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INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS and erroneously named
INTERNET ASSIGNED NUMBERS AUTHORITY

COPIES OF THIS DOCUMENT
FILED IN THE COURT OF
LOS ANGELES COUNTY
OCT 27 2006
John A. ...
By A. ...

**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

**REPLY IN SUPPORT OF REQUEST
FOR JUDICIAL NOTICE BY
DEFENDANT INTERNET
CORPORATION FOR ASSIGNED
NAMES AND NUMBERS AND
ERRONEOUSLY-NAMED
DEFENDANT INTERNET
ASSIGNED NUMBERS AUTHORITY**

[Reply in Support of Demurrer to
Plaintiff's Complaint, and Supplemental
Request for Judicial Notice and
Declaration of Samantha Eisner filed
concurrently herewith; Compendium of
Non-California Authorities lodged
concurrently herewith]

DATE: November 3, 2006
TIME: 8:30 a.m.
DEPT: M

Complaint Filed: June 28, 2006

TABLE OF CONTENTS

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

Page

INTRODUCTION 1

I. GOVERNMENT CONTRACTS ARE PROPER SUBJECTS OF JUDICIAL NOTICE UNDER EVIDENCE CODE SECTION 452(c) 1

 A. The DOC Contracts Are Valid and Complete..... 2

 1. ICANN has Not Requested Judicial Notice of Inoperative Agreements 3

 2. All Agreements Between ICANN and the DOC are Alleged 3

 B. The Government Contracts Are Clear That The DOC Alone Has Authority To Redelegate A ccTLD 4

 C. Plaintiff’s Extrinsic Evidence Regarding ICANN’S and DOC’S Contractual Relationships Does Not Address The ccTLD Redefinition Process..... 5

II. JUDICIAL NOTICE OF ICANN’S REMAINING EXHIBITS IS PROPER UNDER EVIDENCE CODE SECTION 452(h)..... 6

 A. Materials Found On Web Sites Are Proper Subjects of Judicial Notice..... 6

 B. ICANN’S Bylaws Are Not Reasonably Subject To Dispute..... 6

 C. Documents Governing The ccTLD Redefinition Process Are Not Reasonably Subject To Dispute 7

 D. The Purpose For Judicial Notice Of The GAC Statements Is Not Reasonably Subject To Dispute 8

CONCLUSION 9

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
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25
26
27
28

Page

Cases

Childs v. State of California,
144 Cal. App. 3d 155 (1983)..... 8

Citizens For Goleta Valley v. HT Santa Barbara,
117 Cal. App. 4th 1073 (2004) 4

Coalition for Reasonable Regulation of Naturally Occurring Substances v. Cal. Air Res. Bd.,
122 Cal. App. 4th 1249 (2004) 6

G.S. Rasmussen & Assoc., Inc. v. Kalitta Flying Serv., Inc.,
958 F.2d 896 (9th Cir. 1992)..... 8

Gould v. Maryland Sound Indus., Inc.,
31 Cal. App. 4th 1137 (1995) 2

Hayter Trucking, Inc. v. Shell Western E&P, Inc.,
18 Cal. App. 4th 1 (1993) 4

ICM Registry, LLC v. U.S. Department of Commerce and U.S. Dept. of State,
Civil No. 06-0949 (JR) (D.D.C. June 19, 2006) 5

Love v. Wolf,
226 Cal. App. 2d 378 (1964)..... 8

Lungren v. Community Redevelopment Agency,
56 Cal. App. 4th 868 (1997) 1

Mangini v. R.J.Reynolds Tobacco Co.,
7 Cal. 4th 1057 (1994) 6

Mendez v. Pacific Gas and Electric Co.,
115 Cal. App. 2d 192 (1953)..... 2

Miller v. Eisenhower Med. Ctr.,
27 Cal. 3d 614 (1980) 7

Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co., Inc.,
69 Cal. 2d 33 (1968) 4

Ross v. Creel Printing & Publ'g Co.
100 Cal. App. 4th 736 (2002) 6

VeriSign, Inc. v. Internet Corp. for Assigned Names and Numbers,
2004 U.S. Dist. LEXIS 17330, Case No. CV 04-1292 AHM (CTx)..... 7

Statutes

California Evidence Code section 452(c) 1, 5, 6, 7

TABLE OF AUTHORITIES
(continued)

Page

Other Authorities

4 <http://www.ntia.doc.gov/ntiahome/domainname/iana.htm> 3

5 <http://www.ntia.doc.gov/ntiahome/domainname/icann.htm> 3

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1 a redevelopment agency's agreement with an Indian tribe); *Mendez v. Pacific Gas and Electric*
2 *Co.*, 115 Cal. App. 2d 192, 195 (1953) (taking judicial notice of contract between an electric
3 company and the federal government). Plaintiff does not dispute that these agreements constitute
4 "official acts" of the government.¹

5 Moreover, the Court may consider both agreements not only for their existence but also
6 for their content. *Mendez*, 115 Cal. App. at 195 (in action against local power supplier, "[t]he
7 trial court was bound to notice judicially the provisions of the contract [between non-party federal
8 government and local power supplier] and in considering the complaint to read the pleading as if
9 the contract were set out in full therein. When so considered the complaint in effect pleaded that
10 the Federal Government constructed, owned and operated the complete and entire electric
11 distribution system") (internal citations omitted). Thus pursuant to *Mendez*, this Court may
12 judicially notice that the IANA Contract expressly states that ICANN does not have authority to
13 delegate or redelegate a ccTLD. (Eisner Decl., Ex. A at §§ C.2.2.1.2, C.4.1, C.4.2, C.4.3, Appx.
14 A; Ex. B at 7 n.7; Jaquez Decl., Ex. D §§ C2.1.1.2, C4.1 (the contract does not allow ICANN to
15 make changes to root zone files "that constitute delegation or re-delegation of top level
16 domains").) That authority remains with the DOC alone. (*Id.*)

17 **A. The DOC Contracts Are Valid and Complete.**

18 Plaintiff argues that the validity and completeness of the agreements are "unclear"
19 because: (1) the agreements have expired; and (2) there could be "other" relevant agreements
20 between ICANN and DOC that are not alleged. (RJN Opp. at 6:10-7:19.) Plaintiff is wrong.

21
22
23 ¹ Plaintiff's citation to *Gould v. Maryland Sound Indus., Inc.*, 31 Cal. App. 4th 1137,
24 1144-46 (1995), is inapposite. (Dem. Opp. at 5.) The court in *Gould* refused to take judicial
25 notice of the contract at issue because: (1) it was between private parties; (2) it was an implied
26 contract; and (3) language within the contract was disputed by the parties to the contract. *Id.* at
27 1145. None of these issues are present here, and the DOC recently confirmed in an unrelated
28 action the interpretation of the contract that ICANN asserts here. (Declaration of Samantha
Eisner ISO Supplemental Request for Judicial Notice ISO Demurrer ("Eisner Decl."), Ex. B at 7
n.7 ("ICANN submits its recommendations with respect to modifications to the authoritative root
zone file as one of its responsibilities under the Internet Assigned Numbers Authority (IANA)
functions contract with the DOC. The terms of the contract make it clear that *ICANN does not*
have the authority to authorize the changes.") (emphasis added).)

1 1. ICANN has Not Requested Judicial Notice of Inoperative Agreements.

2 When ICANN filed its Request for Judicial Notice, it attached the *then-operative* version
3 of the MOU and the IANA Contract. On September 29, 2006 – a month after ICANN’s filing –
4 the DOC and ICANN entered into a Joint Project Agreement (attached as Exhibit 4 to the
5 Declaration of Edward Johnson), which constitutes the most recent amendment to the MOU. The
6 parties then entered into a new IANA Contract on October 1, 2006. ICANN brought the
7 pendency of the new IANA Contract to the Court’s attention in ICANN’s Demurrer and noted
8 that the provisions relevant to this litigation were not materially different. (Dem. at 3 n.5.)²

9 2. All Agreements Between ICANN and the DOC are Alleged.

10 Plaintiff next argues that the MOU and the IANA Contract are “only part of the
11 contractual arrangements between ICANN and the DOC.” (RJN Opp. at 7:4-5.) But the MOU
12 (and its amendments) and the IANA Contract (and its amendments) are the *only* operative
13 agreements between ICANN and the DOC. Indeed, the DOC web site provides links to its
14 agreements with ICANN at <http://www.ntia.doc.gov/ntiahome/domainname/icann.htm> (ICANN)
15 and <http://www.ntia.doc.gov/ntiahome/domainname/iana.htm> (IANA functions).

16 Plaintiff’s only basis to claim that “other” agreements exist between ICANN and the DOC
17 is a reference in ICANN’s Objections and Responses to Plaintiff’s Requests for Production of
18 Documents, which reads: “Some of the information requested by Plaintiff *concerns* agreements
19 between the [DOC] for ICANN’s performance of the IANA function . . . Defendants object . . .
20 on the grounds . . . that it seeks proprietary or confidential information, disclosure of which is
21 prohibited *by those contractual relationships*” (Johnson Decl., Ex. 1 at 3:4-8 (emphasis added);
22 *see* RJN Opp. at 7:8-9.) ICANN’s statement, however, in no way indicates that there are
23 “additional agreements” between ICANN and the DOC. (RJN Opp. at 7:9-10.) Rather, ICANN’s
24 statement simply maintains that ICANN is obligated – *pursuant to the MOU and the IANA*
25 *Contract* – not to provide certain documents that are proprietary or confidential.

26
27 ² For the Court’s benefit, ICANN is filing a Supplemental Request for Judicial Notice
28 seeking judicial notice of the October 1, 2006 IANA contract – which, as in the previous IANA
Contract, explicitly states that the DOC alone has authority to redelegate a ccTLD. (Eisner Decl.,
Ex. A at §§ C.2.2.1.2, C.4.1, C.4.2, C.4.3, Appx. A.)

1 B. **The Government Contracts Are Clear That The DOC Alone Has Authority**
2 **To Redelegate A ccTLD.**

3 Plaintiff contends that the Court should forego judicial notice of the MOU and the IANA
4 Contract because plaintiff (a non-party to both agreements) does not agree with the plain meaning
5 of those agreements. (RJN Opp. at 7:20-9:13.) Plaintiff cites two cases in support of its position,
6 but neither addresses the issue of judicial notice, let alone the issue of judicially noticing a
7 government contract. *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co., Inc.*,
8 69 Cal. 2d 33, 39-40 (1968); *Hayter Trucking, Inc. v. Shell Western E&P, Inc.*, 18 Cal. App. 4th
9 1, 20 (1993). Indeed, plaintiff does not cite any case regarding the propriety of judicially noticing
10 a government contract – or any contract for that matter – where a *non-party* to the agreement
11 contends that the provisions are ambiguous.

12 ICANN and the DOC have been operating under various forms of the MOU and the
13 IANA Contract for over eight years, and ICANN offers them to the Court to explain ICANN’s
14 role in the redelegation process. Plaintiff’s obviously incorrect interpretation of the agreements
15 should not block judicial notice, especially when both ICANN and the DOC do not dispute the
16 relevant language in those agreements. Cal. Civ. Code § 1636 (“a contract must be so interpreted
17 as to give effect to the mutual intention *of the parties* as it existed at the time of contracting”)
18 (emphasis added); *Citizens For Goleta Valley v. HT Santa Barbara*, 117 Cal. App. 4th 1073,
19 1076 (2004) (“the purpose of the law of contracts is to protect the reasonable expectations *of the*
20 *parties* [to the contract]”) (emphasis added). (See Eisner Decl., Ex. B (DOC Reply) p. 7 n.7
21 (“ICANN submits its recommendations with respect to modifications to the authoritative root
22 zone file as one of its responsibilities under the Internet Assigned Numbers Authority (IANA)
23 functions contract with the DOC. The terms of the contract make it clear that *ICANN does not*
24 *have the authority to authorize the changes.*”) (emphasis added)).)

1 **C. Plaintiff's Extrinsic Evidence Regarding ICANN'S and DOC's Contractual**
2 **Relationships Does Not Address The ccTLD Redelelegation Process.**

3 Plaintiff attempts to bring in extraneous information to show that “ICANN – not the DOC
4 – has authority over the re-delegation process.” (RJN Opp. at 8:11-25.) However, these
5 documents do not support plaintiff’s conclusion.³ For example, plaintiff argues that the DOC’s
6 statement that “ICANN is more autonomous” under the new amendments to the MOU (which is
7 correct), but the amendments do not relieve ICANN from its *separate* contractual obligation
8 under the IANA Contract, which explicitly states that the DOC alone maintains authority to
9 redelegate a ccTLD. (See RJN Opp. at 8:16, citing Johnson Decl., Ex. 8 (ICANN Press Release,
10 Sept. 29, 2006); Jaquez Decl., Ex. D at §§ C.2.1.1.2, C.4.1, C.4.2, C.4.3; Eisner Decl., Ex. A at §§
11 C.2.2.1.2, C.4.1, C.4.2, C.4.3, Appx. A.)

12 As to plaintiff’s reliance on the June 10, 1998 Statement of Policy on Management of
13 Internet Names and Addresses, that 1998 policy is irrelevant to the issue before the Court
14 because: (1) that statement was made prior to the formation of the MOU; and (2) the statement
15 does not address ICANN’s role in the ccTLD redelegation process. (RJN Opp. at 8:16-22.)

16 Finally, plaintiff’s citation to the Answer and Affirmative Defenses of the DOC in *ICM*
17 *Registry, LLC v. U.S. Department of Commerce and U.S. Dept. of State*, ¶ 10 (D.D.C. June 19,
18 2006) is similarly misleading. Whether the DOC possesses “regulatory authority over ICANN” is
19 not the issue here. ICANN has never claimed that the DOC has “regulatory authority” over
20 ICANN. But ICANN does have *contractual* obligations to the DOC that require it to seek DOC
21 approval for any ccTLD redelegation. (Dem. at 3:17-5:7; Jaquez Decl., Ex. D at §§ C.2.1.1.2,
22 C.4.1, C.4.2, C.4.3; Eisner Decl., Ex. A at §§ C.2.2.1.2, C.4.1, C.4.2, C.4.3, Appx. A; Ex. B at
23 7n.7.)

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28 ³ Significantly, plaintiff has failed to seek judicial notice of these documents, or any other
document it inappropriately relies on in support of its opposition.

1 **II. JUDICIAL NOTICE OF ICANN'S REMAINING EXHIBITS IS PROPER UNDER**
2 **EVIDENCE CODE SECTION 452(H).**

3 Under Evidence Code section 452(h), judicial notice can be taken of facts and
4 propositions that: (1) are not reasonably subject to dispute; and (2) are capable of immediate and
5 accurate determination by resort to sources of reasonably indisputable accuracy. Each of the
6 documents that ICANN presents to this Court at Exhibits A (ICANN's Bylaws), E (ICP-1),
7 F (RFC 1591), G (NIC Website excerpts), H (Communiqué of the Governmental Advisory
8 Committee), and I (Letter from Drafting Committee) meet Section 452(h)'s dual-pronged test.

9 **A. Materials Found On Web Sites Are Proper Subjects of Judicial Notice.**

10 Materials found on web sites are appropriate subjects of judicial notice under Section
11 452(h). ICANN's Request cites several cases to support the assertion that courts routinely take
12 judicial notice of the existence and contents of web sites. (See RJN at 1:9-20.) Plaintiff fails to
13 address a single authority cited by ICANN in opposition.⁴ The fact that each of the requested
14 documents is located on a web site satisfies the second prong of Section 452(h) (i.e., that
15 documents on web sites are "capable of immediate and accurate determination by resort to
16 sources of reasonably indisputable accuracy"). Anyone can visit a web site and immediately
17 determine that such documents are, in fact, in existence and discuss the matters alleged.

18 **B. ICANN's Bylaws Are Not Reasonably Subject To Dispute.**

19 Plaintiff presents no argument against judicially-noticing ICANN's Bylaws other than
20 claiming that the Bylaws "are simply irrelevant." (RJN Opp. at 4, n.4.) But ICANN's role in
21 coordinating the Domain Name System is the very reason plaintiff seeks its requested relief from
22 ICANN.⁵ Moreover, plaintiff's complaint relies on a Government Advisory Committee ("GAC")

23 ⁴ Plaintiff's cases are inapposite and do not preclude taking judicial notice here. (Dem.
24 Opp. at 4:22-23.) *Coalition for Reasonable Regulation of Naturally Occurring Substances v. Cal.*
25 *Air Res. Bd.*, 122 Cal. App. 4th 1249, 1255 n.5 (2004) (refusing to take judicial notice of
26 *documents* on a web site because plaintiff failed to issue a challenge that would make the
requested documents relevant to the case); *Ross v. Creel Printing & Publ'g Co.* 100 Cal. App. 4th
736, 744 (2002) (rejecting plaintiff's attempt to "refer" the court to web sites without any formal
request for judicial notice).

27 ⁵ Plaintiff relies on *Mangini v. R.J.Reynolds Tobacco Co.*, 7 Cal. 4th 1057, 1063 (1994)
28 for this "relevance" argument. There, the court refused to take judicial notice of a report on
health issues that was wholly irrelevant to the federal preemption issues before the court. But
here, all of ICANN's requested documents are directly relevant to this case.

1 document, yet the Bylaws demonstrate that the GAC is only an ICANN *advisory committee*
2 whose viewpoints represent nothing more than *recommendations* to ICANN. (Jaquez Decl., Ex.
3 A at Art. XI, § 2(1)(a); Compl., Ex. 12 at ¶ 2; Eisner Decl., Ex. B at 2.)

4 ICANN's Bylaws easily meet the requirements for judicial notice under section 452(h)
5 and have in fact been judicially noticed in the past. *See VeriSign, Inc. v. Internet Corp. for*
6 *Assigned Names and Numbers*, 2004 U.S. Dist. LEXIS 17330 at * 4 n.2, Case No. CV 04-1292
7 AHM (CTx) (C.D. Cal. Aug. 26, 2004) (taking judicial notice of ICANN's Bylaws from
8 ICANN's web site). Moreover, bylaws have also been judicially noticed by the California
9 Supreme Court under section 452(h). *See Miller v. Eisenhower Med. Ctr.*, 27 Cal. 3d 614, 628
10 (1980) (taking judicial notice of model bylaws substantially identical to the bylaws at issue in the
11 action).

12 C. **Documents Governing The ccTLD Redelegation Process Are Not Reasonably**
13 **Subject To Dispute.**

14 Through judicial notice of ICP-1 (Exhibit E) and RFC 1591 (Exhibit F), ICANN places
15 before this Court the actual documents that govern the ccTLD redelegation process. Additional
16 documents on the IANA web site demonstrate that the ICP-1 procedures were followed in
17 evaluating *every* ccTLD Redelegation Request.⁶ Plaintiff's lack of familiarity with the
18 redelegation process does not support plaintiff's argument that the documents should not be the
19 subject of judicial notice. (RJN Opp. at 4:14-16.)

20 This suit is not about whether ICANN has misled the public in the redelegation process.
21 Rather, the Complaint is directed at ICANN's ability to transfer the .cg ccTLD. ICP-1 and
22 RFC 1591 demonstrate that ICANN must consider multiple interests and factors (beyond the
23 foreign government's wishes) in recommending to the DOC whether a ccTLD should be
24 redelegated. (Jaquez Decl., Ex. E at (a), (c)-(e); Ex. F at § 3.) Moreover, both documents support

25 _____
26 ⁶ The IANA Reports page contains links to the Redelegation Reports for every ccTLD
27 redelegation request since February 2001. (Eisner Decl., Ex. C (IANA Reports About ccTLDs).)
28 Significantly, the documents at each of those links state that ICP-1 procedures are followed. For
ease of reference, ICANN offers the three most recent Redelegation Reports for the purpose of
demonstrating that each purports to adhere to ICP-1. (Eisner Decl., Ex. D (IANA Reports on the
.gd, .ma, and .cx ccTLD Redelegation).)

1 the finding that ccTLDs are not property. (Jaquez Decl., Ex. E at (b); Ex. F at § 3.2.) There is no
2 basis for this lawsuit to proceed given these facts, which is why plaintiff so strenuously opposes
3 judicial notice. And plaintiff's suggestion that the ICP-1 – a document created in 1999 – is
4 merely “self-serving hearsay” to assist in this litigation is completely inappropriate.⁷ Further,
5 RFC 1591 is a set of standards promulgated by the *Internet community as a whole* – not ICANN
6 – and thus it similarly cannot be considered “self-serving hearsay.”

7 **D. The Purpose For Judicial Notice Of The GAC Statements Is Not Reasonably**
8 **Subject To Dispute.**

9 ICANN requests judicial notice of two statements by foreign governments. (Jaquez Decl.,
10 Ex. H (GAC Communiqué) and I (Letter from Drafting Committee).)⁸ ICANN's purpose for
11 requesting judicial notice of the GAC Communiqué is to demonstrate that the foreign government
12 signatories to the Communiqué have manifested agreement that no property rights inhere in a
13 ccTLD – not for the purpose of claiming that ccTLDs are, in fact, not property. (Dem. at 9:16-
14 10:25.) The Communiqué is relevant to this action to show that ICANN *and* foreign
15 governments have made statements that ccTLDs are not property. Similarly, the Letter from the
16 Drafting Committee is put before this Court to show that foreign governments have issued
17 support for ICP-1 and the position that neither property rights nor ownership are proper topics of
18 concern in relation to a ccTLD. (*Id.*)⁹

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22 ⁷ Plaintiff's cases involve particular types of documents that are prone to hearsay
23 statements or not otherwise the proper subject of judicial notice. *See, e.g., Childs v. State of*
24 *California*, 144 Cal. App. 3d 155, 162-63 (1983) (refusing to take judicial notice of declaration
lacking statement of personal knowledge); *Love v. Wolf*, 226 Cal. App. 2d 378, 403 (1964)
(refusing to take judicial notice of “self-serving” testimony at investigation hearing).

25 ⁸ ICANN also seeks judicial notice of the existence of NIC's web site (Jaquez Decl., Ex.
26 G) and its contents, namely that the web site states that domain names are free to Congo residents.
ICANN does not request that this Court judicially notice that the domain names are in fact free.

27 ⁹ Plaintiff cites *G.S. Rasmussen & Assoc., Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896
28 (9th Cir. 1992). (RJN Opp. at 5:20-24.) But that decision has nothing to do with judicial notice
(or an attempt to judicially notice property status); instead, the case surveys the law to determine
whether a government-issued certificate is property subject to claims of conversion. *Id.* at 902.

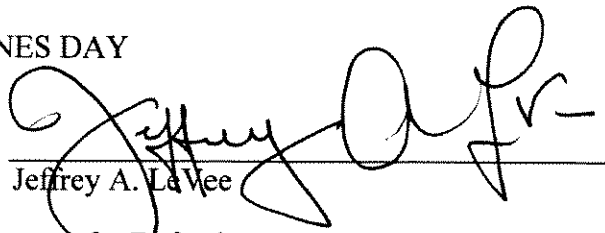
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CONCLUSION

ICANN respectfully requests this Court to take judicial notice of Exhibits A-I of ICANN's Request.

Dated: October 27, 2006

JONES DAY

By: 

Jeffrey A. LaVee

Attorneys for Defendant
INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS and erroneously-named
defendant INTERNET ASSIGNED NUMBERS
AUTHORITY

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PROOF OF SERVICE

I, Grace M. Salter, declare:

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 October 27, 2006, I caused to be served a copy of the within document(s):

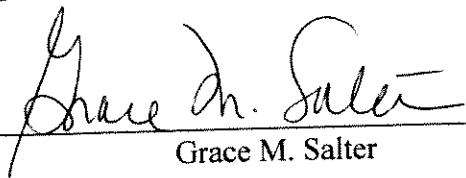
**REPLY IN SUPPORT OF REQUEST FOR JUDICIATION NOTICE BY
DEFENDANT INTERNET CORPORATION FOR ASSIGNED NAMES AND
NUMBERS AND ERRONEOUSLY-NAMED DEFENDANT INTERNET
ASSIGNED NUMBERS AUTHORITY**

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth in the attached Service List.
- by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express agent for delivery.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on October 27, 2006, at Los Angeles, California.



Grace M. Salter

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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

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The Congolese Redemption Fund Via U.S. Mail
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