

1 Robert A. Sacks (Cal. Bar No. 150146)
 Adam Paris (Cal. Bar No. 190693)
 2 Edward E. Johnson (Cal. Bar No. 241065)
 SULLIVAN & CROMWELL LLP
 3 1888 Century Park East
 Los Angeles, California 90067-1725
 4 (310) 712-6600
 (310) 712-8800 (facsimile)

5 Attorneys for Plaintiff C. ITOH MIDDLE
 6 EAST E.C. (Bahrain), through the real
 party in interest, NATIONAL UNION
 7 FIRE INSURANCE COMPANY OF
 PITTSBURGH, PA.

8
 9
 10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 11 COUNTY OF LOS ANGELES
 12 WEST DISTRICT

13 C. ITOH MIDDLE EAST E.C. (Bahrain))
 14 through the real party in interest, NATIONAL)
 UNION FIRE INSURANCE COMPANY)
 15 OF PITTSBURGH, PA,)

16 Plaintiff,

17 v.

18 INTERNET CORPORATION FOR)
 19 ASSIGNED NAMES AND NUMBERS,)
 INTERNET ASSIGNED NUMBERS)
 20 AUTHORITY, the PEOPLE'S)
 21 REPUBLIC OF THE CONGO, and THE)
 CONGOLESE REDEMPTION FUND,)

22 Defendants.

Case No. SC090220

The Hon. John L. Segal

**PLAINTIFF'S SUR-REPLY TO
 DEFENDANTS' DEMURRER AND
 REQUEST FOR JUDICIAL NOTICE**

Hearing: November 20, 2006
 Time 8:30 a.m.
 Dept.: M

Action Filed: June 28, 2006

1 Plaintiff C. Itoh Middle East E.C. (Bahrain), through the real party in interest
2 National Union Fire Insurance Company of Pittsburgh, Pa. ("NUFI"), respectfully submits this
3 sur-reply to the Demurrer and Request for Judicial Notice of Defendants Internet Corporation for
4 Assigned Names and Numbers and Internet Assigned Numbers Authority (collectively,
5 "ICANN").

6 NUFI submits this sur-reply to respond to the following incorrect statements
7 made in the Reply briefs filed by ICANN in support of its Demurrer ("Dem. R.") and
8 accompanying Request for Judicial Notice ("RJN R."):

9 **1. "Plaintiff cites two cases that address a third party's attempt to assert the FSIA**
10 **personal jurisdiction immunity claims—not subject-matter jurisdiction immunity**
from attachment under 1610(a)" (Dem. R. at 3 n.3).

11 In an attempt to distinguish two cases that hold that the immunity from execution
12 provisions of the Foreign Sovereign Immunities Act ("FSIA"), Sections 1609-10, do not
13 implicate subject-matter jurisdiction, ICANN invents a distinction between subject-matter
14 jurisdiction and personal jurisdiction. ICANN claims that two cases relied on by NUFI, *Republic*
15 *of the Philippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986) and *Rubin v. Islamic Republic of Iran*,
16 436 F. Supp. 2d 938 (N.D. Ill. 2006), involve only personal jurisdiction. Neither case even
17 mentions personal jurisdiction, and FSIA expressly provides that personal jurisdiction and
18 subject-matter jurisdiction are coextensive. 28 U.S.C. § 1330(b) ("Personal jurisdiction over a
19 foreign state shall exist as to every claim for relief over which the district courts have [subject
20 matter] jurisdiction") (emphasis added).

21 **2. "[U]nlike the present action, in *Lockheed* the focus was on [the .com TLD] role,**
22 **rather than the proper classification of a domain name." (Dem. R. at 4-5).**

23 ICANN's Demurrer Reply quotes liberally from a trademark case, *Lockheed*
24 *Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980 (9th Cir. 1999), and from a description of
25 *Lockheed* in *Kremen v. Cohen*, 99 F. Supp. 2d 1168 (N.D. Cal. 2000). In each quote, ICANN
26 misleadingly replaces "NSI" – the name of the defendant in *Lockheed* – with "[the .com TLD]."
27 NSI is a company that registers second-level domain names within several top-level domains
28 (including .com, .org, .net, and .us); NSI is not equivalent to the .com top level domain. Read

1 without ICANN's modification, the above sentence confirms the irrelevance of *Lockheed* to this
2 case: "unlike the present action, in *Lockheed* the focus was on NSI's role, rather than the proper
3 classification of a domain name" as property or not property. *Kremen*, 99 F. Supp. 2d at 1173
4 n.2 (emphasis added).

5 3. **"The Complaint alleges that the .cg ccTLD is actually controlled or held by**
6 **purported agents or instrumentalities of the Congo (i.e., the Administrative or**
7 **Technical Contacts for the .cg ccTLD) rather than the Congo itself."** (Dem. R. at 7).

8 This assertion, and the argument that NUFU somehow concedes this point, is
9 baffling. The Complaint alleges repeatedly and unambiguously that the *Congo owns .cg*. See,
10 e.g., Compl. ¶¶ 5, 7, 16, 17, 51-55, 57. NUFU argues in its Opposition that the Congo owns .cg.
11 See Opp. at 10. While the Congo uses agents to administer .cg, see Compl. ¶¶ 51-55, this is
12 because nations – like corporations – can only act through agents. ICANN does not, and can not,
13 point to anything in the Complaint that suggests these agents "own" .cg.

14 4. **"Plaintiff's obviously incorrect interpretation of the agreements should not block**
15 **judicial notice, especially when both ICANN and the DOC do not dispute the**
16 **relevant language in those agreements."** (RJR R. at 4).

17 Not only are ICANN's contracts with the U.S. Department of Commerce ("DOC")
18 not properly subject to judicial notice for the reasons previously argued, even if they were "[t]he
19 court cannot take judicial notice of self-serving hearsay allegations . . . merely because they are
20 part of a document which qualifies for judicial notice." *Childs v. State*, 144 Cal. App. 3d 155,
21 162-63 (1983). Moreover, the DOC has stated in other settings that *ICANN* controls top level
22 domains:¹ "[I]n a June 2001 letter denying a petition for rulemaking on the subject of new
23 gTLDs, the DOC reiterated that, following the White Paper, the DOC would as a matter of
24 policy approve ICANN's decisions without subjecting them to review." A. Michael Froomkin &
25 Mark A. Lemley, *ICANN and Antitrust*, 2003 U. Ill. L. Rev. 1, 16 (2003) (emphasis added). At
26 least one federal court has already rejected ICANN's argument and held that ICANN acts
27 independently of DOC. See *Bord v. Banco de Chile*, 205 F. Supp. 2d 521, 522 -525 (E.D. Va.

28

29 ¹ In the brief cited by ICANN, DOC argues that certain information related to ICANN is
30 protected from disclosure under the Freedom of Information Act because it reflects the
31 DOC's decision-making. This does not concern the ultimate question as to which entity
32 controls the domain names.

1 2002) (dismissing a claim against the Department of Commerce because ICANN, not the DOC,
2 controlled the challenged action).

3 5. "Documents governing the ccTLD redelegation process are not reasonably subject
4 to dispute." (RJN R. at 7).

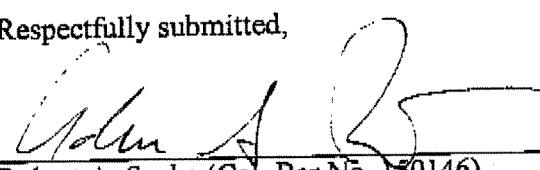
5 ICANN argues that it is indisputable that ICP-1 and RFC 1591 accurately describe
6 its process for redelegating country code domains, while statements of the Government Advisory
7 Committee (GAC) are only "advisory." To support that assertion, it seeks judicial notice of
8 additional documents that ICANN itself wrote and posted on its website—so-called
9 "Redelegation Reports" that purport to describe the process ICANN follows in redelegating
10 certain country code domains.

11 First, these self-serving Reports were all created after this litigation commenced.
12 The Redelegation Reports generated prior to this litigation all ended by stating that "the IANA
13 concludes that the [relevant country domain]" should be delegated or redelegated.² The new
14 Reports now show alleged newfound deference to the DOC. These are inherently untrustworthy.

15 In any event, there is nothing beyond ICANN's bare assertion in its briefs to
16 suggest that these documents actually describe ICANN's redelegation process. At least one
17 respected scholar argues that although ICANN pays lip service to ICP-1 and RFC 1591, in
18 practice it follows the instructions of the GAC. See A. Michael Froomkin, How ICANN Policy
19 Is Made (II), available at <http://www.icannwatch.org/essays/dotau.htm>;³ A. Michael Froomkin,
20 *When We Say US, We Mean It!*, 41 Hous. L. Rev. 839, 858-68 (2004) (describing the increasing
21 power of the GAC). The redelegation reports even state that ICANN is "guided by" the GAC
22 Principles. ICANN's supposed use of ICP-1 and RFC 1591 is plainly not "indisputable."

23 Dated: November 13, 2006

Respectfully submitted,


Robert A. Sacks (Cal. Bar No. 150146)

24
25
26
27 ² The prior reports are available at <http://www.iana.org/reports/ccTld-reports.htm>.

28 ³ NUFU cites this document pursuant to CAL. EVID. CODE § 454(a) (in determining judicial notice, "[a]ny source of pertinent information, including the advice of persons learned in the subject matter, may be consulted or used" by the Court).

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

Of Counsel:

Mark F. Rosenberg
Jacob F.M. Oslick
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004-2498
(212) 558-4000
(212) 558-3588 (facsimile)

Adam S. Paris (Cal. Bar No. 190693)
Edward E. Johnson (Cal. Bar No. 241065)
SULLIVAN & CROMWELL LLP
1888 Century Park East
Los Angeles, California 90067-1725
(310) 712-6600
(310) 712-8800 (facsimile)

Attorneys for Plaintiff C. ITOH MIDDLE
EAST E.C. (Bahrain), through the real party
in interest, NATIONAL UNION FIRE
INSURANCE COMPANY OF
PITTSBURGH, PA.

PROOF OF SERVICE

1
2 I am employed in the County of Los Angeles, State of California. I am over the
3 age of eighteen years and am not a party to this action. My business address is Sullivan &
4 Cromwell LLP, 1888 Century Park East, Suite 2100, Los Angeles, California 90067-1725.

5 I served the below listed document(s) described as:

6 **PLAINTIFF'S SUR-REPLY TO DEFENDANTS'**
7 **DEMURRER AND REQUEST FOR JUDICIAL NOTICE**

8 on November 13, 2006, on all other parties in this action by placing a true copy of the above
9 document(s) enclosed in sealed envelopes addressed as follows:

10 **Via Facsimile & U.S. Mail**

11 Jeffrey A. LeVee
12 Samantha S. Eisner
13 JONES DAY
14 555 South Flower Street, Fiftieth Floor
15 Los Angeles, California 90071-2300

16 **Via Mail**

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

22 The Congolese Redemption Fund
23 Regie National Des Travaux Publics et de la Construction
24 B.P. 2073
25 Brazzaville
26 Republique Populaire du Congo

27 For copies sent by Facsimile, I delivered a true copy of the above documents to
28 the Sullivan & Cromwell LLP personnel responsible for facsimile service, to the persons listed at
the facsimile numbers listed above. I am familiar with the office practice of Sullivan &
Cromwell LLP, which practice is that when documents are deposited with the Sullivan &

PROOF OF SERVICE

1 Cromwell LLP personnel responsible for facsimile service, such documents are transmitted via
 2 facsimile that same day in the course of business.

3 For copies served by United States Mail, I placed each such envelope with
 4 postage thereon fully prepared for the deposit in the United States mail in accordance with the
 5 office practice of Sullivan & Cromwell LLP, which practice is that when correspondence is
 6 deposited with the Sullivan & Cromwell LLP personnel responsible for delivering
 7 correspondence to the United States Postal Service, such correspondence is delivered to the
 8 United States Postal Service that same day in the course of business.

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

11 Executed on November 13, 2006 at Los Angeles, California.

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

 Roberta Striplin