Paula L. Zecchini (SBN 238731)
Aaron M. McKown (SBN 208781)
COZEN O'CONNOR
999 Third Avenue, Suite 1900
Seattle, WA 98104
Telephone: 206.340.1000
Toll Free Phone: 1.800.423.1950
Facsimile: 206.621.8783
E-Mail: pzecchini@cozen.com
amckown@cozen.com

Attorneys for Plaintiff
RUBY GLEN, LLC

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RUBY GLEN, LLC

Plaintiff,

vs.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS AND DOES 1-10

Defendant.

Case No.: 2:16-cv-05505-PA-AS

[Hon. Percy Anderson
Courtroom 15]

PLAINTIFF RUBY GLEN, LLC'S REPLY IN SUPPORT OF MOTION FOR LEAVE TO TAKE THIRD PARTY DISCOVERY OR, IN THE ALTERNATIVE, MOTION FOR THE COURT TO ISSUE A SCHEDULING ORDER

Hearing Date: November 28, 2016
Hearing Time: 1:30 p.m.
Courtroom: 15

I. INTRODUCTION

Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") hinges its Opposition on a legally incorrect premise—that its pending Motion to Dismiss Plaintiff's First Amended Complaint ("FAC") under Rules 12(b)(6) and 12(b)(7) of the Federal Rules of Civil Procedure requires a stay of all discovery. Plaintiff uses that assertion to justify its refusal to participate in the mandatory Federal Rule of Civil Procedure 26(f) ("Rule 26(f)") conference. In doing so, ICANN fails to address the arguments raised in support of Plaintiff Ruby Glen, LLC's ("Plaintiff") Motion for Leave to Take Third Party Discovery or, in the Alternative, Motion for the Court to Issue a Scheduling Order ("Plaintiff's Motion").

As an initial matter, ICANN's opposition to Plaintiff's Motion is confounding given ICANN's presumably strong motivation to uncover the details of NDC's improper agreement to resell, transfer, or assign the rights to its .WEB application to VeriSign, in direct contravention of (a) the Applicant Guidebook, *see* FAC, Ex. C § 6.10, and (b) the sworn statements that ICANN previously brought before this Court, Dkt. No. 18. ICANN's resistance to the contemplated discovery lends itself to only one of two conclusions: either ICANN does not want to know the details of the transaction at issue or ICANN knows the details and is concerned about the ramifications of those details being made public. Neither conclusion bodes well for ICANN's ability to extricate itself from this action.

Regardless, ICANN provides no justification for its dilatory conduct in complying with the clear dictates of the Federal Rules. Although ICANN asserts that (a) courts should not permit discovery during the pendency of a dispositive motion, and (b) granting the Motion will prejudice ICANN, the authority that ICANN offers contradicts those contentions. Indeed, based on ICANN's own authority, Plaintiff respectfully requests that this Court grant Plaintiff's Motion.

II. ARGUMENT

A. ICANN's Motion to Dismiss Does Not Justify Further Delaying this Critical Discovery

As an initial matter, ICANN incorrectly claims that discovery should not be permitted whenever there is a dispositive motion pending. Opp. at 2:27-4:9. ICANN offers its broad contention to suggest that Plaintiff has not demonstrated good cause for the third party discovery sought by Plaintiff's Motion. ICANN's contention, however, is not supported by the Federal Rules. Rather, "the Federal Rules of Civil Procedure do[] not provide for automatic or blanket stays of discovery when a potentially dispositive motion is pending. Indeed, district courts look unfavorably upon such blanket stays of discovery." *Mlejnecky v. Olympus Imaging America, Inc.*, No. 2:10-cv-02630, 2011 WL 489743, at *6 (E.D. Cal. Feb. 7, 2011) (denying defendant's motion for a protective order pending the resolution of a dispositive motion). "Had the Federal Rules contemplated that a motion to dismiss under Fed.R.Civ.P. 12(b)(6) would stay discovery, the Rules would contain a provision for that effect. In fact, such a notion is directly at odds with the need for expeditious resolution of litigation." *Skellerup Ind. Ltd. v. City of Los Angeles*, 163 F.R.D. 598, 600-601 (C.D. Cal. 1995); *see also OMG Fidelity, Inc. v. Sirius Tech., Inc.*, 239 F.R.D. 300, 304 (N.D. N.Y. 2006) ("The mere filing of a dismissal motion, without more, does not guaranty entitlement to such a stay."); *Moran v. Flaherty*, No. 92 Civ. 3200, 1992 WL 276913, at *1 (S.D. N.Y. Sept. 25, 1992) ("[D]iscovery should not be routinely stayed simply on the basis that a motion to dismiss has been filed.").

Indeed, ICANN's own proffered authority militates against the broad proposition that a court should stay discovery whenever there is a pending dispositive motion. *See, e.g., Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 603 (D. Nev. 2011) ("The fact that a non-frivolous motion [to dismiss] is pending is simply not enough to warrant a blanket stay of all discovery."); *Ministerio Roca Solida v. U.S. Dept. of Fish & Wildlife*, 288

F.R.D. 500, 502 (D. Nev. 2013) (requiring that a defendant show "good cause" to stay discovery pending the resolution of a dispositive motion, meaning "more than an apparently meritorious Rule 12(b)(6) motion."). While both *Tradebay* and *Ministerio* agree that delaying discovery is appropriate when a pending motion to dismiss raises a threshold legal issue, such as venue, or the court's subject matter jurisdiction, ICANN has not challenged subject matter jurisdiction or venue in this matter, and has not offered any other "good cause" to delay discovery. *See Tradebay*, 278 F.R.D. at 608 (granting a stay of discovery upon a preliminary conclusion that plaintiff's complaint failed to allege an actual case or controversy).

B. This Discovery May Be Necessary to Resolve ICANN's Rule 12(b)(7) Motion.

ICANN also seeks to delay the critical discovery sought by Plaintiff's Motion based on its unsubstantiated claim that NDC is a necessary party in this litigation. *See* Opp. at 4:9-23. As discussed in Section II.A, *supra*, ICANN's argument does not implicate a threshold jurisdictional issue, and thus is not a basis for delaying discovery. *See Ministerio*, 288 F.R.D. at 504.

If anything, ICANN's Rule 12(b)(7) motion demonstrates the urgent need for this discovery, because it may aid the parties and the Court in resolving the issue of whether NDC should be added to this litigation. As set forth more fully in Plaintiff's Opposition to ICANN's pending Motion to Dismiss, based on the facts presently known to Plaintiff, Plaintiff has asserted claims against ICANN only, *see generally*, FAC, and NDC has no interest in those claims, *see* Opp. to ICANN's Motion to Dismiss, at 22:3-18. The discovery that Plaintiff seeks from NDC certainly impacts Plaintiff's claims against ICANN, because it could allow Plaintiff to amend and supplement its pleadings. It will also facilitate the efficient resolution of this matter, because it may inform whether, as ICANN suggests, Plaintiff should join NDC and assert a claim against it.

C. Plaintiff's Motion Will Cause ICANN No Prejudice

In a further attempt to avoid the discovery at issue, ICANN implausibly argues that it will suffer prejudice if Plaintiff is permitted to serve discovery on non-parties NDC and VeriSign, Inc. ("VeriSign"). *See* Opp. at 1:13 ("prejudice to ICANN of engaging in expedited discovery"); 4:23-24 ("prejudice to ICANN"). The only "prejudice" that ICANN claims is "the unnecessary expense of participating in the expedited discovery by reviewing documents produced by third parties and attending depositions of third parties." Opp. at 5:6-11. However, "[a] showing that discovery may involve some inconvenience and expense does not suffice to establish good cause for issuance of a protective order." *Ministerio*, 288 F.R.D. at 503; *see also Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. at 601 (same). Plaintiff's Motion seeks *no* discovery from ICANN, and thus ICANN will not incur *any* costs associated with assembling, reviewing, and producing its own documents, nor with preparing discovery responses, or preparing its employees for depositions. ICANN's paltry claim of "prejudice" would undermine a serious and substantial standard. Furthermore, if ICANN is truly concerned about the "prejudice" it will suffer from reviewing any documents that NDC and VeriSign produce, it can always wait to conduct its review until its Motion to Dismiss has been resolved.[1]

ICANN fares no better in its superficial effort to allege that Plaintiff's Motion will prejudice NDC or VeriSign. ICANN baldly asserts that, "*if*" NDC and VeriSign are, at some point, joined to this lawsuit, their discovery responses "*may*" need to be revised. Opp. at 5:12-17. ICANN offers no citation or authority for this proposition, which is founded upon a series of hypothetical events. Moreover, ICANN did not even attempt to respond to Plaintiff's Motion, which demonstrated that ICANN, NDC, and

[1] Plaintiff would reasonably expect ICANN to be interested in the information sought by way of its Motion, in light of NDC's repeated averments to ICANN that it had not resold, transferred, or assigned the rights to its .WEB application.

VeriSign "will suffer no prejudice as a result of these discovery requests." Mot. at 8:12-15. Pursuant to the standard timeline set forth in the Federal Rules of Civil Procedure, Plaintiff should have been able to serve these requests nearly two months ago, but for ICANN's inexplicable refusal to participate in the mandatory Rule 26(f) conference. As for NDC, it already agreed to make public all information that is pertinent to its .WEB gTLD application. *See* Mot. at 9:8-13. And VeriSign's brazen announcement that it funded NDC's .WEB bid in order to acquire those rights for itself deprived VeriSign of any legitimate basis to complain about this discovery. ICANN's purported "prejudice" fails.

D. ICANN Offers No "Good Cause" to Delay Entry of a Scheduling Order

ICANN's argument that its Motion to Dismiss constitutes "good cause" for delaying the entry of a scheduling order also misconstrues the prevailing law, and the Court's Standing Order. *See* Opp. at 6:1-14. As explained above, "the Federal Rules of Civil Procedure do not provide for automatic or blanket stays of discovery when a potentially dispositive motion is pending. Indeed, district courts look unfavorably upon such blanket stays of discovery." *Mlejnecky v. Olympus Imaging America, Inc.*, No. 2:10-cv-02630, 2011 WL 489743, at *6 (E.D. Cal. Feb. 7, 2011). ICANN offers no authority for its purported "good cause," other than the mere existence of its Motion to Dismiss. "The fact that a non-frivolous motion is pending is simply not enough to warrant a blanket stay of all discovery." *Ministerio Roca Solida v. U.S. Dept. of Fish & Wildlife*, 288 F.R.D. 500, 504 (D. Nev. 2013). Furthermore, this Court's Standing Order specifically instructs parties to "begin to conduct discovery actively before the Scheduling Conference." *See* Dkt. No. 22. ICANN's refusal to participate in this Court-ordered process forced Plaintiff to seek Court intervention to require ICANN to

comply with its obligations under the Federal Rules. ICANN does not offer this Court "good cause" to warrant additional delays.

E. ICANN Offers No Legitimate Basis for Its Refusal to Participate in the Mandatory Rule 26(f) Conference

Finally, ICANN's deficient justification for its refusal to participate in the mandatory Rule 26(f) conference—that "[i]t is not *practicable*" to comply with Rule 26(f) because of ICANN's pending Motion to Dismiss—does not comport with prevailing law. *See* Opp. at 6:21-24. ICANN once again offers no authority for its position, which the plain meaning of Rule 26(f) contradicts. That rule requires that the parties confer "as soon as ***practicable***," a term that Webster's defines as "feasible," or "capable of being . . . accomplished."[2] Furthermore, the Advisory Committee's Notes to Rule 26 make clear that "[t]he obligation to participate in the [Rule 26(f)] planning process is imposed on all parties that have appeared in the case, including defendants who, because of a pending Rule 12 motion, may not have yet filed an answer in the case." *See* Fed. R. Civ. P. 26 advisory committee's note (1993). Rule 26 directly forecloses ICANN's flimsy attempt to explain its dilatory conduct, and ICANN has offered no legitimate reason for its violation of Rule 26(f).

III. CONCLUSION

For the foregoing reasons, and for the reasons stated in Plaintiff's Motion, Plaintiff Ruby Glen, LLC respectfully asks this Court to:

(a) Grant its motion for leave to conduct third party discovery; or, in the alternative,

(b) Issue a scheduling order.

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[2] *Webster's Third New Int'l Dictionary* (Merriam-Webster, Inc. 1993).

Dated: November 14, 2016

By: *s/ Paula L. Zecchini*

Paula L. Zecchini (SBN 238731)
Aaron M. McKown (SBN 208781)
pzecchini@cozen.com
amckown@cozen.com
COZEN O'CONNOR
999 Third Avenue, Suite 1900
Seattle, WA 98104
Telephone: 206.340.1000
Toll Free Phone: 1.800.423.1950
Facsimile: 206.621.8783
Attorneys for Ruby Glen, LLC

CERTIFICATE OF SERVICE

Pursuant to L.R. 5-3, I hereby certify that on November 14, 2016, I electronically filed the foregoing documents: Plaintiff Ruby Glen, LLC's Reply in Support of Motion for Leave to Take Third Party Discovery or in the Alternative, Motion for the Court to Issue a Scheduling Order, with the Clerk of the Court by using the CM/ECF system and that foregoing document is being served on all counsel of record identified below via transmission of Notice of Electronic Filing generated by CM/ECF:

Eric P Enson
Jeffrey A. LeVee
Charlotte Wasserstein
JONES DAY
555 South Flower Street
Fiftieth Floor
Los Angeles, CA 90071
epenson@jonesday.com,dfutrowsky@jonesday.com
jlevee@jonesday.com,vcrawford@jonesday.com,cmcdaniel@jonesday.com
cswasserstein@jonesday.com,lltouton@jonesday.com,flumlee@jonesday.com,kkelly@jonesday.com

s/ Maria VandenBosch
MARIA VANDENBOSCH