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

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 DEFENDANTS' REQUEST FOR JUDICIAL NOTICE** Hearing: November 3, 2006 Time 8:30 a.m. Dept.: M Action Filed: June 28, 2006

1
MEMORANDUM OF POINTS AND AUTHORITIES

2 Plaintiff C. Itoh Middle East E.C. (Bahrain), through the real party in interest
3 National Union Fire Insurance Company of Pittsburgh, Pa. ("NUFI"), respectfully submits this
4 Memorandum of Points and Authorities in Opposition to the Request for Judicial Notice ("Req.")
5 of Defendants Internet Corporation for Assigned Names and Numbers and Internet Assigned
6 Numbers Authority (collectively, "ICANN") submitted in support of ICANN's Demurrer to the
7 Complaint ("Dem.").

8
INTRODUCTION

9 Along with its demurrer, ICANN submitted a stack of nine exhibits for which it
10 seeks judicial notice. With its Request for Judicial Notice, it seeks to turn the hearing on the
11 Demurrer "into a contested evidentiary hearing through the guise of having the court take
12 judicial notice of documents whose truthfulness or proper interpretation are disputable." *Joslin*
13 v. *H.A.S. Ins. Brokerage*, 184 Cal. App. 3d 369, 374 (1986). This attempt to turn the demurrer
14 into an evidentiary hearing is particularly objectionable given that, in response to NUFI's
15 document requests, ICANN refused to produce a single document. Having prevented NUFI
16 from obtaining any evidence, it now seeks to rely on a few carefully selected documents to
17 contest the allegations of the complaint.

18 The material for which ICANN seeks judicial notice consists largely of self-
19 serving statements that ICANN printed off its own website and some, but not all, of ICANN's
20 agreements with the Department of Commerce. In the face of the well-settled rule that "[i]t is
21 not the ordinary function of a demurrer to test the truth of the plaintiff's allegations," it asks the
22 Court not only to judicially notice its stack of self-serving and often irrelevant documents, but
23 also to accept the truth of factual assertions within the documents and then use those assertions to
24 resolve contested factual issues against the Plaintiff. *Comm. on Children's Television, Inc.* v.
25 *Gen. Foods Corp.*, 35 Cal. 3d 197, 213 (1983). Its request should be denied.

26
27
28

ARGUMENT

ICANN seeks judicial notice of two groups of documents. The first, Exhibits A, E, F, G, H, and I to the Declaration of Sean W. Jaquez,[1] are documents printed off the Internet (mainly ICANN's own website). The second, Exhibits B, C, and D, are agreements between ICANN and the Department of Commerce ("DOC").[2]

I. THE FACTS CONTAINED IN THE DOCUMENTS FROM THE INTERNET ARE NOT JUDICIALLY NOTICEABLE.

A. Facts Contained in Documents Printed Off the Internet Are Not Indisputable.

ICANN bases its request for judicial notice of Exhibits A, E, F, G, H, and I on Section 452(h) of the California Evidence Code. Section 452(h) provides that courts may judicially notice "[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

Judicial notice of a fact, however, is different than judicial notice of the existence of a document. ICANN disingenuously argues in its Request for Judicial Notice that "it cannot be reasonably disputed that [the documents of which it seeks judicial notice] exist and discuss the matters set forth therein" (Req. at 1). But in its Demurrer it does not rely on the existence of the documents, or the fact of what they discuss. On the contrary, it repeatedly relies on the *truth* of the assertions in the documents. Its attempt to establish disputed facts through judicial notice

---

[1] Hereafter, all references to "ICANN Exhibits" refer to Exhibits to the Declaration of Sean W. Jaquez, listed on pages 2-3 of ICANN's Request for Judicial Notice.

[2] ICANN also references, but does not seek judicial notice of, several other documents. *See* Dem. at 3 n.4 (referring to a document ICANN claims contains background information about the privatization of the Internet); *id.* at 3 n.5 (referring to a purported contract between ICANN and the DOC); *id.* at 9 n.10 (referring to a purported "current version" of the document attached as Exhibit 12 to the Complaint). Even worse, it makes numerous assertions without any citation whatsoever. *See, e.g.,* Dem. at 9 (asserting that Request for Comments 1591 consists of the "authoritative standards of Internet protocol"); *id.* at 12 (asserting that "[i]t is common practice for companies to register domain names containing their popular trademarks as soon as registration in *any* TLD becomes available in order to protect against trademark infringement"); *id.* at 15 (asserting that a company called VeriSign implements the re-delegation in the root zone file). In ruling on a demurrer a court may consider only the allegations of the complaint and any facts properly judicially noticed; thus all of these assertions must be disregarded.

of cherry-picked, self-serving documents, most of which it wrote itself, should be rejected. "The court cannot take judicial notice of self-serving hearsay allegations . . . merely because they are part of a document which qualifies for judicial notice." *Childs* v. *State*, 144 Cal. App. 3d 155, 162-63 (1983); *see Conlan* v. *Shewry*, 131 Cal. App. 4th 1354, 1364 n.5 (2005) ("Beyond the mere fact that the report exists, the availability of the report on the internet hardly renders the content of the report 'not reasonably subject to dispute'"); *Love* v. *Wolf*, 226 Cal. App. 2d 378, 403 (1964) ("While courts take judicial notice of public records, we do not take judicial notice of the truth of all matters stated therein."); *AL Holding Co.* v. *O'Brien & Hicks, Inc.*, 75 Cal. App. 4th 1310 (1999) ("It is proper for a trial court in ruling upon a demurrer to consider facts of which it has taken judicial notice, including the existence of a document, though not the truthfulness or proper interpretation of the contents of the document.").

ICANN's sole argument in favor of judicial notice of Exhibits A, E, F, G, H, and I is that they are available on the Internet. (Req. at 3). Needless to say, the availability of a document on the Internet does not make every assertion in that document indisputably true.[3] ICANN's attempt to establish the truth of assertions within these documents is particularly inappropriate given that several of the documents *were written by ICANN itself.* Exhibits A, E, G, H, and I were simply printed from ICANN's own website; another document, Exhibit G, is from a website maintained by the registrar for .cg, appointed by the Congo, the judgment debtor in this case. (Compl. ¶ 55). Allowing ICANN to cite as irrefutable evidence anything that appears on its website, or the websites of other interested parties, would enable any party to a lawsuit to generate self-serving testimony at will. That is not the law. *See Childs*, 144 Cal. App. 3d at 162-63 (rejecting judicial notice of an affidavit because "[t]he court cannot take judicial notice of self-serving hearsay allegations").

---

[3] The cases cited by ICANN (Req. at 1) concern judicial notice of the existence of documents on the Internet, not judicial notice of the truth of assertions in the documents. Moreover, California courts have routinely found that even the existence of websites is not a proper subject of judicial notice. *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 request to take judicial notice of documents on the web site of the Air Resources Board); *Ross* v. *Creel Printing & Publ'g Co.*, 100 Cal. App. 4th 736, 744 (2002) (web sites with information regarding bad check programs are "not a proper subject of either mandatory or permissive judicial notice").

B. The Facts of Which ICANN Seeks Judicial Notice Are Not Indisputable.

Even setting aside the general problem with judicial notice of facts found on the Internet, the specific facts ICANN seeks to establish through judicial notice are not "indisputable" as required by CAL. EV. CODE § 452(h). Only two of the facts merit discussion.[4]

1. ICANN's Procedure for Re-Delegating Country Domains Is Not Judicially Noticeable

First, ICANN seeks judicial notice of the procedures it follows in re-delegating country domains, based on Exhibits E and F. (Dem. at 4-5). ICANN claims that those documents show that ICANN's decisions to re-delegate country domains are "based on a number of factors." (Id. at 4). NUFI's Complaint alleges, in contrast, that ICANN in practice re-delegates country domains based on the requests of the countries that own those domains. (Compl. ¶¶ 48-52).

The assertions in Exhibits E and F are not "indisputable" and therefore cannot be judicially noticed. CAL. EV. CODE § 452(h). Exhibit E[5] was posted on the Internet by ICANN itself; it may accurately describe ICANN's procedures for re-delegating country domains, or may be just rhetoric intended to portray ICANN in a positive light to the public. Moreover, it is not clearly inconsistent with NUFI's allegations: it states that "[t]he desires of the government of a country with regard to delegation of a ccTLD are taken very seriously." (Exh. E at (a)). Even more emphatically, Exhibit G (cited by ICANN for a different point) states that "the delegation of a ccTLD registry is subject to the ultimate authority of the relevant public authority or government." These contradictions preclude judicial notice of ICANN's re-delegation procedures. Even court findings of fact are not accepted as true under the judicial notice

---

[4] The remainder are simply irrelevant. *See, e.g.*, Dem. at 2 (ICANN's "mission" is to protect the domain name system); *id.* at 12 (.cg domains are free to residents of the Congo). Material that "has no bearing on the limited legal question at hand" is not properly the subject of judicial notice. *Mangini* v. *R.J. Reynolds Tobacco Co.*, 7 Cal. 4th 1057, 1063 (1994) (internal quotation marks omitted).

[5] Exhibit F purportedly describes the policies followed by a previous administrator of IANA over a decade ago. It is not probative as to ICANN's current re-delegation procedures.

doctrine. *Sosinsky* v. *Grant,* 6 Cal. App. 4th 1548, 1568-70 (1992). Self-serving hearsay should not be given greater acceptance than court findings.

The procedure ICANN actually follows in re-delegating a country domain is a fact at issue in this litigation. "[W]hen such disputes arise there are no 'sources of reasonably indisputable accuracy' such as treatises or encyclopedias to which the court can turn to resolve the issue. Rather, the court must rely on the testimony of the parties and their witnesses whose perceptions, memory and bias may be the subject of vigorous dispute." *Gould*, 31 Cal. App. 4th at 1145-46. NUFI is entitled to the discovery ICANN has refused to provide, such as internal ICANN documents and correspondence concerning the re-delegation process and testimony from the ICANN officials involved in that process. This factual dispute cannot be resolved by simply consulting documents that one of the parties to this action authored.

2. Whether Country Domains Are Property Is Not Judicially Noticeable

Second, ICANN repeatedly quotes various documents authored by ICANN or its affiliates stating that ccTLDs are not property. (Dem. at 7 n.9 (asserting that statement of ICANN's Governmental Advisory Committee that ccTLDs are not property "demonstrates that a consensus exists among major countries that *no* property rights exist in a ccTLD"); 4, 9 (asserting that "authoritative standards of Internet protocol"—as stated by ICANN's own document—state that ccTLDs are not property); 10 (asserting that ccTLDs are not property because the .cg ccTLD managers—who risk losing their franchise should ccTLDs be deemed property—agree that ccTLDs are not property)). Whether country domains are property for purposes of this litigation is an issue of California law that turns on various disputed facts; it is not a fact subject to judicial notice. *See G.S. Rasmussen & Assocs., Inc.* v. *Kalitta Flying Svc., Inc.*, 958 F.2d 896, 902 (9th Cir. 1992) ("[W]e must turn to state law in determining whether Rasmussen's interest amounts to a property right.").

To the extent ICANN seeks judicial notice merely of the fact that ICANN itself (or its affiliates) believes country domains are not property, that fact is wholly irrelevant, and therefore not judicially noticeable. *Mangini*, 7 Cal. 4th at 1063. Whether ccTLDs are property depends on the characteristics of ccTLDs—not on ICANN's self-serving proclamations. *See,*

e.g., *G.S. Rasmussen & Assocs., Inc.*, 958 F.2d at 902-03 (evaluating the characteristic of an interest to determine whether it constitutes a property right).

II. DISPUTED INFERENCES DRAWN FROM ICANN'S AGREEMENTS WITH THE DOC ARE NOT JUDICIALLY NOTICEABLE

Additionally, ICANN asks the Court to take judicial notice of three of its agreements with the Department of Commerce (Exhibits B through D), under Sections 452(c) and 452(h) of the Evidence Code. Its request should be denied, (i) because the validity and completeness of the contracts are (at best) unclear, and (ii) because it seeks not just judicial notice of the contracts, but also the adoption of its own questionable interpretation of the contracts.

1. The Validity and Completeness of the DOC Contracts Is Unclear.

Although government acts are normally judicially noticeable under Section 452(c), it is well-established that a court cannot take judicial notice of a contract if the validity of the contract is disputed. *Gould* v. *Maryland Sound Indus., Inc.,* 31 Cal. App. 4th 1137, 1146 (1995). Here, both contracts[6] of which ICANN seeks judicial notice appear to be invalid. ICANN acknowledges in its brief that Exhibit D was superseded by a new agreement on October 1, 2006 (Dem. at 3 n.5), but inexplicably fails to seek judicial notice of the operative contract.

As for Exhibits B and C, the Memorandum of Understanding between ICANN and the DOC and an amendment thereto, on September 29, 2006, ICANN and the DOC executed another amendment that supersedes them. (*See* Johnson Decl. Ex. 4 at 1).[7] In fact, this

---

[6] ICANN Exhibits B and C comprise a single contract, since Exhibit C is just an amendment of Exhibit B.

[7] NUFI does not seek judicial notice of this document or anything therein (nor would judicial notice be proper given the ambiguity of the contract and uncertainty about what other contracts may exist). Instead, NUFI brings this document, and the other documents attached to the Declaration of Edward E. Johnson, to the attention of the Court pursuant to CAL. EV. CODE 454(a), which provides that in determining the propriety of 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. *See also* 1 Witkin, Cal. Evid. 4th (4th ed., 2000) Jud. Notice, § 41, p. 135 ("Ordinarily, when a party requests that judicial notice be taken, or the judge proposes to do so on his or her own initiative, the judge must 'afford each party reasonable opportunity' to present 'information relevant to (1) the propriety of taking judicial notice of the matter and (2) the tenor of the matter to be noticed.'" (quoting CAL. EV. CODE 455(a)).

amendment eliminates the very provision cited by ICANN, Br. at 3, and replaces it with language that describes the DOC's role as purely advisory. (Johnson Decl. Ex. 4 at 1). ICANN's misleading attempt to rely on a plainly invalid contract should be rejected.

Not only do the contracts appear to be invalid, they appear to make up only part of the contractual arrangements between ICANN and the DOC. In response to discovery requests from NUFI, ICANN raised a "Government Objection" under which it refused to produce "agreements between ICANN and the United States Department of Commerce for ICANN's performance of the IANA function" on confidentiality grounds. (*See* Johnson Decl. Ex. 1 at 3.) This must mean that additional agreements exist beyond those submitted to the Court with ICANN's demurrer. Moreover, even the agreements ICANN selected to show the Court contemplate that they may be altered or supplanted. (*See* ICANN Ex. D (contract "in itself" does not authorize changes to the root zone file)). The probability that there are additional agreements between ICANN and the DOC that are not before the Court, but that supersede, supplement, clarify, or modify Exhibits B through D, precludes judicial notice of these Exhibits.

A party seeking judicial notice must "[f]urnish[] the court with sufficient information to enable it to take judicial notice of the matter." CAL. EV. CODE § 453(b). ICANN has failed to make any showing that Exhibits B through D accurately describe the contractual arrangements between ICANN and the DOC, and therefore its request for judicial notice must be denied.

2. The Proper Interpretation of the DOC Contracts is Disputable.

Even in the unlikely event the Court were willing to judicially notice the existence of the contracts, in spite of all the questions about invalidity and incompleteness, ICANN's request for judicial notice would still fail. Once again, ICANN's Demurrer does not rely on the mere existence and validity of the DOC contracts. Instead, it asks the Court to ignore the allegations of the Complaint, and adopt its self-serving, highly questionable interpretation of the agreements, to establish as irrefutable fact the sweeping conclusion that the DOC has "authority over the domain name system." (Dem. at 3 (citing ICANN Exh. C)). This request is inappropriate, for at least three reasons.

First, the contracts with the DOC submitted by ICANN simply do not support ICANN's conclusion. For example, Exhibit C, a now-invalid amendment to the Memorandum of Understanding between ICANN and the DOC, does not say that the DOC has "oversight responsibility of the domain name system," as ICANN claims (Dem. at 3), but that the DOC shall "[m]aintain oversight of the technical management of DNS functions currently performed." (ICANN Exh. B at V.B.8.) It is unclear what functions are currently performed, and "oversight" of "technical" matters does not mean DOC has a substantive role, much the one ICANN alleges. Likewise, Exhibit D authorizes ICANN to "perform other IANA functions" (ICANN Ex. D at § C.2.2.1.4), one of which, according to another of ICANN's extrinsic documents, is "the right to revoke and to redelegate a Top Level Domain to another manager." (ICANN Ex. E).

Second, both ICANN and the DOC have repeatedly and publicly stated that ICANN—not the DOC—has authority over the re-delegation process. *See* Johnson Decl. Ex. 8, ICANN Press Release, Sept. 29, 2006 (quoting the CEO of ICANN as saying, in reference to the new amendment to the MOU, "ICANN has secured an agreement that recognizes it as being responsible for the management of the Internet's system of unique identifiers on an ongoing basis. It means ICANN is more autonomous."); Statement of Policy on Management of Internet Names and Addresses, U.S. Dept. of Commerce, Nat'l Telecommunications and Info. Admin., 63 Fed. Reg. 31741, 31744 (June 10, 1998) ("The challenge of deciding policy for the addition of new domains will be formidable. We agree with the many commenters who said that the new corporation [ICANN] would be the most appropriate body to make these decisions based on global input."); *id.* at 31748 (DOC policy statement "recognize[s] the role of the new corporation [ICANN] to establish and implement DNS policy"); Johnson Decl. Exh. 9, Answer and Affirmative Defenses of U.S. Dept. of Commerce & U.S. Dept. of State, *ICM Registry, LLC* v. *U.S. Dept. of Commerce and U.S. Dept. of State* ¶ 10 (D.D.C. June 19, 2006) ("The Department of Commerce admits that it has no regulatory authority over ICANN").

Finally, "rational interpretation [of a contract] requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties," or whether any terms "have acquired a particular meaning by trade usage." *Pacific Gas & Elec. Co.* v. *G.W.*

Thomas Drayage & Rigging Co., 69 Cal. 2d 33, 39-40 (1968); *see also Hayter Trucking, Inc.* v. *Shell Western E&P, Inc.*, 18 Cal. App. 4th 1, 20 (1993) ("[E]xtrinsic evidence relevant to interpretation can no longer be barred simply because of a judicial determination that a writing appears to have only one interpretation."). Thus, even if the DOC contracts were not facially ambiguous, NUFI would still be entitled to take discovery and present evidence to show that the parties intended a different meaning.

In short, who has authority over the domain name system is one of the central fact questions in this litigation, and far from "indisputable." CAL. EV. CODE § 452(h). ICANN has cherry-picked the agreements it wants the Court to see, even though they are no longer operative, while refusing NUFI's discovery request for other agreements. And even the cherry-picked agreements are ambiguous. The DOC's role in re-delegation cannot be discerned from an incomplete set of ambiguous contract provisions. Rather, it is a disputed fact that should be addressed in discovery—not resolved against the plaintiff on demurrer.

CONCLUSION

For the foregoing reasons, NUFI respectfully requests that the Court deny ICANN's Request for Judicial Notice as to all nine documents.

Dated: October 10, 2006

Respectfully submitted,

Robert A. Sacks/EEJ

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

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

1 **PROOF OF SERVICE**

2 I, Jacquelynn G. Perske, declare as follows:

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

6 I served the following document:

7 **PLAINTIFF'S OPPOSITION TO**
DEFENDANTS' REQUEST FOR
8 **JUDICIAL NOTICE**

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

11 **Via Hand Delivery**

12 Jeffrey A. LeVee
Sean W. Jaquez
13 Samantha S. Eisner
JONES DAY
14 555 South Flower Street, Fiftieth Floor
Los Angeles, California 90071-2300
15 Counsel for Defendants Internet Corporation for Assigned
16 Names and Numbers and Internet Assigned Numbers Authority

17 **Via U.S. Mail**

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

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

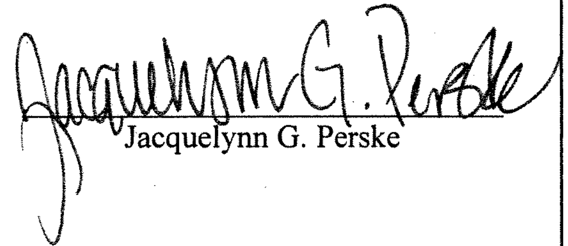
25 For copies served by Hand Delivery, I am familiar with the office practice of
26 Sullivan & Cromwell LLP, which practice is that when correspondence is deposited with the
27 Sullivan & Cromwell LLP personnel responsible for delivering correspondence to the
28

appropriate courier service, such correspondence is delivered to the appropriate courier service that same day in the course of business.

For copies served by U.S. Mail, I placed such envelope with postage thereon fully prepaid for the deposit in the United States in accordance with the office practice of Sullivan & Cromwell LLP for collecting and processing correspondence for mailing, which practice is that when correspondence is deposited with the Sullivan & Cromwell LLP personnel responsible for delivering correspondence to the United States Postal Service, such correspondence is delivered to the United States Postal Service that same day in the course of business.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on October 10, 2006, at Los Angeles, California.



Jacquelynn G. Perske