop and test the mechanisms,
27 methods, and procedures that should be in place and the steps necessary to
28 transition management responsibility for DNS [domain name system] functions

1 now performed by, or on behalf of, the U.S. Government to a private-sector not-for-
2 profit entity." RJN, Ex. C.

3 ICANN seeks to develop consensus wherever possible, and the bulk of
4 ICANN's activity occurs either on the Internet or in meetings open to the public.
5 Jeffrey Decl., ¶ 9. ICANN maintains open and transparent processes, and it
6 regularly posts on the Internet its minutes, transcripts of its meetings, and other
7 important information and correspondence.

8 One of ICANN's functions has been to enter into contracts with the operators
9 of various Internet "registries." Those companies maintain the "zone" or "master"
10 file for the top level domains (TLDs) of the Internet. *Id.*, ¶ 10. TLD registries are,
11 in some senses, similar to phone books in that the registry operators maintain a list
12 (and a variety of other relevant information) about each of the domains within the
13 TLD. *Id.* ICANN presently has contracts with a number of registry operators,
14 including VeriSign, which operates the ".com" and ".net" registries. Compl., ¶¶ 15,
15 22; *see also* Jeffrey Decl., ¶ 10. The current .com registry agreement between
16 VeriSign and ICANN was entered into in May 2001 (the "Registry Agreement").
17 Compl., ¶ 22; Jeffrey Decl., ¶ 10; RJN, Ex. E.

18 **BACKGROUND REGARDING VERISIGN'S CLAIMS**

19 When most users of the Internet type in an address that has not been
20 registered in the registry, the users receive an "error" message or a "page cannot be
21 displayed" message that states in effect that the Internet site does not exist. Compl.,
22 ¶ 34. If, instead, a registry operator wants to redirect the Internet user to an Internet
23 page established by the registry (with content supplied by the registry), the registry
24 can employ a "wildcard." Via a wildcard, the registry operator can cause an
25 Internet user who types in a domain in the TLD that is not specifically assigned to
26 be redirected to an Internet page established by the registry operator.

27 VeriSign's second, third, and fourth claims for relief are all based entirely on
28 a dispute between ICANN and VeriSign arising from VeriSign's insertion of a

1 "wildcard" in the .com zone. Without notice to ICANN or the public, on
2 September 15, 2003, VeriSign introduced a wildcard into the .com zone, as part of a
3 new feature it referred to as "Site Finder." Jeffrey Decl., ¶ 11. On October 3, 2003,
4 ICANN sent VeriSign a letter stating that the introduction violated the .com
5 Registry Agreement, that VeriSign must suspend the change, and that failure to
6 suspend would cause ICANN "to seek promptly to enforce VeriSign's contractual
7 obligations." See RJN Ex. C. In response, VeriSign removed the wildcard.
8 Compl., ¶¶ 32-34, 94, 101, 107; Jeffrey Decl., ¶ 12. VeriSign alleges that ICANN's
9 making of this demand breached the Registry Agreement (claims 2 and 3) and
10 constituted unlawful interference with contractual relations (claim 4). Compl.,
11 ¶¶ 37-38.

12 VeriSign's fifth and sixth claims for relief for breach of contract are based
13 partly on the October 3 letter, but also on statements by ICANN in other contexts
14 concerning VeriSign's performance under the contract. VeriSign alleges that
15 ICANN:

- 16 • "demanded that VeriSign suspend" its wildcard (Compl., ¶ 37);
 - 17 • "issued false public statements that VeriSign was violating its
18 obligations as registry operator and interfering with the stability of the
19 Internet" (Compl., ¶ 37);
 - 20 • "announced to the Internet community that WLS is a Registry Service
21 within the meaning of the 2001 .com Registry Agreement" (Compl.,
22 ¶ 44);
 - 23 • "asserted against VeriSign the authority to" prevent, set prices for, and
24 otherwise restrict WLS (Compl., ¶ 44);
 - 25 • "insisted that VeriSign" comply with various conditions on the
26 introduction of WLS (Compl., ¶ 45);
 - 27 • "claimed that ConsoliDate is a Registry Service" (Compl., ¶ 52);
- 28

- 1 • "made statements and engaged in conduct that presuppose ConsoliDate
2 is a Registry Service within the meaning of the 2001 .com Registry
3 Agreement" (Compl., ¶ 53); and
- 4 • "demanded that VeriSign cease [a marketing incentive program]" on
5 the ground that it had not been approved by ICANN (Compl., ¶ 67).

6 All of the above "conduct" consists simply of ICANN formulating and expressing a
7 position as to the parties' rights and obligations under the Registry Agreement.
8 VeriSign could have sought (but did not seek until filing its seventh claim for relief)
9 to have any disagreement with ICANN's positions resolved by the mechanism set
10 forth in the Registry Agreement. *See* RJN, Ex. E (. com Agreement § II.15).

11 ARGUMENT

12 I. LEGAL STANDARD FOR AN ANTI-SLAPP SPECIAL MOTION TO 13 STRIKE.

14 In 1992, the California legislature enacted Code of Civil Procedure
15 section 425.16 (the "anti-SLAPP statute") in order to "encourage continued
16 participation in matters of public significance." *Equilon Enterprises v. Consumer*
17 *Cause, Inc.*, 29 Cal. 4th 53, 59-60 (2002). Section 425.16(b) authorizes a "special
18 motion to strike" a cause of action against a person arising from "any act of that
19 person in furtherance of the person's right of petition or free speech under the
20 United States or California Constitution in connection with a public issue." Cal.
21 Civ. Proc. Code § 425.16(b)(1).

22 The federal courts in California follow the procedures of the anti-SLAPP
23 statute on state law claims. As stated in *eCash Technologies, Inc. v. Guagliardo*,
24 210 F. Supp. 2d 1138, 1154 (C.D. Cal. 2001): "The Ninth Circuit has determined
25 that . . . section 425.16 applies to state law claims filed in federal court." *See also*
26 *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963,
27 972-73 (9th Cir. 1999).

1 In considering an "anti-SLAPP" motion to strike, a two-step test is employed.
2 First, the moving party must make a "prima facie showing" that the challenged
3 claims arise from an alleged act¹ which was taken "in furtherance of the defendant's
4 right of petition or free speech under the United States or California Constitution in
5 connection with a public issue." *Equilon Enterprises*, 29 Cal. 4th at 67. Second,
6 the non-moving party must establish that there is a probability that the non-moving
7 party will prevail on the challenged claims. Cal. Civ. Proc. Code § 425.16(b)(1);
8 *see also 1-800 Contacts, Inc. v. Steinberg*, 107 Cal. App. 4th 568, 584-85 (2003).
9 "In making its determination, the court shall consider the pleadings, and supporting
10 and opposing affidavits stating the facts upon which the liability or defense is
11 based." Cal. Civ. Proc. Code § 425.16(b)(2). The statute is "intended to 'provide a
12 fast and inexpensive unmasking and dismissal of SLAPPs.'" *Ludwig v. Superior*
13 *Court*, 37 Cal. App. 4th 8, 16 (1995) (quoting *Wilcox*, 27 Cal. App. 4th at 823).

14 **II. VERISIGN'S CLAIMS ARISE FROM ACTS IN FURTHERANCE OF**
15 **FREE SPEECH AND PETITIONING ACTIVITIES.**

16 Section 425.16(b)(1) provides for a special motion to strike "[a] cause of
17 action against a person arising from any act of that person in furtherance of the
18 person's right of petition or free speech" Section 425.16(e) defines four
19 categories of acts in furtherance of the petition or free speech rights protected by
20 the statute. Cal. Civ. Proc. Code § 425.16(b)(1) & (e); *see also 1-800 Contacts,*
21 *Inc.*, 107 Cal. App. 4th at 583. The California Supreme Court "has definitively held
22 [that] statements in relation to pending or upcoming litigation (a 'public issue') are
23 covered by Section 425.16." *eCash Technologies*, 210 F. Supp. 2d at 1154 (citing
24 *Briggs v. Eden Council for Hope and Opportunity*, 19 Cal. 4th 1106, 1123 (1999)).
25 For such communications, there is no "separate requirement that they be shown to

26 ¹ The anti-SLAPP statute applies to all claims, regardless of the form of
27 action, where they arise from allegations of protected speech or petition rights.
28 *Navellier v. Sletten*, 29 Cal. 4th 82, 92-93 (2002) ("conduct alleged to constitute [a]
breach of contract may also come within constitutionally protected speech or
petitioning.").

1 be 'an issue of public significance.'" *Id.* Where statements are made publicly and
2 concerning a matter of public interest, moreover, they are covered by the anti-
3 SLAPP statute even if not made in relation to pending or upcoming litigation. Cal.
4 Civ. Proc. Code § 425.16(e)(3); *see Damon v. Ocean Hills Journalism Club*, 85
5 Cal. App. 4th 468, 475 (2000).

6 **A. VeriSign's Second, Third, and Fourth Claims for Relief Arise**
7 **Solely From ICANN's October 3 Letter Threatening Litigation.**

8 VeriSign's second and third claims for relief allege that ICANN's October 3
9 letter constituted a breach of the parties' Registry Agreement. Compl., ¶¶ 94, 101.
10 VeriSign's fourth claim alleges that ICANN's October 3 letter constituted an
11 interference with VeriSign's contractual relations with a third party. Compl., ¶ 107.
12 Thus, the "conduct" squarely at issue in the second through fourth claims is the
13 letter: VeriSign alleges that the October 3 letter was "wrong," constituted a threat
14 that "ICANN would initiate legal proceedings against VeriSign," and "forced"
15 VeriSign to suspend its wildcard. Compl., ¶ 37.

16 VeriSign's allegations demonstrate that the October 3 letter "clearly fits
17 within the conduct that is subject to the protections of the 'Anti-SLAPP' law." *See*
18 *eCash Technologies*, 210 F. Supp. 2d at 1153-54. Several courts have held that a
19 letter, sent in connection with pending or anticipated litigation, such as the October
20 3 letter, is a communication protected under section 416.25. *See, e.g., Equilon*
21 *Enterprises*, 29 Cal. 4th at 67; *Briggs*, 19 Cal. 4th at 1123; *Dove Audio, Inc. v.*
22 *Rosenfeld, Meyer & Susman*, 47 Cal. App. 4th 777, 783 (1996).

23 In *Dove Audio*, the court held that the anti-SLAPP statute applies to letters
24 sent in anticipation of litigation. In that case, actress Audrey Hepburn's son asked a
25 law firm to investigate the royalty payments that had been received from a
26 recording company that was to pay a percentage of royalty payments from a
27 recording by Hepburn and other celebrities to the performers' designated charities.
28 *Id.* at 780. The law firm sent letters to the other celebrities stating that it intended to

1 file a complaint with the State Attorney General and requested their endorsement.
2 In response, the recording company filed an action against the law firm for libel and
3 interference with economic relationship, asserting that the letter hurt its reputation
4 and business. The court held that "[j]ust as communications preparatory to or in
5 anticipation of the bringing of an action or other official proceedings are within the
6 protection of the litigation privilege of Civil Code section 47, subdivision (b) . . .
7 we hold that such statements are equally entitled to the benefits of section 425.16."
8 *Id.* at 784. *See also Briggs*, 19 Cal. 4th at 1114-16 (pre-litigation conduct is
9 protected by the anti-SLAPP statute regardless of whether it concerns an issue of
10 public significance).

11 Drawing upon the California Supreme Court's holding in *Briggs*, Judge
12 Collins recently applied the anti-SLAPP statute to a letter between private actors.
13 *eCash Technologies, Inc.*, 210 F. Supp. 2d at 1154. In that case, defendants
14 registered the domain name "ecash.com." Plaintiff, who owned the "ECash" mark,
15 filed a lawsuit alleging various infringement claims. Defendant responded with an
16 answer and counterclaims for, among other things, cancellation of plaintiff's mark
17 on the basis of fraudulent registration and state law unfair and/or unlawful business
18 practices. Plaintiff then filed a motion to dismiss as well as a special motion to
19 strike the state law counterclaims pursuant to section 425.16. Before the hearing,
20 defendants added counterclaims for trade libel, slander of title, and unfair
21 competition.

22 In ruling on the special motion to strike, Judge Collins found that defendants'
23 state law counterclaims were subject to the special motion to strike to the extent
24 they were based on plaintiff's letter to Afternic, a company maintaining an auction
25 website, informing it that one of the domain names listed on its website "is the
26 subject of a pending lawsuit filed by" plaintiff. The letter stated further that
27 defendants' use of the domain name "ecash.com" violated plaintiff's rights in that
28 mark under federal cyberpiracy and trademark statutes, among other laws. *Id.* at

1 1146-47. The court held that the letter clearly was sent "in connection with" the
2 case and clearly fit within the conduct that is subject to the protections of the "Anti-
3 SLAPP" law. *Id.* at 1153-54.

4 The California Supreme Court recently clarified that a plaintiff's intent to
5 chill free speech is not relevant in determining whether its claims are subject to
6 California's anti-SLAPP statute. In *Equilon Enterprises*, the Court affirmed lower
7 court findings that plaintiff's claim was subject to a special motion to strike because
8 it arose from defendant's notices of intent to sue for alleged violations of
9 Proposition 65. The notices asserted that a number of plaintiff's gas stations in
10 Southern California had, since 1994, been polluting groundwater. Instead of asking
11 defendant to clarify its notice, plaintiff filed a lawsuit for declaratory and injunctive
12 relief, seeking a declaration that the notice failed to comply with the applicable
13 regulations. Relying on the court of appeal's determination that plaintiff had not
14 established a probability of prevailing on its claim, the Supreme Court affirmed
15 dismissal of plaintiff's complaint and held that, although plaintiff "may well" have
16 "had pure intentions" when it sued plaintiff, its intentions were "ultimately beside
17 the point." *Equilon Enterprises*, 29 Cal. 4th at 67.

18 As each of these cases illustrates, the October 3 letter, which, even by
19 VeriSign's own assertion, was sent in anticipation of a threatened legal proceeding
20 (Compl., ¶ 37), is a protected communication under section 425.16. Since
21 VeriSign's second, third, and fourth causes of action each is premised entirely on
22 the October 3 letter, each of those claims is clearly subject to this special motion to
23 strike. *See Navellier*, 29 Cal. 4th 82 at 92-93 (section 425.16's "definitional focus is
24 not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that
25 gives rise to his or her asserted liability—and whether that activity constitutes
26 protected speech or petitioning.") (emphasis in original).

1 **B. VeriSign's Fifth and Sixth Claims for Relief Arise From the**
2 **October 3 Letter and Other Statements in Furtherance of**
3 **ICANN's Rights.**

4 VeriSign's fifth and sixth claims are based on the October 3 letter, as well as
5 other ICANN statements regarding VeriSign's operation of the .com Registry.² In
6 essence, VeriSign alleges that ICANN's expressions of its views regarding
7 VeriSign's operation of the .com registry have resulted in improper regulation of
8 VeriSign's business, delays, discrimination, lessened competition, and a lack of
9 openness and transparency. Compl., ¶¶ 115, 124.

10 Like the October 3 letter, ICANN's other statements (set forth in the
11 "Background Regarding VeriSign's Claims" section, *supra*) have concerned
12 ICANN's interpretation of VeriSign's obligations under the Registry Agreement,
13 and are therefore protected under California's anti-SLAPP statute. *See* Cal. Civ.
14 Proc. Code § 425.16(e)(3) & (4); *Roberts v. Los Angeles County Bar Association*,
15 105 Cal. App. 4th 604 (2003); *Damon*, 85 Cal. App. 4th at 475. California Code of
16 Civil Procedure section 425.16(e)(3) provides that, for purposes of the anti-SLAPP
17 motion, an act in furtherance of a person's right of petition or free speech includes
18 "any written or oral statement or writing made in a place open to the public or a
19 public forum in connection with an issue of public interest." This provision of
20 section 425.16 extends the protections of the anti-SLAPP statute to public speech
21 outside the realm of anticipated or pending official proceedings.

22
23 ² Even were the other conduct that VeriSign alleges in its fifth and sixth
24 causes of action not constitutionally protected, the fact that VeriSign's fifth and
25 sixth claims are based in part on the October 3 letter is sufficient ground for
26 dismissal. *See Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal. App. 4th 294,
27 308 (2001) (where both constitutionally protected and unprotected conduct is
28 implicated by a cause of action, a plaintiff may not "immunize" a cause of action by
the artifice of including extraneous allegations concerning nonprotected activity).
The issue of "mixed" causes of action also arises in cases currently under review by
the California Supreme Court in *Finke v. The Walt Disney Co.*, 110 Cal. App. 4th
1210 (2003) and *Kids Against Pollution v. California Dental Assoc.*, 108 Cal. App.
4th 1003 (2003).

1 On their face, the alleged statements are plainly examples of ICANN's
2 "speech." Moreover, even VeriSign's allegations acknowledge that they were made
3 "in a place open to the public or a public forum." *See, e.g.,* Compl., ¶ 37 (ICANN
4 "issued false public statements that VeriSign was violating its obligations as
5 registry operator"); Compl., ¶ 44 (ICANN "announced to the Internet community
6 that WLS is a Registry Service within the meaning of the 2001 .com Registry
7 Agreement."). California courts have held that the Internet and non-profit
8 organizations' open Board meetings—such as ICANN's Board meetings, which are
9 open—are public forums for purposes of the anti-SLAPP statute. *See Barrett v.*
10 *Rosenthal*, 114 Cal. App. 4th 1379, 1388 (2004) (“courts have uniformly held or,
11 deeming the proposition obvious, simply assumed that Internet venues to which
12 members of the public have relatively easy access constitute a ‘public forum’ or a
13 place ‘open to the public’ within the meaning of section 425.16”); *Damon*, 85 Cal.
14 App. 4th at 468 (homeowners' association's Board meetings, which were open
15 governance meetings, with notice, agenda and minutes requirements, and strictly
16 limited closed executive sessions, constituted public forum).

17 In fulfilling its mission, ICANN seeks to develop consensus wherever
18 possible, and it pursues that goal through public debate, public comment, open
19 meetings, and frequent website updates regarding its activities. Jeffrey Decl., ¶ 9.
20 Much of ICANN's activity, including its quarterly Board meetings, occurs in
21 meetings open to the public. *Id.* In addition, ICANN maintains open and
22 transparent processes; for example, it regularly posts on the Internet its minutes,
23 correspondence, transcripts of its meetings, and other important information. *Id.*

24 ICANN's alleged statements also meet the statutory requirement that they
25 were made in connection with issues of public interest. California courts have held
26 that an issue is of "public interest" within the meaning of section 425.16 if it meets
27 one or more of the following criteria: (1) the subject of the statement or activity
28 precipitating the claim was a person or entity in the public eye; (2) the statement or

1 activity precipitating the claim involved conduct that could affect large numbers of
2 people beyond the direct participants; or (3) the statement or activity precipitating
3 the claim involved a topic of widespread, public interest. *See Commonwealth*
4 *Energy Corp. v. Investor Data Exchange, Inc.*, 110 Cal. App. 4th 26, 33 (2003)
5 (finding commercial sales of product to a few people was not an issue of public
6 interest).

7 ICANN's statements pertaining to VeriSign's operation of the .com registry
8 satisfy both the second and third prongs of this test. The Internet is currently used
9 by tens of millions of people throughout the world. *See Jeffrey Decl.*, ¶ 6. The
10 .com registry alone accounts for approximately 45% of all the Internet domain
11 names that are registered in the world. *See Jeffrey Decl.*, ¶ 6, Ex. 1. Because
12 ICANN's statements about the operation of the .com registry could affect a large
13 number of people beyond VeriSign and ICANN and are of widespread, public
14 interest, the statements precipitating VeriSign's fifth and sixth claims involve issues
15 of significant public interest.

16 Finally, VeriSign's fifth and sixth causes of action undoubtedly "arise from"
17 ICANN's alleged statements. In the anti-SLAPP context, a defendant meets the
18 "cause of action . . . arising from" burden by "demonstrating that the act underlying
19 the plaintiff's cause fits one of the categories spelled out in section 425.16,
20 subdivision (e)." *Braun v. Chronicle Publishing Co.*, 52 Cal. App. 4th 1036, 1043
21 (1997); *see also Wilcox*, 27 Cal. App. 4th at 820. Both the fifth and sixth claims
22 allege that ICANN has (through these and similar alleged statements regarding
23 VeriSign's proposed services) "repudiated the restrictions on the scope of Registry
24 Services" in the .com Registry Agreement. Compl., ¶¶ 115, 124. Therefore,
25 VeriSign's fifth and sixth causes of action "arise from" ICANN's exercise of its
26 constitutional right to free speech.

27 Although VeriSign's fifth and sixth claims for relief allege numerous
28 contractual violations in a scattershot approach, the gravamen of the claims is

1 plainly that VeriSign disagrees with ICANN's alleged "demands,"
2 "announcements," and "assertions" regarding the scope of ICANN's role under the
3 Registry Agreement and VeriSign's operation of the .com registry. As the court
4 explained in *Wilcox*, 27 Cal. App. 4th at 820-21, the anti-SLAPP statute applies to
5 all claims based upon "*an act* in furtherance of a person's First Amendment rights
6 [and] is not limited to oral and written statements." *Wilcox*, 27 Cal. App. 4th at
7 820-21; Cal. Civ. Proc. Code § 425.16(e)(4). If the plaintiffs' suit "arises out of the
8 defendant's constitutionally protected conduct" then the "plaintiff should be
9 required to satisfy the statute's requirements." *Wilcox* at 821. In addition, it is well-
10 established that the anti-SLAPP statute covers not only allegations that public
11 statements are wrongful in themselves, but also allegations that they were
12 formulated by improper procedures. *Roberts*, 105 Cal. App. 4th at 615 (applying
13 anti-SLAPP statute to breach-of-contract claim against bar association for following
14 improper procedure in formulating evaluation of judicial candidate). Thus,
15 VeriSign's attacks on ICANN's processes for reaching its positions are just as
16 subject to the anti-SLAPP statute as are its attacks on ICANN's statements of
17 position.

18 **III. THE CLAIMS MUST BE STRICKEN UNLESS VERISIGN**
19 **DEMONSTRATES A PROBABILITY IT WILL PREVAIL.**

20 Since ICANN has made a prima facie showing that VeriSign's second, third,
21 fourth, fifth, and sixth claims fall within section 425.16, VeriSign must now
22 establish that there is a probability it will prevail on these challenged claims.
23 However, as set forth in ICANN's Motion to Dismiss filed on April 5, 2004,
24 VeriSign does not have a probability of prevailing on any of these claims. ICANN
25 will not repeat here the bases for dismissing those claims; suffice to say that each is
26 premised on the clearly false notion that ICANN's statements of its legal positions,
27 including its intention to resort to judicial remedies, constitutes a breach of contract
28 or an interference with VeriSign's contractual relations.

1 **IV. ICANN IS ENTITLED TO RECOVER ITS COSTS AND**
2 **ATTORNEYS' FEES.**

3 Section 425.16 provides that "a prevailing defendant on a special motion to
4 strike shall be entitled to recover his or her attorney's fees and costs." Cal. Civ.
5 Proc. Code § 425.16(c). In the event that VeriSign fails to carry its burden of
6 establishing a probability of prevailing on its claims, ICANN requests that the
7 Court order VeriSign to pay ICANN's costs and attorneys' fees in this litigation.

8 **CONCLUSION**

9 For the foregoing reasons, ICANN requests that the Court grant ICANN's
10 Special Motion to Strike VeriSign's second, third, fourth, fifth, and sixth claims for
11 relief and order VeriSign to pay ICANN's costs and attorneys' fees.

12 Dated: April __, 2004

JONES DAY

13
14 By: _____
15 Jeffrey A. LeVee

16 Attorneys for Defendant
17 INTERNET CORPORATION FOR
18 ASSIGNED NAMES AND NUMBERS
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