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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

WEST DISTRICT

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

The Hon. John L. Segal

PLAINTIFF'S OPPOSITION TO DEMURRER OF DEFENDANTS INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS AND INTERNET ASSIGNED NUMBERS AUTHORITY

Hearing: November 3, 2006
Time 8:30 a.m.
Dept.: M

Action Filed: June 28, 2006

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MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff C. Itoh Middle East E.C. (Bahrain), through the real party in interest National Union Fire Insurance Company of Pittsburgh, Pa. ("NUFI"), respectfully submits this Memorandum of Points and Authorities in Opposition to the Demurrer of Defendants Internet Corporation for Assigned Names and Numbers ("ICANN") and the Internet Assigned Numbers Authority ("IANA").

BACKGROUND

NUFI has an uncontested judgment against the Republic of the Congo ("Congo") for more than $23 million. (Compl. ¶ 2). The Congo does not dispute this debt, and has contractually waived all foreign sovereign immunity defenses to enforcement of it. (Compl. ¶¶ 1, 9). Nevertheless, it has done everything it can to avoid payment, even while siphoning off the country's wealth to corrupt government officials. (Compl. ¶¶ 4, 24-38).

The Congo is "an oil-rich nation with more than sufficient assets to pay its debts but one of the world's most notorious debtors."[1] To avoid creditors' collection efforts, it acts "without regard for business propriety or honesty," and has been found by courts to "put[] forward dishonest oral evidence," "rel[y] on documents which did not evidence the true situation and were backdated," create sham corporations with no "sensible purpose" other than to hide assets, flagrantly disobey discovery orders, and participate in fraudulent conveyances. (Compl. ¶¶ 36-37, citing cases). Obtaining the Congo's right to commercially exploit its Internet country domain, .cg, may well be NUFI's only way to recover all or any portion of the debt owed to it.

On April 25, 2005, NUFI obtained writs of garnishment on the Congo's country-code domain name ("country domain"), .cg, directed to both ICANN and IANA. The Los Angeles County Sheriff delivered these writs on May 25, 2005. On June 3, 2005, ICANN and IANA (hereafter, collectively "ICANN") each responded with an identical Memorandum of Garnishee, denying that .cg constituted property.[2] NUFI then commenced this creditor's suit

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[1] Compl. ¶ 3. quoting *Kensington Int'l Ltd.* v. *Republic of Congo*, No. 03-4578, 2005 U.S. Dist. LEXIS 4331 (S.D.N.Y. March 21, 2005).

[2] Even though IANA submitted its own Memorandum of Garnishee, ICANN now claims that IANA is not an entity. This is consistent with the Complaint's allegation that IANA no longer has a separate corporate existence. (Compl. ¶ 14).

against ICANN and the Congo, and served discovery requests on ICANN. ICANN responded solely with objections and refused to provide *any* documents or substantive information. A copy of its objections ("Discovery Objections") is attached as Exhibit 1 to the Declaration of Edward E. Johnson, dated October 10, 2006 and submitted herewith in opposition to the demurrer and to Defendants' Request for Judicial Notice ("Johnson Decl.").

Despite being duly served with the Complaint, and the Congo's outside counsel's knowledge of the litigation, the Congo has chosen to default. (*See* Johnson Decl. Ex. 2, 3).

SUMMARY OF ARGUMENT

The Complaint alleges that: 1) country domains, like other domain names, are valuable property which can be and have been leased or sold for millions of dollars, or used to lease countless subdomains for substantial fees; 2) the Congo owns a country domain, .cg; 3) .cg is used by the Congo for commercial activity in the United States, including the marketing and leasing to U.S. residents for profit of domain names utilizing the .cg name as a suffix; 4) .cg is located in the United States; and 5) ICANN is .cg's custodian with the ability to transfer the Congo's rights to .cg to NUFI. These allegations, if proven, more than suffice to award NUFI the relief it seeks. ICANN's efforts to introduce extrinsic evidence to contradict the allegations of the Complaint, and its assertion of baseless Foreign Sovereign Immunities Act ("FSIA") arguments it has no standing to assert, should be rejected.[3]

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[3] ICANN's brief suggests the Internet world as we know it will come to an end unless its demurrer is granted. This is ridiculous. The Internet will continue to run, and the use by Congolese citizens of the Internet will be unaffected, as transfer to NUFI of the country's rights to .cg has nothing to do with the ability of the Congo's residents to access the Internet. And if the Congo permits its citizens to have a free domain name using .cg as a suffix, NUFI will do so as well.

As the Complaint discusses, foreign countries often voluntarily lease their domain names to private parties for profit, or lease countless subdomains for substantial fees. There is no reason why a judgment creditor against a foreign country should not be able to garnish that country's ability to do so. Nor is there any statutory or public policy reason why corrupt foreign governments that refuse to pay their debts should not have U.S. property – Internet-related or not – garnished to satisfy judgments of U.S. residents. If foreign countries wish to avoid such garnishment, they can stop using their country code domain name for commercial activity in the U.S. and appear in creditor's suit litigation to assert their affirmative FSIA defense that the absence of such activity renders the property immune from attachment. *See* Section II, *infra*.

ARGUMENT

I. NUFI'S COMPLAINT STATES A CLAIM

A. Legal Standard

It is well-settled that "[i]t is not the ordinary function of a demurrer to test the truth of the plaintiff's allegations." *Comm. on Children's Television, Inc.* v. *General Foods Corp.*, 35 Cal. 3d 197, 213 (1983). On a demurrer, the Court accepts "all facts pleaded in the complaint [as] true." *Songer* v. *Cooney*, 214 Cal. App. 3d 387, 390 (1989). A court must overrule a demurrer if the pleading states a possible right of recovery under any set of facts that could be proved. *See Jackson* v. *Superior Court*, 30 Cal. App. 4th 936, 942 (1994). And the complaint's allegations "must be liberally construed, with a view to substantial justice between the parties." CAL. CIV. PROC. CODE § 452; *Landeros* v. *Flood*, 17 Cal. 3d 399, 413 (1976).

B. ICANN May Not Use Extrinsic Evidence to Contradict NUFI's Complaint

ICANN's demurrer does not contend that the Complaint's allegations are legally insufficient. Instead, ICANN asks the Court to ignore fundamental demurrer law by considering a stack of documents consisting of extrinsic hearsay; accepting ICANN's interpretation of these extrinsic documents as undisputable truth regardless of what the Complaint alleges; and then dismissing NUFI's Complaint without providing NUFI an opportunity to establish its contentions through discovery. This the Court cannot do. As a leading treatise explains:

> Because the demurrer tests the pleading alone, and not the evidence or other extrinsic matters, it lies only where the defects appear on the face of the pleading. * * * The defendant cannot make allegations of fact in the demurrer which, if true, would disclose a defect in the complaint. * * * The defendant cannot strengthen the demurrer by *bringing in evidentiary material* that discloses a defect in the complaint. As the court said in *Colm v. Francis* (1916) 30 C.A. 742, 752, 159 P. 237: "[I]t is wholly beyond the scope of the inquiry to ascertain whether the facts stated are true or untrue. That is always the ultimate question to be determined by the evidence upon a trial of the questions of fact. Obviously, the complaint, when appropriately challenged, whether for want of sufficient facts or for an insufficient or inartificial statement of the facts, must stand or fall by its own force. Nothing *dehors* the pleading itself can be considered to determine whether it is obnoxious to objections made against it as a pleading."

5 Witkin, Cal. Proc. 4th, Pleading § 900 at 358-59 (1997) (emphasis original).[4]

[4] *See also Garton* v. *Title Ins. & Trust Co.*, 106 Cal.App.3d 365, 376 (1980); *Hayward* v. *Henderson*, 88 Cal.App.3d 64, 71 (1979); *Tyree* v. *Epstein,* 99 Cal.App.2d 361, 362-365 (1950).

ICANN seeks to avoid rejection of its demurrer by claiming the extrinsic hearsay it has submitted must be judicially noticed as true. That is plainly not the case. In fact:

> [S]ince a demurrer is not the appropriate procedure for determining the truth of disputed facts, judicial notice of matters upon demurrer will be dispositive only. . . where there is not or cannot be a factual dispute concerning that which is sought to be judicially noticed. The hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable.

Knickerbocker, 31 Cal. Jur. 3d Evidence § 74 (2006) (footnotes omitted).[5]

The documents ICANN requests judicial notice for do not contain statements "there is not or cannot be a factual dispute" about, since the accuracy, completeness, and proper interpretation of these documents are very much in dispute. The documents fall into two categories: (1) hearsay statements on, or in documents posted on, ICANN's own and other websites, and (2) selected alleged agreements between ICANN and the Department of Commerce ("DOC"). We address each of these categories below.[6]

1. Information from Websites

There is no basis for judicially noticing information found on an Internet website as truthful, much less indisputably so. Even a court's factual findings are not considered indisputable for purposes of taking judicial notice. *See Sosinsky* v. *Grant*, 6 Cal. App. 4th 1548, 1568 (1992) ("Taking judicial notice of the truth of a judge's factual finding would appear to us to be tantamount to taking judicial notice that the judge's factual finding must necessarily have been correct and that the judge is therefore infallible. We resist the temptation to do so."). A website's mere posting of documents or statements does not give the materials greater weight than court findings, much less transform hearsay into undisputable fact. Indeed, courts regularly refuse to judicially notice even a website's *existence*.[7]

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[5] *See also Gould* v. *Maryland Sound Indus., Inc.*, 31 Cal. App. 4th 1137, 1146 (1995) (rejecting judicial notice of written contract, since plaintiff contended that contract was not effective); *Cruz* v. *County of Los Angeles*, 173 Cal. App. 3d 1131, 1134 (1985); *Joslin* v. *H.A.S. Ins. Brokerage*, 184 Cal. App. 3d 369, 374-375 (1986).

[6] A more detailed discussion of the reasons why judicial notice is inappropriate is contained in Plaintiff's Opposition to Defendants' Request for Judicial Notice.

[7] *See, e.g.*, *Coalition for Reasonable Regulation of Naturally Occurring Substances* v. *Cal. Air Resources Bd.*, 122 Cal. App. 4th 1249, 1255 n.5 (2004) (refusing to take judicial notice of documents on website); *Ross* v. *Creel Printing & Publ'g Co.*, 100 Cal. App. 4th

2. Agreements or Understandings with DOC

Similarly, statements from alleged ICANN agreements with the DOC cannot be used to contradict the Complaint's allegations. *See Gould* v. *Maryland Sound Indus., Inc.*, 31 Cal. App. 4th 1137, 1144-46 (1995) (refusing to take judicial notice of contract).

Even if the mere existence of these purported contracts could be judicially noticed, there would be no basis for judicial notice of the accuracy and completeness of the statements therein, much less ICANN's interpretation of them.

The Complaint alleges that ICANN has the power to transfer the Congo's rights in .cg, and mentions nothing about the DOC. (Compl. ¶¶ 49, 51). ICANN seeks to contradict the Complaint by contending the purported DOC agreements show that ICANN's actions are subject to DOC approval. The validity, meaning, accuracy, and completeness of these documents, however, are plainly disputable.

First, some of the alleged agreements have expired. These include an IANA Contract that apparently expired on March 31, 2006 ("Expired IANA Contract") and a since-abrogated version of ICANN's Memorandum of Understanding ("MOU") with the DOC. (*See* Declaration of Sean Jaquez ("Jaquez Decl."), Ex. D. at § B.2) (permitting extension of the agreement through March 31, 2006); ICANN Br. at 3 n.5 (acknowledging a different agreement as effective as of October 1, 2006); *Joint Project Agreement Between The U.S. Department Of Commerce And The Internet Corporation For Assigned Names And Numbers*, September 29, 2006 (replacing MOU Section V.B. with a new and very different section) (attached as Exhibit 4 to the Johnson Decl.). The current validity of expired contracts is, at a minimum, disputable.

Second, the documents do not say what ICANN claims they do. The MOU, for example, says only, in Section V.B.8, that the DOC will maintain technical oversight of the domain name system. Technical oversight does not mean ICANN cannot make any substantive decisions or effectuate garnishments without DOC approval. And, in any event, the new Joint

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736, 744 (2002) (websites with information regarding bad check programs are "not a proper subject of either mandatory or permissive judicial notice").

Project Agreement abrogates this section and apparently limits the DOC to an advisory role. (*See* Johnson Decl. Ex. 4 at 1). Similarly, the Expired IANA contract states only that it, "*in itself*, does not authorize modifications, additions or deletions to the root zone file or associated information." (Jaquez Decl. Ex. D at § C.4.1 (emphasis supplied)). Such authorization could come from another agreement, understanding, or course of conduct.

In that regard, as noted above, ICANN has refused to provide *any* substantive information or documents in response to NUFI's discovery requests. The Complaint alleges, as examples of ICANN's control over country domain transfers, various instances in which ICANN has made such transfers. (Compl. ¶ 49). ICANN refuses to provide discovery on how these transfers were made, even though such discovery is obviously relevant to ICANN's position that it cannot effect such transfers because the DOC controls them. Moreover, while ICANN asks this Court to accept its word that the purported agreements with the DOC it has submitted are indisputably truthful and complete, it acknowledges in its Discovery Objections the existence of additional agreements with the DOC. It refuses to produce them, however, on the basis of a so-called "Government Objection," claiming that these "agreements between ICANN and the United States Department of Commerce for ICANN's performance of the IANA function" constitute "proprietary or confidential information." (Johnson Decl. Ex. 1 at 3). As a result, neither NUFI nor the Court knows whether additional agreements or understandings with the DOC exist that supersede, supplement, clarify, or modify the ones ICANN has deigned to provide with its demurrer. Such agreements could make clear that ICANN has the very power NUFI alleges, or that the DOC has agreed in advance to consent to the exercise of such power. Indeed, as Plaintiff's Opposition to Defendants' Request for Judicial Notice discusses, numerous public statements made by ICANN and the DOC support NUFI's allegations and are inconsistent with ICANN's interpretation of the documents it has submitted.

In fact, ICANN's claim that the DOC must approve re-delegations also contradicts statements in ICANN's own demurrer. These include ICANN's concessions that it "designates to qualified applicants the operation of domain name registries" (ICANN Br. at 2)

and has performed "the IANA function" since 2000, which includes "the right to revoke and to redelegate a Top Level Domain to another manager." (ICANN Br. at 3; Jaquez Decl. Ex. E at 2).

C. The Complaint States a Claim Under CAL. CIV. PROC. CODE § 708.210

1. The Complaint Adequately Alleges Each Element Of NUFI's Claim

Accepting NUFI's allegations as true, as the Court must, there is no question that the Complaint states a claim. To state a claim under CAL. CIV. PROC. CODE § 708.210, a plaintiff must allege only that the garnishee possesses or controls property owned by the judgment debtor. NUFI does so. The Complaint alleges that domains are owned, and that country domains, and the attendant right to lease and profit from them, are owned by the countries to which they correspond. (Compl. ¶¶ 6, 7, 17, 44, 46, 47, 50, 51). The Complaint specifically alleges that the Congo owns .cg. (Compl. ¶¶ 5, 7, 16, 17, 50, 57). The Complaint further alleges that ICANN possesses and controls .cg., and that the Congo's rights in .cg can "readily be turned over by ICANN to Plaintiff." (Compl. ¶ 7). Moreover, the Complaint provides specific, recent examples of ICANN turning over the country domains of Iraq and Afghanistan to their new governments. (Compl. ¶¶ 7, 39-49). These allegations state a claim.

2. The Complaint Alleges That Country Domains Are Property

ICANN argues that domain names are not property.[8] California law, however, plainly recognizes domain names as property. The California Civil Code defines property as anything that can be owned, and "ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others." CAL. CIV. CODE § 654. Indeed, the definition of "property" is "all-embracing so as to include every intangible benefit or prerogative susceptible of possession or disposition." *Downing* v. *Mun. Court*, 88 Cal. App. 2d 345, 350 (1948) (quotation omitted). It includes "any valuable right or interest protected by law." *Id.* (internal citation omitted).

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[8] ICANN frames this as an FSIA argument, presumably to avoid the application of California law. But the FSIA merely provides for limited affirmative immunity defenses (none of which are applicable here) to a creditor's state law rights. *See* 28 U.S.C. § 1606 (unless a foreign state has sovereign immunity, it "shall be liable in the same manner and to the same extent as a private individual under like circumstances"). Thus, whether a country domain is property depends on California law.

Applying California law, the Ninth Circuit Court of Appeals recognized that:

> Domain names satisfy each criterion [of property]. Like a share of corporate stock or a plot of land, a domain name is a well-defined interest. Someone who registers a domain name decides where on the Internet those who invoke that particular name -- whether by typing it into their web browsers, by following a hyperlink, or by other means -- are sent. Ownership is exclusive in that the registrant alone makes that decision. Moreover, like other forms of property, domain names are valued, bought and sold, often for millions of dollars. . . . Finally, registrants have a legitimate claim to exclusivity. Registering a domain name is like staking a claim to a plot of land at the title office. It informs others that the domain name is the registrant's and no one else's.

Kremen v. *Cohen*, 337 F.3d 1024, 1030 (9th Cir. 2003).

Accordingly, *Kremen* concluded that a domain name holder possesses an "intangible property right" in the domain. *Id.*

ICANN tries to evade *Kremen*'s holding by claiming — in a footnote — that country domains are factually different from other domain names in ways that purportedly make them not property. (ICANN Br. at 7 n.8). But the Complaint makes no such distinction – it alleges that "[d]omain names, including country domain names, are valuable property." (Compl. ¶ 46). If ICANN wishes to contest that country domains are valuable property because of purported factual distinctions between them and other domain names, it must do so after discovery in the context of a full evidentiary record, not on demurrer.[9]

[9] ICANN attempts to distinguish country domains from other domains by claiming that they cannot be trademarks or service marks. There is no reason why they couldn't be, but, in any event, property is more than trademarks or service marks. ICANN's control of country domains ensures that each name has only one owner at any time, so trademark protection is unnecessary, and the purported lack of same does not prevent the owner from exercising basic common-law property rights such as leasing or selling rights to its domain for substantial profit. ICANN also argues that the Anti-cybersquatting Consumer Protection Act ("ACPA"), 15 U.S.C. § 1125(d), does not protect country domains. But the ACPA does not discuss, much less preclude, garnishing domain names to satisfy judgments. It merely prohibits "cybersquatting," a non-trademark owner's registration of a trademark as a domain name, and then "either ransoming the domain name back to the trademark holder or [] using the domain name to divert business from the trademark holder." *Bosley Med. Inst., Inc.* v. *Kremer*, 403 F.3d 672, 680 (9th Cir. 2005).

3. There Is No Exception in California's Judgment Enforcement Statutes For Domain Names

ICANN claims that there is a special exception hidden in California's judgment enforcement statutes for domain names. (ICANN Br. at 14).[10] Under California law, however, "all property" of the judgment debtor is subject to enforcement of a money judgment, "[e]xcept as otherwise provided by law." CAL. CIV. PROC. CODE § 695.010(a). The exceptions "provided by law" consist of several "narrowly circumscribed types of property" identified ***by statute*** as not subject to enforcement. *In re Petruzzelli*, 139 B.R. 241, 243-44 (Bankr. E.D. Cal. 1992); *see* CAL. CIV. PROC. CODE §§ 695.030, 695.035, 695.050, 695.060 (specifying exclusions). Thus, a party claiming that property is not subject to enforcement must point to an applicable statutory exclusion. *See Rojas* v. *Superior Court*, 33 Cal. 4th 407, 424 (2004) ("[I]f exemptions are specified in a statute, we may not imply additional exemptions unless there is a clear legislative intent to the contrary."); *Partch* v. *Adams*, 55 Cal. App. 2d 1, 7 (1942) ("The obvious purpose of the attachment and execution sections is to make all property, except that excepted, subject to attachment and execution . . . .").

ICANN points to no such exception.[11] Although ICANN argues that domain names are not subject to garnishment, it cites only *Virginia* law for support. (ICANN Br. at 14, citing *Network Solutions, Inc.* v. *Umbro Int'l, Inc.*, 259 Va. 759 (Va. 2000)). *Umbro*, however, did not deal with California garnishment exemptions; it merely found that, under Virginia law, a domain name is not property. *Id.* *Umbro* expressly recognized that other jurisdictions define property more broadly (*see id.* at 771-72), and California law, as discussed by the Ninth Circuit in *Kremen,* does so. Thus, ICANN cannot use Virginia law as a basis to imply an "additional exemption[]" to California's broad statutory scheme. *See Rojas*, 33 Cal. 4th at 424.

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[10] ICANN was required, under CAL. CIV. PROC. CODE § 703.520(a), to state in its Memorandum of Garnishee whether it was contending that .cg was exempt from garnishment. It made no such contention. Instead, ICANN merely responded that .cg was not property at all. Accordingly, if.cg. is property, any argument that such property is exempt from garnishment has been waived.

[11] In a footnote, ICANN refers to CAL. CIV. PROC. CODE § 695.050. (ICANN Br. at 15 n.15). As ICANN recognizes, however, that section does not apply, because a country domain is not a government-issued license. *(Id.)* Moreover, ICANN is a private company, not a government entity.

4. The Complaint Alleges That The Congo Owns .cg

ICANN contends that the Congo does not own .cg. (ICANN Br. at 1, 4-5, 9-10), disputing that the Congo "can order ICANN or the DOC to take any actions" with respect to .cg. (ICANN Br. at 4). ICANN claims that it considers numerous factors in deciding whom to designate a country domain to, and that the "wishes of the government" are just "one of those factors." (ICANN Br. at 4). In so doing, ICANN ignores that the Complaint clearly alleges that the Congo owns .cg, the Congo appointed .cg's current managers, and ICANN complies with foreign states' instructions to change country domain managers. (Compl. ¶¶ 5, 7, 16, 17, 50, 51-55, 57). It also ignores that one of ICANN's *own* cited extrinsic documents recognizes a foreign state's right to "designate the Registry for the ccTLD concerned." (ICANN Br. at 9, n. 10) (referencing a document entitled "Principles And Guidelines For The Delegation And Administration of Country Code Top Level Domains," attached as Ex. 7 to the Johnson Decl.)

5. The Complaint Alleges That Country Domains Are Transferable

ICANN also argues that country domains are not transferable. That argument is similarly unavailing, as it ignores contrary allegations in the Complaint. Specifically, the Complaint alleges that they are transferable, and notes that "the country of Tuvalu has leased the right to its '.tv' domain name for more than $50 million dollars" and "the country of Laos has sold the rights to its '.la' name for a similarly large sum." (Compl. ¶ 46).[12]

D. Even If The DOC Approves Re-Delegations, The Complaint States A Claim

As noted above, NUFI disputes ICANN's contention that ICANN cannot transfer the rights to .cg without DOC approval. Even if ICANN is correct, however, this would not mean that NUFI's Complaint should be dismissed. Many types of property can be transferred only upon the approval of a government body or other entity. Such property, however, remains assignable and garnishable. Examples of such property include liquor licenses, second-level domain names, and a lessee's interest in real property. *See Golden* v. *State*, 133 Cal. App. 2d

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[12] ICANN has refused to provide any discovery concerning these or the many other transfers of country domains which have taken place.

640, 643-45 (1955) (recognizing liquor licenses as "within reach of [a debtor's] creditors" despite the need for the government to approve the transfer); *In re Barnes*, 276 F.3d 927, 928 (7th Cir. 2002) ("True, a liquor license may not be transferred without the approval of the state's Alcoholic Beverage Commission and can be revoked upon proof of misconduct. But these are not unusual conditions on property; the sale of many goods require government approval"); *Tenen* v. *Winter*, 94-cv-7934-CJS, Doc. No. 295 (W.D.N.Y. April 12, 2002) (enforcing judgment by ordering defendant Dan Winter to turn over "all rights and possessory interests" in danwinter.com, and directing Network Solutions, Inc. to "take all steps necessary to assist" in the transfer of danwinter.com to plaintiffs); *Zurakov* v. *Register.com, Inc.*, 304 A.D.2d 176, 179-80 (N.Y. App. Div. 2003) (rejecting argument that registrant of domain name could not have exclusive right to control it because contract for registration stated that the registrar could "suspend, cancel, transfer or modify [the registrant's] use of the Services at any time, for any reason, in [the registrar's] sole discretion"); CAL. CIV. PROC. CODE § 695.035(a)(3) (lessee's interest in real property may be applied to satisfaction of a money judgment even if the lessee's right to assign the interest is subject to the lessor's consent).

II. THE FSIA DOES NOT PREVENT GARNISHMENT OF .CG

A. ICANN Cannot Assert The Congo's Affirmative Defenses Under the FSIA

ICANN argues that this Court lacks the ability to provide NUFI relief because of foreign sovereign immunity. But ICANN is not a foreign sovereign and has no standing to assert the Congo's affirmative immunity defense. *See, e.g., Republic of the Philippines* v. *Marcos*, 806 F.2d 344, 360 (2d Cir. 1986); *Rubin* v. *Islamic Republic of Iran*, 436 F. Supp. 2d 938, 943 (N.D. Ill. 2006); *Nat'l Union Fire Ins. Co.* v. *People's Republic of Congo*, No. 91 C 3172, Doc. No. 84, at 8, 10 (N.D. Ill. December 5, 1991) (Weisberg, M.J.) ("*NUFI*").[13]

[13] In *Walker* v. *Republic of Congo*, 395 F.3d 229, 233 (5th Cir. 2004), the Fifth Circuit permitted a third-party to invoke a foreign state's sovereign immunity rights. *Walker* is not binding on this Court and was wrongly decided. It cited no authority for its view, and it is clear that relevant precedents were not brought to its attention. *See id.* at 233 (noting court was "unable to find any authority for the proposition that it is the sovereign's exclusive right to raise the issue of sovereign immunity under the FSIA"). In fact, there is substantial authority for that proposition, as demonstrated by the cases cited herein. Moreover, as one court has noted, *Walker*'s reasoning actually offends the dignity of foreign states. It could be that the Congo has not appeared or asserted its rights here

To assert a third-party's interest under federal law, the Supreme Court requires entities to: 1) suffer an "injury in fact"; 2) have a "close relation" to the third party; and 3) show "some hindrance to the third party's ability to protect his or her own interests." *Powers* v. *Ohio*, 499 U.S. 400, 410-11 (1991) (internal citations omitted). ICANN meets none of these prongs. First, it will suffer no injury in fact because ICANN "does not hold any property right" in .cg. (ICANN Br. at 1). Second, it has no close relationship with the Congo. *See Rubin*, 436 F. Supp. 2d at 944 (no close relationship between Iran and garnishee in possession of Iran's property). And third, nothing prevents the Congo from appearing to protect its own rights, as it has done in numerous other cases around the world. (Compl. ¶¶ 35-37).

Contrary to ICANN's contentions, FSIA immunity from attachment or execution is not jurisdictional, but is merely an affirmative defense that a foreign state must promptly plead or waive. *Caribbean Trading and Fidelity Corp.* v. *Nigerian Nat'l Petroleum Corp.*, 948 F.2d 111, 115 (2d Cir. 1991); *see also Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran* v. *Cubic Def. Sys.*, 385 F.3d 1206, 1218 (9th Cir. 2004) (distinguishing between foreign sovereign immunity from suit, which is jurisdictional, and foreign sovereign immunity from attachment, which is not), *vac'd on other grounds* 126 S. Ct. 1193 (2006). As the Northern District of Illinois explained when refusing to permit another garnishee (Amoco) to raise the Congo's alleged sovereign immunity from attachment with respect to a different debt:

> [T]he immunity rules in §§ 1609 and 1610 for execution upon foreign state property are not rules of subject matter jurisdiction. Immunity under § 1609 may be waived. It has been waived by The Congo.
>
> First, the statute shows that when Congress meant jurisdiction it said so. Sections 1604 and 1605 provide for immunity from jurisdiction. The word jurisdiction does not appear in § 1609 or § 1610. If Congress viewed the immunity rules for foreign state property as jurisdictional, why didn't it say so?
>
> Without some basis for viewing § 1609 immunity as jurisdictional, it is no answer to simply assert, as Amoco does repeatedly, that a lack of subject matter jurisdiction cannot be waived.

NUFI, at 8.

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because it "prefer[s] that the [property] at issue be used to pay the judgment award, as opposed to other of its property." *Rubin* v. *Islamic Republic of Iran*, 408 F. Supp. 2d 549, 558 (N.D. Ill. 2005).

B. The Complaint Adequately Alleges That .cg Is Property Located in the United States and Used for Commercial Activity in the United States

Even if ICANN could assert the Congo's affirmative FSIA immunity defenses, its arguments are without merit. The FSIA, as ICANN recognizes, permits attachment and execution of property located in the United States and used for commercial activity in the United States. The Complaint expressly alleges that .cg is located in the United States and is used for commercial activity here. (Compl. ¶¶ 7, 16, 17). ICANN cannot challenge the factual accuracy of these allegations on demurrer anymore than it can with respect to any other factual allegations of the Complaint. At a minimum, NUFI is entitled to discovery to prove its contentions. *See Connecticut Bank of Commerce* v. *Republic of Congo*, 309 F.3d 240, 260 -261 (5th Cir. 2002) (reversing dismissal of garnishment and remanding for development of factual record).

In any event, ICANN's contentions fail. While ICANN argues that .cg is not located in the United States because the .cg registry is allegedly maintained in the Congo or Switzerland (ICANN Br. at 11), domain names such as .cg constitute "intangible property." *Kremen*, 337 F.3d at 1030. Under California law, "[a]n intangible . . . has no physical characteristics that would serve as a basis for assigning it to a particular locality." *In re Waits' Estate*, 23 Cal. 2d 676, 680 (Cal. 1944). Accordingly, "[t]he location assigned to it **depends on what action is to be taken with reference to it.**" *Id.* (emphasis supplied).

Here, the "action" NUFI seeks is an order directing ICANN, a California entity, to transfer to NUFI or its appointed designee the Congo's rights to .cg. Under *Kremen,* this means .cg is located in California.

ICANN claims that certain New York and Virginia cases support its argument. ICANN is wrong. In *Name.Space Inc.* v. *Network Solutions, Inc.*, 202 F.3d 573, 577 (2d Cir. 2000), the Second Circuit made no legal situs determination, much less under California law. In *NBC Universal, Inc.* v. *NBCUNIVERSAL.COM*, 378 F. Supp. 2d 715, 716 (E.D. Va. 2005), the Eastern District of Virginia held that, in suits involving second-level domain names within the ".com" top-level domain, the ACPA gave it jurisdiction because the .com registry is in

Virginia.[14] The ACPA confers jurisdiction "in the judicial district in which the domain name registrar, domain name registry, or other domain name authority . . . is located." *Id.*, 15 U.S.C. § 1225(d)(2)(A). The Complaint alleges that ICANN is the .cg registrar, and thus, under the reasoning of the ACPA and the cases ICANN cites, filing suit where ICANN is located is proper. (Compl. ¶ 48). And in *Globalsantafe Corp.* v. *Globalsantafe.com*, 250 F. Supp. 2d 610, 622-623 (E.D. Va. 2003), the Eastern District of Virginia held that second-level domain names were sited in Virginia because the .com registry (the zone file containing all second-level domain names) is in Virginia and this "vital .com TLD zone file effectively enables Verisign [the .com registry operator] to transfer control of any '.com' domain name." *Id.* at 622. But this supports NUFI's argument: if second-level domains are sited at their zone file because they can be transferred from there, then top-level domains, such as .cg, would be located at the zone file where they are controlled and can be transferred: the root zone file controlled by ICANN.[15] (Compl. ¶¶ 42-49).

ICANN's arguments against commercial activity fare no better. ICANN's asserts that the Congo's lease for profit of at least 50 .cg domain names is "far too trivial" to be considered "commercial activity." But it cites no authority for this proposition, and fewer leases have been held to constitute commercial activity for FSIA purposes. *See Lloyd's Underwriters* v. *AO Gazsnabtranzit*, No. 00-0242, 2000 WL 1719493 (N.D. Ga. Nov. 2, 2000) (licensing by Republic of Moldova of its .md country domain to three U.S. companies constitutes commercial activity under the FSIA).[16] In any event, NUFI is entitled to discovery to uncover the existence of the many other leases of .cg domain names to U.S. entities that undoubtedly exist.[17]

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[14] It is, at a minimum, curious that ICANN contends that the ACPA is "not applicable to ccTLDs," and yet relies on two ACPA cases. (ICANN Br. at 8, 11.).

[15] ICANN argues, without support, that the root zone file is actually located in Virginia. Even if true, this is irrelevant: Virginia is also in the United States, which is all the FSIA requires. Moreover, the Court clearly has jurisdiction over ICANN, even if the root zone file ICANN controls is elsewhere.

[16] Moreover, the FSIA requires only that the property be "used for commercial activity in the United States," it does not require exclusive commercial use. 28 U.S.C. § 1610(a).

[17] To NUFI's knowledge, no complete list of .cg registrations is publicly available. Thousands of non-trademarked registrations could exist. NUFI found the registrations it included as exhibits to its Complaint by manually typing possible web addresses into the WHOIS database to learn which had been registered. To minimize its time and expense, NUFI concentrated this search on what it thought were the best candidates to be .cg domains. Since filing its Complaint, NUFI has discovered additional .cg registrations, including non-trademarked names such as casino.cg and business.cg.

ICANN also argues that the Congo's lease of .cg domain names is just a "public service" allegedly performed by the Congo to protect the "well-known trademarks" of corporations. (ICANN Br. at 12). This argument goes well beyond appropriate demurrer contentions, and is nonsense. The Congo leases .cg domain names, it does not provide them for free; it leases them to all U.S. persons or entities willing to pay, not just trademark owners; and it protects the rights of trademark owners, even if they do not acquire a .cg suffix, by refusing to register for use with .cg protected trademarks not belonging to the putative registrant. (*See* Johnson Decl. Ex. 6 (stating that the Congo forbids registration of trademarked subdomains "without the consent of the owner" and "delete[s] immediately" any mark so registered)).[18]

III. EVEN IF THE COURT GRANTS ICANN'S DEMURRER, NUFI SHOULD BE GRANTED LEAVE TO AMEND.

Under California law, leave to amend must be freely granted. *Quelimane Co.* v. *Stewart Title Guaranty Co.*, 19 Cal. 4th 26, 39 (1998); *Blank* v. *Kirwan*, 39 Cal.3d 311, 318 (1985) (failure to permit amendment is an abuse of discretion); *Angie M.* v. *Superior Court*, 37 Cal. App. 4th 1217, 1227 (1995). "Liberality in permitting amendments is the rule." *Weingarten* v. *Block*, 102 Cal. App. 3d 129, 134 (1980). The present Complaint is NUFI's first attempt to state these claims, and it would be an abuse of discretion not to permit NUFI to attempt to cure any deficiencies in an amended pleading. Accordingly, if the Court determines that the demurrer should be granted, NUFI should be given leave to amend its Complaint in order to assert a proper claim to correct any defects found by the Court.

[18] We understand the Court may not judicially notice the truth of the Congo's position concerning wrongful registration of trademarked .cg domain names, but use this extrinsic evidence to show that ICANN's contention that the Congo leases .cg domain names only as a public service to protect trademark owners cannot be accepted as true.

CONCLUSION

For the foregoing reasons, NUFI respectfully requests that the Court overrule ICANN's demurrer.

Dated: October 10, 2006

Respectfully submitted,

Robt A. Sacks/EEJ

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PROOF OF SERVICE

I, Jacquelynn G. Perske, declare as follows:

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I served the following document:

PLAINTIFF'S OPPOSITION TO DEMURRER OF DEFENDANTS INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS AND INTERNET ASSIGNED NUMBERS AUTHORITY

on October 10, 2006, on all parties in this action by placing true copies of the above document enclosed in a sealed envelope addressed as follows:

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Via U.S. Mail

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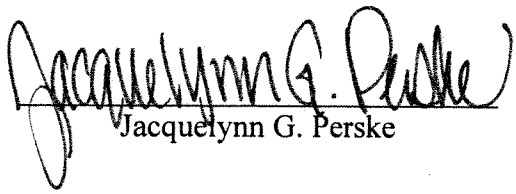

Jacquelynn G. Perske