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INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS and erroneously named
INTERNET ASSIGNED NUMBERS AUTHORITY

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES**

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

Assigned for all purposes to
Honorable John L. Segal

**NOTICE OF DEMURRER AND
DEMURRER TO COMPLAINT BY
DEFENDANT INTERNET
CORPORATION FOR ASSIGNED
NAMES AND NUMBERS AND
ERRONEOUSLY-NAMED
DEFENDANT INTERNET
ASSIGNED NUMBERS
AUTHORITY; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

[Request for Judicial Notice and
Declaration of Sean W. Jaquez filed
concurrently herewith; Compendium of
Non-California Authorities and
[Proposed] Order lodged concurrently
herewith]

DATE: September 20, 2006
TIME: 8:30 a.m.
DEPT: M

Complaint Filed: June 28, 2006

CONFORMED COPY
OF ORIGINAL FILED
Los Angeles Superior Court

AUG 28 2006

John A. Clarke, Executive Officer/Clerk

By S. Funk, Deputy

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on September 20, 2006, at 8:30 a.m., or as soon thereafter
3 as counsel may be heard, in Department M of the above-entitled Court located at the Santa
4 Monica Courthouse, 1725 Main Street, Santa Monica, California 90401, Defendant Internet
5 Corporation for Assigned Names and Numbers ("ICANN") and erroneously-named Defendant
6 Internet Assigned Numbers Authority ("IANA") will and hereby do demur to the Complaint filed
7 herein by plaintiff C. Itoh Middle East E.C. (Bahrain), through the real party in interest, National
8 Union Fire Insurance Company of Pittsburgh, PA.

9 The Demurrer is made pursuant to California Code of Civil Procedure section 430.10, and
10 is based upon this Notice of Hearing; the Demurrer by Defendants ICANN and IANA and
11 Memorandum of Points and Authorities filed herewith; the concurrently-filed Request for Judicial
12 Notice and declaration in support thereof; the accompanying Compendium of Non-California
13 authorities; the pleadings, documents, and records on file in this action; and all other matters that
14 may appropriately be presented to the Court before or at the hearing on the Demurrer.

15 Dated: August 28, 2006

Jones Day

16
17 By: 

18 Jeffrey A. LeVee

19 Attorneys for Defendants
20 INTERNET CORPORATION FOR
21 ASSIGNED NAMES AND NUMBERS AND
22 ERRONEOUSLY NAMED INTERNET
23 ASSIGNED NUMBERS AUTHORITY
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DEMURRER

Defendant Internet Corporation for Assigned Names and Numbers and erroneously-named Defendant Internet Assigned Numbers Authority demur to the First Cause of Action in Plaintiff's Complaint on the following grounds:

DEMURRER TO FIRST CAUSE OF ACTION

1. The Court has no jurisdiction over the subject of the First Cause of Action; *see* Cal. Civ. Proc. Code § 430.10(a); and

2. The First Cause of Action fails to state facts sufficient to constitute a cause of action under California Code of Civil Procedure section 708.210 because Plaintiff has not sufficiently pled facts to constitute a cause of action. *See* Cal. Civ. Proc. Code § 430.10(e).

Dated: August 28, 2006

Jones Day

By: 

Jeffrey A. LeVee

Attorneys for Defendants
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS AND
ERRONEOUSLY NAMED INTERNET
ASSIGNED NUMBERS AUTHORITY

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	Page
I. INTRODUCTION	1
II. FACTUAL BACKGROUND	2
III. ARGUMENT	5
A. This Court does not have jurisdiction over the .cg cctld under the Foreign sovereign immunities act (FSIA), 28 U.S.C. §§ 1603 et seq.	6
1. The .cg ccTLD is Not Property	7
2. The Congo has no interest in the .cg ccTLD.....	9
3. The .cg ccTLD is not in the United States	10
4. The .cg ccTLD is not used for commercial activity.....	11
5. This Court does not have jurisdiction over property allegedly held by Agents or Instrumentalities of the Congo	12
B. Plaintiff fails to state a claim for a Creditor’s Suit under California Code of Civil Procedure section 708.210	14
1. Domains Cannot Be Levied Upon In Satisfaction Of A Money Judgment	14
2. The .cg ccTLD Is Not Transferable Or Assignable	15
IV. CONCLUSION.....	15

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

Cases

555-1212.COM, Inc. v. Commc'n House Int'l, Inc.,
157 F. Supp. 2d 1084 (N.D. Cal. 2001) 8

Af-Cap v. Republic of Congo,
383 F.3d 361 (5th Cir. 2004)..... 6

Argentine Republic v. Amerada Hess Shipping Corp.,
488 U.S. 428 (1989)..... 6

Brookfield Commc'ns, Inc. v. West Coast Entertainment Corp.,
174 F.3d 1036 (9th Cir. 1999)..... 8

Chuidian v. Phillipine Nat'l Bank,
912 F.2d 1095 (9th Cir. 1990)..... 13

Coalition for ICANN Transparency, Inc. v. VeriSign, Inc.,
2006 U.S. Dist. LEXIS 45617 (N.D. Cal. Feb. 28, 2006)..... 2

Coca-Cola Co. v. Purdy,
382 F.3d 774 (8th Cir. 2004)..... 8

Conn. Bank of Commerce v. Republic of Congo,
299 F.3d 378 (5th Cir. 2002),
aff'd on reh'g, 309 F.3d 240 (5th Cir. 2002) 6, 11

Corzo v. Banco Central de Reserva del Peru,
243 F.3d 519 (9th Cir. 2001)..... 6

Dorer v. Arel,
60 F. Supp. 2d 558 (E.D. Va. 1999)..... 14

Dotster, Inc. v. Internet Corp. for Assigned Names and Numbers,
296 F. Supp. 2d 1159 (C.D. Cal. 2003) 2

Evans v. City of Berkeley,
38 Cal. 4th 1 (2006) 5

FG Hemisphere Assocs., LLC v. Republique du Congo,
No. 04-20965 and No. 05-20042, 2006 U.S. App. LEXIS 17255 (5th Cir. July 10, 2006)..... 6

First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba,
462 U.S. 611 (1983)..... 13

Globalsantafe Corp. v. Globalsantafe.Com,
250 F. Supp. 2d 610 (E.D. Va. 2003)..... 11

Image Online Design, Inc. v. Core Ass'n,
120 F. Supp. 2d 870 (C.D. Cal. 2000) 8

TABLE OF AUTHORITIES
(continued)

		Page
1		
2		
3	<i>In re Martin Container, Inc.</i> ,	
4	65 USPQ2d 1058 (TTAB 2002)	7
5	<i>In re Steelbuilding.com</i> ,	
6	415 F.3d 1293 (Fed. Cir. 2005).....	7
7	<i>Kremen v. Cohen</i> ,	
8	337 F.3d 1024 (9th Cir. 2003).....	7, 14
9	<i>Kremen v. Cohen</i> ,	
10	99 F. Supp. 2d 1168, 1173 (N.D. Cal. 2000)	9
11	<i>Lawrence v. Bank of America</i> ,	
12	163 Cal. App. 3d 431 (1985).....	6
13	<i>Lockheed Martin Corp. v. Network Solutions, Inc.</i> ,	
14	194 F.3d 980 (9th Cir. 1999).....	9
15	<i>Moore v. Regents of the Univ. of Cal.</i>	
16	(1990) 51 Cal.3d 120	5
17	<i>Name.Space, Inc. v. Network Solutions, Inc.</i> ,	
18	202 F.3d 573 (2nd Cir. 2000).....	11
19	<i>NBC Universal, Inc. v. NBCUNIVERSAL.COM</i> ,	
20	378 F. Supp. 2d 715 (E.D. Va. 2005).....	11
21	<i>Network Solutions, Inc. v. Umbro Int'l, Inc.</i> ,	
22	259 Va. 759 (2000)	14
23	<i>Novak v. Benn</i> ,	
24	896 So. 2d 513 (Ala. App. Ct. 2004)	14
25	<i>Serrano v. Priest</i> ,	
26	5 Cal. 3d 584 (1971)	5
27	<i>VeriSign, Inc. v. Internet Corp. for Assigned Names and Numbers</i> ,	
28	2004 U.S. Dist. LEXIS 17330 (C.D. Cal. Aug. 26, 2004).....	2
	<i>Walker Int'l Holdings Ltd. v. Republic of Congo</i> ,	
	395 F.3d 229 (5th Cir. 2004).....	13
	<i>Zelig v. County of Los Angeles</i> ,	
	27 Cal. 4th 1112 (2002)	5
	Statutes	
	15 U.S.C. § 1117	8
	15 U.S.C. § 1125(d)	8

TABLE OF AUTHORITIES
(continued)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

28 U.S.C. § 1603(b)	13
28 U.S.C. § 1610	2
28 U.S.C. § 1610(a)	6, 7, 11
28 U.S.C. § 1610(b)	13
Cal. Civ. Proc. Code § 389	12
Cal. Civ. Proc. Code § 430.10(a)	5
Cal. Civ. Proc. Code § 430.10(e)	5
Cal. Civ. Proc. Code § 695.030	14
Cal. Civ. Proc. Code § 695.030(a)	14
Cal. Civ. Proc. Code § 695.050	15
Cal. Civ. Proc. Code § 708.210	6, 14

Other Authorities

1 J. McCarthy, McCarthy on Trademarks & Unfair Competition, section 7:17.1 (4th ed. 2004)	7
<i>Management of Internet Names and Addresses</i> , 63 Fed. Reg. 31741 (1998)	3
S. Rep. No. 106-140, at *10 (1999)	8

1
2
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This creditor's suit relates to a years-long dispute, deep into its second decade, between the Plaintiff and the Republic of Congo. Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") has nothing to do with the dispute. After the Congo failed to pay on a multi-million dollar construction contract, Plaintiff has looked to various jurisdictions around the world to help satisfy the arbitration judgment it won against the Congo. But Plaintiff has no legal basis for dragging ICANN and erroneously-named Defendant Internet Assigned Numbers Authority ("IANA")¹ into this dispute, and thus ICANN and IANA should be dismissed.

Plaintiff's alleged basis for suing ICANN is that ICANN is the holder of "property" identified as the country code top-level domain for the Republic of Congo (".cg ccTLD"). Setting aside the fact that ccTLDs are not property, ICANN only serves as the *administrator* of the connection of the ccTLD to the Internet. ICANN does not hold any property right in this connection but simply ensures that each ccTLD – .cg or otherwise – functions in a manner that preserves the stability of the Internet.

ICANN is a not-for-profit public benefit corporation which administers certain features of the Internet's domain name system. ICANN does not collect or hold funds paid by persons to use any particular domain name or any top level domain. Thus, ICANN cannot hold any asset or money of the Congo that would make ICANN a proper party to this creditor's suit.

Plaintiff's contention that the .cg ccTLD is property that can simply be transferred is wrong. No country – indeed no person – "owns" a ccTLD. Rather, designated trustees are delegated the authority to manage and operate ccTLDs in accordance with ICANN-adopted policies, as well as local policies that are adapted to best meet the economic, cultural, political, and linguistic circumstances of the country or territory involved. Thus, Plaintiff has no basis to seek any relief against ICANN; indeed, if Plaintiff's legal position was correct, ICANN could be

¹ IANA is a function performed by ICANN pursuant to an agreement with the U.S. Department of Commerce ("DOC"). See *infra*, § II. IANA is not an entity and cannot be a party to any action. As such, ICANN objects to the inclusion of IANA to this lawsuit. For purposes of this Demurrer, however, ICANN will refer to ICANN and IANA collectively as "ICANN."

1 named in any creditor suit involving debts allegedly owed by countries all over the world, which
2 would run contrary to ICANN's mission and violate ICANN's obligations under its agreements
3 with the United States Government to administer and coordinate ccTLDs.²

4 There are three reasons in particular why Plaintiff's suit must be dismissed: (1) Plaintiff's
5 claim does not meet the requirements of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C.
6 § 1610, the sole means for any court in the United States to assert jurisdiction over the execution
7 of a judgment against a foreign nation; (2) even if Plaintiff could meet the requirements of the
8 FSIA, the Complaint *still* fails because courts have already found that Internet domains are *not*
9 subject to execution of a money judgment; and (3) the Complaint fails to meet the requirements
10 of California law on enforcement of judgments, particularly because the .cg ccTLD is not
11 property and cannot be transferred or assigned by ICANN or the Republic of Congo.

12 **II. FACTUAL BACKGROUND**

13 **Background on ICANN.** ICANN is a not-for-profit public benefit corporation that was
14 organized under California law in 1998. ICANN's mission is to protect the stability, integrity,
15 and utility of the domain name system on behalf of the global Internet community. (ICANN's
16 Bylaws, § 1, attached as Exhibit A to the Declaration of Sean W. Jaquez in Support of
17 Defendants' concurrently-filed Request for Judicial Notice ("Jaquez Decl."))

18 In accordance with this mission, and pursuant to a series of agreements with the United
19 States Department of Commerce ("DOC"), ICANN is responsible for administering certain
20 technical aspects of the Internet's domain name system.³ Among other things, ICANN designates
21 to qualified applicants the operation of domain name registries. A registry is like a telephone
22 phone book that maintains a definitive list of the second-level domain name addresses (*e.g.*,

23 _____
24 ² All of this information is publicly available. When Plaintiff attempted to levy the .cg
ccTLD over a year ago pursuant to a writ of execution (Compl., Ex. 10.), ICANN and IANA
explained these publicly-available facts to Plaintiff at that time. (*E.g.*, Compl., Ex. 11.)

25 ³ A number of courts have acknowledged ICANN's public benefit role in the Internet
26 domain name system. *E.g.*, *Coalition for ICANN Transparency, Inc. v. VeriSign, Inc.*, 2006 U.S.
27 Dist. LEXIS 45617 (N.D. Cal. Feb. 28, 2006); *VeriSign, Inc. v. Internet Corp. for Assigned
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28 (Copies of these decisions are contained in ICANN's Compendium of Non-California
Authorities.)

1 lasuperiorcourt.org) for each Top-Level Domain (“TLD”) (e.g., .org). There are 17 so-called
2 “generic” TLD registries (e.g., .com, .net, .org), and approximately 240 country code TLDs that
3 are referred to as “ccTLDs” (e.g., .cg, .us, .uk).

4 **ICANN’s Agreement With The DOC.** In November 1998, ICANN signed a
5 Memorandum of Understanding (“MOU”) with the DOC. (Jaquez Decl., Ex. B (MOU).) The
6 MOU has been amended and extended six times, but its purpose has remained the same – to
7 “jointly design, develop and test the mechanisms, methods, and procedures that should be in place
8 and the steps necessary to transition management responsibility for DNS [domain name system]
9 functions now performed by, or on behalf of, the U.S. Government to a private-sector not-for-
10 profit entity.”⁴ (Jaquez Decl., Ex. B at § II.B.) The MOU recognizes that privatization cannot
11 occur overnight and specifically provides in Section V.B.8 that the DOC will maintain oversight
12 responsibility of the domain name system until such time as further agreements are arranged for
13 the private sector to undertake that management. To date, the DOC continues to have authority
14 over the domain name system. (Jaquez Decl., Ex. C (Amend. 6 to the MOU) at § V.B.11.) In
15 particular, ICANN cannot delegate or redelegate any ccTLD; that authority resides exclusively in
16 the DOC, as explained further below.

17 **The IANA Function.** In the past, certain technical functions of the U.S. Government’s
18 administration of the Internet were contracted by the Government to the Internet Assigned
19 Numbers Authority (“IANA”). Since 2000, the IANA function has been performed by ICANN
20 pursuant to a contract with the DOC that has been amended and extended several times (“the
21 IANA Contract”). (Jaquez Decl., Ex. D (Current IANA Contract).)⁵ Among other things, the
22 IANA Contract provides that ICANN will “receiv[e] [ccTLD] delegation and redelegation
23 requests, investigat[e] the circumstances pertinent to those requests, and mak[e] its
24 recommendations and report[] actions undertaken in connection with processing such requests.”

25 ⁴ A detailed background on the privatization of the Internet can be found in a document
26 published by the DOC on June 5, 1998 entitled *Management of Internet Names and Addresses*,
available at 63 Fed. Reg. 31741-01 (1998).

27 ⁵ On October 1, 2006, a new IANA contract will become effective between ICANN and
28 the DOC. The new contract is not materially different for any purpose relevant to this litigation.
(New IANA Contract §§ C.2.2.1.2, C.4.1, C.4.2, C.4.3, Appx. A, available at
http://www.ntia.doc.gov/domainname/iana/ianacontract_081406.pdf.)

1 (*Id.* at § C.2.1.1.2.) The IANA Contract, however, specifically *forbids ICANN from authorizing*
2 *any delegation or redelegation of any top level domain.* (*Id.* at §§ C.2.1.1.2, C.4.1, C.4.2, C.4.3.)

3 **Country Code TLDs.** In addition to so-called “generic” TLDs such as “.com,” “.net,”
4 and “.gov,” there are also numerous “country code” TLDs, which are commonly referred to as
5 ccTLDs. Examples of ccTLDs are “.us” for the United States, “.uk” for the United Kingdom, and
6 “.cg” for the Republic of Congo. These ccTLDs are generally used for Internet addresses that are
7 specific to a country based on two-letter codes that appear on a list prepared by the International
8 Organization for Standardization (“ISO”). Country code TLDs are administered by appointed
9 ccTLD managers, who act as trustees performing a service on behalf of the Internet community,
10 both globally and in the country or territory designated by the country code.

11 A summary of ICANN’s practices with respect to its performance of the IANA Contract
12 (specifically ccTLD delegation and redelegation) are found in a release that ICANN published in
13 May 1999, which is generally referred to as “ICP-1.” (Jaquez Decl., Ex. E (ISP-1).) ICP-1
14 codifies RFC 1591, which is the universally-accepted Internet standard for the delegation and
15 redelegation of TLDs, including ccTLDs. (Jaquez Decl., Ex. F (RFC 1591).)

16 Each ccTLD has a sponsoring organization, technical contact, and an administrative
17 contact. Each performs various roles in the functioning of the ccTLD. Pursuant to ICP-1 and the
18 IANA Contract, ICANN can and does make *recommendations* to the DOC in regard to
19 replacement of those managers. But, as noted above, the IANA Contract provides that ICANN
20 *cannot authorize* any of these changes – as that would constitute a redelegation.

21 ICANN’s recommendations regarding the possible replacement of the managers of a
22 ccTLD are based on a number of factors that are designed to ensure the sound operation of the
23 Internet. Although one of those factors is the wishes of the government of the country involved,
24 no foreign government “owns” its ccTLD or can order ICANN or the DOC to take any actions
25 with respect to a ccTLD. Indeed, ccTLDs are not “owned” in any sense; they are made available
26 to benefit the entire Internet community. (Jaquez Decl., Exs. E, F.)

27 Thus, even if ICANN received the formally expressed wishes of the Congo to replace the
28 managers of the .cg ccTLD, ICANN would have to consider a number of factors before making

1 any recommendation to the DOC. Among other things, ICANN would consider the position of
2 the current managers of the ccTLD, the effect such a redelegation would have on the stability of
3 the Internet, the apparent ability of the proposed managers to administer the ccTLD, whether the
4 contacts would be equitable and fair to all groups that request names, and whether the proposed
5 redelegation would benefit the Internet community as a whole. (Jaquez Decl., Exs. E, F.) Thus,
6 to repeat, no country “owns” a ccTLD or has the right to order ICANN or the DOC to change the
7 manner in which the ccTLD is operated.

8 **The “.cg” ccTLD.** The Co-Sponsoring Organizations for the .cg ccTLD are ONPT
9 Congo and Interpoint Switzerland, which are located in the Congo. (Compl., Ex.13.) The
10 Administrative Contact is Monsieur Akouala of ONPT Congo and Interpoint Switzerland, who is
11 also located in the Congo. (Compl., Ex. 13.) The Technical Contact is Frederic Gregorie of
12 Interpoint SARL, who is located in Switzerland. (Compl., Ex. 13.) The Technical Contact
13 coordinates the registration of domain names in the .cg ccTLD through designated registrars, as
14 well as through its web site directly. (Jaquez Decl., Ex. G (relevant portions of NIC’s web site).)
15 Domain name registrations in the .cg ccTLD are free to all citizens and lawful residents of the
16 Congo; foreign entities are charged a registration fee. (Jaquez Decl., Ex. G.)

17 **III. ARGUMENT**

18 California Code of Civil Procedure section 430.10(a) provides that a party may demur to a
19 complaint on the ground that the Court is without jurisdiction over the matter pleaded. Section
20 430.10(e) allows a party to demur to a complaint which does not state facts sufficient to constitute
21 a cause of action. Cal. Code Civ. Proc., § 430.10(e). The legal standard for ruling on such a
22 demurrer is well settled: the Court assumes all properly pled material facts to be true, but
23 disregards contentions, deductions or conclusion of law. *Moore v. Regents of the Univ. of Cal.*,
24 51 Cal. 3d 120, 135-136, 142, fns. 18, 19, 37 (1990); *Serrano v. Priest*, 5 Cal. 3d 584, 591 (1971);
25 *Zelig v. County of Los Angeles*, 27 Cal. 4th 1112, 1126 (2002). “[A] complaint otherwise good
26 on its face is subject to demurrer when facts judicially noticed render it defective.’ [Citation.]”
27 *Evans v. City of Berkeley*, 38 Cal. 4th 1, 6 (2006).

1 Where the facts are not in dispute and no liability exists as a matter of substantive law, the
2 court should sustain the demurrer without leave to amend. *Lawrence v. Bank of America*, 163
3 Cal. App. 3d 431, 536 (1985).

4 **A. THIS COURT DOES NOT HAVE JURISDICTION OVER THE .CG**
5 **CCTLD UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT (FSIA),**
6 **28 U.S.C. §§ 1603 ET SEQ.**

7 The FSIA “provides the sole basis for obtaining jurisdiction over [property of] a foreign
8 state in the courts of this country.” *Argentine Republic v. Amerada Hess Shipping Corp.*, 488
9 U.S. 428, 443 (1989). The FSIA provides certain exceptions to the general rule of a foreign
10 nation’s immunity to suit in the courts of the United States, even when the foreign nation has
11 waived immunity to enforcement actions. A court in the United States may only assume
12 jurisdiction over the foreign nation if one of the FSIA’s enumerated exceptions applies. *Corzo v.*
13 *Banco Central de Reserva del Peru*, 243 F.3d 519, 522 (9th Cir. 2001).

14 In order to execute against the property of a foreign nation in satisfaction of a money
15 judgment, a plaintiff must not only show that the foreign state has waived its immunity from
16 attachment in aid of execution,⁶ but *also* that it is seeking to attach (1) property of the foreign
17 nation (2) located in the United States (3) that is used for commercial activity therein. 28 U.S.C.
18 § 1610(a); *Af-Cap v. Republic of Congo*, 383 F.3d 361, 367 (5th Cir. 2004) (“a court is prohibited
19 from executing against the property of a foreign state unless [the elements of 28 U.S.C. § 1610(a)
20 are met]”). Only after a plaintiff has met the jurisdictional prerequisite may a court apply
21 California’s creditor’s suit statute (Cal. Civ. Proc. Code § 708.210) to determine the substantive
22 viability of a claim for execution.⁷ See *FG Hemisphere Assocs., LLC v. Republique du Congo*,
23 No. 04-20965 and No. 05-20042, 2006 U.S. App. LEXIS 17255 (5th Cir. July 10, 2006) (court
24 without jurisdiction to execute property of foreign nation through the FSIA cannot issue
25 garnishment order under state enforcement laws); *Conn. Bank of Commerce v. Republic of*

26 ⁶ For purposes of this demurrer only, ICANN does not dispute Plaintiff’s contention that
27 the Congo itself waived immunity.

28 ⁷ This Court’s earlier issuance of the Writs of Execution against ICANN and IANA are
also subject to a FSIA immunity analysis, and must be dissolved if this Court is without
jurisdiction over the .cg ccTLD.

1 Congo, 299 F.3d 378, 390-91 (5th Cir. 2002) (same), *aff'd on reh'g*, 309 F.3d 240 (5th Cir.
2 2002).

3 **1. The .cg ccTLD is Not Property.**

4 For this Court to have jurisdiction under the FSIA, Plaintiff must be seeking to execute
5 upon a “property” interest. 28 U.S.C. § 1610(a). Although Plaintiff alleges that the .cg ccTLD is
6 property, no court has held that a TLD – let alone a ccTLD – is property for any purpose.⁸
7 Moreover, the U.S. Patent and Trademark Office (“PTO”), the U.S. Congress, and established
8 principals of Internet protocol all support the finding that ccTLDs are not property.⁹

9 **(a) The PTO supports the finding that ccTLDs are not property.**

10 The PTO is responsible for examining claims to trademark and service-mark rights in the
11 United States. It has made clear that a TLD alone is not subject to trademark or service-mark
12 rights, but instead is an informational description of the names being registered. United States
13 Patent and Trademark Office, Examination Guide 2-99, Marks Composed in Whole or in Part, of
14 Domain Names (Sept. 29, 1999); *In re Martin Container, Inc.*, 65 USPQ2d 1058, 1060 (TTAB
15 2002). *See also* 1 J. McCarthy, McCarthy on Trademarks & Unfair Competition, section 7:17.1
16 (4th ed. 2004). Thus no property rights are vested in a TLD, let alone a ccTLD. This conclusion
17 is also supported by judicial decisions. *E.g.*, *In re Steelbuilding.com*, 415 F.3d 1293, 1299-300

18 ⁸ While some courts have suggested that second-level domain names (e.g.,
19 “lasuperiorcourt” in “www.lasuperiorcourt.org”) are property for limited purposes, there is no
20 similar dispute over ccTLDs. *E.g.*, *Kremen v. Cohen*, 337 F.3d 1024, 1033-34 (9th Cir. 2003)
21 (holding that second-level domain names are “property” for purposes of conversion). In *Kremen*,
22 second-level domain names were considered property for purpose of conversion because the court
23 found that: (i) the interest was capable of precise definition; (ii) it was capable of exclusive
24 possession or control; and (iii) the putative owner could establish a legitimate claim to
25 exclusivity. *Id.* at 1030.

26 The court’s rationale is not applicable to ccTLDs. For example, (i) ccTLDs cannot be
27 bought or sold, (ii) ccTLDs are not alienable but require at a minimum DOC approval prior to any
28 redelegation, and (iii) ccTLDs do not point to any particular location on the Internet (in fact, if an
Internet user types a ccTLD into a web browser (e.g., “.cg”) that user’s computer will receive an
error message).

29 ⁹ Various foreign governments have also addressed the issue of whether ccTLDs are
property and they have all come out against any property rights inuring therein. For example,
many foreign governments signed onto a communiqué stating that “**no private intellectual or
other property rights inhere to the TLD itself nor accrue to the delegated manager of the TLD
as the result of such delegation.**” (*See* Jaquez Decl., Ex. H (Communiqué of the Governmental
Advisory Committee, 24 August 1999) (emphasis added).) This communiqué demonstrates that a
consensus exists among major countries that **no** property rights exist in a ccTLD.

1 (Fed. Cir. 2005); *Brookfield Commc'ns, Inc. v. West Coast Entertainment Corp.*, 174 F.3d 1036,
2 1055 (9th Cir. 1999) (“The domain name is more than a mere address: like trademarks, *second-*
3 *level domain* names communicate information as to source.”) (emphasis added); *555-1212.COM,*
4 *Inc. v. Commc'n House Int'l, Inc.*, 157 F. Supp. 2d 1084, 1090 (N.D. Cal. 2001); *Image Online*
5 *Design, Inc. v. Core Ass'n*, 120 F. Supp. 2d 870, 877-80 (C.D. Cal. 2000).

6 **(b) The United States Congress supports the finding that ccTLDs**
7 **are not property.**

8 The Anti-cybersquatting Consumer Protection Act (“ACPA”) is a Federal law enacted in
9 1999 to protect the owners of trademarks from abuse by domain name cybersquatters. 15 U.S.C.
10 § 1125(d). Under the ACPA, a trademark owner can request, among other things, that a domain
11 name be transferred to them. 15 U.S.C. § 1117. Congress, and the Courts, agree that the ACPA
12 applies to second-level domain names only, not TLDs. *See e.g., Coca-Cola Co. v. Purdy*, 382
13 F.3d 774, 784 (8th Cir. 2004) (“ACPA’s definition of ‘domain name’ essentially reaches second
14 level domain names”) (*citing* S. Rep. No. 106-140, at *10 (1999)). No case has ever applied the
15 ACPA to a TLD – let alone a ccTLD – because Congress has made clear that the term “domain
16 name” refers to lower-level domains. Thus, any “property” rights granted to lower-level domain
17 names, for purposes of the ACPA, are not applicable to ccTLDs.

18 Congress defined a “domain name,” for purposes of the ACPA, as “any alphanumeric
19 designation which is registered with or assigned by any domain name registrar, domain name
20 registry, or other domain name registration authority as part of an electronic address on the
21 Internet.” S. Rep. No. 106-140, at *10 (1999). ICANN does not and cannot register domain
22 names. (*See* Jaquez Decl., Ex. A at Art. II § 2 (“ICANN shall not act as a Domain Name System
23 Registry or Registrar or Internet Protocol Address Registry in competition with entities affected
24 by the policies of ICANN.”)); Jaquez Decl., Ex. B at § V.D.1 (“ICANN shall not act as a domain
25 name Registry or Registrar or IP Address Registry in competition with entities affected by the
26 plan developed under this Agreement.”).) Moreover, a ccTLD does not have an “electronic
27 address on the Internet,” as required by the ACPA. If an Internet user were to type “.cg” into its
28 web browser, that user’s computer would get an error message.

1 (c) **Internet Protocol supports the finding that ccTLDs are not**
2 **property.**

3 Finally, authoritative standards of Internet protocol state that ccTLDs are not property. A
4 Request for Comments (“RFC”) is a publicly-available document describing the standards that
5 make the Internet work. RFC 1591 describes the standards for the domain name system structure
6 and the delegation of TLDs within that structure, including ccTLDs. RFC 1591 – which is
7 codified in ICANN’s ICP-1 – states in pertinent part:

8 *Concerns about “rights” and “ownership” of domains are*
9 *inappropriate.* It is appropriate to be concerned about
“responsibilities” and “service” to the community.

10 (Jaquez Decl., Ex. E at (b); Ex. F at § 3.2 (emphasis added).) *See also Lockheed Martin Corp. v.*
11 *Network Solutions, Inc.*, 194 F.3d 980, 984-85 (9th Cir. 1999) (holding that a TLD registry is
12 nothing more than a “service”); *Kremen v Cohen*, 99 F. Supp. 2d 1168, 1173 (N.D. Cal. 2000)
13 (finding *Lockheed* inapplicable in determining whether a domain name was property because
14 *Lockheed* focused on the role of a TLD (i.e., a “service”) rather than the classification of a
15 second-level domain name).

16 **2. The Congo has no interest in the .cg ccTLD.**

17 Even assuming *arguendo* that the .cg ccTLD is property – which it is not – Plaintiff must
18 demonstrate that it is the *Congo’s* property. But the allegations in the Complaint – when read in
19 combination with the exhibits attached to the Complaint and judicially-noticeable material –
20 demonstrate the opposite. Plaintiff alleges that the “Congo’s rights to its ‘.cg’ domain name have
21 been granted . . . by [ICANN]” because “ICANN recognizes that country domains, like ‘.cg,’ are
22 owned by the countries to which they correspond.” (Compl., ¶¶ 7, 50.) But ICANN has never
23 granted nor recognized such rights. Plaintiff’s sole basis for this assumption is two paragraphs in
24 an outdated publication by ICANN’s Governmental Advisory Committee (“GAC”). (Compl.,
25 ¶ 51 (citing ¶¶ 7.1, 7.4 of “Principles for Delegation and Administration of ccTLDs”
26 (“Superseded GAC Principles”)).) But those paragraphs do not support Plaintiff’s position.¹⁰

27 ¹⁰ The current version of the GAC Principles, dated April 5, 2005, is publicly available on
28 the GAC website at http://gac.icann.org/web/home/ccTLD_Principles.rtf (“GAC Principles”).
The provisions relevant to this demurrer, however, are not materially different.

1 The GAC has publicly acknowledged that its role is solely to provide *advice* to ICANN’s
2 Board of Directors on ICANN matters that concern governments or may affect public policy
3 issues. (*See* Jaquez Decl., Ex. A at Art. XI, § 2(1)(a); Compl., Ex. 12 at ¶ 2 (“The objective of
4 [the Superseded GAC Principles] is to *suggest* principles” (emphasis added)).) Thus any
5 document drafted by the GAC is considered to be advisory.

6 Plaintiff ignores this, and also ignores language in the very document that it cites that
7 demonstrates that the Congo *does not* have a property interest in the .cg ccTLD. Nowhere in the
8 Superseded GAC Principles, including Clause 5 (“Role of Government or Public Authority”) is
9 there *ever* an indication that ICANN or the GAC “supports” government ownership of a ccTLD.
10 Indeed, the governments’ role is described as “represent[ing] the interests of the people of the
11 county or territory for which the ccTLD has been delegated” (Compl., Ex. 12 at ¶ 5.1)
12 maintaining “responsibility for public policy objectives” and “ultimate policy authority” (*id.* at ¶
13 5.2), and to otherwise follow “the general principle that the Internet naming system is a public
14 resource in the sense that its functions must be administered in the public or common interest”
15 (*id.* at ¶ 5.3). Similarly, Clause 4.2 of the Superseded GAC Principles reiterates that “[n]o private
16 intellectual or other property rights should inhere in the ccTLD itself.”

17 Even the .cg ccTLD managers have acknowledged that there are no ownership interests
18 attached to the domain. For example, the .cg .ccTLD managers have publicly stated that they
19 support RFC 1591, which is codified in ICP-1 and states, “[c]oncerns about ‘rights’ and
20 ‘ownership’ of [ccTLD] domains are inappropriate. It is appropriate to be concerned about
21 ‘responsibilities’ and ‘service’ to the community.” (Jaquez Decl., Ex. F (emphasis added); Ex. I
22 (Letter from Drafting Committee, Alternate ccTLD Best Practices Draft (3 March 2000) stating
23 .cg ccTLD managers’ support for ICP-1).) And even more to the point, ICANN *cannot* grant
24 ownership interests in a ccTLD; ICANN cannot even redelegate management of a ccTLD – as
25 stated above, that function is performed by the DOC alone.

26 **3. The .cg ccTLD is not in the United States.**

27 Plaintiff contends that the domain is located in the United States because ICANN’s
28 management of the “root servers” is in California and all ccTLDs from all over the world receive

1 their initial queries from the root servers.¹¹ (Compl., ¶ 48.) But the location of the management
2 of the root servers is not the location of a ccTLD. 28 U.S.C. § 1610(a). Indeed, courts have
3 stated repeatedly that a ccTLD is “located” where the ccTLD *registry* is located.¹²

4 Plaintiff’s own example in the Complaint supports finding that the ccTLD is located with
5 the registry. (Compl. ¶ 42 (“The root servers tell the user’s computer *where to find* the
6 computers governing the “.org” domain”) (emphasis added).) The .cg ccTLD registry is located
7 in the Republic of Congo, with its Sponsoring Organizations and Administrative Contact, or
8 arguably in Switzerland with its Technical Contact. (Compl., Ex. 13.) And if a court considered
9 ICANN’s management of the root servers as the location for all ccTLDs, this prong of the FSIA
10 would all but be eliminated. This was clearly not Congress’ intent, as the decisions cited above
11 properly suggest.

12 **4. The .cg ccTLD is not used for commercial activity.**

13 Finally, Plaintiff must allege that the .cg ccTLD is being used for commercial activity. 28
14 U.S.C. § 1610(a). The characterization of “commercial activity” is determined by the “question
15 [of] whether the particular actions that the foreign state performs (whatever the motive behind
16 them) are the *type* of actions by which a private party engages in ‘trade and traffic or commerce’”
17 *Conn. Bank of Commerce*, 299 F.3d at 392 (emphasis in original) (citation omitted), *aff’d on*
18 *reh’g*, 309 F.3d 240 (5th Cir. 2002).

19
20 ¹¹ As a technical matter, the delegation or redelegation of a ccTLD is established by
21 changing entries in the Internet root zone file. (Compl., ¶ 42.) The “root zone file” is maintained
22 by VeriSign, Inc. – not ICANN – in Virginia pursuant to a separate Cooperative Agreement
between VeriSign and the DOC. This begs the question of whether this Court can maintain
jurisdiction even if it finds that Plaintiff’s suit survives demurrer.

23 ¹² *Name.Space, Inc. v. Network Solutions, Inc.*, 202 F.3d 573, 577 (2nd Cir. 2000) (“The
24 root zone file serves the function of directing an address query to the proper TLD zone file, which
25 contains information regarding *the location of the numerous gTLDs and ccTLDs.*”) (emphasis
26 added); *NBC Universal, Inc. v. NBCUNIVERSAL.COM*, 378 F. Supp. 2d 715, 716 (E.D. Va.
27 2005) (holding that the .com gTLD is “located” in Dulles, Virginia, with VeriSign, Inc., the
28 *registry* for the .com gTLD) (emphasis added); *Globalsantafe Corp. v. Globalsantafe.Com*, 250
F. Supp. 2d 610, 623 (E.D. Va. 2003) (“Significantly, if the infringing domain name were
registered in a top-level domain whose *registry* was outside the United States, jurisdiction in the
United States might be avoided entirely. . . . In other words, there is a significant gap in the
ACPA’s trademark enforcement regime for domain names registered under top-level domain
names, *such as the foreign country code domain names, whose registry is located outside the*
United States.”).

1 Plaintiff has not alleged any fact that the .cg ccTLD is used for commercial activity.
2 Instead, Plaintiff alleges certain activity in *other* ccTLDs, which has nothing to do with the .cg
3 ccTLD. (Compl., ¶ 6.) The only information that Plaintiff cites to in support of its argument that
4 the .cg ccTLD is used for commercial activity in the United States is 50 .cg domain names
5 registered to U.S. registrants. (Compl., ¶ 7; Compl., Ex. 15.) Each of these domain names,
6 however, are registrations of well-known trademarks like “dell.cg” (by Dell Computer), aol.cg
7 (by America Online), and Budweiser.cg (by Anheuser Busch). This is not commercial activity of
8 the type required by the FSIA. It is common practice for companies to register domain names
9 containing their popular trademarks as soon as registration in *any* TLD becomes available in
10 order to protect against trademark infringement. This business practice is far too trivial to serve
11 as a basis for finding that the .cg ccTLD is being “used for” commercial activity. Indeed, the fact
12 that the .cg ccTLD managers themselves have affirmed that they are acting in the “public service”
13 – and Plaintiff has not alleged any fact demonstrating that their intent is any different – weights
14 heavily against redefining it as commercial. Moreover, the fact that .cg domain names are *free* to
15 any citizen or resident of the Congo also weights against it. (Jaquez Decl., Ex. G.)

16 **5. This Court does not have jurisdiction over property allegedly held by**
17 **Agents or Instrumentalities of the Congo.**

18 The Complaint suggests that Plaintiff may argue, under FSIA section 1610(b), that
19 interests held by certain persons purportedly related to the Congo can be imputed to the Congo in
20 satisfaction of the judgment.¹³ (Compl., ¶¶ 12-14.) The Complaint alleges that the
21 Administrative Contact of the .cg ccTLD, “Monsieur Akouala,” is the “Minister of
22 Communications of the Congolese government” and thus an official of the Congo. (Compl.,
23 ¶ 52). The Complaint further alleges that the Co-Sponsoring Organization, “ONPT Congo,” is

24
25 ¹³ Any person who is alleged to have an interest in the .cg ccTLD would obviously be
26 impaired if Plaintiff’s suit is ultimately successful. Should this Court determine that Plaintiff’s
27 claim should survive demurrer, under Cal. Civ. Proc. Code § 389, this Court may find it
28 necessary to determine whether Monsieur Akouala, ONPT Congo, Interpoint Switzerland,
Frederic Gregorie, or Interpoint SARL are subject to service of process, and if not, whether “in
equity and good conscience the action should proceed . . . or should be dismissed” to protect
against prejudice to the absent parties.

1 the Congo “state-run” SoTelCo, and thus an instrumentality¹⁴ of the Congo. (Compl., ¶¶ 53-54).
2 But under the FSIA, in order to attach property of an official or instrumentality of a foreign
3 nation, Plaintiff must demonstrate that the official or instrumentality has waived immunity
4 ***separate and apart from*** the foreign nation itself. 28 U.S.C. 1610(b); *Walker Int’l Holdings Ltd.*
5 *v. Republic of Congo*, 395 F.3d 229, 237 (5th Cir. 2004) (no attachment of property of
6 instrumentality of state where all elements of the FSIA application have not been pleaded against
7 the instrumentality itself); *Chuidian v. Phillipine Nat’l Bank*, 912 F.2d 1095, 1103 (9th Cir. 1990)
8 (suits against foreign government officials acting in their official capacities must be analyzed
9 independently under the FSIA framework). The Complaint does not do this. (Compl., ¶ 9
10 (stating only that “the Congo waived any and all rights to sovereign immunity”).) Additionally,
11 there is a presumption of independence of state instrumentalities from the foreign nation such that
12 the purported property of one instrumentality should not be used to satisfy an unrelated obligation
13 of the foreign nation. *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462
14 U.S. 611, 626-627 (1983). Here, Plaintiff has not alleged that Monsieur Akoulala or ONPT
15 Congo have any relation to the defaulted construction contract that serves as the basis of the
16 money judgment. That alone should be enough to demonstrate that jurisdiction cannot lie.

17 Plaintiff next argues that Interpoint SARL – the .cg ccTLD Technical Contact – is an
18 agent or alter ego of the Congo. (Compl., ¶¶ 51-55 (Interpoint SARL is believed to be the
19 “appointed agent to lease subdomains . . . [and] collect from such subdomain lessees revenue for
20 the Congo’s account.”).) Plaintiff has not sufficiently pled either theory.

21 In order for Plaintiff to invoke the jurisdiction of the court and attach the property of a
22 foreign nation through an agent or alter ego theory, Plaintiff must demonstrate that the property
23 could be attached against the foreign nation directly. *Walker Int’l Holdings Ltd.*, 395 F.3d at 238
24 (denying the attachment of bonuses owed to the Congo’s national oil company that were sought
25 in execution of a judgment against the Congo, because the property was not able to be attached

26
27 ¹⁴ An “agency or instrumentality of a foreign state” is defined as: any entity (1) which is a
28 separate legal person, corporate or otherwise; (2) which is an organ of a foreign state or political
subdivision thereof, or a majority of whose shares are owned by a foreign state; and (3) which is
not a citizen of a State of the U.S. 28 U.S.C. § 1603(b).

1 against the Congo itself). As stated above, Plaintiff has not done this. Indeed, with respect to
2 Interpoint SARL, the Complaint does not cite to or attach any documentation supporting the
3 claimed relationship. Moreover, the Complaint contains no allegation of the Congo's veiled
4 ownership of Interpoint SARL, nor any allegation that the alleged agreement with Interpoint
5 SARL was entered into to shield the Congo from liability for the funds earned on its behalf.

6 **B. PLAINTIFF FAILS TO STATE A CLAIM FOR A CREDITOR'S SUIT
7 UNDER CALIFORNIA CODE OF CIVIL PROCEDURE SECTION 708.210.**

8 The Complaint also fails because Plaintiff has not alleged the necessary requirements to
9 maintain a creditor's suit. California Civil Procedure Code section 708.210 provides that a
10 judgment creditor can only bring a creditor's suit against a third person who has possession or
11 control of property in which the judgment debtor has an interest. Cal. Civ. Proc. Code § 708.210.
12 But the Complaint fails to allege that the Congo has any property interest in the .cg ccTLD
13 (*supra*, § III (A)(1) and (2)), and courts have already found that domains are *not* subject to
14 execution of a money judgment. Moreover, property sought in execution of a money judgment
15 must be assignable or transferable, and the .cg ccTLD is not. Cal. Civ. Proc. Code § 695.030(a).
16 As stated above, nobody but the DOC can redelegate management of a ccTLD.

17 **1. Domains Cannot Be Levied Upon In Satisfaction Of A Money
18 Judgment.**

19 As a matter of law, domain names cannot be executed upon to satisfy a money judgment.
20 The only courts to address execution upon a domain did so in the context of second-level domain
21 names. *Dorer v. Arel*, 60 F. Supp. 2d 558, 559-61 (E.D. Va. 1999) (indicating that domain names
22 cannot be levied); *Network Solutions, Inc. v. Umbro Int'l, Inc.*, 259 Va. 759, 769-73 (2000)
23 (same); *Novak v. Benn*, 896 So. 2d 513, 521 n.1 (Ala. App. Ct. 2004) (citing *Dorer*). Although
24 each case acknowledged that second-level domain names possess an intangible property right –
25 which is consistent with the Ninth Circuit's reading in *Kremen* – each case found that domains
26 *cannot* be executed upon to satisfy a money judgment. *Dorer*, 60 F. Supp. 2d at 559-61; *Umbro*,
27 259 Va. at 769-73; *Novak*, 896 So. 2d at 521 n.1.
28

1 2. **The .cg ccTLD Is Not Transferable Or Assignable.**

2 Contrary to Plaintiff's unfounded contentions (Compl., ¶¶ 6, 17, 49), the .cg ccTLD is not
3 transferable or assignable, and therefore is not subject to execution here. Cal. Civ. Proc. Code
4 § 695.030. As stated above, the Congo *cannot* force ICANN to recommend redelegation of the
5 .cg ccTLD to the DOC, or that the DOC itself redelegate the ccTLD to a designee of the Congo's
6 choosing. Moreover, the current managers of the .cg ccTLD also *cannot* demand the same. The
7 *only* way that the .cg ccTLD can be redelegated is through a lengthy process by which ICANN,
8 among other things, independently investigates the merits of the proposed redelegation and the
9 qualifications of the proposed manager; ICANN then decides to recommend the proposed
10 redelegation to the DOC; the DOC then decides to approve the redelegation; and finally VeriSign
11 implements the redelegation in the root zone file. (See discussion supra, § II & n.12.) This is
12 hardly a process resembling a transfer or assignment of "property."¹⁵

13 **IV. CONCLUSION**

14 For the foregoing reasons, Plaintiff's creditor's suit must be dismissed against ICANN and
15 IANA and the prior writs of execution and levy must be dissolved.

16 Dated: August 28, 2006

Jones Day

17
18 By: 
19 Jeffrey A. LeVee

20 Attorneys for Defendants
21 INTERNET CORPORATION FOR
22 ASSIGNED NAMES AND NUMBERS AND
23 INTERNET ASSIGNED NUMBERS
24 AUTHORITY

25
26 ¹⁵ The fact that the DOC alone must give approval of any redelegation makes its approval
27 similar to a governmental license to engage in a business activity. This type of license is not
28 subject to the enforcement of a money judgment. Cal. Civ. Proc. Code § 695.050. Just as the
transfer of a government-issued license through an enforcement proceeding would supplant the
regulatory power of the issuing body, if this Court were to transfer the .cg ccTLD at the Plaintiff's
request, it would usurp the power of the DOC.

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PROOF OF SERVICE

I, Grace M. Salter, declare:

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 South Flower Street, Fiftieth Floor, Los Angeles, California 90071-2300. On August 28, 2006, I caused to be served a copy of the within document(s):

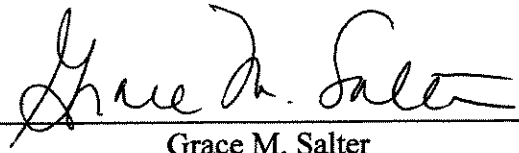
**NOTICE OF DEMURRER AND DEMURRER TO COMPLAINT BY
DEFENDANT INTERNET CORPORATION FOR ASSIGNED NAMES AND
NUMBERS AND ERRONEOUSLY-NAMED DEFENDANT INTERNET
ASSIGNED NUMBERS AUTHORITY; MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth in the attached Service List.
- by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express agent for delivery.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on August 28, 2006, at Los Angeles, California.



Grace M. Salter

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SERVICE LIST
C. ITOH MIDDLE EAST E.C. (Bahrain) v. INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS, et al.
LOS ANGELES SUPERIOR COURT, CASE NO. SC090220

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