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11 Attorneys for Plaintiff
NAME.SPACE, INC.

12 UNITED STATES DISTRICT COURT
13 CENTRAL DISTRICT OF CALIFORNIA
14 WESTERN DIVISION
15

16 NAME.SPACE, INC.,
17 Plaintiff,
18 v.
19 INTERNET CORPORATION FOR
20 ASSIGNED NAMES AND NUMBERS,
21 Defendant.

Case No. CV12- 8676 (PA)

Assigned for all purposes to the
Honorable Percy Anderson

**PLAINTIFF'S OPPOSITION TO
DEFENDANT ICANN'S
REQUEST FOR JUDICIAL
NOTICE IN SUPPORT OF ITS
MOTION TO DISMISS
PLAINTIFF'S COMPLAINT**

Hearing Date: Jan. 23, 2012
Hearing Time: 1:30 p.m.
Judge: Honorable Percy Anderson
Hearing Location: 312 N. Spring St.

1 Plaintiff name.space, Inc. (“name.space”) hereby submits this opposition to
2 the Request for Judicial Notice (“RJN”) filed by Defendant Internet Corporation for
3 Assigned Names and Numbers (“ICANN”) in support of ICANN’s Motion to
4 Dismiss (“Motion”). ICANN asks this Court to take judicial notice of three
5 documents in support of its Motion: (1) ICANN’s Articles of Incorporation (the
6 “Articles”); (2) ICANN’s Bylaws (the “Bylaws”); and (3) a document ICANN
7 misleadingly refers to as the “2000 Unsponsored TLD Application,” but is in fact
8 the “Unsponsored TLD Application Transmittal Form” (“Transmittal Form”).
9 ICANN’s request is purportedly made pursuant to Federal Rule of Evidence 201,
10 but relies largely on a separate doctrine—sometimes referred to as “incorporation
11 by reference”—allowing a court to consider extrinsic evidence in a motion to
12 dismiss if the complaint “necessarily relies” on that evidence. Regardless, under
13 both the incorporation by reference doctrine and Rule 201, none of the documents
14 subject to ICANN’s request are properly considered on a motion to dismiss, and
15 ICANN’s request should therefore be denied.

16 **LEGAL STANDARD**

17 It is well settled that “a district court may not consider any material beyond
18 the pleadings in ruling on a Rule 12(b)(6) motion.” *Lee v. City of Los Angeles*, 250
19 F.3d 668, 688 (9th Cir. 2001) (quotations omitted); *see also Brocato v. Dep’t of*
20 *Corrections*, No. CV 06-00575 CJC (JEM), 2009 U.S. Dist. LEXIS 100382, at *7
21 (C.D. Cal. Sept. 21, 2009) (“On a motion to dismiss pursuant to Federal Rule of
22 Civil Procedure 12(b)(6), the Court must limit its review to the four corners of the
23 operative complaint and may not consider facts presented in briefs or extrinsic
24 evidence.”).

25 A narrow exception exists for “unattached evidence on which the complaint
26 necessarily relies.” *United States v. Corinthian Colleges*, 655 F.3d 984, 999 (9th
27 Cir. 2011). A complaint “necessarily relies” on a document where “(1) the
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1 complaint refers to the document; (2) the document is central to the plaintiff's
 2 claim; and (3) no party questions the authenticity of the document." *Id.* In
 3 addition, the Court may take judicial notice pursuant to Federal Rule of Evidence
 4 201 of "matters of public record," but not of facts that may be "subject to
 5 reasonable dispute." *Id.* (citing *Lee*, 250 F.3d at 689).

6 ARGUMENT

7 **I. NAME.SPACE NEVER REFERS TO OR RELIES ON ICANN'S 8 ARTICLES OR BYLAWS.**

9 name.space's Complaint does not include even a single reference to
 10 ICANN's Articles or Bylaws. The Complaint thus cannot possibly *rely* on
 11 documents that it never mentions or references, which by itself is sufficient to deny
 12 ICANN's request. *See Corinthian Colleges*, 655 F.3d at 999.

13 Perhaps recognizing this shortcoming, ICANN invents its own standard and
 14 argues that name.space's Complaint "necessarily implicates" ICANN's Articles and
 15 Bylaws. (RJN at 3.) Not only is "implication" the wrong standard for considering
 16 extrinsic evidence on a motion to dismiss, but ICANN's unilateral determination
 17 that name.space "necessarily implicates" the Articles and Bylaws merely by
 18 addressing ICANN's responsibilities in the Complaint, without ever referencing or
 19 discussing the Articles or Bylaws, is insufficient. In fact, the Complaint explicitly
 20 attributes the language that ICANN claims "necessarily implicates" the Articles and
 21 Bylaws to agreements that exist between ICANN and the United States
 22 government, *not* the Articles or Bylaws. (*See* Compl. ¶¶ 36-42.) In any event, even
 23 if the Articles or Bylaws had been referenced in the Complaint (which they were
 24 not), they are not *central* to the Complaint, and thus cannot be considered on a
 25 motion to dismiss.¹ *See Corinthian Colleges*, 655 F.3d at 999 (holding that judicial
 26 notice is improper where documents are not central to a plaintiff's complaint).

27 ¹ ICANN's citation to *Verisign, Inc. v. Internet Corp. for Assigned Names & Numbers*, No. CV
 28 04-1292 AHM (CTx), 2004 U.S. Dist. LEXIS 17330, at *6 n.2 (C.D. Cal. Aug. 26, 2004), is
 (Footnote continues on next page.)

1 Further, ICANN’s RJN is improper because it is not merely asking the Court
2 to take judicial notice of the *existence* of the Articles and Bylaws under Rule 201,
3 but essentially seeking to have the Court credit ICANN’s assertion that it *complied*
4 with its Articles and Bylaws. (*See, e.g.*, Mot. at 4, 15 (claiming that ICANN “does
5 not ‘compete’ in the DNS” because its Bylaws forbid it); 12-13 (stating that “the
6 notices of, agendas for, reports considered at, and the minutes of each [Board]
7 meeting are publicly posted on ICANN’s website, *as required by ICANN’s*
8 *Bylaws*”) (emphasis added).) The Court, however, cannot take judicial notice of
9 disputed facts, including ICANN’s contention that it complied with the
10 requirements set forth in the Articles and Bylaws. *See, e.g., Neighborhood*
11 *Assistance Corp. of Am. v. First One Lending Corp.*, SACV 12-463, 2012 U.S.
12 Dist. LEXIS 67950, at *30 (C.D. Cal. May 15, 2012) (rejecting defendants’ request
13 that the court take judicial notice of articles of incorporation and other documents
14 on a motion to dismiss, and noting that, even if the court could take judicial notice
15 of those documents, “the Court cannot take judicial notice of disputed facts
16 included in the documents”); *Lauter v. Anoufievr*, 642 F. Supp. 2d 1060, 1077
17 (C.D. Cal. 2009) (“a court may not take judicial notice of a fact that is subject to
18 ‘reasonable dispute’ simply because it is . . . asserted in another document which
19 otherwise is properly the subject of judicial notice”); *Patel v. Parnes*, 253 F.R.D.
20 531, 546 (C.D. Cal. 2008) (“The truth of the content [of a publicly filed document]
21 and the inferences properly drawn from them . . . is not a proper subject of judicial
22 notice under Rule 201.”).

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(Footnote continued from previous page.)

25 inapposite. There, not only did Verisign cite to ICANN’s Bylaws, but the Bylaws were central its
26 allegation that advisory bodies to ICANN were the *de facto* decision-makers, rather than the
27 Board. *Id.* at *6 n.2, 16. To support this proposition, Verisign’s Complaint pointed to “the
28 requirement of ICANN’s Bylaws that the constituency group’s policy decisions be followed by
the Board of Directors of ICANN.” *Id.* at *16.

1 **II. THE COMPLAINT DOES NOT RELY ON THE TRANSMITTAL**
2 **FORM.**

3 ICANN misleadingly refers to Exhibit C of its RJN as the “2000
4 Application,” but that is not what Exhibit C is. Exhibit C is merely the
5 “Unsponsored TLD Application Transmittal Form” that accompanied name.space’s
6 application. As with the Articles and Bylaws, name.space’s Complaint does not
7 make a single reference to the Transmittal Form, and the Court should not
8 countenance ICANN’s attempt to sneak that document into the proceedings under
9 another name. *See, e.g., Gammel v. Hewlett-Packard Co.*, SACV 11-1404, 2012
10 U.S. Dist. LEXIS 155681, at *8-9 (C.D. Cal. Aug. 29, 2012) (refusing to consider a
11 document under the “incorporation by reference” doctrine because the document
12 was not referenced in the complaint).

13 Setting aside ICANN’s mischaracterization of the document, ICANN’s
14 argument that name.space “relies on” the Transmittal Form (or the “2000
15 Application”) falls flat. name.space’s claims concern ICANN’s unlawful and
16 anticompetitive conduct in the 2012 Application Round. name.space references its
17 2000 Application to provide background regarding name.space’s business
18 operations and context to its claims concerning ICANN’s anticompetitive conduct
19 in structuring the 2012 Application Round, but none of name.space’s claims rely on
20 the Transmittal Form or the fact that name.space submitted an application for 118
21 generic Top-Level Domains (“gTLDs”) in 2000. (Compl. ¶¶ 45-58, 73, 75, 90
22 (describing how ICANN significantly raised the price of applying in 2012
23 compared with 2000)).

24 The Transmittal Form is in no way “central” to name.space’s Complaint and
25 does not fit within the narrow exception to allow the Court to consider it on a
26 motion to dismiss. *See Corinthian Colleges*, 655 F.3d at 999 (one of the
27 requirements to “consider unattached evidence on which the complaint ‘necessarily
28 relies’” is that the “the document is central to the plaintiff’s claim”). Tellingly,

1 even ICANN cannot find the supposed link between the Transmittal Form and
2 name.space’s claims. ICANN merely lists the few references in the Complaint to
3 name.space’s 2000 gTLD application and puts forth the conclusory proclamation
4 that “[t]hus, there is no question [name.space’s] [2000] Application is central to
5 name.space’s claims and subject to judicial notice” (RJN at 4.)

6 Conspicuously absent is any suggestion of how references to name.space’s gTLD
7 application in 2000 relate to the claims brought by name.space based on the 2012
8 Application Round.

9 Finally, even if the Transmittal Form were referenced in the Complaint,
10 ICANN does not cite any authority for the proposition that a court may consider a
11 document on a motion to dismiss that was used merely to provide some historical
12 background to a Complaint. Unlike, for example, *Nielson v. Union Bank of Cal.,*
13 *N.A.*, 290 F. Supp. 2d 1011, 1114 (C.D. Cal. 2003), name.space does not advance
14 any claims for breach of the Transmittal Form, and it does not rely on the
15 Transmittal Form as a contract. Nor does name.space base any of its claims on the
16 Transmittal Form or the 2000 gTLD application process in general. Thus, the
17 policy rationale for considering documents under the incorporation by reference
18 doctrine is inapplicable here. *See Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir.
19 1998) (the policy rationale for considering “documents crucial to the plaintiff’s
20 claims, but not explicitly incorporated in [the] complaint,” exists to prevent
21 “plaintiffs from surviving a Rule 12(b)(6) motion by deliberately omitting
22 references to *documents upon which their claims are based*”) (emphasis added);
23 *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991) (“[W]e
24 have held that when a plaintiff chooses not to attach to the complaint or incorporate
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1 by reference a prospectus *upon which it solely relies* and which is *integral to the*
 2 *complaint*, the defendant may produce the prospectus” (emphasis added).²

3 **III. ICANN’S PUBLICATION OF DOCUMENTS ON ITS OWN WEBSITE**
 4 **DOES NOT ESTABLISH THE RELIABILITY REQUIRED FOR**
 5 **JUDICIAL NOTICE.**

6 In addition to the shortcomings noted above, judicial notice is inappropriate
 7 pursuant to Federal Rule of Evidence 201 because the unauthenticated documents at
 8 issue taken from ICANN’s website lack the requisite reliability to be judicially
 9 noticed. *See* Fed. R. Evid. 201(b)(2).

10 *First*, documents available on the Internet, particularly when the document is
 11 posted to the requesting party’s own website, do not meet the standards of
 12 reliability and trustworthiness required by Rule 201. *See, e.g., Experian Info.*
 13 *Solutions, Inc. v. Lifelock, Inc.*, 633 F. Supp. 2d 1104, 1107 (C.D. Cal. 2009)
 14 (material on the Governor of Connecticut’s web page is not “capable of accurate
 15 and ready determination by resort to sources whose accuracy cannot be
 16 questioned”); *Victaulic Co. v. Tieman*, 499 F.3d 227, 236 (3d Cir. 2007) (“private
 17 corporate websites, particularly when describing their own business, generally are
 18 not the sorts of ‘sources whose accuracy cannot reasonably be questioned’ that our
 19 judicial notice rule contemplates”) (internal citation omitted).

20 *Second*, because ICANN failed to authenticate the documents attached to the
 21 RJN, these documents may not be judicially noticed. *See, e.g., CYBERSitter, LLC*
 22 *v. People’s Republic of China*, 805 F. Supp. 2d 958, 963 (C.D. Cal. 2011) (denying

23 ² As discussed in name.space’s opposition to ICANN’s motion to dismiss, even if the Court could
 24 properly consider or take judicial notice of the Transmittal Form’s *existence*, the language of the
 25 purported release contained therein is ambiguous at best, and its context and impact is heavily
 26 disputed. Thus the Court cannot accept ICANN’s subjective interpretation of the document as
 27 true on a motion to dismiss. *See, e.g., Gammel*, 2012 U.S. Dist. LEXIS 155681, at *7-8
 28 (recognizing that the court can consider a document under the incorporation by reference or
 judicial notice doctrines, but not “for the truth of the matters they assert”); *see also Lee*, 250 F.3d
 at 689 (“a court may not take judicial notice of a fact that is ‘subject to ‘reasonable dispute’”) (citing Fed. R. Evid. 201(b)).

1 request for judicial notice of “statements or images appearing on undated,
2 unverified websites without an accompanying declaration as to when, where, and
3 how such images or statements were obtained”); *In re Easysaver Rewards Litig.*,
4 737 F. Supp. 2d 1159, 1168 (S.D. Cal. 2010) (“Information from the internet does
5 not necessarily bear an indicia of reliability and therefore must be properly
6 authenticated by affidavit.”).

7 **CONCLUSION**

8 For the foregoing reasons, name.space respectfully requests that the Court
9 deny ICANN’s Request for Judicial Notice.

10 Dated: January 4, 2013

MORRISON & FOERSTER LLP

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12
13 By: /s/ Craig B. Whitney
Craig B. Whitney

14 Attorneys for Plaintiff
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