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 9 INTERNET CORPORATION FOR  
 ASSIGNED NAMES AND NUMBERS

10 UNITED STATES DISTRICT COURT  
 11 CENTRAL DISTRICT OF CALIFORNIA

12  
 13 RUBY GLEN, LLC ,  
 14 Plaintiff,  
 15 v.  
 16 INTERNET CORPORATION FOR  
 ASSIGNED NAMES AND  
 17 NUMBERS,  
 18 Defendant.

Case No. 2:16-cv-5505 PA (ASx)

Assigned for all purposes to the  
 Honorable Percy Anderson

OPPOSITION TO MOTION FOR  
 LEAVE TO TAKE THIRD  
 PARTY DISCOVERY OR, IN  
 THE ALTERNATIVE, MOTION  
 FOR THE COURT TO ISSUE A  
 SCHEDULING ORDER

[[Proposed] Order filed concurrently  
 herewith]

Hearing Date: November 28, 2016  
 Hearing Time: 1:30 p.m.  
 Courtroom: 15

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1 **I. INTRODUCTION**

2 Plaintiff Ruby Glen, LLC's ("Plaintiff's") Motion for Leave to Take Third  
3 Party Discovery or, in the Alternative, Motion for the Court to Issue a Scheduling  
4 Order ("Motion"), should be denied. There is no good cause to take expedited  
5 discovery given that a dispositive motion is pending. Defendant Internet  
6 Corporation for Assigned Names and Numbers ("ICANN") recently moved to  
7 dismiss all claims against it, for both failure to state a claim and on the grounds that  
8 the covenant not to sue bars all of Plaintiff's claims. In addition, ICANN also  
9 moved to dismiss based on Plaintiff's failure to include third party Nu Dotco LLC  
10 ("NDC") as a necessary party. Therefore, it is uncertain whether this lawsuit will  
11 proceed and, if it does, who will be parties, thereby making early discovery unduly  
12 burdensome and possibly unnecessary. Moreover, any purported benefit to Plaintiff  
13 does not outweigh the prejudice to ICANN of engaging in expedited discovery.  
14 Finally, Plaintiff's Motion mischaracterizes ICANN's declination to engage in a  
15 discovery conference by insinuating that ICANN is acting inconsistently with the  
16 Federal Rules of Civil Procedure. In fact, ICANN is in full compliance with the  
17 Federal Rules of Civil Procedure given that no scheduling conference has been set,  
18 no scheduling order is in effect, and it is premature to confer while ICANN's  
19 motion to dismiss is pending.

20 **II. FACTUAL AND PROCEDURAL BACKGROUND**

21 Plaintiff filed its Complaint on July 22, 2016 (ECF No. 1), and filed its First  
22 Amended Complaint ("FAC") on August 8, 2016. (ECF No. 23). Plaintiff's  
23 allegations arise out of a July 2016 auction in which NDC submitted the top bid,  
24 thereby moving closer to entering into a registry agreement with ICANN to operate  
25 the .WEB gTLD. Thereafter, non-party Verisign, Inc. ("Verisign") disclosed an  
26 agreement it has with NDC under which NDC has agreed that, if it eventually  
27 enters into an agreement with ICANN to operate .WEB, then NDC will submit a  
28 request to ICANN that the agreement be transferred to Verisign.

1           On October 26, 2016, ICANN moved to dismiss the FAC first under Federal  
2 Rule of Civil Procedure 12(b)(6) for failure to state a claim, second on the grounds  
3 that the covenant not to sue bars all claims, and third under Federal Rule of Civil  
4 Procedure 12(b)(7) for failure to join NDC, a necessary party, as prescribed by  
5 Federal Rule of Civil Procedure 19 (“Rule 19”). (ECF No. 30). On the same date,  
6 Plaintiff filed the present discovery Motion in which it seeks leave to propound  
7 discovery on third parties NDC and Verisign on an expedited basis, or in the  
8 alternative, for this Court to enter a scheduling order.

### 9           **III. LEGAL STANDARD**

10           Under Federal Rule of Civil Procedure Rule 26(d), formal discovery does not  
11 commence until after the parties have engaged in a discovery conference, unless a  
12 party demonstrates good cause for expedited discovery. *Semitoool, Inc. v. Tokyo*  
13 *Electron Am., Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002); *Am. LegalNet, Inc. v.*  
14 *Davis*, 673 F. Supp. 2d 1063, 1067 (C.D. Cal. 2009). Good cause exists only  
15 “where the need for expedited discovery, in consideration of the administration of  
16 justice, outweighs the prejudice to the responding party.” *Semitoool, Inc.*, 208 F.R.D.  
17 at 276 (denying plaintiff’s request to take expedited third party discovery for failure  
18 to demonstrate good cause); *Am. LegalNet, Inc.*, 673 F. Supp. 2d at 1067, 1071  
19 (denying plaintiff’s motion for expedited discovery where the plaintiff failed to  
20 show good cause).

### 21           **IV. ARGUMENT**

#### 22           **A.    THERE IS NO GOOD CAUSE TO PERMIT PLAINTIFF 23           LEAVE TO TAKE THIRD PARTY DISCOVERY ON AN 24           EXPEDITED BASIS.**

25           Plaintiff seeks leave to take discovery on an expedited basis and on a  
26 schedule accelerated far beyond what is contemplated in the Federal Rules.  
27 Plaintiff’s request should be denied for two reasons.

28           First, there is no good cause to allow Plaintiff leave to take the discovery it

1 seeks on an expedited basis while ICANN’s motion to dismiss is pending. Courts  
2 have refused to permit discovery where, as here, the pleadings have not yet closed.  
3 *Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 608 (D. Nev. 2011) (staying  
4 discovery pending resolution of a motion to dismiss where the motion was  
5 “potentially dispositive of the entire case [and] Plaintiff does not claim that it needs  
6 any discovery to oppose the motion”); *In re Flash Memory Antitrust Litig.*, No. C  
7 07-0086 SBA, 2007 U.S. Dist. LEXIS 95869, at \*27–28 (N.D. Cal. Dec. 24, 2007)  
8 (declining to permit discovery before amended operative complaint is filed, on the  
9 grounds that “with no operative complaint . . . there are no claims by which  
10 relevance of requested discovery may be measured”). The Ninth Circuit has  
11 recognized that the purpose of a motion to dismiss is to enable challenges to the  
12 legal sufficiency of a complaint ***without bearing the expense of discovery***. See  
13 *Rutman Wine Co. v. E & J Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987)  
14 (affirming pre-discovery dismissal because “[i]t is sounder practice to determine  
15 whether there is any reasonable likelihood that plaintiffs can construct a claim  
16 before forcing the parties to undergo the expense of discovery”); *Tradebay, LLC*,  
17 278 F.R.D. at 608. Further, the Ninth Circuit has held that “discovery at the  
18 pleading stage is ***only*** appropriate where factual issues are raised by a Rule 12(b)  
19 motion,” which is not applicable here. *Ministerio Roca Solida v. U.S. Dept. of Fish*  
20 *& Wildlife*, 288 F.R.D. 500, 502 (D. Nev. 2013) (emphasis added) (citing *Wagh v.*  
21 *Metris Direct, Inc.* 363 F.3d 821, 829–30 (9th Cir. 2003), *overruled on other*  
22 *grounds by Odom v. Microsoft Corp.*, 486 F.3d 541 (9th Cir. 2007)).

23 The case of *In re Graphics Processing Units Antitrust Litigation* is  
24 instructive. It stands for the proposition that where a pending motion may obviate  
25 the need for any discovery whatsoever, the court should deny requests for early  
26 discovery. *In re Graphics Processing Units Antitrust Litig.*, Nos. C 06-07417  
27 WHA, 1826, 2007 U.S. Dist. LEXIS 57982, at \*12–13 (N.D. Cal. July 24, 2007).  
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1 In that case, the plaintiffs sought early discovery while the defendants' motions to  
2 dismiss were pending, but the court denied plaintiffs' request based on the general  
3 principle that "adjudicating the motions to dismiss will shed light on the best course  
4 for discovery" and noting that "[o]ur immediate circumstances omit any compelling  
5 need for prompt discovery." *Id.* at \*24. The same is true here, as ICANN's  
6 pending motion to dismiss on the grounds that the FAC fails to state a claim and a  
7 covenant not to sue bars Plaintiff's claims may well obviate the need for any  
8 discovery from third parties or ICANN.

9 Moreover, as ICANN argued in its motion to dismiss, Plaintiff failed to join  
10 NDC, a necessary party to the litigation. (Mot. to Dismiss at 22–25, ECF No. 30).  
11 Even if the Court grants Plaintiff leave to amend to join NDC, the instant discovery  
12 Motion would be mooted in part, given that NDC would then be a party to the  
13 action and subject to discovery requests as are all parties. Therefore, the expedited  
14 discovery Plaintiff seeks is premature, given that the Court has not yet determined  
15 whether all necessary parties have been joined in the litigation. *AF Holdings LLC*  
16 *v. Does*, 2012 WL 974933, at \* 5 (E.D. Cal. Mar. 21, 2012) (denying plaintiff's  
17 request for expedited discovery from a third party on the grounds that, "[a]ssuming  
18 plaintiff has a good faith basis for its claims, plaintiff can name [third party] as a  
19 defendant, serve him with process, hold the Rule 26(f) conference, and conduct any  
20 discovery necessary"). Accordingly, Plaintiff's Motion should be denied given the  
21 pending, dispositive motion to dismiss that also could affect which parties are  
22 involved.

23 Second, any theoretical benefit to Plaintiff does not outweigh the prejudice to  
24 ICANN and others, as discussed below. Demands for otherwise premature  
25 discovery may only be granted "where the need for expedited discovery, in  
26 consideration of the administration of justice, outweighs the prejudice to the  
27 responding party." *Semitool, Inc.*, 208 F.R.D. at 276. Here, Plaintiff argues that  
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1 expedited discovery is necessary because Plaintiff *may* file a motion for a  
2 preliminary injunction at some unidentified point in the future.<sup>1</sup> But, the possibility  
3 that Plaintiff may file such a motion, and the possibility that early discovery may  
4 aid Plaintiff in supporting such a motion does not equate to good cause, particularly  
5 in light of the prejudice to ICANN, NDC, and any other third party. If the Motion  
6 were granted, and even if discovery was not aimed at ICANN, ICANN would still  
7 incur the unnecessary expense of participating in the expedited discovery by  
8 reviewing documents produced by third parties and attending depositions of third  
9 parties, all before the pleadings have closed and before the parties are definitively  
10 established. Similarly, NDC, perhaps Verisign, and any other third parties will be  
11 subject to unnecessary or overbroad discovery that may be irrelevant or useless if  
12 ICANN's motion to dismiss is granted. Moreover, if NDC, and possibly Verisign,  
13 is subject to discovery before its inclusion in the lawsuit, those entities' discovery  
14 responses may differ and have to be revised if they are joined to the lawsuit as  
15 parties because discovery standards applicable to non-parties and parties differ  
16 substantially. There is little, if any, compelling need for third party discovery from  
17 NDC, Verisign, or any other third party on an expedited basis, and nothing prevents  
18 Plaintiff from seeking such discovery during the ordinary course of litigation and  
19 after the pleadings and parties are set. Therefore, given that neither the pleadings  
20 nor the parties to the litigation are presently set, and given that the prejudice to  
21 ICANN, NDC, and other third parties outweighs any theoretical benefit to Plaintiff,  
22 there is no good cause to permit expedited discovery.  
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25 <sup>1</sup> As Plaintiff explains in its Motion, one of the factors courts consider in  
26 determining whether good cause for expedited discovery exists is whether a  
27 preliminary injunction is pending. (Mot. at 5, ECF No. 32). By Plaintiff's own  
28 admission, the standard is whether the injunction is *pending*, not whether a motion  
for a preliminary injunction is contemplated and may be filed on some unspecified  
date.



1           **B.     THERE IS GOOD CAUSE TO DELAY ENTRY OF A**  
2           **SCHEDULING ORDER.**

3           Plaintiff's request that this Court issue a scheduling order is likewise  
4 premature. Federal Rule of Civil Procedure 16(b) provides that a judge may delay  
5 issuing a scheduling order if he or she "finds good cause for delay." Fed. R. Civ. P.  
6 16(b)(2). There is good cause here for the Court to delay issuing a scheduling order  
7 for many of the reasons already enumerated. A scheduling order is unnecessary  
8 and premature at this procedural juncture, where the pleadings have not closed and  
9 the parties have not been established. ICANN's motion to dismiss may moot the  
10 need for any scheduling order; or, in the alternative, ICANN's motion to dismiss  
11 may result in joining NDC in this lawsuit, rendering it more efficient and logical to  
12 delay issuing a scheduling order until all parties are joined. Accordingly, given that  
13 both the pleadings and the parties are presently in flux, good cause exists to delay  
14 issuing a scheduling order that may in fact be wholly unnecessary.

15           **C.     PLAINTIFF MISCHARACTERIZES ICANN'S**  
16           **DETERMINATION THAT A RULE 26(F) CONFERENCE**  
17           **WOULD BE PREMATURE AT THE PRESENT JUNCTURE.**

18           Plaintiff's claims regarding ICANN's "refusal" to confer with Plaintiff  
19 mischaracterizes both ICANN's position and its obligations under Federal Rule of  
20 Civil Procedure 26(f) ("Rule 26(f)"). Under Rule 26(f), the parties are required to  
21 confer regarding discovery "as soon as practicable—and in any event at least 21  
22 days before a scheduling conference is to be held or a scheduling order is due under  
23 Rule 16(b)." Fed. R. Civ. P. 26(f)(1). It is not practicable for the parties to confer  
24 regarding discovery at this procedural stage, where there is a pending motion to  
25 dismiss for failure to state a claim and failure to join a necessary party—one of the  
26 very entities from which Plaintiff seeks expedited discovery. It would be highly  
27 inefficient to confer with Plaintiff regarding discovery for a matter which should be  
28 dismissed in its entirety for the reasons set forth in ICANN's motion to dismiss.  
(Mot. to Dismiss). If the lawsuit proceeds, ICANN believes NDC should be a

1 party, and it should participate in discovery planning. Furthermore, neither a  
2 scheduling conference nor a scheduling order is presently set, as previously  
3 mentioned. Accordingly, the Rules do not require ICANN to engage in a Rule  
4 26(f) conference at this procedural juncture, and ICANN has legitimate reasons for  
5 declining to do so prematurely. As such, Plaintiff's suggestions that ICANN acted  
6 improperly in declining to engage in a premature Rule 26(f) conference (*see* Mot. at  
7 1, 4, ECF No. 32) are misplaced.

8 **V. CONCLUSION**

9 For the foregoing reasons, Plaintiff's request to take expedited third party  
10 discovery or, in the alternative, for the entry of a scheduling order must be denied.  
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12 Dated: November 7, 2016

JONES DAY

13 By: /s/ Eric P. Enson  
14 Eric P. Enson

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