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 12 RUBY GLEN, LLC

13 UNITED STATES DISTRICT COURT
 14 FOR THE CENTRAL DISTRICT OF CALIFORNIA

15 RUBY GLEN, LLC

16 Plaintiff,

17 vs.

18 INTERNET CORPORATION FOR
 19 ASSIGNED NAMES AND NUMBERS
 20 AND DOES 1-10

21 Defendant.

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

**PLAINTIFF RUBY GLEN, LLC’S
 NOTICE OF MOTION AND
 MOTION FOR LEAVE TO TAKE
 THIRD PARTY DISCOVERY OR,
 IN THE ALTERNATIVE, MOTION
 FOR THE COURT TO ISSUE A
 SCHEDULING ORDER**

22 **TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF**
 23 **RECORD:**

24 **PLEASE TAKE NOTICE** that Plaintiff Ruby Glen, LLC (“Plaintiff”) will and
 25 does move this Court for leave to take third party discovery or, in the alternative,
 26 Plaintiff moves this Court to issue a scheduling order pursuant to Federal Rule of Civil
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1 Procedure 16(b).¹ Plaintiff respectfully submits this motion in order to seek discovery
2 from third parties Nu Dotco, LLC (“NDC”) and VeriSign, Inc. (“VeriSign”).

3 This application is made pursuant to Federal Rule of Civil Procedure 26(d), on
4 the grounds that good cause exists to permit third party discovery because (a) as of the
5 date of filing this Motion, Defendant Internet Company for Assigned Names and
6 numbers (“ICANN”) has yet to assign the rights to the .WEB generic top level domain
7 (“gTLD”) to either VeriSign or NDC, (b) Plaintiff may need to seek injunctive relief to
8 stop Defendant Internet Company for Assigned Names and Numbers (“ICANN”) from
9 improperly assigning the .WEB generic top level domain (“gTLD”) contention set to
10 VeriSign or NDC, and (c) pursuant to the Federal Rules of Civil Procedure, the parties
11 should have already participated in a Rule 26(f) conference, which would have allowed
12 Plaintiff to seek this discovery without the Court’s intervention. Plaintiff has diligently
13 sought, unsuccessfully, to participate in a Rule 26(f) conference with ICANN. *See*
14 Declaration of Paula Zecchini (“Zecchini Decl.”), ¶ 2. More than two and a half months
15 have elapsed since ICANN first appeared in this case, and ICANN has thus far resisted
16 Plaintiff’s efforts to arrange for the parties to participate in a Rule 26(f) conference.

17 This motion is made following the conference of counsel pursuant to L.R. 7-3,
18 which took place on October 8, 2016 and October 11, 2016. The parties conferred by
19 email and telephone, and ICANN opposes Plaintiff’s motion.

20 This application is based on this Notice, the memorandum of points and
21 authorities, the declaration of Paula Zecchini, the papers, records, and pleadings on file
22 in this case, and on such oral argument as the Court allows.

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¹ Plaintiff brings this matter before this Court, as opposed to the assigned United States Magistrate Judge, because this Court has previously noted that such requests relate to a scheduling matter, rather than a discovery matter. *See America Unites for Kids v. Sandra Lyons*, Case 2:15-cv-02124-PA-AJW (C.D. Cal. Apr. 6, 2015).

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Dated: October 10, 2016

By: s/ Paula L. Zecchini

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION AND FACTUAL BACKGROUND

3 Plaintiff Ruby Glen, LLC (“Plaintiff”) seeks leave to serve third party discovery
4 or, in the alternative, moves this Court to issue a scheduling order that would permit
5 Plaintiff, as well as Defendant Internet Corporation for Assigned Names and Numbers
6 (“ICANN”), to proceed with discovery.

7 This case concerns ICANN’s bid process for granting the rights to the .WEB
8 generic top level domains (“gTLD”). Over Plaintiff’s strenuous objection, and similar
9 objections several of the other participants in this bid process, ICANN conducted an
10 auction of last resort for the .WEB gTLD on July 27, 2016. The concerns voiced by
11 Plaintiff and others involved what appeared to be undisclosed material changes in the
12 facts underlying the application of one bidder, third party Nu Dotco, LLC (“NDC”)—
13 changes that should have disqualified NDC from participating in the .WEB gTLD
14 auction. In the days following the .WEB gTLD auction, third party VeriSign, Inc.
15 (“Verisign”) confirmed the suspicions of Plaintiff and the other participants when it
16 issued a press release detailing its use of NDC as a shell to acquire the .WEB registry
17 for itself, thereby subverting ICANN’s applicant evaluation process. Plaintiff contends
18 that ICANN knew or should have known about the arrangement between NDC and
19 VeriSign prior to the auction, and that ICANN should have delayed the auction pending
20 a full and transparent investigation into this material and disqualifying change in the
21 control of this bidder for the .WEB gTLD.

22 NDC submitted the high bid (in excess of \$135 million) for the .WEB contention
23 set auction, a bid that more than doubled the *total net proceeds* of the *fifteen* other
24 auctions ICANN has conducted since June 2014. VeriSign has since boasted of its
25 agreement with NDC, pursuant to which VeriSign supplied NDC with \$130 million for
26 the .WEB gTLD bid, and NDC agreed to assign VeriSign the rights to the .WEB gTLD.
27 ICANN has not yet assigned the .WEB gTLD to NDC or VeriSign.

1 Plaintiff brings the instant motion because, despite its diligent efforts, ICANN
2 has not agreed to participate in the conference that typically precedes the start of
3 discovery, pursuant to Federal Rule of Civil Procedure 26(f). ICANN entered its
4 appearance in this matter more than three months ago, and its repeated declinations of
5 Plaintiff's invitations to engage in this mandatory conference have forced Plaintiff to
6 seek the Court's leave to serve critical and time-sensitive third party discovery—
7 discovery that Plaintiff should have been able to serve weeks ago, based on the default
8 timeline in the Federal Rules of Civil Procedure. Alternatively, the issuance of a
9 scheduling order pursuant to Federal Rule of Civil Procedure 16(b) would facilitate the
10 Rule 26(f) conference, allowing (i) the case to move forward, and (ii) Plaintiff to
11 proceed with this discovery.

12 **II. Relevant Factual Background**

13 Plaintiff initiated this action on July 22, 2016 with the filing of its Complaint.
14 *See* Dkt. No. 1. ICANN entered its appearance on July 25, 2016. *See* Dkt. No. 13. On
15 August 8, 2016, Plaintiff filed its Amended Complaint. *See* Dkt. No. 23.

16 Pursuant to its obligations under Federal Rule of Civil Procedure 26(f), Plaintiff
17 diligently endeavored to participate in the required discovery planning conference with
18 ICANN, so that the parties could (1) proceed with discovery, (2) comply with the
19 Court's standing order, and (3) submit the necessary report to the Court in advance of
20 the standard deadline for the Court to issue a scheduling order pursuant to Federal Rule
21 of Civil Procedure 16(b). *See* Declaration of Paula Zecchini ("Zecchini Decl."), ¶ 2.
22 However, ICANN has repeatedly declined to participate in a Rule 26(f) conference. *Id.*

23 Plaintiff and ICANN disagree regarding the extent to which the Rules require
24 and/or allow the parties to engage in the discovery process at this time. Therefore,
25 Plaintiff seeks the Court's leave to serve discovery on two third parties: NDC and
26 VeriSign. Alternatively, Plaintiff respectfully requests the Court issue a scheduling
27 order pursuant to Rule 16(b) so that the parties can move forward with conducting the
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1 Rule 26(f) Conference, and Plaintiff may proceed with this discovery as to both ICANN
2 and third parties.

3 **III. ARGUMENT**

4 **A. The Court Should Grant Plaintiff Leave to Serve Third Party**
5 **Discovery Prior to a Rule 26(f) Conference.**

6 This Court has authority, upon good cause shown, to grant a party leave to serve
7 third party discovery prior to the parties participating in a Rule 26(f) conference.
8 *Semitoool, Inc. v. Tokyo Electron America, Inc.*, 208 F.R.D. 273 (N.D. Cal. 2002); *see*
9 *also Interserve, Inc. v. Fusion Garage PTE, Ltd.*, No. C 09-05812, 2010 WL 143665,
10 at *2 (N.D. Cal. Jan. 7, 2010) (courts in the Ninth Circuit “use the ‘good cause’ standard
11 to determine whether discovery should be allowed to proceed prior to a Rule 26(f)
12 conference.”). “Good cause may be found where the need for expedited discovery, in
13 consideration of the administration of justice, outweighs the prejudice to the responding
14 party.” *Interserve*, at *2 (quoting *Semitoool, Inc. v. Tokyo Electron America, Inc.*, 208
15 F.R.D. 273, 276 (N.D. Cal. 2002). “In determining whether good cause justifies
16 expedited discovery, courts commonly consider factors including: ‘(1) whether a
17 preliminary injunction is pending; (2) the breadth of the discovery requests; (3) the
18 purpose for requesting the expedited discovery; (4) the burden on the defendants to
19 comply with the requests; and (5) how far in advance of the typical discovery process
20 the request was made.’” *America Unites for Kids v. Sandra Lyons*, Case 2:15-cv-02124-
21 PA-AJW, at 2-3 (C.D. Cal. Apr. 6, 2015) (quoting *American LegalNet, Inc. v. Davis*,
22 673 F. Supp. 2d 1063, 1067 (C.D. Cal. 2009)).

23 Moreover, the Court’s Standing Order provides that:

24 [I]t is advisable for counsel to begin to conduct discovery actively before
25 the Scheduling Conference. At the very least, the parties shall comply
26 fully with the letter and spirit of Fed. R. Civ. P. 26(a) and thereby obtain
27 and produce most of what would be produced in the early stage of
28 discovery, because at the Scheduling Conference the Court will impose
tight deadlines to complete discovery.”

1 Dkt. No. 22.

2 Each “good cause” factor favors allowing this third party discovery.

3 1. Whether a request for injunctive relief is pending.

4 Although, at present, there is not a pending request for injunctive relief, Plaintiff
5 will likely be forced to seek such relief to halt the assignment of the .WEB gTLD to
6 NDC or VeriSign. ICANN, NDC, and VeriSign could attempt to move forward with
7 this process at any point, and it is critical to determine, before any transfer occurs, (a)
8 the details surrounding VeriSign’s payment of money to, and apparent control of, NDC
9 in relation to the .WEB auction, (b) whether the agreements between VeriSign and NDC
10 are such that they undermined NDC’s eligibility to participate in the .WEB auction to
11 acquire the .WEB gTLD for VeriSign, (c) the extent to which ICANN knew, or should
12 have known, about the arrangement between NDC and Verisign, and (d) whether
13 information disclosed to ICANN by NDC or VeriSign in the days leading up to the
14 .WEB gTLD auction should have resulted in either (i) delay of the .WEB gTLD auction
15 to allow for further investigation into NDC’s eligibility to participate in the .WEB gTLD
16 auction or (ii) NDC’s outright disqualification from participating in the .WEB gTLD
17 auction. The discovery sought will allow Plaintiff to supplement its current evidentiary
18 basis for seeking injunctive relief and to potentially amend its pleadings in light of
19 ICANN’s stated intent to file a motion to dismiss.

20 2. The breadth of the discovery requests.

21 The discovery that Plaintiff seeks from NDC and VeriSign is narrowly tailored
22 to the disputed issues in this case—namely, (a) changes to NDC’s ownership and
23 management structure after the submission to ICANN of its application to participate
24 in the auction process for the .WEB gTLD, (b) VeriSign’s provision of funds to cover
25 NDC’s bid for the .WEB contention set, (c) VeriSign’s agreement with NDC to acquire
26 the rights to the .WEB contention set, (d) ICANN’s investigation of these matters, and
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1 (e) the impact of these matters on NDC's eligibility to participate in the .WEB string
2 contention and ICANN's decision in that regard.

3 In particular, Plaintiff requests the Court order and allow the scheduling of third
4 party discovery to be permitted on 10 business days' notice with the respondents being
5 required to produce as follows:

- 6 · From NDC: information and documents in its possession, custody, and/or under
7 its control related to the admitted changes to its management, control, or
8 ownership or the transfer, sale or assignment of its rights to its application for
9 .WEB during the entirety of the .WEB contention set application process,
10 including specifically any changes in Mr. Nicolai Bezsonoff's² status with NDC;
11 all documents in NDC's possession, custody, and/or under its control related to
12 its agreement with VeriSign to provide NDC with \$130 million towards NDC's
13 bid for the .WEB contention set, and to acquire the rights to the .WEB contention
14 set, including all communications between NDC and VeriSign related thereto,
15 and all communications between NDC and ICANN related thereto; and
- 16 · From VeriSign: information and documents in its possession, custody, and/or
17 under its control related to its agreement with NDC to provide NDC with \$130
18 million towards NDC's bid for the .WEB contention set, and to acquire the rights
19 to the .WEB contention set, including all communications between VeriSign and
20 NDC related thereto, including anti-trust issues related thereto, and all
21 communications between VeriSign and ICANN related thereto.

22 These requests are narrowly tailored to discover critical and time-sensitive information
23 regarding the disputed issues in this case, including whether NDC was qualified to bid
24 on the .WEB contention set and what information, if any, was available to ICANN in
25 relation to NDC and VeriSign's conduct in relation thereto.

26 3. The purpose for requesting the expedited discovery.

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28 ² NDC listed Mr. Bezsonoff as a Manager and COO on its ICANN application.

1 Plaintiff's purpose in seeking this discovery is four-fold: (a) to expedite the
2 resolution of this matter by (i) facilitating the full and transparent investigation that is a
3 critical component of any legitimate gTLD delegation process, and (ii) resolving the
4 issue of NDC's eligibility to participate in the .WEB string contention; (b) to provide
5 Plaintiff with information necessary to support a motion for a preliminary injunction to
6 enjoin any assignment of rights in the .WEB gTLD until the resolution of this matter;
7 (c) to overcome the parties' respective differences as to the timing and necessity of
8 engaging in a Rule 26(f) conference at this stage in the litigation; and (d) learning
9 critical facts necessary to address the issues ICANN intends to raise by a motion to
10 dismiss.

11 4. The burden on the defendants to comply with the requests.

12 ICANN, NDC, and VeriSign will suffer no prejudice as a result of these
13 discovery requests, because, pursuant to the default deadlines established by the Federal
14 Rules of Civil Procedure and the Court's standing order, the parties should already be
15 conducting this discovery.

16 Federal Rule of Civil Procedure 16(b) requires that the court issue a scheduling
17 order after the parties provide the court with a Rule 26(f) report, or after holding a
18 scheduling conference with the parties. Fed. R. Civ. P. 16(b)(1). The court must issue
19 a scheduling order "as soon as practicable, but unless the judge finds good cause for
20 delay, the judge must issue it within the earlier of 90 days after any defendant has been
21 served with the complaint or 60 days after any defendant has appeared." *Id.*

22 ICANN entered its appearance on July 25, 2016, meaning that, absent the Court
23 making an affirmative determination to deviate from the timetable set forth in the
24 Federal Rules, the parties should have completed a Rule 26(f) conference by September
25 2, 2016. *See Zecchini Decl.*, ¶ 2. Almost two months later, ICANN continues to refuse
26 to participate in discovery, now claiming that no discovery should occur until after the
27 Court rules on a motion to dismiss that ICANN intends to file on October 26, 2016.
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1 ICANN, however, has failed to identify any prejudice by allowing Plaintiff to initiate
2 discovery. Indeed, it is Plaintiff who will be prejudiced as the critical facts relevant to
3 its claims are entirely in the possession of ICANN, NDC, and VeriSign. Plaintiff merely
4 wants to move this matter forward in an effort to gather the necessary information to
5 resolve it in a fair and expeditious manner—this is especially the case given the Court’s
6 recent indication that it will grant no further extensions of ICANN’s deadline to file a
7 responsive pleading. *See* Dkt. No. 27.

8 Moreover, NDC already agreed to make public all of the relevant information
9 requested on its gTLD application. *See* Am. Comp. at ¶¶ 16-20, 31-35; *see also* ICANN
10 gTLD Applicant Guidebook (“Applicant Guidebook”), §§ 1.2.1, 1.2.7, 6.1, 6.7-6.11.³
11 In so doing, NDC took on the affirmative obligation to publicly disclose any changes
12 to its ownership or management structure. *See* Am. Comp. at ¶¶ 33-35; Applicant
13 Guidebook, §§ 1.2.1, 1.2.7, 6.1, 6.10. Similarly, VeriSign can hardly complain of any
14 burden in providing the requested discovery. It publicly announced, *after* the .WEB
15 auction, that it funded NDC’s bid for the .WEB gTLD in order to acquire it for itself,
16 without going through the ICANN applicant evaluation process that applies to *every*
17 bidder. *See* Am. Comp. at ¶¶ 57-62; Zecchini Decl., ¶ 4. To ensure the legitimacy of
18 the gTLD delegation process, VeriSign must produce information to fully explain the
19 background and genesis of its agreement with NDC, its efforts to acquire the .WEB
20 gTLD, and any information that was shared with ICANN in relation to such efforts.
21 There can be no doubt that VeriSign’s use of back channels to acquire the .WEB gTLD
22 outside of ICANN’s applicant process is the type of opaque relationship that would have
23 necessitated additional disclosures to ICANN.

24 5. How far in advance of the typical discovery process the request
25 was made.

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28 ³ A true and correct copy of the Applicant Guidebook is attached to the Zecchini
Declaration as Exhibit B. *See* Zecchini Decl., ¶ 3.

1 As explained above, Plaintiff is seeking to conduct discovery that it should have
2 been permitted to seek weeks ago, according to the default timeline set forth in the
3 Federal Rules. In particular, but for the parties' disagreement regarding the deadline to
4 participate in a Rule 26(f) conference, the parties would have already completed this
5 step, which typically precedes any third party discovery.

6 Plaintiff has diligently sought a Rule 26(f) conference with ICANN. The parties
7 disagree as to whether they must participate in this conference, and ICANN has
8 indicated that it will not do so absent a court order. Plaintiff should not be forced to
9 wait indefinitely to conduct third party discovery. Therefore, the need for expedited
10 discovery, in consideration of the administration of justice, outweighs any potential
11 prejudice to ICANN, NDC, or VeriSign.

12 **B. Alternatively, the Court Should Issue a Scheduling Order.**

13 As an alternative request for relief, Plaintiff respectfully requests that this Court
14 issue a scheduling order pursuant to Federal Rule of Civil Procedure 16(b), so the case
15 may proceed, and the parties can conduct discovery of each other and of third parties
16 with relevant information to the claims and defenses alleged in this case. As explained
17 above, absent a finding of "good cause for delay," the Court must issue a scheduling
18 order "as soon as practicable," and no later than sixty days after the defendant enters an
19 appearance. Fed. R. Civ. P. 16(b)(2). That deadline passed on September 23, 2016,
20 more than a month ago.

21 ICANN's decision to refrain from participating in a Rule 26(f) conference absent
22 Court intervention has left Plaintiff no choice but to seek relief from the Court so that it
23 may conduct this critical discovery. This request is entirely consistent with the Court's
24 standing order, which advises the parties to "begin to conduct discovery actively before
25 the Scheduling Conference." *See* Dkt. No. 22. If the Court declines to permit Plaintiff
26 to conduct third party discovery prior to a Rule 26(f) conference, the issuance of a
27 scheduling order would facilitate the natural and orderly progression of this case.
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1 **IV. CONCLUSION**

2 For the foregoing reasons, Plaintiff Ruby Glen, LLC respectfully asks this Court
3 to:

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

6 (b) Issue a scheduling order.

7 Dated: October 26, 2016

By: s/ Paula L. Zecchini

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18 *Attorneys for Ruby Glen, LLC*

19 **CERTIFICATE OF SERVICE**

20 The undersigned hereby certifies, under penalty of perjury under the laws of the
21 State of California, that I electronically filed the foregoing document with the Clerk of
22 the Court using the CM/ECF system which will send notification of such filing to the
23 following:

24 **Electronic Mail Notice List**

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