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Jeffrey A. LeVee (State Bar No. 125863)  
Samantha S. Eisner (State Bar No. 230344)  
JONES DAY  
555 South Flower Street  
Fiftieth Floor  
Los Angeles, CA 90071-2300  
Telephone: (213) 489-3939  
Facsimile: (213) 243-2539

CONFORMED COPY  
OF ORIGINAL FILED  
Los Angeles Superior Court  
NOV 14 2006  
John A. Clarke, Executive Officer/Clerk  
By A. Fraser, Deputy

Attorneys for Defendants  
INTERNET CORPORATION FOR ASSIGNED  
NAMES AND NUMBERS and erroneously named  
INTERNET ASSIGNED NUMBERS AUTHORITY

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF LOS ANGELES**

C. ITOH MIDDLE EAST E.C. (Bahrain)  
through the real party in interest, NATIONAL  
UNION FIRE INSURANCE COMPANY OF  
PITTSBURGH, PA,  
  
Plaintiff,  
  
v.  
  
INTERNET CORPORATION FOR  
ASSIGNED NAMES AND NUMBERS,  
INTERNET ASSIGNED NUMBERS  
AUTHORITY, the PEOPLE'S REPUBLIC  
OF THE CONGO, and THE CONGOLESE  
REDEMPTION FUND,  
  
Defendants.

**CASE NO. SC090220**  
  
Assigned for all purposes to  
Honorable John L. Segal  
  
**DEFENDANTS' OPPOSITION TO  
PLAINTIFF'S REQUEST FOR  
LEAVE TO FILE A SUR-REPLY IN  
OPPOSITION TO DEFENDANTS'  
DEMURRER AND REQUEST FOR  
JUDICIAL NOTICE**  
  
DATE: November 20, 2006  
TIME: 8:30 a.m.  
DEPT: M  
  
Complaint Filed: June 28, 2006

1 **I. PLAINTIFF TAKES ADVANTAGE OF ICANN'S GRANTING OF A**  
2 **CONTINUANCE TO FILE THIS IMPROPER REQUEST.**

3 Just as in its Opposition to ICANN's Demurrer,<sup>1</sup> Plaintiff's proposed sur-reply brazenly  
4 ignores the law and the facts. To add insult to injury, Plaintiff's timing in bringing the sur-reply  
5 can only be viewed as taking advantage of ICANN's cooperation in continuing the hearing on its  
6 demurrer. Based upon the parties' stipulated briefing schedule,<sup>2</sup> ICANN's demurrer was set for  
7 hearing on November 3, 2006. On November 2, the Court, on its own motion, continued the  
8 hearing to November 9. Just two days before that hearing, Plaintiff contacted ICANN to seek a  
9 further continuance, as Plaintiff's counsel was suffering from a back injury. ICANN immediately  
10 agreed to the continuance, even initiating a call to the Court to facilitate the request. In agreeing  
11 to the continuance to November 20, ICANN *never* imagined that Plaintiff would take advantage  
12 of the delay to prepare and file the proposed sur-reply. This conduct should not be condoned, and  
13 Plaintiff's Request should be denied.

14 **II. THE REQUEST RELAYS FALSE INFORMATION AND IS IMPROPER IN**  
15 **EVERY REGARD.**

16 On top of the prejudicial timing of the proposed sur-reply, Plaintiff's claim that "the Court  
17 would benefit" from its statements in the sur-reply, and the presentation of (irrelevant) authorities,  
18 is wrong. (Request at 1:8-9.) Plaintiff's proposed sur-reply is riddled with inaccuracies and  
19 statements that can only be meant to *confuse* the court.<sup>3</sup> Plaintiff's request should be denied, and  
20 the contents of the sur-reply disregarded.

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24 \_\_\_\_\_  
25 <sup>1</sup> All references to ICANN refer jointly to Defendant Internet Corporation for Assigned  
26 Names and Numbers ("ICANN") and erroneously-named defendant Internet Assigned Numbers  
27 Authority ("IANA").

28 <sup>2</sup> ICANN originally noticed this hearing for September 20, 2006.

<sup>3</sup> ICANN will not address every argument presented within the sur-reply here. Indeed,  
ICANN recognizes that the *hearing* of its Demurrer and Request for Judicial Notice is the proper  
forum in which to argue this matter. ICANN presents this Opposition to demonstrate the  
infirmity of the proposed sur-reply in its entirety, and to mitigate any confusion that Plaintiff's  
unauthorized submission may have caused.

1           A.     **Network Solutions, Inc., At The Time Of The *Lockheed* Opinion, Was The**  
2                     **Entity In Charge Of The .com TLD Registry.**

3           One example of Plaintiff's blatant falsehoods is its attempt to discredit ICANN's use of  
4     *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980 (9th Cir. 1999). Plaintiff  
5     spuriously claims that "ICANN misleadingly replaces 'NSI' with '[the .com TLD]'" based on  
6     Plaintiff's improper belief that NSI is merely "a company that registers second-level domain  
7     names." (Sur-Reply at 1:25-26.) Though NSI, or Network Solutions, is *currently* a registrar, **at**  
8     **the time of the *Lockheed* opinion, NSI – like its successor VeriSign is today – was the .com**  
9     **TLD Registry operator.**<sup>4</sup> Plaintiff's argument on sur-reply is blatantly false.

10           B.     **Plaintiff's Proposed Sur-Reply To ICANN's Requests For Judicial Notice**  
11                     **Relies Upon Fabrications, Misconstrued Authority, And Opinion Pieces.**

12           On October 31, 2006, Plaintiff filed its opposition to ICANN's Supplemental Request for  
13     Judicial Notice. Because the arguments made therein were nearly identical to the arguments  
14     Plaintiff made in opposition to ICANN's initial Request for Judicial Notice, ICANN chose not to  
15     file another reply and chose to wait for the hearing on these matters to further address Plaintiff's  
16     arguments. Plaintiff, however, apparently could not wait for the hearing (as it properly should  
17     have done), and presents a jumble of arguments which *misstate* ICANN's positions and intended  
18     usage of the requested documents.

19                     1.     **All of Plaintiff's Additional Authority Was Available at the Time of**  
20                             **Opposition.**

21           Every single authority that Plaintiff presents to the Court at 2:13-3:22 of its proposed sur-  
22     reply was available to Plaintiff when it filed its oppositions *and* address arguments made within  
23     those oppositions. That Plaintiff wished to conduct more research in the time before hearing does  
24     not mean that this Court or ICANN should be burdened with this proposed sur-reply, particularly

25           \_\_\_\_\_

26           <sup>4</sup> This Court does not have to take ICANN's word for this. For example, Amendment 11  
27     to the DOC/NSI Cooperative Agreement, dated October 6, 1998, affirms that NSI is the *registry*  
28     for gTLDs (including the .com TLD). This Amendment, available at  
[http://www.ntia.doc.gov/ntiahome/domainname/agreements/Amend11\\_052206.pdf](http://www.ntia.doc.gov/ntiahome/domainname/agreements/Amend11_052206.pdf), is a  
governmental contract and is properly the subject of the judicial notice. ICANN will make a  
formal Request for Judicial Notice of this contract if the Court so requests.

1 where Plaintiff's arguments are so faulty. For example, Plaintiff relies upon *Childs v. State*, 144  
2 Cal. App. 3d 155 (1983) to support its argument against judicially noticing the terms of ICANN's  
3 contracts with the United States Department of Commerce. (Sur-reply at 2:15-19.) But *Childs*  
4 involved a denial of judicially noticing a *declaration* – and has nothing to do with governmental  
5 contracts. *Childs*, 144 Cal. App. 3d at 163. Similarly, Plaintiff relies on *Bord v. Banco de Chile*,  
6 205 F. Supp. 2d 521 (E.D. Va. 2002), to argue that ICANN acts independently of the Department  
7 of Commerce (“DOC”). (Sur-reply at 2:23-25.) *Bord*, however, does not involve – in any way –  
8 the ccTLD redelegation process – a process in which ICANN cannot operate independently from  
9 the DOC.

10 **2. Plaintiff Has No Basis to Claim the Redelegation Reports as**  
11 **“Inherently Untrustworthy.”**

12 In its proposed sur-reply, Plaintiff toes the line towards libel against ICANN. Without  
13 one bit of support, it suggests that ICANN has failed to follow its internal procedures and the  
14 terms of the IANA functions contract in the past, that ICANN is now creating “new”  
15 Redelegation Reports to attempt to show “newfound deference to the DOC,” and that while  
16 ICANN creates these documents, they do not describe the redelegation process actually followed.  
17 (Sur-reply at 3:5-16.) Though one of the attached reports<sup>5</sup> was created nearly a month before this  
18 suit was commenced, Plaintiff falsely claims that the Redelegation Reports that ICANN seeks to  
19 have judicially noticed were “all created after this litigation commenced.” (Sur-reply at 3:11-13.)  
20 Further, ICANN made clear that it was attaching the three most recent Redelegation Reports as  
21 exemplars to demonstrate that each follows the ICP-1 process, not as the entirety of Redelegation  
22 Reports. (Supp. RJN at 2:22-28.) Plaintiff's unwarranted impugment of ICANN goes too far,  
23 and should not be condoned.

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28 <sup>5</sup> The .ax report is dated June 9, 2006. See <http://www.iana.org/reports/ax-report-09jun06.pdf>.

1                   3.       Plaintiff's Reliance Upon Law Review Articles and Essays is  
2                                   Improper.

3                   In its proposed sur-reply, Plaintiff offers *three* articles by the same author, A. Michael  
4 Froomkin, to purportedly show that the DOC does not exert control over ICANN and that  
5 ICANN only pays “lip service” to its required procedures. (Sur-reply at 2:20-23, 3:16-21.) This  
6 reliance is improper on many levels, including but not limited to the fact that Plaintiff urges this  
7 Court to recognize the truth of the statements contained in these articles – and then further  
8 intimates that the Court should rely on them in *this situation*, though each is wholly inapposite.<sup>6</sup>

9                   To the extent Plaintiff wishes to rely on Mr. Froomkin’s statements in its sur-reply, it  
10 would do well to take note of the points made within the selected articles. Then it would realize  
11 the futility of its entire case. In his essay “How ICANN Policy Is Made (II)” Mr. Froomkin’s  
12 closing point captures the essence of control of a ccTLD: “Ultimately, I think **governments can,**  
13 **and should be allowed to, exert control over ccTLDs designed to serve their nations.** RFC 1591  
14 requires that the ccTLD operator have a local presence . . . . **Taking a functioning ccTLD from**  
15 **someone against their will is not something a . . . government would necessarily find it easy to**  
16 **do.”** A. Michael Froomkin, How ICANN Policy Is Made (II), *available at*  
17 <http://www.icannwatch.org/essays/dotau.htm> (last visited November 13, 2006) (emphasis added).  
18 Plaintiff’s reliance on Mr. Froomkin’s 2004 article is similarly puzzling – he affirms that “**state**  
19 **practice tends to support the GAC view that ‘no private intellectual or other property rights**  
20 **inhere to the TLD itself** nor accrue to the delegated manager of the [cc]TLD as the result of such

21 \_\_\_\_\_  
22                   <sup>6</sup> In one instance, the Plaintiff relies upon the author’s characterization of a letter drafted  
23 by the DOC, as opposed to turning to the letter itself. Further, the Plaintiff *admits* that the  
24 selected quote refers to “**other settings**” – specifically, that the DOC believes that *new TLDs*  
25 should be selected through the ICANN process, without DOC interference. *See* A. Michael  
26 Froomkin & Mark A. Lemley, *ICANN and Antitrust*, 2003 U. Ill. L. Rev. 1, 16 (2003). This  
27 selected application has nothing to do with the ccTLD redelegation process at issue in Plaintiff’s  
28 complaint. Another is an opinion piece written about the 2001 redelegation of the .au ccTLD to a  
manager approved by the Australian Government. .” A. Michael Froomkin, How ICANN Policy  
Is Made (II), *available at* <http://www.icannwatch.org/essays/dotau.htm> (last visited November 13,  
2006). Here, we are dealing with a commercial entity’s attempt to divest the Congo of *any*  
control over the .cg ccTLD. Finally, the 2004 article is a review of evolving view of intellectual  
property rights for nations. A. Michael Froomkin, *When We Say US™, We Mean It!*, 41 Hous. L.  
Rev. 839, 866-67 (2004). This article does not support Plaintiff’s assertion that ICANN “follows  
the instructions of the GAC” as opposed to its policies. (Sur-reply at 3:17-18.)

1 delegation' [and] there is only vague support for the suggestion that some kind of property or  
2 property right inures to the government. . . . [T]he United States . . . ha[s] issued rulings barring  
3 [trademark] registration of a TLD." A. Michael Froomkin, *When We Say US<sup>TM</sup>, We Mean It!*, 41  
4 Hous. L. Rev. 839, 866-67 (2004) (emphasis added).

5 **CONCLUSION**

6 Plaintiff should never have filed this Request for Leave to File a Sur-Reply. The only  
7 reason it had the opportunity to do so was because *ICANN agreed to a continuance to*  
8 *accommodate Plaintiff's counsel's injury*. Taking advantage of the extra time, Plaintiff submits a  
9 confusing, and blatantly incorrect sur-reply, supposedly for the benefit of this Court, when in  
10 reality it could – and **should** – have waited for oral argument to present these issues. The Request  
11 fails procedurally and substantively, and ICANN respectfully requests this Court to deny Plaintiff  
12 leave to file its proposed sur-reply, and to ignore all statements therein.

13 Dated: November 14, 2006

JONES DAY

14  
15  
16 By: 

Samantha Eisner

17 Attorneys for Defendants  
18 INTERNET CORPORATION FOR  
19 ASSIGNED NAMES AND NUMBERS AND  
20 ERRONEOUSLY NAMED INTERNET  
21 ASSIGNED NUMBERS AUTHORITY  
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**PROOF OF SERVICE BY FACSIMILE**

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 South Flower Street, Fiftieth Floor, Los Angeles, California 90071-2300. On November 14, 2006, I served a copy of the within document:


**DEFENDANTS' OPPOSITION TO PLAINTIFF'S REQUEST FOR LEAVE TO FILE A SUR-REPLY IN OPPOSITION TO DEFENDANTS' DEMURRER AND REQUEST FOR JUDICIAL NOTICE**

by telefaxing a copy thereof to the following individual(s) at the following facsimile number:

Robert A. Sacks, Esq.  
Edward E. Johnson, Esq.  
Sullivan & Cromwell, LLP  
1888 Century Park East  
Suite 2100  
Los Angeles CA 90067-1725  
Phone: (310) 712-6600  
Fax: (310) 712-8800

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 14, 2006, at Los Angeles, California.

  
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Deborah Futrowsky

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**PROOF OF SERVICE BY MAIL**

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 South Flower Street, Fiftieth Floor, Los Angeles, California 90071-2300. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. On November 14, 2006, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document:

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S REQUEST FOR LEAVE TO FILE A SUR-REPLY IN OPPOSITION TO DEFENDANTS' DEMURRER AND REQUEST FOR JUDICIAL NOTICE**

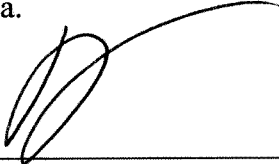
in a sealed envelope, postage fully paid, addressed as follows:

SEE ATTACHED SERVICE LIST

Following ordinary business practices, the envelope was sealed and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 14, 2006, at Los Angeles, California.

  
\_\_\_\_\_  
Deborah Futrowsky



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**SERVICE LIST**  
***C. ITOH MIDDLE EAST E.C. (Bahrain) v. INTERNET CORPORATION FOR ASSIGNED***  
***NAMES AND NUMBERS, et al.***  
**LOS ANGELES SUPERIOR COURT, CASE NO. SC090220**

Robert A. Sacks, Esq.  
Edward E. Johnson, Esq.  
Sullivan & Cromwell, LLP  
1888 Century Park East, Suite 2100  
Los Angeles CA 90067-1725  
Phone: (310) 712-6600  
Fax: (310) 712-8800

The People's Republic of the Congo  
Regie National Des Travaux Publics et de la Construction  
B.P. 2073  
Brazzaville  
Republique Populaire du Congo

The Congolese Redemption Fund  
Regis National Des Travaux Publics et de la Construction  
B.P. 2073  
Brazzaville  
Republique Populaire du Congo