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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA CRUZ

TODD GLASSEY and MICHAEL MCNEIL, Plaintiffs, v. MICROSEMI CORPORATION, ET AL., Defendants.	CASE NO.: 16-CV-01577 **(1) INTERNET SOCIETY'S NOTICE OF MOTION AND SPECIAL MOTION TO STRIKE PURSUANT TO CCP § 425.16 ("ANTI-SLAPP");** **(2) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT; and** <u>Lodged Under Separate Cover</u>: **(3) [PROPOSED] ORDER ON SPECIAL MOTION TO STRIKE.** Date: October 3, 2016 Time: 8:30 a.m. Judge: Hon. John Gallagher Department: 4 Action Filed: June 24, 2016

NOTICE OF MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that at 8:30 a.m., on October 3, 2016, in Department 4 of the Superior Court of the State of California, Santa Cruz County, located at 701 Ocean Street, Santa Cruz, CA 95060, Defendant the Internet Society ("ISOC") will, and hereby does, move to strike the fifth cause of action (the only cause of action alleged against ISOC) of the Complaint of Plaintiffs Todd Glassey and Michael McNeil under California's "anti-SLAPP" statute, California Code of Civil Procedure § 425.16.[1]

Concurrently with the filing of this Motion, ISOC is filing a General Demurrer to the fifth cause of action of the Complaint. If the Court grants this anti-SLAPP Motion and dismisses this action as to ISOC, the Demurrer will be moot.

This Motion is based on this Notice of Motion and Special Motion to Strike, the Memorandum of Points and Authorities attached hereto, the Request for Judicial Notice filed concurrently herewith, all pleadings and papers filed in this action, and such additional papers and arguments as may be presented at or in connection with the hearing.

Dated: August 29, 2016

Respectfully submitted,

By: /s/ Jason D. Russell

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[1] Section 425.16(f) provides that the hearing on an anti-SLAPP motion is to be scheduled within 30 days after service of the motion "unless the docket conditions of the court require a later hearing." This motion has been set on the Court's docket for October 3, 2016, the same date on which ISOC's Demurrer has been scheduled.

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PRELIMINARY STATEMENT

In response to the Complaint for Damages (the "Complaint") filed by plaintiffs Todd Glassey and Michael McNeil ("Plaintiffs"), Defendant the Internet Society ("ISOC") respectfully submits this Memorandum of Points and Authorities in Support of Its Special Motion to Strike the Fifth Cause of Action of the Complaint Pursuant to CCP § 425.16 ("anti-SLAPP").

The Complaint is a third regurgitation of allegations Plaintiffs have previously made in this Court beginning in 2009 and in the United States District Court for the Northern District of California in 2013, and then again in 2014. (*See* Ex. 1, Amended Compl. at 33, *Michael E. McNeil and Todd S. Glassey v. Book et al*., No. CV-165643, (Santa Cruz Sup. Ct., filed May 21, 2010) ("*Glassey I*"); Ex. 4 ¶¶ 37, 78, 79, 84, 85, Compl., ECF No. 1, *Glassey, et al. v. Symmetricom, Inc.*, No. 3:13–cv–04662–NC (N.D. Cal., filed Oct. 7, 2013) ("*Glassey II*"); Ex. 10 ¶¶ 5, 183, 215-48, Second Amended Compl., ECF No. 112, *Glassey et al. v. Microsemi, Inc. et al*., No. 14-cv-03629-WHA (N.D. Cal., filed Nov. 13, 2014) ("*Glassey III*").)[1]

Attached to the Complaint in this action, as in Plaintiffs' prior actions, are two agreements from 1999 settling a dispute between Plaintiffs and their former employer. (*See* Compl. Exs. A, B (collectively, the "1999 Settlement Agreements").) Nowhere does the Complaint describe Plaintiffs' (nonexistent) relationship to ISOC, nor do Plaintiffs allege that ISOC was a party to—or even in privity with a party to—the 1999 Settlement Agreements. Yet Plaintiffs claim, inexplicably, that ISOC breached the 1999 Settlement Agreements "by failing to acknowledge [its] obligations thereunder," and "by failing to stress those using the intellectual property through the so-called Open Source agreement of their obligations under Exhibit 'A' and Exhibit 'B.'" (Compl. ¶ 13.)

[1] All "Ex." references herein are to the exhibits to the concurrently filed Declaration of Angela Colt, unless otherwise noted. As explained in ISOC's concurrently filed Request for Judicial Notice, all exhibits may properly be considered in connection with this Motion.

This cause of action against ISOC presents precisely the situation that the anti-SLAPP motion was designed to prevent. Under California Code of Civil Procedure § 425.16 ("CCP § 425.16"), if a defendant can establish that the conduct being challenged in the complaint is a "protected activity" under California's anti-SLAPP statute, which ISOC can easily do here, then the burden shifts to Plaintiffs to establish that they have a likelihood of success on the merits of their proposed claim or else the claim must be dismissed.

Here, Plaintiffs challenge ISOC's publication of suggested standards for the use of the Internet worldwide, without any purported acknowledgment of Plaintiffs' so-called intellectual property rights. But ISOC's conduct—as free speech by a non-profit entity—is quintessential "protected activity" entitled to the fullest protection under the anti-SLAPP statute. Consequently, the burden shifts to Plaintiffs to show that they have a likelihood of success on their claims about the purported breach of contracts by ISOC. Putting aside that ISOC was neither alleged to be a party to, nor even in privity with a party to, either of the 1999 Settlement Agreements, a federal district court has already decided in a binding final judgment, affirmed by the Ninth Circuit Court of Appeals, that there were "too many fundamental problems with Plaintiffs' pleading," including Plaintiffs' own concession that they did not own the intellectual property which was the subject of the 1999 Settlement Agreements. *Glassey III*, 2014 WL 7387161, at *5, *aff'd sub nom. Glassey v. Microsemi, Inc.*, 636 F. App'x 433 (9th Cir. 2016). Accordingly, Plaintiffs have zero probability of success on the merits and the cause of action alleged against ISOC should be stricken. CCP § 425.16(b)(1).

SUMMARY OF ALLEGATIONS AND JUDICIALLY NOTICEABLE FACTS

Only one of the five causes of action is asserted against ISOC. The gravamen of Plaintiffs' allegations against ISOC is that in promulgating Internet standards, ISOC breached the 1999 Settlement Agreements (1) by failing to acknowledge its obligations under the 1999 Settlement Agreements; and (2) "in promulgating its standards," by failing to "stress the restrictions on the use of the intellectual property covered by [the 1999

Settlement Agreements] to the point almost universal abuse of the intellectual property has developed." (Compl. ¶ 33.)

The 1999 Settlement Agreements themselves show that ISOC was not a party to them (nor even in privity with a party to them), and Plaintiffs do not—and cannot—allege otherwise. (*Compare* Compl. Exs. A, B (ISOC not a party) *with* Compl. ¶¶ 13, 32, 33 (alleging breach of contract, but not alleging ISOC's relationship to the 1999 Settlement Agreements).) And Plaintiffs conveniently ignore their previous concession in *Glassey III*—cited by the federal court in dismissing with prejudice that action—that they do not own the intellectual property covered by the 1999 Settlement Agreements, calling into question whether they have been injured at all. *Glassey III*, 2014 WL 7387161, at *5 (dismissing with prejudice and reasoning "even they concede that they do not own the asserted patents").

As explained below, after a loss on the merits on their allegations related to their nonexistent property interest in the intellectual property that is the subject matter of the 1999 Settlement Agreements, Plaintiffs now—in their fourth suit relating to the agreements—seek another bite at the proverbial apple. Plaintiffs inexplicably target ISOC's free speech activities "in promulgating its standards," purportedly in breach of contracts to which Plaintiffs cannot allege ISOC has any relationship. Accordingly, Plaintiffs' frivolous claim against ISOC has zero probability of success and is precisely the kind of claim the anti-SLAPP statute was intended to address.

ARGUMENT

I. Legal Standard for Deciding an "Anti-SLAPP" Motion

"The purpose [of CCP § 425.16] is to curtail the chilling effect meritless lawsuits may have on the valid exercise of free speech and petition rights, and the statute is to be interpreted broadly to accomplish that goal." *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures*, 184 Cal. App. 4th 1539, 1547 (2010).[2] An anti-SLAPP motion

[2] All emphasis in quotations is added, and internal citations, quotation marks, ellipses, brackets and other internal marks are omitted, unless otherwise noted.

involves a two-step process. "First, the moving party has the initial burden of making a threshold showing that the challenged cause of action is one arising from a protected activity" as defined in CCP § 425.16. *Malin v. Singer*, 217 Cal. App. 4th 1283, 1292 (2013). The anti-SLAPP statute describes four types of protected activity:

(1) any written or oral statement made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;

(2) any written or oral statement made in connection with an issue under consideration or review in such a proceeding;

(3) any written or oral statement made in a public forum in connection with an issue of public interest; or

(4) any other conduct in furtherance of the exercise of the constitutional right of petition or free speech in connection with an issue of public interest.

CCP § 425.16(e). By its own terms, the anti-SLAPP statute "shall be considered broadly." CCP § 425.16. "The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability and whether that activity constitutes protected speech or petitioning." *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664, 679 (2010), *as modified on denial of reh'g* (Feb. 24, 2010).

Once the court finds that the defendant has made a threshold showing that the activity is protected, the "burden then shifts to the plaintiff to establish a probability of prevailing on the claim." *Haight Ashbury Free Clinics*, 184 Cal. App. 4th at 1547.

II. Plaintiffs' Cause of Action Against ISOC Implicates Protected Activity and Should Be Stricken

As the California Supreme Court has repeatedly recognized, "a cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech ... shall be subject to a special motion to strike." *Rusheen v. Cohen*, 37 Cal. 4th 1048, 1056 (2006). "Web sites accessible to the public are 'public forums' for the purposes of the anti-SLAPP statute." *Kronemyer v. Internet Movie Data Base, Inc.*, 150

Cal. App. 4th 941, 950 (2007). *See also Hupp v. Freedom Commc'ns, Inc.*, 221 Cal. App. 4th 398, 405 (2013) (maintaining an online "forum for discussion of issues of public interest" is protected activity under anti-SLAPP statute); *Maranatha Corr., LLC v. Dep't of Corr. & Rehab.*, 158 Cal. App. 4th 1075, 1086 (2008) ("Under its plain meaning, a public forum is not limited to a physical setting, but also includes other forms of public communication.").

Courts routinely accord free speech protection under CCP §§ 425.16(e)(3) and 425.16(e)(4) to web pages that are not commercial, but "educational in nature and assert[] a company's positions on . . . issues of public interest." *Bernardo v. Planned Parenthood Fed'n of Am.*, 115 Cal. App. 4th 322, 341, 344-46 (2004). Educational events, in addition to educational materials, arise from protected activity as well. *U.S. W. Falun Dafa Ass'n v. Chinese Chamber of Commerce*, 163 Cal. App. 4th 590, 602 (2008) (holding street fairs designed "to educate the public on the subjects of Chinese culture and history and to encourage participation in the New Year celebration" are protected activity under anti-SLAPP statute). Similarly, acts of "designing and publishing," even within advertising, "an editorial feature," arise from protected activity for purposes of the anti-SLAPP statute. *Stewart*, 181 Cal. App. 4th at 679.

The "scope of the term 'public interest,' is to be construed broadly." *Brodeur v. Atlas Entm't, Inc.*, 248 Cal. App. 4th 665 (2016). Indeed, as the Court of Appeal recently held in *Brodeur*, "the issue need not be 'significant' to be protected by the anti-SLAPP statute—it is enough that it is one in which the public takes an interest." *Id.*

Here, the fifth cause of action is based on the allegation that ISOC, a non-profit, through its sponsorship of the Internet Engineering Task Force, acts as the standards organization, and promulgates protocols and standards, for "Internet users worldwide" without stressing the so-called "restrictions on the use of the intellectual property covered by Exhibit 'A' and Exhibit 'B'[.]" (Compl. ¶¶ 32, 33.) Allegedly, despite ISOC's use of the "technology covered by Exhibit "A' and Exhibit 'B' in its internal processes, ISOC

"has failed to provide its assignor or licensor a written acknowledgement of its obligations and willingness to assume them as required by Section 8.4." (*Id.* ¶ 33.)

ISOC's promulgation of Internet standards falls within section 425.16(e)(3) because Plaintiffs allege that the promulgation was made in "writing" in a "public forum," namely its website. *See, e.g., Kronemyer*, 150 Cal. App. 4th at 950 (web sites are public forums). And by Plaintiffs' own allegations, ISOC's statements are "in connection with an issue of public interest" since they are intended for "Internet users worldwide" and the standards have resulted in "almost universal abuse of the intellectual property." (Compl. ¶¶ 32, 33.) Similarly, Plaintiffs' own allegations establish the educational nature of ISOC's website by virtue of its being a "standards organization." (Compl. ¶¶ 13, 32; *see also* http://www.isoc.org/isoc/general/ (ISOC is a not-for-profit corporation whose "principal purpose is to maintain and extend the development and availability of the Internet and its associated technologies and applications"); http://www.internetsociety.org/who-we-are/mission (ISOC promotes "the open development, evolution, and use of the Internet for the benefit of all people throughout the world"). Accordingly, there is no commercial speech exception applicable to ISOC, and the free-speech protections of section 425.16(e)(3) apply.

For these same reasons, ISOC's alleged conduct also constitutes "protected activity" under section 425.16(e)(4) because the promulgation of Internet standards is "conduct in furtherance of the exercise of the constitutional right . . . of free speech in connection with . . . an issue of public interest." CCP § 425.16(e)(4). *See Rivera v. First Databank, Inc.*, 187 Cal. App. 4th 709, 716 (2010) (issue of public interest is interpreted in same manner for CCP §§ 425.16(e)(3) and (e)(4) since the identical language is used in both subparts).

III. Plaintiffs Cannot Demonstrate Any Probability of Success on the Merits

"If the court finds the defendant has made the threshold showing, it determines then whether the plaintiff has demonstrated a probability of prevailing on the claim." *Rusheen*, 37 Cal. 4th at 1056. In order to establish a probability of prevailing on the claim, "a

plaintiff responding to an anti-SLAPP motion must state and substantiate a legally sufficient claim." *Id.* "Put another way, the plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Jarrow Formulas, Inc. v. Lamarche,* 31 Cal. 4th 728, 741 (2003). An anti-SLAPP "motion should be granted if the defendant presents evidence that defeats the plaintiff's claim as a matter of law," such as "by showing the plaintiff cannot establish an element of its cause of action or by showing there is a complete defense to the cause of action[.]" *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP*, 133 Cal. App. 4th 658, 676 (2005).

As explained more fully in ISOC's Demurrer, Plaintiffs cannot state a claim against ISOC for breach of the 1999 Settlement Agreements because Plaintiffs have not alleged (and cannot allege) that ISOC was a party to either of the 1999 Settlement Agreements. *Clemens v. Am. Warranty Corp.*, 193 Cal. App. 3d 444, 452 (1987) ("Under California law, only a signatory to a contract may be liable for any breach."); *Tri-Continent Int'l Corp. v. Paris Sav. & Loan Ass'n*, 12 Cal. App. 4th 1354, 1359 (1993) (plaintiff "cannot assert a claim for breach of contract against one who is not a party to the contract").

Moreover, even if Plaintiffs could plausibly allege that ISOC was somehow bound by the 1999 Settlement Agreements (which they cannot), Plaintiffs' breach of contract claim against ISOC would be barred by the doctrines of collateral estoppel and claim splitting, which doctrines preclude the re-litigation of issues argued and finally decided in *Glassey III*, and those issues which could have been brought, in *Glassey I*, *Glassey II*, and *Glassey III*. *See Franceschi v. Franchise Tax Bd.*, 1 Cal. App. 5th 247, 259-263 (2016) (complaint barred by res judicata where issues had previously been litigated or could have been brought in prior litigation).

Here, Plaintiffs have already raised—and lost—the issue of whether they are entitled to anything under the 1999 Settlement Agreements, by breach or otherwise, in a federal district court. (*Compare* Compl. ¶ 13 (alleging ISOC breached the 1999 Settlement Agreements "by failing to acknowledge [its] obligations thereunder" and that "IETF

additionally breached by failing to stress to those using the intellectual property . . . their obligations under [the 1999 Settlement Agreements]") and *id*. ¶ 33 (alleging ISOC "failed to provide its assignor written acknowledgement of its obligations" and "failed to stress the restrictions on the use of the intellectual property covered by [the 1999 Settlement Agreements] to the point almost universal abuse of the intellectual property has developed") *with* Ex. 10 ¶ 181, *Glassey III*, ECF No. 112 (alleging IETF and Microsemi "acted in concert" "to allow Plaintiffs' protected Phase-II IP to be placed into Network Standards . . . in violation of Plaintiffs' IP Rights"), *id*. ¶ 183 (alleging Microsemi breached the 1999 Settlement Agreements because it "refused" to "create a document saying [it] will be bound by terms of the [1999 Settlement Agreements]"), and *id*. ¶ 218 (alleging "many of the IETF Standards published . . . have been identified 'to have Plaintiffs' IP inside them without authorization").) That adverse decision is memorialized in a final judgment on the merits, affirmed by the Ninth Circuit Court of Appeals. *Glassey III*, 2014 WL 7387161, at *1, *4-5 (dismissing Plaintiffs' second amended complaint and noting "plaintiffs have utterly failed to file a pleading that states a plausible claim"); *Glassey v. Microsemi, Inc.*, 636 F. App'x 433, 434 (9th Cir. 2016).

Thus, as a matter of law, Plaintiffs cannot prevail on their breach of contract claim against ISOC.

CONCLUSION

For the foregoing reasons, Plaintiffs' fifth cause of action against ISOC should be stricken under CCP § 425.16(b)(1) and ISOC should be dismissed from this action.

Dated: August 29, 2016

Respectfully submitted,

By: /s/ Jason D. Russell

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