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INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DOTCONNECTAFRICA TRUST,

Plaintiff,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, *et al.*,

Defendants.

Case No. CV 16-00862-RGK(JCx)

Assigned for all purposes to the Honorable R. Gary Klausner

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS' OPPOSITION TO MOTION FOR LEAVE TO AMEND

[Declaration of J. LeVee and [Proposed] Order filed concurrently herewith]

Hearing Date: November 7, 2016
Hearing Time: 9:00 a.m.
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I. INTRODUCTION

Plaintiff DotConnectAfrica Trust ("Plaintiff") has filed a motion for leave to file a second amended complaint ("Motion") long after the August 1, 2016 deadline to amend the pleadings set forth in this Court's scheduling order ("Scheduling Order," ECF No. 110). Plaintiff's Motion seeks to add a Fifth Amendment procedural due process claim ("Due Process Claim") against the Internet Corporation for Assigned Names and Numbers ("ICANN"). Plaintiff does not contend that it suddenly discovered new facts that support the addition of the Due Process Claim (after the deadline to do so), nor could it since all the materials Plaintiff cites were widely available on the Internet prior to the amendment deadline, as well as prior to the filing of the lawsuit. Rather, Plaintiff merely states that it did not "contemplate" the cause of action until now. (Mot. at 6.) Moreover, the proposed Due Process Claim is blatantly frivolous, as it relies upon the nonsensical notions that: (1) Plaintiff has a constitutional right to operate the new gTLD .AFRICA; and (2) ICANN is an agent of the U.S. Government.[1] Nothing in the Proposed Second Amended Complaint ("PSAC") or the Motion plausibly suggests any constitutionally cognizable property or liberty interest in the right to operate .AFRICA (as there is none), rendering the proposed Due Process Claim defective at the outset. Further, no set of facts could be pled to show that ICANN is a governmental actor, because it is not.

The real reason Plaintiff seeks to amend its First Amended Complaint ("FAC") to add the Due Process Claim is to artificially create subject matter jurisdiction in a desperate bid to keep this action in federal court, since ZA Central Registry ("ZACR") as an indispensable party destroys the Court's diversity jurisdiction. (*See* ECF No. 137 at 4 n.2.) Such gamesmanship and manipulation of

[1] On September 28, 2016, ICANN's counsel informed Plaintiff's counsel that moving to amend the FAC to add a due process claim may warrant sanctions under Fed. R. Civ. P. 11. ICANN reserves all rights in that regard.

the pleading process cannot be permitted. There is no "good cause" to amend the Scheduling Order, as Fed. R. Civ. P. 16(b) ("Rule 16(b)") requires. In addition, leave to amend the FAC is not warranted under Fed. R. Civ. P. 15(a) ("Rule 15(a)") because: (1) Plaintiff brings the Motion in bad faith; (2) Plaintiff unduly delayed bringing the Motion; (3) granting the Motion would significantly and severely prejudice ICANN in this action; (4) the proposed amendment is futile because the claim fails as a matter of law; and (5) Plaintiff has already amended its complaint. *See Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990).

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY[2]

Plaintiff filed this suit against ICANN on January 20, 2016, in Los Angeles County Superior Court. (ECF No. 1.) After the Superior Court denied Plaintiff's request for a temporary restraining order, ICANN timely removed the case to the district court, invoking diversity jurisdiction. (ECF No. 1.)

On February 26, 2016, Plaintiff filed its FAC, adding ZACR as a defendant. (ECF No. 10.) Therein, Plaintiff asserted claims for breach of contract, intentional and negligent misrepresentation, fraud and conspiracy to commit fraud, unfair competition, negligence, intentional interference with contract (against ZACR only), confirmation of the independent review process ("IRP") declaration ("Declaration") as well as three claims for declaratory relief. (ECF No. 10.) The underlying allegation of each of the claims is that ICANN wrongly did not comply with its own procedures in evaluating Plaintiff's application to operate the new gTLD .AFRICA and did not comply with the Declaration. (ECF No. 10.)

On March 1, 2016, Plaintiff moved for a preliminary injunction, which this Court granted on April 12, 2016. (ECF Nos. 16, 75.) On April 26, 2016, ZACR moved to dismiss the FAC as to ZACR for failure to state a claim, which this Court

[2] As the Court is familiar with Plaintiff's allegations (*see* ECF No. 75 at 1-2), ICANN includes only the background relevant to resolving this Motion.

granted on June 14, 2016. (ECF Nos. 80, 112.) While its motion to dismiss was pending, ZACR also moved for reconsideration of the preliminary injunction order—a motion in which ICANN joined. (ECF Nos. 85, 113.)

On June 7, 2016, this Court entered the Scheduling Order setting forth an August 1, 2016 deadline to amend the pleadings, a November 30, 2016 discovery cutoff, and a February 2017 trial date. (ECF No. 110.)

On June 20, 2016, the district court denied the motion to reconsider the order granting the preliminary injunction. (ECF No. 113.)

On July 29, 2016, ICANN moved for a protective order limiting the scope of the Fed. R. Civ. P. 30(b)(6) ("Rule 30(b)(6)") deposition notice Plaintiff served on ICANN ("Motion for Protective Order"). (ECF No. 121-1.) Among the topics ICANN asked Magistrate Judge Chooljian to eliminate were four concerning the "IANA functions contract" that ICANN had previously entered into with the U.S. Government. (*See* ECF No. 121-3, Ex. 1 at 14.) ICANN argued those topics were wholly irrelevant to the lawsuit. (ECF No. 121-1 at 15.) Magistrate Judge Chooljian agreed, and granted a protective order "prohibiting inquiry" into those topics. (ECF No. 127 at 2.)

On August 1, 2016, ZACR moved to intervene in the action, which Plaintiff opposed. (ECF No. 122, 128.) On September 22, 2017, this Court ordered "the parties and ZACR" to file supplemental briefing on the "discrete issue" as to whether ZACR "is an indispensible party as to Plaintiff's Tenth Claim for Declaratory Relief[.]" (ECF No. 134.) In its supplemental brief, filed September 27, 2016, Plaintiff stated: "DCA intends shortly hereafter to file a motion for leave to amend to add a Fifth Amendment claim for violation of due process against ICANN as an entity contracted with the U.S. government to provide a public benefit; *if DCA amends the complaint to add this claim, the Court will have federal question jurisdiction over the matter*, mooting the question of ZACR's indispensability." (ECF No. 137 at 4 n.2 (emphasis added).) That same day,

September 27, 2016, Plaintiff called ICANN to meet and confer regarding the instant Motion. (LeVee Decl. ¶ 2.)[3] ICANN responded in writing on September 28, 2016, reserving its rights to seek sanctions in connection with any motion seeking leave to add a claim that posits ICANN is a governmental actor based on multiple grounds, including that courts have already determined that ICANN is *not* a governmental actor. (LeVee Decl. ¶ 2, Ex. 1.)

On October 4, 2016, more than two months after the Scheduling Order's deadline to amend the pleadings, Plaintiff filed the Motion seeking leave to amend the FAC to add the Due Process Claim. (ECF No. 138.)

III. LEGAL STANDARDS

Pursuant to Fed. R. Civ. P. 16(b), after the date set forth in a scheduling order to amend the pleadings has passed, the deadline may be modified only for "good cause." Fed. R. Civ. P. 16(b). "Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking the amendment." *Johnson v. Mammoth Recreations*, 975 F.2d 604, 609 (9th Cir. 1992).[4] If the moving "party was not diligent, the inquiry should end" and the motion must be denied. *Id*.

If a plaintiff can demonstrate the requisite "good cause" under Rule 16(b) to amend the scheduling order, it must then demonstrate that the amendment to the pleading is warranted under Fed. R. Civ. P. 15(a)(2), which provides that "a party may amend its pleading only with the opposing party's written consent or the

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[3] Plaintiff's Motion erroneously states that it met and conferred with ICANN on "September 7, 2016" (ECF No. 138 at 1 (emphasis added)). Since this statement is completely untrue, ICANN assumes it is a typographical error.

[4] "[T]o demonstrate diligence under Rule 16's 'good cause' standard, the movant may be required to show the following: (1) that she was diligent in assisting the Court in creating a workable Rule 16 order . . . ; (2) that her noncompliance with a Rule 16 deadline occurred or will occur, notwithstanding her diligent efforts to comply, because of the development of matters which could not have been reasonably foreseen or anticipated at the time of the Rule 16 scheduling conference, . . . ; and (3) that she was diligent in seeking amendment of the Rule 16 order, once it became apparent that she could not comply with the order." *Jackson v. Laureate, Inc.*, 186 F.R.D. 605, 608 (E.D. Cal. 1999) (citations omitted).

court's leave." Fed. R. Civ. P. 15(a)(2). Leave to amend "is not to be granted automatically." *Jackson v. Bank of Haw.*, 902 F.2d 1385, 1387 (9th Cir. 1990). Instead, "granting leave to amend is subject to several limitations," which include: "(1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5) whether plaintiff has previously amended its complaint." *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989). Of these factors, "prejudice to the opposing party carries the greatest weight." *Bever v. CitiMortg., Inc.*, No. 1:11-cv-01584-AWI-SKO, 2014 U.S. Dist. LEXIS 54390, at *26 (E.D. Cal. Apr. 17, 2014) (citing *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003)).

IV. ARGUMENT

A. THE MOTION MUST BE DENIED UNDER RULE 16 BECAUSE THERE IS NO GOOD CAUSE TO AMEND THE SCHEDULING ORDER.

The "good cause" requirement of Rule 16 considers the diligence of the party seeking to amend the scheduling order. Therefore, Plaintiff bears the burden of demonstrating that it has acted diligently. *Johnson*, 975 F.2d at 609; *Jackson v. Laureate, Inc.*, 186 F.R.D. 605, 607 (E.D. Cal. 1999). Plaintiff cannot carry its burden of showing diligence because "the allegations Plaintiff seeks to add to the complaint are not comprised of newly discovered facts, but *facts that have already been known . . . or facts that Plaintiff has known, or should have known* since the inception of the lawsuit or at the time he amended his complaint . . . but failed to raise." *Bever*, 2014 U.S. Dist. LEXIS 54390, at *24–25 (emphasis added). Plaintiff's conduct in this litigation shows that it was well aware of all facts it claims are relevant to the Due Process Claim long before the August 1 deadline.

First, Plaintiff does not even attempt to argue that it was unaware of the allegedly relevant facts prior to the August 1, 2016 deadline to amend the pleadings. Instead, Plaintiff merely states without explanation that it "did not contemplate" bringing the Due Process Claim until some unidentified time "after the scheduling

order was entered." (Mot. at 6.) Plaintiff also provides no reason why it did not investigate, or could not have investigated, all of the alleged relevant facts earlier. In fact, the Motion is not supported by ***any*** attorney declaration that could support these vague allusions to the timing of Plaintiff's alleged investigation.

The first hint Plaintiff provided that it would move to amend the pleadings was on September 27, 2016, in its supplemental brief regarding whether ZACR is an indispensable party, nearly two months after the Scheduling Order's deadline to amend the pleadings. (ECF No. 137 at 4 n.2.) Plaintiff has not suggested any reason why it could not have investigated the facts it claims are relevant to its proposed amendments long before that date. As such, Plaintiff has not carried its burden of showing that it was diligent in investigating those facts. *See Bank of Haw.*, 902 F.2d at 1388 (affirming denial of leave to amend because delay in proposing amendment was "inexplicable and unjustified"); *Laureate, Inc.*, 186 F.R.D. at 608 n.4 (denying motion for leave to amend complaint because "the parties and/or their lawyers are expected to do 'investigative homework' that is reflected in their status reports concerning plans for disclosure of expert witnesses, discovery, and amendment to pleadings").

Second, Plaintiff's counsel's on-the-record statements in this matter show that Plaintiff knew of all the allegedly relevant facts long before the August 1, 2016 deadline. Specifically, on August 23, 2016 (three weeks after the Scheduling Order's deadline to amend the pleadings), the hearing on ICANN's Motion for Protective Order took place before Magistrate Judge Chooljian. Four topics included in the Rule 30(b)(6) deposition notice Plaintiff served on ICANN on May 20, 2016 (*see* ECF No. 121-2 ¶ 2) sought testimony regarding a contract between ICANN and the U.S. Government. (ECF No. 121-3, Ex. A at 14; LeVee Decl., Ex. 2 [Hrg. Tr. at 12:21-23].) Magistrate Judge Chooljian deemed these topics "a burdensome fishing expedition about potential transparency and accountability and failure to follow guidelines in connection with a *contract that is not at issue*. . . .

any relevance in the Court's mind is outweighed by the burden required to prepare a witness to testify regarding the Department of Commerce contract." (LeVee Decl., Ex. 2 [Hrg. Tr. at 12:21-13:8] (emphasis added).)

Had Plaintiff been investigating whether a Due Process Claim was viable, Plaintiff would have stated that it was doing so, as the contracts referenced in the deposition topic might have been relevant to that proposed claim. Plaintiff did nothing of the sort. Instead, Plaintiff merely stated that ICANN's contracts with the U.S. Government might be relevant to show ICANN not following its own rules:

> ICANN has presented arguments in its papers that the rules in its Guidebook are discretionary, that it does not have to follow its own rules in the Guidebook, and *our point in bringing in these contracts is that ICANN, at the moment, although a transition is going to happen soon, is overseen by the U.S. Department of Commerce through these contracts, and the contracts state that ICANN basically has to follow its own rules*. So that was our point in bringing in the contracts, and we wanted someone to testify as to, you know, again, how does ICANN see that relationship? How does ICANN see the statement it made regarding the fact that it doesn't have to follow the rules as compared to this contract it has with the U.S. Department of Commerce that says "*You have to follow your rules when you make decisions about gTLD applicants*"?

(LeVee Decl., Ex. 2 [Hrg. Tr. at 81:20-82:12] (emphasis added).)

In other words, Plaintiff was well aware of all of the relevant facts concerning ICANN's relationship with the U.S. Government long before this August 23, 2016 hearing (and before Plaintiff served ICANN with the Rule 30(b)(6) deposition notice on May 20, 2016, *see* ECF No. 121-2 ¶ 2), yet never suggested to the Court that Plaintiff intended to raise a due process claim. This

failure is fatal to the Motion. Even after it became clear at the August 23 hearing that Plaintiff would not be entitled to discovery related to ICANN's contracts with the U.S. Government because no claim was relevant to those requests, Plaintiff *still* did not mention any potential due process claim. The only reasonable explanation is that Plaintiff did not, at that time, have any intention of adding such a frivolous claim. Rather, Plaintiff concocted the idea to add the Due Process Claim only once it became clear that doing so would be the only way to preserve federal jurisdiction. This conduct utterly fails to meet the requisite level of diligence to permit an amendment to the Scheduling Order. *See Laureate, Inc*., 186 F.R.D. at 608 (denying motion for leave to amend because a plaintiff must "collaborate with the district court in managing the case" and must "alert the Rule 16 scheduling judge of the nature and timing of such anticipated amendments" in their filings).

Plaintiff's lack of diligence in seeking the amendment alone precludes the Motion from being granted. *Johnson*, 975 F.2d at 609 (9th Cir. 1992) (if the party moving for leave to amend does not show that it meets the Rule 16(b) "good cause" standard, "the inquiry should end" and the motion should be denied).

B. THE MOTION MUST BE DENIED UNDER RULE 15(a) BECAUSE PLAINTIFF CANNOT SHOW THAT JUSTICE REQUIRES PERMITTING THE AMENDMENT.

The Court considers five factors in deciding whether to grant leave to amend a complaint under Rule 15(a): "(1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment; and (5) whether plaintiff has previously amended his complaint." *Allen*, 911 F.2d at 373. All five factors militate in favor of denying Plaintiff's Motion.

1. Plaintiff Proposes The Amendment In Bad Faith Because It Is An Attempt To Artificially Create Federal Subject Matter Jurisdiction.

Plaintiff has brought the Motion in bad faith because it comprises a transparent bid to artificially create federal subject matter jurisdiction.

Longstanding principles of jurisprudence dictate that "[o]f course, the Federal question must not be merely colorable or fraudulently set up for the mere purpose of endeavoring to give the court jurisdiction." *Siler v. Louisville & Nashville R. Co.*, 213 U.S. 175, 191–92 (1909). Indeed, the Ninth Circuit has squarely held that "plaintiff tampers with the jurisdiction of the court by artificially affecting it." *Attorneys Tr. v. Videotape Comput. Prods., Inc.*, 93 F.3d 593, 595 (9th Cir. 1996).

Plaintiff first indicated that it considered the proposed amendment on September 27, 2016, the day it filed its supplemental brief regarding ZACR's indispensability. (ECF No. 137 at 4 n.2.) That timing is no coincidence. If the proposed Due Process Claim had been brought in good faith, Plaintiff would have investigated facts relevant to it *before* filing the original complaint, or at least prior to the Scheduling Order's deadline to amend the pleadings. Instead, Plaintiff waited until the jurisdictional writing was on the wall and the Court seemed poised to remand the matter to state court. *See generally Erum v. Cty. of Kauai*, No. 08-00113 SOM-BMK, 2008 U.S. Dist. LEXIS 22647 (D. Haw. Mar. 20, 2008).

The case of *Erum v. County of Kauai* is instructive. There, as here, the plaintiff filed suit in state court, and the state court denied a request for a temporary restraining order. *Id*. at *5. When the plaintiff brought suit in federal court, the "Complaint was dismissed [without prejudice] because, although premised on diversity jurisdiction, it lacked complete diversity." *Id*. at *8. Just like Plaintiff here, the plaintiff in *Erum* attempted to artificially create subject matter jurisdiction by pleading a federal question claim in its amended complaint. The district court dismissed the action because "[t]he history of this case . . . demonstrate[s] that [plaintiff], in asserting 'federal' claims in his Amended Complaint, is merely attempting to manufacture federal question jurisdiction. . . . [H]is claims, while citing federal statutes, are immaterial, insubstantial, and frivolous, and made solely for the purpose of manufacturing federal question jurisdiction[.]" *Id*. at *2.

The history of this case similarly shows that Plaintiff's true and only

motivation for seeking to add the Due Process Claim is to manufacture subject matter jurisdiction. Indeed, Plaintiff's first reference to any such amendment (in its September 27 brief) admitted as much: "DCA intends shortly hereafter to file a motion for leave to amend to add a Fifth Amendment claim for violation of due process . . . if DCA amends the complaint to add this claim, the Court will have federal question jurisdiction over the matter, mooting the question of ZACR's indispensability." (ECF No. 137 at 4 n.2.) Such efforts to manufacture jurisdiction should not be countenanced, and the Motion should be denied on this grounds as well. *See Erum,* 2008 U.S. Dist. LEXIS 22647, at *11–12 ("The court can only conclude that [plaintiff] seeks to manufacture subject matter jurisdiction in this action.").

2. Plaintiff Unduly Delayed In Seeking To Amend The Complaint.

"A motion to amend a complaint may be denied if there is undue delay." *Burns v. Cty. of King*, 883 F.2d 819, 823 (9th Cir. 1989). Plaintiff's undue delay in proposing this amendment is evident when considering three timing issues: (1) whether Plaintiff could have alleged the claim in its original pleading (it could have); (2) whether Plaintiff unduly delayed in proposing the amendment after discovering the relevant facts (it did); and (3) the time that has elapsed since the Scheduling Order's deadline (over two months).

First, "[r]elevant to evaluating the delay issue is whether the moving party knew or should have known the facts and theories raised by the amendment in the original pleading." *Bank of Haw.*, 902 F.2d at 1388; *see also AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 953 (9th Cir. 2006)). Plaintiff fails to explain why it could not have alleged this claim at the time it originally filed suit or at the time it filed the FAC, which shows not only that there is no good cause to amend the Scheduling Order under Rule 16(b) but also that Plaintiff unduly delayed in filing the Motion. *See Chodos v. W. Publ'g Co.*, 292 F.3d 992, 1003 (9th Cir.

2002) (affirming denial of a motion for leave to amend because the facts supporting the amendment "had been available to [the plaintiff] even before the first amendment to his complaint").

Second, the time between Plaintiff's discovery of the facts relevant to the proposed amendment and the filing of the motion for leave to amend is relevant to a finding of undue delay. *See AmerisourceBergen Corp.,* 465 F.3d at 953 ("an eight month delay between the time of obtaining a relevant fact and seeking a leave to amend is unreasonable"). Here, Plaintiff has not indicated when it became aware of the facts relevant to its Due Process Claim, but it is evident that such information was publicly available for years, and long before the August 1 amendment deadline. The documents and facts that Plaintiff relies upon in its Motion relating to ICANN's contracts with the U.S. Government were undeniably publicly posted and available *prior* to the filing of its *original* complaint, let alone the amendment deadline. (Mot. at 1-4, 12.) As such, Plaintiff unduly delayed in filing the Motion. *See Osakan v. Apple Am. Grp.*, No. C08-4722 SBA, 2010 U.S. Dist. LEXIS 53830, at *9–12 (N.D. Cal. May 3, 2010) (denying leave to amend where amendments were offered to cure a class defect that the plaintiff was aware of at least six months before the motion to amend); *ExperExch., Inc. v. Doculex, Inc*., No. C-08-03875 JCS, 2009 U.S. Dist. LEXIS 112411, at *85–86 (N.D. Cal. Nov. 16, 2009) (denying leave to amend because the plaintiff "waited two months after discovering its allegedly 'new' facts to bring its motion to amend").

Third, the length of time that has elapsed since the deadline to amend the pleading is also relevant, and the delay of months is sufficient to find denial of leave to amend is warranted based on delay. *Lockheed Martin Corp. v. Network Sols., Inc*., 194 F.3d 980, 986 (9th Cir. 1999) (affirming trial court's ruling that delay weighed against permitting amendment because the plaintiff's "motion to amend came several months after the stipulated deadline for amending . . . .").

3. ICANN Would Be Severely Prejudiced Were The Motion Granted.

Of the five-factor test courts use to assess whether leave to amend is warranted under Rule 15(a), "prejudice to the opposing party carries the greatest weight." *Bever*, 2014 U.S. Dist. LEXIS 54390, at *26 (citing *Eminence Capital, LLC*, 316 F.3d at 1052). ICANN would be severely prejudiced were the Court to permit the proposed amendment, for two reasons.

First, ***there is no possibility that the existing schedule can be maintained if the Motion is granted***. The earliest the Motion can be heard is the date for which Plaintiff noticed it, namely November 7, 2016. (ECF No. 138.) That date falls mere weeks before the close of discovery, leaving ICANN no time to file a motion to dismiss the claim, let alone conduct discovery or file a motion for summary judgment in connection with it. *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002) (affirming district court's denial of motion to amend pleadings filed five days before close of discovery where additional causes of action would have required delaying the proceedings). Similarly, the December 13, 2016 motion cutoff and the February 28, 2017 trial dates would need to be vacated, also weighing in favor of denying the Motion. *Bever*, 2014 U.S. Dist. LEXIS 54390, at *31 (prejudice found where the proposed amendment would require "an extension of all the remaining deadlines").

Second, the parties would undoubtedly need to conduct additional discovery, comprising yet another reason the Motion should be denied. *See Bank of Haw.*, 902 F.2d at 1387 (affirming denial of motion for leave to amend because the proposed "additional claims advance different legal theories and require proof of different facts"); *Zivkovic.*, 302 F.3d at 1087 (affirming denial of motion to amend filed five days before close of discovery where additional claims required additional discovery). Indeed, adding a constitutional claim to the dispute where none was previously pled "would . . . greatly alter[] the nature of the litigation" and would

require ICANN to undertake "an entirely new course of defense" (including but not limited to rebutting the notion that it is a governmental actor). *See Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990) (affirming denial of leave to amend where plaintiff sought to add federal question claims for the first time).

Recognizing that the need for additional discovery in connection with the proposed amendment dooms its Motion, Plaintiff blithely asserts that "ICANN will have limited discovery to conduct, if any at all, related to this proposed cause of action[.]" (Mot. at 8.) Plaintiff is mistaken (and in any event it is not for Plaintiff to decide or predict whether ICANN would propound discovery in connection with claims brought against it). The adjudication of the proposed Due Process Claim may involve issues other than ICANN's relationship with the U.S. Government, and even obtaining facts on that issue may require formal discovery (including possibly from the Government itself); as such, ICANN would suffer prejudice sufficient to deny the Motion. Indeed, Rule 30(b)(6) depositions are currently underway, and might need to be reopened at the parties' great inconvenience, to permit discovery into Plaintiff's Due Process Claim.

In sum, ICANN would suffer prejudice were the Motion granted, given the need for vacating the remaining dates set forth in the Scheduling Order as well as additional discovery. As such, the Motion should be denied.

4. <u>The Proposed Amendment Is Unquestionably Futile.</u>

The Motion must be denied because permitting Plaintiff to add the Due Process Claim would be futile. *See Zinman v. Wal-Mart Stores, Inc.*, No. 09-02045 CW, 2010 U.S. Dist. LEXIS 62826, at *5 (N.D. Cal. June 1, 2010) ("[f]utility, *on its own*, can warrant denying leave to amend.") (emphasis added). Indeed, "[w]here the legal basis for a cause of action is tenuous, futility supports the refusal to grant leave to amend." *Lockheed Martin Corp.*, 194 F.3d at 986.

(a) ICANN Is Not a Governmental Actor.

To start, the claim fails as a matter of law because Plaintiff does not and cannot plausibly (and in good faith) allege that ICANN, a private, non-governmental corporation, is a federal actor subject to the Fifth Amendment. In other words, no equitable relief is available against ICANN in connection with a Fifth Amendment claim, because it is a private entity,[5] and courts treat private entities as federal actors only in narrow circumstances, none of which apply here.

In fact, the Ninth Circuit has expressly held that "ICANN . . . is not a government actor." *McNeil v. Verisign, Inc.*, 127 Fed. App'x 913, 914 (9th Cir. 2005) (dismissing First Amendment claim against ICANN on state action grounds). The District Court of the Southern District of New York reached the same conclusion in a published ruling, holding: "ICANN is not a governmental body." *Register.com v. Verio, Inc.*, 126 F. Supp. 2d 238, 247 (S.D.N.Y. 2000), *aff'd* 356 F.2d 393 (2d Cir. 2004) (emphasis added). As the court explained, "the Department of Commerce's establishment of ICANN signified a movement away from nascent public regulation of the Internet and toward a consensus-based *private* ordering regime." *Id*. (emphasis added).[6]

Viewed generously, Plaintiff's Motion argues that ICANN should be treated as a federal actor for two reasons: (1) on account of ICANN's supposed "close nexus" with the Government; and (2) because ICANN performs a public function. (Mot. at 2-5, 11-13.) But Plaintiff does not and cannot plead facts showing that ICANN is a governmental actor in either respect.

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[5] To the extent Plaintiff seeks *Bivens*-type damages, that remedy is squarely foreclosed by *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001). There, the Court held that its precedent "forecloses the extension of *Bivens* to private entities" as distinguished from federal employees. *Id*. at 66–68 & n.2.

[6] Another federal court in this circuit has reached similar conclusions, noting that "there is no authority for the proposition that ICANN policies have the force of law." *Frogface v. Network Sols., Inc.*, No. C-00-3854 WHO, 2002 U.S. Dist. LEXIS 2594, at *9-10 (N.D. Cal. Jan. 14, 2002).

(i) The Nexus Between The U.S. Government And The Challenged Conduct Is Not Sufficiently Close That ICANN Could Be Deemed A Federal Actor.

"[S]tate action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be treated as that of the State itself.'" *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n,* 531 U.S. 288, 295 (2001) (citations omitted); *Morse v. N. Coast Opportunities, Inc.,* 118 F.3d 1338, 1342 (9th Cir. 1997) ("the standard for determining the existence of federal government action can be no broader than the standard applicable to State action under § 1983"). The closeness of an alleged governmental nexus rests on whether: "(1) the organization is mostly comprised of state institutions; (2) state officials dominate decision making of the organization; (3) the organization's funds are largely generated by the state institutions; and (4) the organization is acting in lieu of a traditional state actor." *Villegas v. Gilroy Garlic Festival Assoc.,* 541 F.3d 950, 955 & n.4 (9th Cir. 2008) (en banc).

No set of facts could be pled to show that the "nexus" between ICANN and the U.S. Government is sufficiently "close" to meet this standard. As an initial matter, the Motion describes ICANN's relationship with the U.S. Government in a manner that is patently false (as Plaintiff perhaps recognizes since the Motion's erroneous statements are *not* alleged in the PSAC, and the Motion cites no evidence or other authority to support its false statements). For example, the Motion wrongly states that "the U.S. Government . . . sits on ICANN's Board" (Mot. at 12) even though ICANN's Bylaws actually forbid any governmental official from sitting on ICANN's Board and, as such, the U.S. Government has never done so.[7]

Leaving aside the false statements Plaintiff included in its Motion, the sum total of the PSAC's allegations regarding the U.S. Government's connection to

[7] ICANN Bylaws § 7.4(a), *available at* https://www.icann.org/resources/pages/governance/bylaws-en/#_Ref444606439.

ICANN are that: (a) ICANN is a party to a contract, which has now expired, under which ICANN provided technical-parameter-assignment services, including making recommendations to the Government about delegations and redelegations of top-level domains[8]; and (b) the U.S. Government is a member of ICANN's Governmental Advisory Committee ("GAC") *along with 100 other governments*. (*See* PSAC ¶¶ 138-46; *id*. ¶ 45 ("Membership on the GAC is open to all representatives of all national governments").)[9] Neither allegation meets the "close nexus" requirement described *supra*.

As to the contractual relationship between ICANN and the U.S. Government, Plaintiff alleges that "ICANN's provision of the IANA function is pursuant to its contract with the U.S. government." (ECF No. 138-1 ¶ 141.) Yet governmental regulation, by contract or otherwise, does not convert the regulated entity into a government actor. *Rendell-Baker v. Kohn,* 457 U.S. 830, 841 (1982) ("Acts of . . . private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts."); *Caviness v. Horizon Cmty. Learning Ctr., Inc.,* 590 F.3d 806, 816 (9th Cir. 2010) ("[t]he Supreme Court has repeatedly held that 'the mere fact that a business is subject to state regulation does not by itself convert its action into that of the State.'" (citation omitted)).

As to the GAC, the PSAC alleges that "the U.S. Government maintains active involvement in ICANN's review of gTLD applications through its seat on ICANN's GAC." (ECF No. 138-1 ¶ 142.) The GAC advises ICANN "on the activities of ICANN as they relate to concerns of governments."[10] Membership on a committee that *advises* ICANN is no basis to deem ICANN's actions to be actions

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[8] *See* PSAC, Ex. A [IANA Contract § C.9.2.9d].

[9] *See also* https://gacweb.icann.org/display/gacweb/GAC+Representatives.

[10] ICANN Bylaws, § 12.2(a)(1), https://www.icann.org/resources/pages/governance/bylaws-en/#_Ref444421344.

of the U.S. Government. *Am. Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 52 (1999) ("[a]ction taken by private entities with the mere approval or acquiescence of the State is not state action.").

Notably, Plaintiff does not propose to allege that either ICANN's performance of the IANA functions or the U.S. Government's GAC membership relate to the ICANN conduct Plaintiff challenges in this action. Accordingly, the proposed Due Process Claim must fail because in order to deem ICANN's actions as governmental, the law requires that the "close nexus" must be "between the [Government] *and the challenged action*[.]" *Jackson v. Metro. Edison Co.,* 419 U.S. 345, 351 (1974) (emphasis added).

(ii) ICANN Performs No Governmental Function That Would Permit It To Be Treated As A Federal Actor.

Next, Plaintiff alleges that ICANN is a federal actor because it provides a "governmental function." (PSAC ¶ 143.) But the factual allegations pled in support of that legal conclusion are limited to ICANN performing a "*public* function." (PSAC ¶ 140 (emphasis added).) That "a private entity performs a function which serves the public does not make its acts state action." *Rendell-Baker,* 457 U.S. at 842. Importantly, for a private entity to be deemed a governmental actor because it performs a "public function[,]" the challenged function must be "both traditionally and exclusively governmental." *Lee v. Katz,* 276 F.3d 550, 554–55 (9th Cir. 2002). This test is difficult to satisfy—as the Supreme Court observed in *Flagg Brothers, Inc. v. Brooks,* 436 U.S. 149, 157–58 (1978): "While many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'" (citation omitted).

With respect to top-level domains (such as AFRICA in .AFRICA), ICANN started receiving TLD applications in 2000, and in 2001 ICANN, not the U.S. Government, began contracting with registry operators and recommending that TLDs be added to the root zone. *See name.space, Inc. v. Internet Corp. for*

Assigned Names & Nos., 795 F.3d 1124, 1128 (9th Cir. 2015). Then, the U.S. National Telecommunications and Information Administration verified that changes to the root zone met ICANN's procedures before authorizing those changes,[11] but even that role ended when the last IANA functions contract expired on September 30, 2016.[12] In short, there is no plausible basis to allege that contracting for or establishing Internet domains is "both traditionally and exclusively governmental."

The proposed Due Process Claim has no chance of stating a cognizable claim for relief because ICANN is not a federal actor. Accordingly, as the proposed amendment is futile, leave to amend should be denied. *See, e.g., Dev v. Donahoe*, No. 2:12-cv-3026-JAM-EFB PS, 2014 U.S. Dist. LEXIS 56037, at *5–6 (E.D. Cal. Apr. 22, 2014), *adopted by* 2014 U.S. Dist. LEXIS 89037, at *1 (E.D. Cal. June 27, 2014) (denying motion for leave to add claim arising under U.S. Constitution because "it is apparent from the face of both the existing and proposed amended complaints that the defendants . . . were not state actors or otherwise acting under color of state law").

(b) Even If ICANN Were Deemed A Governmental Actor, The Proposed Amendment Is Otherwise Futile.

Even assuming for purposes of this Motion that ICANN might be deemed a governmental actor (which it is not), the proposed amendment is futile for additional and independent reasons as well.

To start, the Court must make the threshold determination of whether Plaintiff had any interest in property or liberty sufficient to trigger the due process protections of the Fifth Amendment. *See Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569 (1972). The PSAC attempts to claim a violation of Plaintiff's

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[11] *See* ECF 138-1 at 48 (showing the process flow for changes prior to expiration of the IANA contract on September 30, 2016).

[12] *See* https://www.ntia.doc.gov/press-release/2016/statement-assistant-secretary-strickling-iana-functions-contract.

property (not liberty) rights insofar as the claim seeks "fair review of its .Africa application." (PSAC ¶ 145.) Property rights cognizable under the Constitution "are created and their dimensions are defined by existing rules or understandings that stem from an *independent source such as state law* -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth*, 408 U.S. at 577. Nothing in the PSAC or the Motion plausibly suggests any constitutionally cognizable property interest in the right to operate .AFRICA (as there is no such right), rendering the Due Process Claim defective at the outset.

Moreover, Plaintiff's allegations do not plausibly suggest that ICANN's conduct did not afford Plaintiff due process, which generally requires notice and an opportunity to be heard.[13] *See Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). In *Mathews*, the Supreme Court set forth a three-factor balancing test to determine the procedures that are required to satisfy due process: (1) the interest at stake; (2) the risk of "erroneous deprivation" through the procedures employed; and (3) the "fiscal and administrative burdens" that additional procedural safeguards would entail. *Id*. at 335. Plaintiff offers no argument whatsoever as to how its allegations, even if taken as true could possibly satisfy this standard, instead devoting its entire argument regarding futility to asserting that ICANN is a governmental actor. (*See* Mot. at 11-12.) Plaintiff does not allege that it lacked notice of *any* stage in the processing of its application for .AFRICA ("Application"), nor that it was not allowed to be heard either during the IRP or in this Court.

5. Plaintiff Has Already Amended Its Complaint.

Plaintiff has already amended its complaint (ECF No. 10), which weighs against permitting the proposed amendment. *See Ascon Props., Inc.*, 866 F.2d at

[13] The PSAC and the Motion are not in accord as to the type of due process claim Plaintiff proposes; the PSAC alleges violations *only* of "*procedural* due process rights" (PSAC ¶ 146) whereas the motion discusses *only* a claim for "*substantive* due process rights" (Mot. at 10-11).

1160 (affirming denial of motion for leave to amend complaint and noting that "[t]he district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint").[14]

V. CONCLUSION

Because there is no "good cause" to amend the Scheduling Order under Rule 16(b), and Plaintiff does not meet the standard for leave to amend the FAC set forth in Rule 15(a), the Motion should be denied.

Dated: October 17, 2016

JONES DAY

By: */s/ Jeffrey A. LeVee*
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INTERNET CORPORATION FOR ASSIGNED NAMES AD NUMBERS

[14] Moreover, Plaintiff has not shown that it was unaware of any relevant facts it claims support the proposed amendment prior to the filing of its FAC. As such, the Motion must be denied. *Chodos*, 292 F.3d at 1003 (affirming trial court's denial of motion for leave to amend where the relevant "facts had been available to [plaintiff] even *before the first amendment* to his complaint") (emphasis added).