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

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

13 C. ITOH MIDDLE EAST E.C. (Bahrain) )  
 14 through the real party in interest, NATIONAL )  
 UNION FIRE INSURANCE COMPANY )  
 15 OF PITTSBURGH, PA, )  
 16 Plaintiff, )  
 17 )  
 18 v. )  
 19 INTERNET CORPORATION FOR )  
 ASSIGNED NAMES AND NUMBERS, )  
 20 INTERNET ASSIGNED NUMBERS )  
 AUTHORITY, the PEOPLE'S )  
 21 REPUBLIC OF THE CONGO, and THE )  
 CONGOLESE REDEMPTION FUND, )  
 22 Defendants. )

Case No. SC090220  
 The Hon. John L. Segal  
**PLAINTIFF'S SUR-REPLY TO  
 DEFENDANTS' DEMURRER AND  
 REQUEST FOR JUDICIAL NOTICE**

Hearing: November 20, 2006  
 Time 8:30 a.m.  
 Dept.: M  
 Action Filed: June 28, 2006

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

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

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

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

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

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

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

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

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

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

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

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

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

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

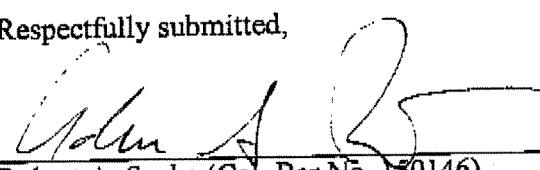
5 ICANN argues that it is indisputable that ICP-1 and RFC 1591 accurately describe  
6 its process for redelegating country code domains, while statements of the Government Advisory  
7 Committee (GAC) are only "advisory." To support that assertion, it seeks judicial notice of  
8 additional documents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

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

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

23 Dated: November 13, 2006

Respectfully submitted,

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

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

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

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**PROOF OF SERVICE**

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

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

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

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

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

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

**Via Mail**

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

The Congolese Redemption Fund  
Regie National Des Travaux Publics et de la Construction  
B.P. 2073  
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9 I declare under penalty of perjury under the laws of the State of California that the  
 10 foregoing is true and correct.

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

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 Roberta Striplin