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11 Attorneys for Plaintiff
NAME.SPACE, INC.

12
13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA
15 WESTERN DIVISION
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18 NAME.SPACE, INC.,
19 Plaintiff,
20 v.
21 INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS,
22 Defendant.
23

Case No. CV 12-8676 (PA)
Assigned for all purposes to the
Honorable Percy Anderson
**PLAINTIFF NAME.SPACE'S
OBJECTION TO NEW
EVIDENCE SUBMITTED BY
ICANN IN SUPPORT OF ITS
REPLY MEMORANDUM**
Hearing Date: February 25, 2013
Hearing Time: 1:30 p.m.
Judge: Honorable Percy Anderson
Hearing Location: 312 N. Spring St.

1 Plaintiff name.space, Inc. (“name.space”) hereby objects to ICANN’s
2 submission of new evidence in support of its reply memorandum—namely, the
3 Declaration of Louis Touton and accompanying exhibits, and the Declaration of
4 Jeffrey A. Levee and accompanying exhibits. Under applicable Ninth Circuit law,
5 the Court should not consider new evidence presented for the first time in support
6 of a reply brief and, in any event, the new evidence underscores that, at a minimum,
7 there are disputed issues of material fact concerning the 2000 Application that make
8 summary judgment here unwarranted.

9 ARGUMENT

10 The introduction of new evidence in reply papers is improper where the non-
11 movant does not have the opportunity to respond to the new evidence. *See J.G. v.*
12 *Douglas County Sch. Dist.*, 552 F.3d 786, 803 n.14 (9th Cir. 2008) (“Where new
13 evidence is presented in a reply to a motion for summary judgment, the district
14 court should not consider the new evidence without giving the [non-]movant an
15 opportunity to respond.”) (quoting *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir.
16 1996)). Courts routinely apply this rule to exclude from consideration new
17 evidence presented for the first time in a movant’s reply brief. *See, e.g., Wallace v.*
18 *Countrywide Home Loans, Inc.*, Case No. SACV 08-1463, 2009 U.S. Dist. LEXIS
19 110140, at *18-19 (C.D. Cal. Nov. 23, 2009) (declining to consider new evidence
20 presented for the first time on reply and noting that “[t]he opposing party should not
21 have to incur the cost and effort of additional filings . . . because the movants
22 deliberately, or more likely inadvertently, held back part of their case”) (quotations
23 omitted); *SEC v. Private Equity Mgmt. Group, Inc.*, Case No. CV 09-2901, 2009
24 U.S. Dist. LEXIS 75158, at *21 (C.D. Cal. Aug. 10, 2009) (declining to consider
25 new evidence submitted for the first time on reply); *Iconix, Inc. v. Tokuda*, 457 F.
26 Supp. 2d 969, 976 (N.D. Cal. 2006) (sustaining objection to new evidence
27 presented in reply brief); *Wolfe v. Deeb*, No. C 04-5164 CRB, 2005 U.S. Dist.
28 LEXIS 4873, at *2 n.1 (N.D. Cal. Mar. 22, 2005) (court “did not rely” on new

1 arguments submitted in reply); *Davenport v. M/V New Horizon*, No. C 01-0933
2 SBA, 2002 U.S. Dist. LEXIS 26811, at *7-8. (N.D. Cal. Dec. 17, 2002) (“the Court
3 refuses to consider the evidence Tosco presented in support of its reply brief”).

4 Under this well-established precedent, the Court should not consider the new
5 evidence that ICANN attempts to introduce for the first time on reply. In its Order
6 dated January 15, 2013, this Court converted ICANN’s existing motion to dismiss
7 into a motion for summary judgment because ICANN had submitted evidence with
8 its motion to dismiss—the 2000 Application—that it argued was sufficient on its
9 own to demonstrate that the complaint should be dismissed, even at this early stage
10 of the litigation. In its order, the Court determined that name.space’s “claims do
11 not necessarily rely on the 2000 Application” and concluded that conversion was
12 necessary in order for the Court to consider this evidence.

13 ICANN now appears to recognize that name.space has identified genuine
14 disputes of material fact in its opposition papers over the proper interpretation of
15 the 2000 Application that prevents its motion from being granted, and therefore
16 wants to add more fuel to the fire. This is improper at this stage of the litigation.
17 ICANN had the opportunity to make its argument in its opening brief, and
18 submitted whatever material it felt was necessary to support that argument. The
19 new evidence submitted with ICANN’s reply brief relates to arguments that
20 ICANN made in its opening brief, and ICANN should have sought to introduce this
21 evidence at that time, but did not. (*Compare* Mem. in Support of ICANN’s Mot. to
22 Dismiss, ECF No. 19-1, at 7-9 *with* Reply Mem. in Support of ICANN’s Mot. for
23 Summary Judgment, ECF No. 42, at 7, 9-10.) There have now been five briefs
24 addressing the 2000 Application, and enough is enough. name.space “should not
25 have to incur the cost and effort of additional filings.” *Wallace*, 2009 U.S. Dist.
26 LEXIS 110140, at *18-19. name.space respectfully requests that ICANN’s new
27 evidence (which simply demonstrates that substantial issues of fact still exist in any
28 event) not be considered on this motion.

1 If the Court considers this evidence, name.space respectfully requests that it
2 be provided an opportunity to respond to this new evidence. *See, e.g., A.F.*
3 *Rothschild Fund v. HHS*, No. C 11-02760, 2011 U.S. Dist. LEXIS 109842, at *1
4 (N.D. Cal. Sept. 26, 2011) (“Given that Defendants raised new evidence in their
5 reply brief, Plaintiff is entitled to respond”) (citing *Provenz*, 102 F.3d at 1483).

6 **CONCLUSION**

7 For the foregoing reasons, name.space respectfully requests that the Court
8 exclude the Touton and Levee Declarations, and their accompanying exhibits, from
9 consideration.

10 Dated: February 15, 2013

MORRISON & FOERSTER LLP

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

14 Attorneys for Plaintiff
15 NAME.SPACE, INC.

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