

1 Jeffrey A. LeVee (State Bar No. 125863)
 jlevee@JonesDay.com
 2 Eric P. Enson (State Bar No. 204447)
 eponson@JonesDay.com
 3 Kathleen P Wallace (State Bar No. 234949)
 kwallace@JonesDay.com
 4 JONES DAY
 555 South Flower Street
 5 Fiftieth Floor
 Los Angeles, CA 90071.2300
 6 Telephone: +1.213.489.3939
 Facsimile: +1.213.243.2539
 7

8 Attorneys for Defendant
 9 INTERNET CORPORATION FOR
 ASSIGNED NAMES AND NUMBERS

10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA
 12 WESTERN DIVISION

13
 14 NAME.SPACE, INC.,

15 Plaintiff,

16 v.

17 INTERNET CORPORATION FOR
 18 ASSIGNED NAMES AND
 NUMBERS,

19 Defendant.

Case No. CV 12-8676-PA

Assigned for all purposes to
 Honorable Percy Anderson

**MEMORANDUM IN SUPPORT
 OF ICANN'S OPPOSITION TO
 NAME.SPACE'S RULE 56(d)
 APPLICATION**

[ICANN's Reply Memorandum in
 Support of ICANN's Motion for
 Summary Judgment; Declarations
 of Louis Touton and Jeffrey A.
 LeVee; ICANN's Objections to the
 Declaration of Paul Garrin Filed
 And Served Concurrently Herewith]

Hearing Date: Feb. 25, 2013
 Hearing Time: 1:30 pm
 Hearing Location: 312 N. Spring St.

1 **INTRODUCTION**

2 Name.space half-heartedly attempts to invoke Rule 56(d) (formerly 56(f)) in
 3 its Opposition to ICANN’s motion for summary judgment and in the declaration of
 4 its counsel. (*See* Opp’n (ECF No. 37) at 22; Declaration of Michael Miller in
 5 Support of Name.space’s Opposition to Summary Judgment (ECF No. 39).)
 6 Name.space’s Rule 56(d) request should be denied because it falls short of
 7 satisfying name.space’s burden under that rule. Specifically, name.space’s
 8 conclusory statements fail to: (1) identify the ***specific facts*** name.space hopes to
 9 elicit from the requested discovery; (2) state any basis that such facts ***actually exist***;
 10 and (3) show that such facts are ***essential*** to prevent summary judgment. Fed. R.
 11 Civ. P. 56(d).¹

12 **ARGUMENT**

13 Federal Rule of Civil Procedure 56(d) provides that “[i]f a nonmovant shows
 14 by affidavit or declaration that, for specified reasons, it cannot present facts
 15 essential to justify its opposition, the court may: (1) defer considering the motion
 16 or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or
 17 (3) issue any other appropriate order.” Fed. R. Civ. P. 56(d). In order to be
 18 successful on a Rule 56(d) motion, the moving party (here, name.space) must show
 19 “(1) that they have set forth in affidavit form the ***specific facts*** that they hope to
 20 elicit from further discovery, (2) that the facts sought ***exist***, and (3) that these
 21 sought-after facts are ‘***essential***’ to resist the summary judgment motion.” *State of*
 22 *Cal., on Behalf of Cal. Dept. of Toxic Substance Control v. Campbell*, 138 F.3d 772,
 23 779 (9th Cir. 1998) (emphasis added); *Family Home and Finance Center v. Federal*
 24 *Home Loan Mortgage Corp.*, 525 F.3d 822, 827 (9th Cir. 2008).

25 The party opposing summary judgment “has the burden under [Rule 56(d)] to
 26

27 ¹ Name.space’s Rule 56(d) application is also deficient because name.space
 28 failed to meet and confer with ICANN prior to filing its application. *See* L.R. 7-3.

1 show what facts she hopes to discover to raise an issue of material fact.” *Hancock v.*
2 *Montgomery Ward Long Term Disability Trust*, 787 F.2d 1302, 1306 n.1 (9th Cir.
3 1986). “An affidavit by counsel which does not do so fails to meet the
4 requirements of [Rule 56(d)]. *Id.* Mere references in memoranda and declarations
5 to a “need for discovery” likewise fail to meet the requirements of Rule 56(d).
6 *Brae Transp., Inc. v. Coopers & Lybrand*, 790 F.2d 1439, 1443 (9th Cir. 1986).
7 Failure to comply with the requirements of Rule 56(d) is a basis for denying
8 discovery and proceeding to summary judgment. *Id.*

9 As a threshold issue, name.space has not alleged – in either its Opposition or
10 Mr. Miller’s Declaration – that it cannot present facts essential to justify its
11 Opposition. *See* Fed. R. Civ. P. 56(d). Instead, name.space claims the exact
12 opposite. *See* Miller Decl. at 3:7-8 (“name.space believes it has provided sufficient
13 facts to preclude the entry of summary judgment for ICANN.”); *id.* at 3:8-11
14 (stating that discovery may produce “**additional** facts that would preclude summary
15 judgment for ICANN.”) (emphasis added). This alone is sufficient grounds to deny
16 name.space’s Rule 56(d) request. *Brae Transp., Inc.*, 790 F.2d at 1443.

17 Even ignoring this fatal defect in name.space’s non-specific request for
18 discovery, name.space’s Rule 56(d) request also fails because it does not set forth
19 any specific facts it hopes to elicit in such discovery – much less facts that actually
20 exist and will defeat summary judgment. Name.space merely speculates that
21 discovery might yield probative facts, not even facts in its favor. (Miller Decl.
22 ¶¶ 11-15.) For instance, name.space claims that it would depose the individuals
23 responsible for drafting the 2000 Application, including the release language, yet it
24 does not articulate the testimony that it hopes to elicit which would create a genuine
25 issue of material fact. (*Id.* at ¶ 14.) Name.space also claims that it requires
26 document discovery “concerning the 2000 Application,” but again fails to state the
27 evidence it hopes will surface from its vague discovery request. (*Id.* at ¶ 12.)

28 Because name.space failed to make the showing required under Rule 56(d),

1 the Court should deny name.space’s request to defer consideration of ICANN’s
 2 motion for summary judgment. *See Mueller v. County of Los Angeles*, 262 Fed.
 3 Appx. 858, 859 (9th Cir. 2008) (denying Rule 56(d) application where nonmovant’s
 4 supporting affidavit failed to identify the specific facts that he sought to discover
 5 and to explain why those facts would preclude summary judgment); *see also*
 6 *Sanders v. Laidlaw Educational Servs.*, 323 Fed. Appx. 521, 522-23 (9th Cir. 2009)
 7 (denying Rule 56(d) continuance where the nonmovant “merely identified pieces of
 8 discovery yet to be obtained and depositions yet to be taken”); *Margolis v. Ryan*,
 9 140 F.3d 850, 854 (9th Cir. 1998) (district court’s denial of Rule 56(d) discovery
 10 was proper where nonmovant’s affidavit was based on speculation).

11 **CONCLUSION**

12 Because name.space failed to meet its burden as required by the Ninth
 13 Circuit and the Federal Rules, name.space’s request for a continuance should be
 14 denied.

15 Dated: February 11, 2013 JONES DAY

17 By: /s/ Jeffrey A. LeVee
 18 Jeffrey A. LeVee

19 Attorneys for Defendant
 20 INTERNET CORPORATION FOR
 21 ASSIGNED NAMES AND
 22 NUMBERS