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7 RUBY GLEN, LLC

8 UNITED STATES DISTRICT COURT
9 FOR THE CENTRAL DISTRICT OF CALIFORNIA

10
11 RUBY GLEN, LLC

12 Plaintiff,

13 vs.

14 INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS
15 AND DOES 1-10

16 Defendant.

Case No.: 2:16-cv-05505-PA-AS

[Hon. Percy Anderson
Courtroom 15]

**PLAINTIFF RUBY GLEN, LLC'S
REPLY IN SUPPORT OF MOTION
FOR LEAVE TO TAKE THIRD
PARTY DISCOVERY OR, IN THE
ALTERNATIVE, MOTION FOR
THE COURT TO ISSUE A
SCHEDULING ORDER**

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

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1 **II. ARGUMENT**

2 **A. ICANN’s Motion to Dismiss Does Not Justify Further Delaying this**
3 **Critical Discovery**

4 As an initial matter, ICANN incorrectly claims that discovery should not be
5 permitted whenever there is a dispositive motion pending. Opp. at 2:27-4:9. ICANN
6 offers its broad contention to suggest that Plaintiff has not demonstrated good cause for
7 the third party discovery sought by Plaintiff’s Motion. ICANN’s contention, however,
8 is not supported by the Federal Rules. Rather, “the Federal Rules of Civil Procedure
9 do[] not provide for automatic or blanket stays of discovery when a potentially
10 dispositive motion is pending. Indeed, district courts look unfavorably upon such
11 blanket stays of discovery.” *Mlejnecky v. Olympus Imaging America, Inc.*, No. 2:10-
12 cv-02630, 2011 WL 489743, at *6 (E.D. Cal. Feb. 7, 2011) (denying defendant’s motion
13 for a protective order pending the resolution of a dispositive motion). “Had the Federal
14 Rules contemplated that a motion to dismiss under Fed.R.Civ.P. 12(b)(6) would stay
15 discovery, the Rules would contain a provision for that effect. In fact, such a notion is
16 directly at odds with the need for expeditious resolution of litigation.” *Skellerup Ind.*
17 *Ltd. v. City of Los Angeles*, 163 F.R.D. 598, 600-601 (C.D. Cal. 1995); *see also OMG*
18 *Fidelity, Inc. v. Sirius Tech., Inc.*, 239 F.R.D. 300, 304 (N.D. N.Y. 2006) (“The mere
19 filing of a dismissal motion, without more, does not guaranty entitlement to such a
20 stay.”); *Moran v. Flaherty*, No. 92 Civ. 3200, 1992 WL 276913, at *1 (S.D. N.Y. Sept.
21 25, 1992) (“[D]iscovery should not be routinely stayed simply on the basis that a motion
22 to dismiss has been filed.”).

23 Indeed, ICANN’s own proffered authority militates against the broad proposition
24 that a court should stay discovery whenever there is a pending dispositive motion. *See,*
25 *e.g., Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 603 (D. Nev. 2011) (“The fact that
26 a non-frivolous motion [to dismiss] is pending is simply not enough to warrant a blanket
27 stay of all discovery.”); *Ministerio Roca Solida v. U.S. Dept. of Fish & Wildlife*, 288

1 F.R.D. 500, 502 (D. Nev. 2013) (requiring that a defendant show “good cause” to stay
2 discovery pending the resolution of a dispositive motion, meaning “more than an
3 apparently meritorious Rule 12(b)(6) motion.”). While both *Tradebay* and *Ministerio*
4 agree that delaying discovery is appropriate when a pending motion to dismiss raises a
5 threshold legal issue, such as venue, or the court’s subject matter jurisdiction, ICANN
6 has not challenged subject matter jurisdiction or venue in this matter, and has not offered
7 any other “good cause” to delay discovery. *See Tradebay*, 278 F.R.D. at 608 (granting
8 a stay of discovery upon a preliminary conclusion that plaintiff’s complaint failed to
9 allege an actual case or controversy).

10 **B. This Discovery May Be Necessary to Resolve ICANN’s Rule 12(b)(7)**
11 **Motion.**

12 ICANN also seeks to delay the critical discovery sought by Plaintiff’s Motion
13 based on its unsubstantiated claim that NDC is a necessary party in this litigation. *See*
14 *Opp.* at 4:9-23. As discussed in Section II.A, *supra*, ICANN’s argument does not
15 implicate a threshold jurisdictional issue, and thus is not a basis for delaying discovery.
16 *See Ministerio*, 288 F.R.D. at 504.

17 If anything, ICANN’s Rule 12(b)(7) motion demonstrates the urgent need for this
18 discovery, because it may aid the parties and the Court in resolving the issue of whether
19 NDC should be added to this litigation. As set forth more fully in Plaintiff’s Opposition
20 to ICANN’s pending Motion to Dismiss, based on the facts presently known to Plaintiff,
21 Plaintiff has asserted claims against ICANN only, *see generally*, FAC, and NDC has no
22 interest in those claims, *see Opp.* to ICANN’s Motion to Dismiss, at 22:3-18. The
23 discovery that Plaintiff seeks from NDC certainly impacts Plaintiff’s claims against
24 ICANN, because it could allow Plaintiff to amend and supplement its pleadings. It will
25 also facilitate the efficient resolution of this matter, because it may inform whether, as
26 ICANN suggests, Plaintiff should join NDC and assert a claim against it.

1 **C. Plaintiff’s Motion Will Cause ICANN No Prejudice**

2 In a further attempt to avoid the discovery at issue, ICANN implausibly argues
 3 that it will suffer prejudice if Plaintiff is permitted to serve discovery on non-parties
 4 NDC and VeriSign, Inc. (“VeriSign”). *See* Opp. at 1:13 (“prejudice to ICANN of
 5 engaging in expedited discovery”); 4:23-24 (“prejudice to ICANN”). The only
 6 “prejudice” that ICANN claims is “the unnecessary expense of participating in the
 7 expedited discovery by reviewing documents produced by third parties and attending
 8 depositions of third parties.” Opp. at 5:6-11. However, “[a] showing that discovery
 9 may involve some inconvenience and expense does not suffice to establish good cause
 10 for issuance of a protective order.” *Ministerio*, 288 F.R.D. at 503; *see also Tradebay,*
 11 *LLC v. eBay, Inc.*, 278 F.R.D. at 601 (same). Plaintiff’s Motion seeks *no* discovery
 12 from ICANN, and thus ICANN will not incur *any* costs associated with assembling,
 13 reviewing, and producing its own documents, nor with preparing discovery responses,
 14 or preparing its employees for depositions. ICANN’s paltry claim of “prejudice” would
 15 undermine a serious and substantial standard. Furthermore, if ICANN is truly
 16 concerned about the “prejudice” it will suffer from reviewing any documents that NDC
 17 and VeriSign produce, it can always wait to conduct its review until its Motion to
 18 Dismiss has been resolved.¹

19 ICANN fares no better in its superficial effort to allege that Plaintiff’s Motion
 20 will prejudice NDC or VeriSign. ICANN baldly asserts that, “*if*” NDC and VeriSign
 21 are, at some point, joined to this lawsuit, their discovery responses “*may*” need to be
 22 revised. Opp. at 5:12-17. ICANN offers no citation or authority for this proposition,
 23 which is founded upon a series of hypothetical events. Moreover, ICANN did not even
 24 attempt to respond to Plaintiff’s Motion, which demonstrated that ICANN, NDC, and
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26 ¹ Plaintiff would reasonably expect ICANN to be interested in the information
 27 sought by way of its Motion, in light of NDC’s repeated averments to ICANN that it
 28 had not resold, transferred, or assigned the rights to its .WEB application.

1 VeriSign “will suffer no prejudice as a result of these discovery requests.” Mot. at 8:12-
2 15. Pursuant to the standard timeline set forth in the Federal Rules of Civil Procedure,
3 Plaintiff should have been able to serve these requests nearly two months ago, but for
4 ICANN’s inexplicable refusal to participate in the mandatory Rule 26(f) conference.
5 As for NDC, it already agreed to make public all information that is pertinent to its
6 .WEB gTLD application. *See* Mot. at 9:8-13. And VeriSign’s brazen announcement
7 that it funded NDC’s .WEB bid in order to acquire those rights for itself deprived
8 VeriSign of any legitimate basis to complain about this discovery. ICANN’s purported
9 “prejudice” fails.

10 **D. ICANN Offers No “Good Cause” to Delay Entry of a Scheduling**
11 **Order**

12 ICANN’s argument that its Motion to Dismiss constitutes “good cause” for
13 delaying the entry of a scheduling order also misconstrues the prevailing law, and the
14 Court’s Standing Order. *See* Opp. at 6:1-14. As explained above, “the Federal Rules
15 of Civil Procedure do not provide for automatic or blanket stays of discovery when a
16 potentially dispositive motion is pending. Indeed, district courts look unfavorably upon
17 such blanket stays of discovery.” *Mlejnecky v. Olympus Imaging America, Inc.*, No.
18 2:10-cv-02630, 2011 WL 489743, at *6 (E.D. Cal. Feb. 7, 2011). ICANN offers no
19 authority for its purported “good cause,” other than the mere existence of its Motion to
20 Dismiss. “The fact that a non-frivolous motion is pending is simply not enough to
21 warrant a blanket stay of all discovery.” *Ministerio Roca Solida v. U.S. Dept. of Fish*
22 *& Wildlife*, 288 F.R.D. 500, 504 (D. Nev. 2013). Furthermore, this Court’s Standing
23 Order specifically instructs parties to “begin to conduct discovery actively before the
24 Scheduling Conference.” *See* Dkt. No. 22. ICANN’s refusal to participate in this
25 Court-ordered process forced Plaintiff to seek Court intervention to require ICANN to
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1 comply with its obligations under the Federal Rules. ICANN does not offer this Court
2 “good cause” to warrant additional delays.

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4 **E. ICANN Offers No Legitimate Basis for Its Refusal to Participate in
the Mandatory Rule 26(f) Conference**

5 Finally, ICANN’s deficient justification for its refusal to participate in the
6 mandatory Rule 26(f) conference—that “[i]t is not *practicable*” to comply with Rule
7 26(f) because of ICANN’s pending Motion to Dismiss—does not comport with
8 prevailing law. *See* Opp. at 6:21-24. ICANN once again offers no authority for its
9 position, which the plain meaning of Rule 26(f) contradicts. That rule requires that the
10 parties confer “as soon as *practicable*,” a term that Webster’s defines as “feasible,” or
11 “capable of being . . . accomplished.”² Furthermore, the Advisory Committee’s Notes
12 to Rule 26 make clear that “[t]he obligation to participate in the [Rule 26(f)] planning
13 process is imposed on all parties that have appeared in the case, including defendants
14 who, because of a pending Rule 12 motion, may not have yet filed an answer in the
15 case.” *See* Fed. R. Civ. P. 26 advisory committee’s note (1993). Rule 26 directly
16 forecloses ICANN’s flimsy attempt to explain its dilatory conduct, and ICANN has
17 offered no legitimate reason for its violation of Rule 26(f).

18 **III. CONCLUSION**

19 For the foregoing reasons, and for the reasons stated in Plaintiff’s Motion,
20 Plaintiff Ruby Glen, LLC respectfully asks this Court to:

21 (a) Grant its motion for leave to conduct third party discovery; or, in the
22 alternative,

23 (b) Issue a scheduling order.

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27 ² *Webster’s Third New Int’l Dictionary* (Merriam-Webster, Inc. 1993).

1 Dated: November 14, 2016

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CERTIFICATE OF SERVICE

Pursuant to L.R. 5-3, I hereby certify that on November 14, 2016, I electronically filed the foregoing documents: Plaintiff Ruby Glen, LLC’s Reply in Support of Motion for Leave to Take Third Party Discovery or in the Alternative, Motion for the Court to Issue a Scheduling Order, with the Clerk of the Court by using the CM/ECF system and that foregoing document is being served on all counsel of record identified below via transmission of Notice of Electronic Filing generated by CM/ECF:

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s/ Maria VandenBosch
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