

1 MARK R. MCDONALD (CA SBN 137001)  
mmcdonald@mofocom  
2 MORRISON & FOERSTER LLP  
555 West Fifth Street, Suite 3500  
3 Los Angeles, California 90013  
Telephone: (213) 892-5200  
4 Facsimile: (213) 892-5454

5 MICHAEL B. MILLER (admitted *pro hac vice*)  
mbmiller@mofocom  
6 CRAIG B. WHITNEY (CA SBN 217673)  
cwhitney@mofocom  
7 ADAM J. HUNT (admitted *pro hac vice*)  
adamhunt@mofocom  
8 MORRISON & FOERSTER LLP  
1290 Avenue of the Americas  
9 New York, New York 10104  
Telephone: 212.468.8000  
10 Facsimile: 212.468.7900

11 Attorneys for Plaintiff  
NAME.SPACE, INC.

12  
13 UNITED STATES DISTRICT COURT  
14 CENTRAL DISTRICT OF CALIFORNIA  
15 WESTERN DIVISION  
16

17 NAME.SPACE, INC.,  
18 Plaintiff,  
19 v.  
20 INTERNET CORPORATION FOR  
21 ASSIGNED NAMES AND NUMBERS,  
22 Defendant.  
23  
24

Case No. CV 12-8676 (PA)

**MEMORANDUM IN SUPPORT  
OF PLAINTIFF NAME.SPACE'S  
OPPOSITION TO ICANN'S  
MOTION FOR SUMMARY  
JUDGMENT**

Hearing Date: February 25, 2013  
Hearing Time: 1:30 p.m.  
Judge: Honorable Percy Anderson  
Hearing Location: 312 N. Spring St.

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

**TABLE OF CONTENTS**

**Page**

PRELIMINARY STATEMENT ..... 1

STATEMENT OF FACTS ..... 2

LEGAL STANDARD ..... 5

ARGUMENT ..... 6

I. ICANN IS NOT ENTITLED TO SUMMARY JUDGMENT ON THE BASIS OF THE 2000 APPLICATION. .... 6

    A. name.space’s Claims Do No Rely on the 2000 Application. .... 7

    B. Nothing in the Plain Language of the 2000 Application Evidences an Intent to Shield ICANN From Claims Flowing From Future, Unknown Conduct. .... 10

    C. Extrinsic Evidence Supports name.space’s Interpretation of the 2000 Application, and Conflicts with ICANN’s Interpretation..... 14

    D. ICANN’s Reading of the 2000 Application Would Violate Public Policy. .... 18

II. ICANN CANNOT SHOW THAT IT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON NAME.SPACE’S CLAIMS. .... 19

    A. ICANN Is Not Entitled to Summary Judgment on Name.Space’s Antitrust Claims..... 19

    B. ICANN Is Not Entitled to Summary Judgment on name.space’s Tortious Interference Claims. .... 21

III. ALTERNATIVELY, THE COURT SHOULD DEFER CONSIDERATION OF ICANN’S MOTION UNTIL NAME.SPACE HAS HAD THE OPPORTUNITY TO CONDUCT DISCOVERY..... 22

IV. ICANN’S RULE 12(B)(1) MOTION SHOULD BE DENIED..... 22

CONCLUSION..... 24

**TABLE OF AUTHORITIES**

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

**Page(s)**

**CASES**

*Angus v. Transnational Automotive Group, Inc.*,  
No. CV 09-00143, 2012 U.S. Dist. LEXIS 5033 (C.D. Cal. Jan. 17, 2012) ..... 21

*Catch Curve, Inc. v. Venali, Inc.*,  
519 F. Supp. 2d 1028 (C.D. Cal. 2007) ..... 22

*Chaganti v. Ceridian Benefits*,  
C 03-05785, 2004 U.S. Dist. LEXIS 17075 (N.D. Cal. Aug. 23, 2004) ..... 11

*Doe v. Holy*,  
557 F.3d 1066, 1073 (9th Cir. 2009) ..... 23

*Dore v. Arnold Worldwide, Inc.*,  
39 Cal. 4th 384 (2006) ..... 14

*First Nat’l Mortg. Co. v. Fed. Realty Inv. Trust*,  
631 F.3d 1058 (9th Cir. 2011) ..... 14, 16

*Grillo v. State of California*,  
No. C 05-2559, 2006 U.S. Dist. LEXIS 15255 (N.D. Cal. Feb. 13, 2006) ..... 12

*HDC Med., Inc. v. Minntech Corp.*,  
474 F.3d 543 (8th Cir. 2007) ..... 22

*Hickey v. A.E. Staley Mfg.*,  
995 F.2d 1385 (7th Cir. 1993) ..... 5

*In re Flash Memory Antitrust Litig.*,  
643 F. Supp. 2d 1133 (N.D. Cal. 2009) ..... 20, 21

*Int’l Brotherhood of Elec. Workers, Local 47 v. S. Cal. Edison Co.*,  
880 F.2d 104 (9th Cir. 1989) ..... 19

*Jardin v. Datallegro, Inc.*,  
No. 08-cv-1462, 2009 U.S. Dist. LEXIS 3339 (S.D. Cal. Jan. 18, 2009) .....  
..... 10, 11, 13

*Jones v. Taber*,  
648 F.2d 1201 (9th Cir. 1981) ..... 6

*Lawlor v. Nat’l Screen Serv. Corp.*,  
349 U.S. 322 (1955) ..... 18, 19

*Lizalde v. Advanced Planning Servs.*,  
875 F. Supp. 2d 1150 (S.D. Cal. 2012) ..... 12, 19

*Marvin v. Sun Microsystems, Inc.*,  
No. C-08-03727, 2010 U.S. Dist. LEXIS 6326 (N.D. Cal. Jan. 11, 2010) ..... 12

1 *McCarthy v. United States*,  
850 F.2d 558 (9th Cir. 1988)..... 23

2 *Miles v. American Seafoods Co.*,  
3 197 F.3d 1032 (9th Cir. 1999)..... 5

4 *Millennium Labs., Inc. v. Ameritox. Ltd.*,  
5 No. 12-CV-1063, 2012 U.S. Dist. LEXIS 147528 (S.D. Cal. Oct. 12,  
2012)..... 24

6 *Nova Wines, Inc. v. Adler Fels Winery LLC*,  
467 F. Supp. 2d 965 (C.D. Cal. 2006) ..... 24

7 *Playboy Enters., Inc. v. Netscape Commc’ns Corp.*,  
8 354 F.3d 1020 (9th Cir. 2004)..... 24

9 *Qwest Commc’n v. Herakles, LLC*,  
10 No. 2:07-cv-00393, 2008 U.S. Dist. LEXIS 72660 (E.D. Cal. Aug. 18,  
2008)..... 21

11 *Reynolds v. Allstate Ins. Co.*,  
855 F. Supp. 2d 989 (N.D. Cal. 2012) ..... 16

12 *S. Cal. Gas Co. v. City of Alhambra*,  
13 Case No. CV 10-8635, 2011 U.S. Dist. LEXIS 107514 (C.D. Cal. June 6,  
2011)..... 5, 20

14 *San Diego Gas & Elec. Co. v. Canadian Hunter Mktg.*,  
15 132 F.3d 1303 (9th Cir. 1997)..... 5

16 *San Diego Hospice v. Cnty of San Diego*,  
31 Cal. App. 4th 1048 (1995)..... 11, 12, 13

17 *Skrbina v. Fleming Cos.*,  
18 45 Cal. App. 4th 1353 (1996)..... 11, 13

19 *Solis v. Kirkwood Resort Co.*,  
94 Cal. App. 4th 354 (2001)..... 14

20 *Texas Partners v. Conrock Co.*,  
21 685 F.2d 1116 (9th Cir. 1982)..... 22

22 *Waller v. Truck Ins. Exch.*,  
11 Cal. 4th 1 (1995) ..... 18

23 *Zipusch v. LA Workout, Inc.*,  
24 155 Cal. App. 4th 1281 (2007) ..... 14

25 **STATUTES**

26 15 U.S.C. § 1125(a)(1)(A) ..... 24

27 Cal. Civ. Code § 1654 ..... 14

28 Cal. Civ. Code § 1542 ..... 11, 12

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

Fed. R. Civ. P. 56(d)..... 22

**OTHER AUTHORITIES**

4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:11.50 (4th ed.)..... 24



1 rights, and ICANN’s tortious interference with name.space’s existing and  
2 prospective contracts. All of the relevant conduct took place well after 2000.

3 The evidence in the record makes clear that the parties never intended the  
4 release language in the 2000 Application to cover anything other than the 2000  
5 Application and, at a minimum, genuine issues of material fact exist as to the  
6 proper interpretation of the 2000 Application. Alternatively, given that no  
7 discovery has occurred in this action, name.space is entitled to the opportunity to  
8 conduct discovery to support its position in this litigation.

9 ICANN submitted two other pieces of evidence in connection with its  
10 Motion to Dismiss: ICANN’s articles of incorporation (“Articles”) and bylaws  
11 (“Bylaws”). Although it appears that the January 15 Order does not relate to this  
12 evidence, name.space will demonstrate in this memorandum why that evidence fails  
13 to remove genuine issues of material fact as to issues relevant to them.

14 Accordingly, summary judgment should be denied and name.space should be  
15 permitted to litigate the merits of its claims against ICANN.<sup>1</sup>

16 **STATEMENT OF FACTS**

17 The following facts relate solely to the issues raised in ICANN’s motion for  
18 summary judgment:

19 In 2000, ICANN created the 2000 Proof of Concept: a process by which  
20 ICANN tested the prospect of introducing new TLDs to the ICANN-controlled  
21 DNS. (Decl. of Paul Garrin (“Garrin Decl.”) ¶ 2.) ICANN repeatedly emphasized  
22 the limited nature of the 2000 Proof of Concept, stating, for example, that the 2000  
23 Proof of Concept would “involve introduction of only a limited number of new  
24 TLDs.” (*Id.*) ICANN also informed applicants that materials submitted in the 2000  
25 Proof of Concept, including the non-refundable \$50,000 application fee, would  
26 apply only to the 2000 Proof of Concept. (*Id.* ¶¶ 3-4.) In ICANN’s words, the

27 \_\_\_\_\_  
28 <sup>1</sup> name.space incorporates by reference its Memorandum in Support of Its Opposition to  
ICANN’s Motion to Dismiss, dated January 4, 2013, ECF No. 32 (“Opp’n”).

1 2000 Proof of Concept was “intended to serve as a ‘proof of concept’ for ways in  
2 which the DNS might evolve in the longer term.” (*Id.* ¶ 2.)

3 In October 2000, name.space submitted its 2000 Application to participate in  
4 the 2000 Proof of Concept and operate 118 gTLDs that would resolve on the DNS.  
5 (*Id.* ¶ 6.) To transmit its 2000 Application, name.space signed an ICANN-drafted  
6 “Transmittal Form” that included the following language: “[I]n consideration of  
7 ICANN’s review of the application” the applicant releases “all claims and liabilities  
8 relating in any way to (a) any action or inaction by or on behalf of ICANN in  
9 connection with this application or (b) the establishment or failure to establish a  
10 new TLD.” (*Id.*) In name.space’s countless discussions with ICANN regarding the  
11 2000 Proof of Concept, ICANN never expressed a belief that participating in the  
12 2000 Proof of Concept would prevent an applicant from asserting any legal claims  
13 against ICANN unrelated to participation in the 2000 Proof of Concept. (*Id.* ¶ 7-8.)  
14 For its part, name.space always understood and intended that the release language  
15 in the 2000 Application related at most to claims concerning the consideration of  
16 the 2000 Application. (*Id.* ¶ 9.)

17 Around 2008—nearly eight years after the 2000 Proof of Concept—ICANN  
18 began to discuss the possibility of accepting new applications for new gTLDs. (*Id.*  
19 ¶ 15.) ICANN called this new application process the “New gTLD Program,”  
20 which evolved into the 2012 Application Round that is the subject of this lawsuit.  
21 (*Id.*) It was evident from the beginning that the New gTLD Program was separate  
22 and distinct from the 2000 Proof of Concept. (*Id.* ¶ 16.) In fact, the first version of  
23 the ICANN-published guidebook for potential applicants in the New gTLD  
24 Program never even mentioned the 2000 Proof of Concept, and comments to the  
25 first version reiterated ICANN’s previous position that the 2000 Proof of Concept  
26 was a “limited expansion of the DNS” and distinct from the New gTLD Program.  
27 (*Id.* ¶¶ 16-17.)  
28



1           The New gTLD Program Guidebook ultimately acknowledged the 2000  
2 Proof of Concept, but only by recognizing that applicants in the 2000 Proof of  
3 Concept still might have outstanding legal claims in connection with that process.  
4 (*Id.* ¶¶ 18, 23.) ICANN (without mentioning the release) offered 2000 Proof of  
5 Concept applicants an \$86,000 credit in the 2012 Application Round, but only in  
6 exchange for written confirmation that “the applicant has no legal claims arising  
7 from the 2000 proof-of-concept process.” (*Id.* ¶ 23.) ICANN prepared a summary  
8 analysis in connection with an earlier draft of this language that recognized that  
9 “ICANN should explain why proof-of-concept applicants from the year 2000 would  
10 be offered an \$86,000 credit *when there is no obvious connection between the*  
11 *applications processes for the to-be launched gTLDs and the 2000 gTLDs.*” (*Id.* ¶  
12 20 (emphasis added).) ICANN has never refuted this lack of connection between  
13 the 2000 Proof of Concept and the 2012 Application Round. (*Id.* ¶ 21.) Instead,  
14 ICANN made clear that unsuccessful applicants in the 2000 Proof of Concept were  
15 permitted to apply in the 2012 Application Round and to pay \$185,000 per TLD  
16 (minus a one-time credit), but never told those applicants that ICANN believed that  
17 the 2000 Application’s release language meant that they could do so without any  
18 legal rights regarding the treatment of their 2012 application. (*Id.* ¶¶ 18, 23.)

19           In the seven drafts and the final version of the New gTLD guidebook and  
20 related documents prepared by ICANN, there is *not a single reference* to the 2000  
21 Application’s release language. (*Id.* ¶ 22.)

22           Further, leading up to and during the current 2012 Application Round,  
23 name.space had private conversations with ICANN’s leadership and participated in  
24 public discussions with ICANN and other stakeholders in the New gTLD Program.  
25 (*Id.* ¶ 24.) At no point did ICANN mention the 2000 Application’s release  
26 language or otherwise indicate that ICANN believed participation in the 2000 Proof  
27 of Concept would bar 2000 applicants from bringing claims against ICANN  
28 relating to the 2012 Application Round. (*Id.*)

## LEGAL STANDARD

1  
2 “Summary judgment is proper ‘if the movant shows that there is no genuine  
3 dispute as to any material fact and the movant is entitled to judgment as a matter of  
4 law.’” *S. Cal. Gas Co. v. City of Alhambra*, Case No. CV 10-8635 (PA), 2011 U.S.  
5 Dist. LEXIS 107514, at \*5-6 (C.D. Cal. June 6, 2011) (quoting Fed. R. Civ. P.  
6 56(a)). On a motion for summary judgment, “the moving party bears the burden of  
7 showing that there is no material factual dispute.” *Id.* at \*6. Thus, “the court must  
8 regard as true the opposing party’s evidence, if it is supported by affidavits or other  
9 evidentiary material [and] draw all reasonable inferences in favor of the party  
10 against whom summary judgment is sought.” *Id.* (quoting *Celotex Corp. v. Catrett*,  
11 477 U.S. 317, 324 (1986) and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,  
12 475 U.S. 574, 587 (1986)).

13 If a contract is ambiguous, courts “ordinarily are hesitant to grant summary  
14 judgment because differing views of the intent of parties will raise genuine issues of  
15 material fact.” *San Diego Gas & Elec. Co. v. Canadian Hunter Mktg.*, 132 F.3d  
16 1303, 1307 (9th Cir. 1997) (citations omitted); *see also Hickey v. A.E. Staley Mfg.*,  
17 995 F.2d 1385, 1389 (7th Cir. 1993) (“Summary judgment should be entered only if  
18 the pertinent provisions of the contractual documents are unambiguous; it is the  
19 lack of ambiguity within the express terms of the contract that forecloses any  
20 genuine issues of material fact.”) (citations omitted). The Ninth Circuit “has not,  
21 however, adopted a rigid rule prohibiting reference to extrinsic evidence in  
22 resolving a contractual ambiguity on a summary judgment motion.” *San Diego Gas*  
23 *& Elec. Co.*, 132 F.3d at 1307. “Rather, construing all evidence in the light most  
24 favorable to, and making all reasonable inferences in favor of, the non-moving  
25 party,” the court must “determine whether the ambiguity [can] be resolved in a  
26 manner consistent with the non-moving party’s claim.” *Id.* (citations omitted).

27 Finally, the party asserting an affirmative defense, such as the applicability of  
28 a release provision, bears the burden of proving the affirmative defense. *See Miles*

1 v. *American Seafoods Co.*, 197 F.3d 1032, 1034 (9th Cir. 1999); *Jones v. Taber*,  
2 648 F.2d 1201, 1203 (9th Cir. 1981). To meet its burden, ICANN must do more  
3 than show that there are *some* facts barred by the release provision. Instead,  
4 ICANN must show that there are *no* facts at all that have been alleged by  
5 name.space that can give rise to potential ICANN liability. Thus, because ICANN  
6 submitted no extrinsic evidence in support of its motion, if an ambiguity exists in  
7 the relevant contractual language, ICANN's motion for summary judgment must be  
8 denied.

### 9 ARGUMENT

#### 10 **I. ICANN IS NOT ENTITLED TO SUMMARY JUDGMENT ON THE** 11 **BASIS OF THE 2000 APPLICATION.**

12 In its Reply to name.space's Opposition to ICANN's Motion to Dismiss,  
13 ICANN appears to have conceded that the release in the 2000 Application can  
14 apply only to the 2000 Proof of Concept itself, and not to any conduct occurring  
15 after the completion of the 2000 Proof of Concept or involving other application  
16 rounds. That significant concession is consistent with the Court's holding that  
17 "Plaintiff's claims do not 'necessarily rely' on the 2000 Application." Order at 1.

18 If ICANN decides to try to change its argument, and argue instead that the  
19 2000 Application bars the future (and in 2000 yet unknown and impossible to  
20 predict) conduct on which name.space's Complaint is actually based, that new  
21 argument must fail. The 2000 Application's release language cannot be read to  
22 bring within its scope future conduct, especially future conduct that is unrelated to  
23 the 2000 Application process. This is the necessary result of the plain language of  
24 the 2000 Application, extrinsic evidence relevant to the 2000 Application and  
25 public policy requirements. At the very least, name.space is entitled to discovery  
26 on these issues. name.space respectfully submits that it would be inappropriate to  
27 grant ICANN's motion for summary judgment on this record.  
28

1           **A. name.space’s Claims Do No Rely on the 2000 Application.**

2           ICANN appears to have conceded that the 2000 Application’s release  
3 language could have no effect on any conduct other than the 2000 Application  
4 process itself. For example, ICANN wrote in its reply brief that, “ICANN does not  
5 argue that name.space’s 2000 release discharged ICANN of all liability on all  
6 theoretically possible claims into perpetuity. Instead, ICANN contends that  
7 name.space has released ICANN for claims relating to its 2000 Application and  
8 ICANN’s ‘establishment or failure to establish a new TLD’ in the domain name  
9 system (‘DNS’) coordinated by ICANN . . . .” (Reply at 1-2.)

10           If this is truly ICANN’s position, then the Court’s January 15 Order  
11 “conclud[ing] that Plaintiff’s claims do not ‘necessarily rely’ on the 2000  
12 Application” is sufficient to dispose of it. This conclusion is evident on the face of  
13 name.space’s Complaint, which is replete with references to the 2012 Application  
14 Process and conduct occurring in 2010 and after (and which describes the 2000  
15 Proof of Concept by way of historical background and context). ICANN did not  
16 submit with its original motion any evidence that the 2000 Application is a  
17 necessary part of name.space’s Complaint. This lack of any admissible evidence  
18 supporting ICANN’s argument in and of itself requires the denial of ICANN’s  
19 summary judgment motion—to prevail on this motion, ICANN must show that  
20 there are *no* allegations on which name.space can base its claim that relate to the  
21 2012 Application Round rather than the 2000 Proof of Concept.<sup>2</sup> By contrast,  
22 name.space has presented admissible evidence demonstrating that the 2000 Proof of  
23 Concept and 2012 Application Round are separate and distinct.

24           For the avoidance of all doubt:

- 25           • name.space’s Complaint does not assert any claims that allege that  
26           ICANN acted unlawfully when it failed to approve name.space’s 2000

---

27           <sup>2</sup> Even if name.space had based all of its claims on the 2000 Proof of Concept—which it clearly  
28           *did not*—there would still be a factual dispute regarding the applicability of the 2000  
          Application’s release to future conduct, as discussed in Section I.B. below.

1 Application, or that it acted unlawfully when it approved other  
 2 applications in 2000—put most simply, name.space will not argue in  
 this case that ICANN is liable because it failed to award name.space  
 any TLDs in 2000 or because it awarded other entities TLDs in 2000;

- 3
- 4 • name.space’s Complaint does not allege that ICANN’s 2000 Proof of  
 Concept was the product of a conspiracy between ICANN and the  
 5 ICANN co-conspirators identified in the Complaint, or that the  
 conspiracy identified in the Complaint affected the 2000 Proof of  
 6 Concept. name.space’s Complaint does not allege that the conspiracy  
 even existed during the pendency of the 2000 Proof of Concept;
  - 7 • name.space’s Complaint does not assert any claims that allege that  
 ICANN’s conduct in connection with the 2000 Proof of Concept  
 8 constituted an unlawful exercise of market power, or any sort of  
 unlawful exclusionary conduct, and does not allege that the 2000 Proof  
 of Concept had any effect on the relevant antitrust markets identified  
 9 in the Complaint;
  - 10 • name.space’s Complaint does not assert any claims that allege that  
 ICANN’s conduct in connection with the 2000 Proof of Concept  
 11 infringed any trademark rights now being asserted by name.space or  
 that any of the TLDs awarded to the successful applicants in the 2000  
 12 Proof of Concept infringed or otherwise violated name.space’s  
 trademark rights; and
  - 13 • None of name.space’s claims rely on any allegation that part of the  
 14 unlawful behavior includes ICANN’s conduct in connection with the  
 2000 Proof of Concept; similarly, the anticompetitive effects about  
 15 which name.space complains are happening now, not in 2000.

16 Instead, name.space’s Complaint is essentially premised on the facts that,  
 17 *after the 2000 Proof of Concept was completed and all TLDs had been delegated as*  
 18 *part of that process and having nothing to do with the 2000 Proof of Concept,*  
 19 ICANN entered into a conspiracy with certain identified and un-identified co-  
 20 conspirators in an unlawful conspiracy to prevent companies such as name.space  
 21 from competing in the market for TLDs in the ICANN-controlled Internet, in  
 22 violation of federal antitrust laws and to the benefit of ICANN itself and its co-  
 23 conspirators. name.space expressly pleads that the relevant conspiracy was formed  
 24 in or around 2010. (Compl. ¶ 66.) The result of that unlawful conspiracy included  
 25 the 2012 Application Round and the rules adopted by ICANN to govern that round.  
 26 (Garrin Decl. ¶ 25.) Many of the co-conspirators who participated in the  
 27 conspiracy did not even exist back in 2000. (*Id.*) The Complaint is also based on  
 28 the fact that ICANN has sought to maintain its monopoly power in the market for

1 domain names by dictating the supply of TLDs as an integral part of the 2012  
2 Application Round, and has created and maintained a thriving defensive registration  
3 market in the TLDs that will be awarded in connection with the 2012 Application  
4 Round, forcing content creators to “defensively” register their brands with multiple  
5 TLDs and permitting ICANN and some TLD registries to extract monopoly rents.  
6 (Compl. ¶¶ 77-80, 106-114.) Further, ICANN has trampled name.space’s  
7 intellectual property rights in the TLDs that name.space has originated, operated  
8 and promoted in commerce continuously since 1996 in violation of unfair  
9 competition and trademark laws through the 2012 Application Round. (*Id.* ¶¶ 119-  
10 143.) ICANN has also tortiously interfered with name.space’s existing and  
11 prospective contracts, again, all in connection with the 2012 Application Round.  
12 (*Id.* ¶¶ 159-172.) The 2000 Application is not relevant to these claims. ICANN’s  
13 burden is not to simply show some way in which the Complaint can be interpreted  
14 at this early stage to involve the 2000 Application; instead, ICANN must show that  
15 every possible allegation in the Complaint involves the 2000 Application such that  
16 the 2000 release language applies to it. ICANN does not (and cannot) meet its  
17 burden.

18 ICANN appears to try to tie together the 2000 Proof of Concept and 2012  
19 Application Round, arguing that, “[t]he fact that ICANN waited twelve years to  
20 accept new applications for such TLDs does not mean that the language in the  
21 release is somehow less effective.” (Reply at 1.) It is not entirely clear what  
22 ICANN means by this statement. If ICANN is trying to argue that the 2012  
23 Application Round is somehow merely an outgrowth of the 2000 Proof of Concept,  
24 and is itself not a distinct application process, then ICANN’s argument is factually  
25 unupportable. ICANN submitted *no evidence* in support of any assertion that the  
26 2012 Application Round is somehow just the 2000 Proof of Concept twelve years  
27 on. ICANN submitted no such evidence because *there is no such evidence*—the  
28

1 2012 Application Round was, by all accounts, separate and distinct from the 2000  
2 Proof of Concept.<sup>3</sup>

3 ICANN has stated that the 2000 Proof of Concept was merely a test program,  
4 in which no applicant had any rights to any sort of process or result. (Garrin Decl.  
5 ¶ 13.) ICANN itself has stated repeatedly that the 2012 Application Round is  
6 distinct from the early process, and that involvement in the earlier process creates  
7 no additional rights or obligations in the later process. (*Id.* ¶¶ 3-4, 12, 19-20.)

8 Notwithstanding ICANN’s protestations that it is *not* arguing “that  
9 name.space’s 2000 release discharged ICANN of all liability on all theoretically  
10 possible claims into perpetuity,” its motion is ambiguous as to its application to  
11 claims that “do not ‘necessarily rely’ on the 2000 Application.” Order at 1. The  
12 remainder of Section I of this memorandum addresses this latter argument.

13 **B. Nothing in the Plain Language of the 2000 Application Evidences**  
14 **an Intent to Shield ICANN From Claims Flowing From Future,**  
15 **Unknown Conduct.**

16 As noted above, it is not clear if ICANN is arguing that the 2000  
17 Application’s release language can be applied outside of the context of the 2000  
18 Application. Any attempt by ICANN to apply the 2000 Application in this  
19 overbroad fashion would go well beyond the intent of the parties in connection with  
20 the 2000 Application. “As a general rule, contractual limitations on liability for  
21 future conduct must be clearly set forth.” *Jardin v. Datallegro, Inc.*, No. 08-cv-  
22 1462, 2009 U.S. Dist. LEXIS 3339, at \*15 (S.D. Cal. Jan. 18, 2009) (citing 17A  
23 Am. Jur. 2d Contracts § 282). Nothing in the operative language of the 2000  
24 Application demonstrates a clear, specific intention by the parties to forever limit  
25 ICANN’s liability from future, unknown antitrust, trademark and unfair

---

27 <sup>3</sup> To be clear, name.space is not arguing that ICANN acted unlawfully when it “waited twelve  
28 years to accept new applications for such TLDs,” and none of its claims turn on or even seek to  
invoke that delay as a basis for imposing liability on ICANN.

1 competition claims, among others, based on ICANN’s wrongful conspiracies and  
2 other conduct surrounding the 2012 Application Round.

3 The 2000 Application states only that “*in consideration of ICANN’s review*  
4 *of the application*” (that is, the **2000** Application), the applicant releases “all claims  
5 and liabilities relating in any way to (a) any action or inaction by or on behalf of  
6 ICANN in connection with this application or (b) the establishment or failure to  
7 establish a new TLD.” (ICANN’s Request for Judicial Notice, ECF No. 20  
8 (“RJN”), Ex. C ¶ B14.2.) This language does not contain any forward-looking  
9 language, let alone any language that could be construed as barring future claims  
10 flowing from conduct that had not yet occurred and that was unknown to  
11 name.space (and everyone else) in 2000. *See Jardin*, 2009 U.S. Dist. LEXIS 3339,  
12 at \*15 (declining to enforce release because “the language of the contract does not  
13 explicitly release liability for future misconduct”).

14 *San Diego Hospice v. Cnty of San Diego*, 31 Cal. App. 4th 1048 (1995), the  
15 case relied on most heavily by ICANN in its motion, shows the error in ICANN’s  
16 argument. The release in that case expressly noted that it related to claims “which  
17 have not yet been discovered” and “all disputes that exist or hereafter could arise.”  
18 *Id.* at 1053. Moreover, in that case, “[t]o eliminate any doubt as to the scope of the  
19 release, the parties recited and expressly waived the protections afforded by Civil  
20 Code Section 1542.” *Id.* The 2000 Application contains none of this clear  
21 language. *See also Skrbina v. Fleming Cos.*, 45 Cal. App. 4th 1353, 1360 (1996)  
22 (plaintiff released all claims “***known or unknown***, which [it] may now have, have  
23 ever had, ***or may in the future have***”) (emphasis added).

24 That the 2000 Application did not contain an express waiver of California  
25 Civil Code 1542 further demonstrates that it cannot release future claims against  
26 ICANN, and especially not future claims based on conduct that was unrelated to  
27 and occurred long after the 2000 Application. *See Chaganti v. Ceridian Benefits*, C  
28 03-05785, 2004 U.S. Dist. LEXIS 17075, at \*11 (N.D. Cal. Aug. 23, 2004) (release



1 waiving unknown future claims is only valid where the release explicitly waives  
2 California Civil Code section 1542, which demonstrates that the waiving party  
3 “consciously understood the benefits conferred by section 1542 and consciously  
4 waived those benefits”); *see also Lizalde v. Advanced Planning Servs.*, 875 F.  
5 Supp. 2d 1150, 1159 (S.D. Cal. 2012) (“A release of claims based on future  
6 unknown conduct is unenforceable as a matter of law in California.”); *Marvin v.*  
7 *Sun Microsystems, Inc.*, No. C-08-03727, 2010 U.S. Dist. LEXIS 6326, at \*11  
8 (N.D. Cal. Jan. 11, 2010) (denying motion to dismiss because release “[did] not  
9 apply to claims arising out of decisions, actions or omissions occurring after the  
10 execution of the Release.”).

11 As ICANN’s own cited cases demonstrate, courts routinely consider an  
12 express waiver of California Civil Code Section 1542 as important evidence of the  
13 parties’ intention to release future unknown claims, even where the language of the  
14 release is far more specific than the language in the 2000 Application. For  
15 example, in *San Diego Hospice*, the court noted that a release of future unknown  
16 claims was enforceable, emphasizing that “to eliminate any doubt as to the scope of  
17 the release, the parties recited and expressly waived the protections afforded by  
18 Civil Code Section 1542.” 31 Cal. App. 4th at 1053. Similarly, in *Grillo v. State of*  
19 *California*, No. C 05-2559, 2006 U.S. Dist. LEXIS 15255 (N.D. Cal. Feb. 13,  
20 2006), the court enforced a settlement agreement barring future unknown claims,  
21 stressing that plaintiff “waived the benefits of California Civil Code Section 1542.”  
22 *Id.* at \*8. ICANN thus cannot reasonably contend that the absence of an express  
23 Section 1542 waiver has no bearing on the scope of the 2000 Application.<sup>4</sup>  
24  
25

26 <sup>4</sup> ICANN’s attempt to analogize the 2000 Application to the release in *Grillo* is misplaced. (See  
27 Reply at 4.) In *Grillo*, the release shielded the defendant from claims “relating to” the allegations  
28 made in two specific federal court complaints filed against the defendant. *Grillo*, 2006 U.S. Dist.  
LEXIS 15255, at \*8. The court simply looked to *those two complaints* to determine whether the  
plaintiff was attempting to bring claims covered by the release. *Id.* at \*21-22.

1 ICANN counters with the meritless and misleading contention that “the  
2 forward-looking nature of the release is evidenced in name.space’s discharge of  
3 rights to any TLD that ‘may be established’ in the DNS.” (Reply at 2 (quoting  
4 RJN, Ex. C ¶ B12).) But the 2000 Proof of Concept already had begun by the time  
5 that the transmittal form was submitted by name.space, and so it was natural for  
6 name.space to release current claims relating to the 2000 Proof of Concept,  
7 including with respect to any TLD that “may be established” as part of that process.  
8 Moreover, the Proof of Concept application process gave the successful applicant  
9 the right to negotiate a delegation agreement with ICANN; it was not a delegation  
10 in and of itself. The “may be established” language makes perfect sense in this  
11 context, not as a back-door expansion of the future scope of the release, but because  
12 of the contingent nature of the right to negotiate that was at stake.

13 In any event, the inferential process ICANN goes through to get the 2000  
14 Application language where it wants stands in sharp contrast to the unambiguous  
15 forward-looking language in the *San Diego Hospice* and *Skrbina* releases. The  
16 operative language in the 2000 Application is nowhere near specific enough to  
17 evidence an intention to release future unknown claims under California law. *See*  
18 *Jardin*, 2009 U.S. Dist. LEXIS 3339, at \*15 (“contractual limitations on liability for  
19 future conduct must be clearly set forth”). Notably, the language that ICANN  
20 selectively quotes in its attempt to broaden the impact of the release does not appear  
21 in release language at all; it is located in an entirely different paragraph of the 2000  
22 Application. (*Compare* RJN, Ex. C ¶ B14 *with* RJN, Ex. C ¶ B12.) An  
23 examination of the context of the “may be established” language quoted by ICANN  
24 in fact demonstrates that it was limited to TLDs that “may be established” by  
25 participating in the 2000 Proof of Concept.

26 The 2000 Application’s release language is at best ambiguous because  
27 name.space has articulated “an alternative, semantically reasonable” interpretation  
28 that limits the 2000 Application to claims arising from the 2000 Application itself

1 and not to future conduct. *See Solis v. Kirkwood Resort Co.*, 94 Cal. App. 4th 354,  
2 360 (2001) (“An ambiguity exists when a party can identify an alternative,  
3 semantically reasonable, candidate of meaning of a writing”); *see also Dore v.*  
4 *Arnold Worldwide, Inc.*, 39 Cal. 4th 384, 391 (2006) (“An ambiguity arises when  
5 language is reasonably susceptible of more than one application to material facts.”).  
6 Further, in California, “[t]he interpretive doctrine of construing contractual  
7 ambiguity against the drafting party is well established.” *Zipusch v. LA Workout,*  
8 *Inc.*, 155 Cal. App. 4th 1281, 1287 (2007); *see also* Cal. Civ. Code § 1654 (the  
9 language of a contract should be interpreted most strongly against the party who  
10 caused the uncertainty to exist). Therefore, given that ICANN was solely  
11 responsible for drafting the 2000 Application (Garrin Decl. ¶ 6)—and the scope of  
12 the release in particular—any ambiguity in the 2000 Application should be  
13 construed against ICANN and summary judgment should be denied. *See Zipusch,*  
14 *155 Cal. App. 4th at 1287* (holding summary judgment was not appropriate where  
15 release did not specifically contemplate allegations raised in the complaint, and  
16 recognizing that “[t]he interpretive doctrine of construing contractual ambiguity  
17 against the drafting party is well established”).

18 **C. Extrinsic Evidence Supports name.space’s Interpretation of the**  
19 **2000 Application, and Conflicts with ICANN’s Interpretation.**

20 In contrast to ICANN’s argument, name.space’s position on this motion is  
21 supported by more than just the plain language of the 2000 Application—it is  
22 supported by extrinsic evidence that, at the very least, demonstrates that genuine  
23 issues of material fact exist as to the meaning of the 2000 Application. *See First*  
24 *Nat’l Mortg. Co. v. Fed. Realty Inv. Trust*, 631 F.3d 1058, 1066-67 (9th Cir. 2011)  
25 (noting that “[w]here the meaning of the words used in a contract is disputed, the  
26 trial court must provisionally receive any proffered extrinsic evidence which is  
27 relevant to show whether the contract is reasonably susceptible of a particular  
28 meaning”). In fact, the extrinsic evidence confirms that there can be little doubt

1 that the 2000 Application’s release language has no impact whatsoever on the  
2 claims asserted in name.space’s Complaint.

3 **a. The larger context of the 2000 Application supports**  
4 **name.space’s interpretation.**

5 The larger context of the 2000 Application supports name.space’s  
6 interpretation of the release language. The context of the release language in the  
7 2000 Application makes clear that the applicant’s agreement to limit ICANN’s  
8 liability is being made “[i]n consideration of ICANN’s review of the application”  
9 submitted in the 2000 Proof of Concept. (RJN, Ex. C ¶ B14.) Read as a whole, the  
10 2000 Application, and the release language therein, is limited to claims and  
11 liabilities flowing from the 2000 Application, and at most name.space’s  
12 participation in the 2000 Proof of Concept.

13 This reading is consistent with name.space’s reasonable expectations given  
14 the information available to it at the time. ICANN’s own materials confirm that  
15 2000 applicants had no way of knowing whether or when there would be  
16 subsequent application rounds to introduce new TLDs, and no way of knowing how  
17 any subsequent round would be structured if one actually was launched. (Garrin  
18 Decl. ¶ 4 (ICANN stated in 2000 that “*if* there are subsequent rounds, there will be  
19 revisions in the program based on experience in the first round. This will likely  
20 require submission of new application materials.”) (Emphasis added).)<sup>5</sup>

21 The various TLD application rounds conducted by ICANN put into context  
22 the extraordinary relief that ICANN is seeking here. According to ICANN’s  
23 release argument, the only entities in the world that are *not* permitted to seek relief

24 \_\_\_\_\_  
25 <sup>5</sup> ICANN has also argued that because name.space brought an antitrust suit against Network  
26 Solutions, Inc. (“NSI”), “name.space knew when it signed the release in 2000 that it might have  
27 (and was releasing ICANN of) claims identical to those asserted against NSI.” (Reply at 3.) This  
28 argument is baseless. The lawsuit against NSI involved a different entity operating under a  
different set of rules, and has nothing to do with this case. Regardless, ICANN’s belief as to what  
name.space might have known at the time of the 2000 Application is irrelevant to the  
interpretation of the 2000 Agreement in this procedural posture because, if it is material at all, it  
constitutes a genuine issue of material fact.

1 against ICANN with respect to each of ICANN’s application rounds that *followed*  
2 the 2000 Proof of Concept are those that had the misfortune to participate in the  
3 2000 Proof of Concept. Thus, ICANN is taking the position that previous  
4 applicants have absolutely no remedy no matter how egregious ICANN’s  
5 mistreatment of them in future processes. This makes no sense. At the very least,  
6 ICANN has not identified why such mistreatment can possibly be justified.<sup>6</sup>

7 **b. ICANN’s Post-Contractual Conduct Raises Disputed Issues**  
8 **of Fact Regarding the Scope of the 2000 Application.**

9 “The conduct of the parties after execution of the contract and before any  
10 controversy has arisen as to its effect affords the most reliable evidence of the  
11 parties’ intentions.” *See Reynolds v. Allstate Ins. Co.*, 855 F. Supp. 2d 989, 999  
12 (N.D. Cal. 2012). ICANN’s conduct in the years following the 2000 Proof of  
13 Concept demonstrates that the parties never intended the 2000 Application to cover  
14 the claims in this action and, at a minimum, raises disputed fact issues that preclude  
15 summary judgment.

16 *First*, in connection with the 2012 Application Round, ICANN issued a 338-  
17 page guidebook (the “2012 Guidebook”) setting forth in detail “the process for  
18 applying for a new generic top-level domain” and “the conditions associated with  
19 particular types of applications.” (Garrin Decl. Ex. 3 at 16.) The 2012 Guidebook  
20 contains no statements, representations or any other information about the release  
21 language of 2000 Application, or any other suggestion that 2000 applicants were  
22 operating under any handicap relating to the 2000 Application. Indeed, *no version*  
23 *of the 2012 Guidebook discusses the release language in the 2000 Application.* (*Id.*  
24 ¶ 22.)

25 <sup>6</sup> It also directly violates ICANN’s Bylaws, which state that “ICANN shall not apply its  
26 standards, policies, procedures, or practices inequitably or single out any particular entity for  
27 disparate treatment unless justified by substantial and reasonable cause, such as the promotion of  
28 effective competition.” (RJN, Ex. B at 11.) ICANN’s position is so extraordinary that it suggests  
that it is itself part of the antitrust conspiracy being waged by ICANN and its co-conspirators  
against name.space and other companies seeking to stand in the way of ICANN’s unlawful  
scheme.

1           *Second*, the 2012 Guidebook references the 2000 Proof of Concept only  
2 once—and does so by acknowledging that 2000 applicants might in fact still *have*  
3 existing claims against ICANN from the 2000 Proof of Concept. (*Id.* ¶ 23.) The  
4 2012 Guidebook permits applicants from the 2000 Proof of Concept to seek a one-  
5 time, one-TLD string \$86,000 fee reduction in exchange for “a confirmation that  
6 the applicant was not awarded any TLD string pursuant to the 2000 proof-of-  
7 concept application round *and that the applicant has no legal claims arising from*  
8 *the 2000 proof-of-concept process.*” (*Id.*, Ex. 3 at 17-18 (emphasis added).) In  
9 other words, 2000 Proof of Concept applicants seeking to apply in the 2012  
10 Application Round were offered \$86,000 in exchange for agreeing that they had no  
11 claims against ICANN arising out of the 2000 Proof of Concept process—which  
12 would be completely unnecessary if the release language in the 2000 Application  
13 extended into the future.

14           *Third*, ICANN in materials prepared by ICANN in connection with draft  
15 versions of the 2012 Guidebook, ICANN appears to have expressly acknowledged  
16 that the 2000 Proof of Concept is distinct from the 2012 Application Round. In  
17 public comments regarding the \$86,000 credit language, ICANN essentially  
18 acknowledged that it “should explain why proof-of-concept applicants from the  
19 year 2000 would be offered an \$86,000 credit ... [*when there is no obvious*  
20 *connection between the applications processes for the to-be launched gTLDs and*  
21 *the 2000 gTLDs.*” (*Id.*, Ex. 2 at 13 (emphasis added).) ICANN never provided any  
22 such explanation or refuted this statement that “there is no obvious connection  
23 between the applications processes for the to-be launched gTLDs and the 2000  
24 gTLDs.” (*Id.* ¶ 20.)

25           *Fourth*, there have been other situations in which ICANN would have been  
26 expected to raise the release issue if it really thought the release language in the  
27 2000 Application had the meaning it is now advancing here. For example, in a  
28 prior adversary proceeding against ICM Registry (“ICM”), another 2000 Proof of

1 Concept applicant, ICANN never argued that the 2000 Application barred ICM  
2 from making claims relating to the “failure to establish” the .xxx TLD. In 2000,  
3 ICM applied to operate .xxx as a generic top-level domain, but ICANN denied its  
4 application. (Decl. of Michael Miller (“Miller Decl.”), Ex. 1 at 7.) In 2004, ICM  
5 sought delegation of .xxx as a sponsored top-level domain (“sTLD”) in an  
6 application launched by ICANN in 2003 to introduce additional sTLDs to the DNS.  
7 (*Id.*) A dispute followed, and ICM ultimately brought its claims relating to  
8 delegation of the .xxx TLD before the International Centre for Dispute Resolution.  
9 (*Id.* at 9-10.) Although ICM brought claims specifically relating to the  
10 establishment of the .xxx TLD pursuant to the 2000 Application, however, ICANN  
11 never argued that ICM had released its claims by submitting the 2000 Application.  
12 (*Id.* at ¶ 21.)

13 “The fundamental rules of contract interpretation are based on the premise  
14 that the interpretation of a contract must give effect to the mutual intention of the  
15 parties.” *Waller v. Truck Ins. Exch.*, 11 Cal. 4th 1, 18 (1995). It is clear from the  
16 language of the contract and the extrinsic evidence that the parties never intended  
17 the 2000 Application to release any claims outside of the 2000 Application.  
18 Accordingly, the Court should deny ICANN’s motion for summary judgment on  
19 the issue of the 2000 Application.

20 **D. ICANN’s Reading of the 2000 Application Would Violate Public**  
21 **Policy.**

22 If ICANN is really taking the position that the 2000 Application releases all  
23 claims even if they relate to substantively new conduct, and applies to new claims  
24 based on that substantively new conduct that had not yet taken place and was  
25 unknown at the time of the release, then the 2000 Application release itself is void  
26 as a matter of public policy. “Acceptance of [ICANN’s] novel contention would in  
27 effect confer on them a partial immunity from civil liability for future violations” of  
28 the antitrust laws that is unrelated to ICANN’s pre-release conduct. *See Lawlor v.*

1 *Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329 (1955). Similarly, “‘a purported  
 2 waiver of future, unknown federal intellectual property rights is unenforceable and  
 3 void as against public policy’ because it would allow defendants to ‘violate  
 4 another’s intellectual property rights with impunity in contravention of the clear and  
 5 long standing public policies underlying the trademark, copyright and patent  
 6 laws.’” *Lizalde*, 875 F. Supp. 2d at 1159 (quoting *FASA Corp. v. Playmates Toys,*  
 7 *Inc.*, 892 F. Supp. 1061, 1066-68 (N.D. Ill. 1995) (applying California law)).

8 **II. ICANN CANNOT SHOW THAT IT IS ENTITLED TO JUDGMENT**  
 9 **AS A MATTER OF LAW ON NAME.SPACE’S CLAIMS.**

10 As noted above, the Court’s order converting ICANN’s motion to dismiss  
 11 into a motion for summary judgment cited only the Court’s interest in considering  
 12 the 2000 Application as the basis for the conversion. To the extent, however, the  
 13 Court wishes to examine ICANN’s other “evidence” under a summary judgment  
 14 standard, name.space respectfully submits that the Court should deny ICANN’s  
 15 motion for summary judgment in its entirety.<sup>7</sup>

16 **A. ICANN Is Not Entitled to Summary Judgment on Name.Space’s**  
 17 **Antitrust Claims.**

18 ICANN has failed to set forth undisputed facts that would entitle ICANN to  
 19 judgment as a matter of law when such facts are viewed in a light most favorable to  
 20 name.space. *See Int’l Brotherhood of Elec. Workers, Local 47 v. S. Cal. Edison*  
 21 *Co.*, 880 F.2d 104, 107 (9th Cir. 1989).<sup>8</sup> Other than the 2000 Application, the only  
 22 “facts” that ICANN has submitted in support of its motion for summary judgment  
 23 are the Articles and Bylaws. ICANN cites the Articles solely for the proposition  
 24 that those Articles state that: (1) “ICANN . . . has the exclusive authority to  
 25 determine what companies will operate as registries for these TLDs”; (2) “ICANN

26 <sup>7</sup> To the extent that the Court instead examines the remainder of ICANN’s motion under motion  
 27 to dismiss standards, name.space incorporates the arguments made in its opposition to ICANN’s  
 28 motion to dismiss. (*See* ECF No. 32.)

<sup>8</sup> In addition, ICANN has not submitted a statement of undisputed facts pursuant to Local Rule  
 56-1.



1 is required to perform these functions ‘exclusively for charitable, educational, and  
2 scientific purposes within the meaning of § 501(c)(3) of the Internal Revenue Code  
3 of 1986 . . . .’”; and (3) “ICANN must act ‘through open and transparent processes  
4 that enable competition and open entry in Internet-related markets.’” (Mot. at 4.)  
5 ICANN does not even attempt to explain how any of these facts, even if true, entitle  
6 it to summary judgment as a matter of law, but, regardless, the mere fact that  
7 ICANN’s Articles contain these requirements does not mean that ICANN *followed*  
8 these requirements, which name.space disputes. Similarly, ICANN cites to its  
9 Bylaws for the proposition that its “Bylaws specifically restrict [ICANN] from  
10 acting as a registry or registrar in competition with the entities affected by  
11 ICANN’s policies” and that “the notices of, agendas for, reports considered at, and  
12 the minutes of each meeting are publicly posted on ICANN’s website.” (Mot. at 4,  
13 12-13, 15.) Again, for the purposes of deciding ICANN’s motion for summary  
14 judgment, however, it is ICANN’s burden to come forward with facts undisputed  
15 facts showing that it *complied* with its Bylaws, which it has failed to do.<sup>9</sup> *S. Cal.*  
16 *Gas Co.*, 2011 U.S. Dist. LEXIS 107514, at \*5-6.

17 The mere existence in its Articles or Bylaws of a requirement that ICANN  
18 not compete does not make it so. Otherwise, all a company would have to do to  
19 avoid liability for any claim would be to include a requirement in its bylaws that it  
20 not violate the law. In addition, the requirement that ICANN post minutes of Board  
21 meetings on its website is meaningless, even if ICANN had introduced facts  
22 showing that such a requirement was followed (which it has not). The mere posting  
23 of Board minutes on a website does not compel a conclusion that no agreements in  
24 furtherance of a conspiracy occurred at such Board meetings—particularly when  
25 viewed in the light most favorable to name.space. *See, e.g., In re Flash Memory*  
26

---

27 <sup>9</sup> Further, even without the benefit of discovery, name.space has introduced facts disputing  
28 ICANN’s compliance with its Articles and Bylaws. (*See* name.space’s L.R. 56-2 Statement, filed  
concurrently herewith.)

1 *Antitrust Litig.*, 643 F. Supp. 2d 1133, 1148 (N.D. Cal. 2009) (finding that Section  
2 1 claims were plausible in part because “participation [at regularly-held industry  
3 events and meetings] demonstrates how and when Defendants had opportunities to  
4 exchange information or make agreements”). Accordingly, the meager—and  
5 disputed—evidence put forth by ICANN provides no basis for summary judgment  
6 on name.space’s antitrust claims.

7 **B. ICANN Is Not Entitled to Summary Judgment on name.space’s**  
8 **Tortious Interference Claims.**

9 ICANN has presented no facts, let alone undisputed facts, to defeat  
10 name.space’s tortious interference claims, and accordingly there is no basis for  
11 summary judgment on those claims. In addition, ICANN’s arguments in support of  
12 its motion to dismiss fail to defeat name.space’s tortious interference claims at the  
13 pleading stage as a matter of law. ICANN asserts that name.space must allege that  
14 ICANN “intentionally ‘designed’ to induce breach of, or disrupt, name.space’s  
15 business relationships.” (Reply at 12.) But ICANN’s assertion of an “intentionally  
16 designed” pleading requirement is a fiction because pleading knowledge of  
17 interference merely as a result of ICANN’s action is sufficient under the law. *See*  
18 *Qwest Commc’n v. Herakles, LLC*, No. 2:07-cv-00393, 2008 U.S. Dist. LEXIS  
19 72660, at \*15 (E.D. Cal. Aug. 18, 2008) (“[Plaintiff] need not prove that the []  
20 Defendants specifically intended to interfere with the Lease, but must show that  
21 they ‘knew that the interference was certain or substantially certain to occur as a  
22 result of [their] action[s].’”) (quoting *Korea Supply Co. v. Lockheed Martin Corp.*,  
23 29 Cal. 4th 1134, 1154 (2003)). name.space has adequately alleged that ICANN  
24 was aware of name.space’s business practices and was therefore aware that the  
25 2012 Application Round would disrupt name.space’s business. *See Angus v.*  
26 *Transnational Automotive Group, Inc.*, No. CV 09-00143, 2012 U.S. Dist. LEXIS  
27 5033, at \*38 (C.D. Cal. Jan. 17, 2012) (citing *Bank of N. Y. v. Fremont General*  
28 *Corp.*, 523 F.3d 902, 909 (9th Cir. 2008)) (“[a] plaintiff may establish intent to

1 disrupt a contractual relationship by inference”). Accordingly, name.space has  
 2 satisfied its pleading obligations and dismissal is not warranted.

3 **III. ALTERNATIVELY, THE COURT SHOULD DEFER**  
 4 **CONSIDERATION OF ICANN’S MOTION UNTIL NAME.SPACE**  
 5 **HAS HAD THE OPPORTUNITY TO CONDUCT DISCOVERY.**

6 The Court should deny ICANN’s motion for summary judgment as set forth  
 7 above. At a minimum, however, the Court should defer consideration to allow  
 8 name.space to conduct necessary and critical discovery to counter ICANN’s limited  
 9 facts submitted in support of its motion. Federal Rule of Civil Procedure 56(d)  
 10 allows the Court to deny a motion for summary judgment, defer considering the  
 11 motion or “make any other appropriate order” when a party opposing a motion for  
 12 summary judgment can demonstrate that it cannot “for specified reasons present  
 13 facts essential to justify its opposition.” Fed. R. Civ. P. 56(d); *see also Texas*  
 14 *Partners v. Conrock Co.*, 685 F.2d 1116, 1119 (9th Cir. 1982) (reversing summary  
 15 judgment where plaintiffs were not afforded opportunity to proceed with  
 16 discovery). Thus, as set forth in the Declaration of Michael Miller, name.space  
 17 respectfully submits that granting a motion for summary judgment at this stage  
 18 would be premature because the parties have not conducted any discovery and  
 19 name.space must be given the opportunity to uncover facts essential to justify its  
 20 opposition.<sup>10</sup> *See id.*

21 **IV. ICANN’S RULE 12(B)(1) MOTION SHOULD BE DENIED.**

22 ICANN’s motion to dismiss name.space’s trademark and unfair competition  
 23 claims is brought exclusively under Rule 12(b)(1). “[W]hen considering a motion

---

24 <sup>10</sup> In particular, with regard to name.space’s antitrust claims, “the Ninth Circuit has noted that  
 25 “there is a policy disfavoring the pre-trial dismissal of antitrust actions because the proof lies  
 26 largely in the hands of the defendants.” *Catch Curve, Inc. v. Venali, Inc.*, 519 F. Supp. 2d 1028,  
 27 1037 (C.D. Cal. 2007) (quoting *Ernest W. Hahn, Inc. v. Codding*, 615 F.2d 830, 835 (9th Cir.  
 28 1980)). This is particularly true where, as here, name.space has not had an opportunity to conduct  
 any discovery and there are important issues of motive and intent at issue. *See HDC Med., Inc. v.*  
*Minntech Corp.*, 474 F.3d 543, 546 (8th Cir. 2007) (noting that “courts should enter summary  
 judgment on the merits in antitrust litigation sparingly” and that summary judgment in antitrust  
 cases is appropriate only where “where there has been ample opportunity for discovery”).

1 to dismiss pursuant to Rule 12(b)(1) the district court is not restricted to the face of  
2 the pleadings, but may review any evidence, such as affidavits and testimony, to  
3 resolve factual disputes concerning the existence of jurisdiction.” *McCarthy v.*  
4 *United States*, 850 F.2d 558, 560 (9th Cir. 1988). ICANN, however, did not  
5 introduce any extrinsic evidence to support its Rule 12(b)(1) motion and the Court  
6 must therefore assume the truth of name.space’s factual allegations and draw all  
7 reasonable inferences in its favor. *See Doe v. Holy See*, 557 F.3d 1066, 1073 (9th  
8 Cir. 2009). Thus, for the reasons set forth in name.space’s opposition to ICANN’s  
9 motion to dismiss, name.space adequately pleaded a “case or controversy”  
10 sufficient to withstand a challenge under Rule 12(b)(1). (*See Opp’n* at 19-22.)

11 In ICANN’s Reply, ICANN ignores the relevant allegations in the Complaint  
12 cited by name.space, which are sufficient to establish an actual case or controversy.  
13 ICANN focuses instead on a futile argument that its operation of an application  
14 process through which it received a substantial non-refundable payment—\$185,000  
15 *per application*—from applicants in exchange for the chance to operate TLDs  
16 associated with name.space does not constitute a sale or an offer for sale. ICANN  
17 has plainly accepted payment for the right to use name.space’s marks as if they  
18 were ICANN’s to sell, and is therefore creating a likelihood of confusion as to the  
19 origin or affiliation of these marks. Merely because the purchaser does not yet have  
20 the ability to operate name.space’s TLDs on the Root is irrelevant to whether there  
21 is subject matter jurisdiction over name.space’s trademark and unfair competition  
22 claims. Case law is replete with actionable suits where the defendant has not yet  
23 delivered the product bearing the trademark or trade dress at issue, such as the “pre-  
24 sell” and “offer to sell” cases cited by name.space and cited without relevant  
25 distinction by ICANN. *See, e.g., Nova Wines, Inc. v. Adler Fels Winery LLC*, 467  
26 F. Supp. 2d 965, 972, 982 (C.D. Cal. 2006); *Millennium Labs., Inc. v. Ameritox.*  
27 *Ltd.*, No. 12-CV-1063, 2012 U.S. Dist. LEXIS 147528, at \*2 (S.D. Cal. Oct. 12,  
28 2012).



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

Dated: February 4, 2013

MORRISON & FOERSTER LLP

By: /s/ Craig B. Whitney  
Craig B. Whitney

Attorneys for Plaintiff  
NAME.SPACE, INC.