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11 DOTCONNECTAFRICA TRUST

12 **UNITED STATES DISTRICT COURT**

13 **CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION**

14 DOTCONNECTAFRICA TRUST, a  
15 Mauritius Charitable Trust;

16 Plaintiff,

17 v.

18  
19 INTERNET CORPORATION FOR  
20 ASSIGNED NAMES AND NUMBERS,  
21 a California corporation; ZA Central  
22 Registry, a South African non-profit  
23 company; and DOES 1 through 50,  
24 inclusive;

25 Defendants.

Case No. 2:16-cv-00862-RGK (JCx)

**PLAINTIFF’S NOTICE OF AND  
MOTION FOR LEAVE TO  
AMEND; MEMORANDUM OF  
POINTS AND AUTHORITIES**

Date: November 7, 2016

Hearing: 9:00 a.m.

Courtroom: 850

[Filed concurrently: Proposed Second  
Amended Complaint]

1 **TO THE HONORABLE COURT, ALL PARTIES AND THEIR**  
2 **ATTORNEYS OF RECORD:**

3 **PLEASE TAKE NOTICE** that on November 7, 2016, at 9:00 a.m., or as  
4 soon thereafter as the matter may be heard, before the Honorable R. Gary Klausner  
5 of the United States District Court for the Central District of California, Western  
6 Division, Courtroom 850, located at 255 E. Temple Street, Los Angeles,  
7 California, 90012, Plaintiff DotConnectAfrica Trust (“DCA”) will and does move  
8 for leave to amend the First Amended Complaint, adding a cause of action for a  
9 violation of its Fifth Amendment right to Due Process against Defendant Internet  
10 Corporation for Assigned Names and Numbers (“ICANN”).

11 This Motion is made pursuant to Fed. R. Civ. P. 15 and 16, on the grounds  
12 that DCA should be granted leave to amend to vindicate the merits of its claims.  
13 DCA has not acted dilatorily in seeking leave to amend and DCA’s rights to Due  
14 Process under the Fifth Amendment have been violated by ICANN. ICANN is an  
15 agent of the United States Government through its contract to provide the Internet  
16 Assigned Numbers Authority (IANA) functions and ICANN has violated DCA’s  
17 Fifth Amendment rights throughout the processing of DCA’s .Africa gTLD  
18 application. ICANN will suffer no prejudice if leave to amend is granted.

19 This Motion is based on this Notice, the accompanying memorandum of  
20 points and authorities, the papers, records and pleadings on file in this case, and on  
21 such oral argument as the Court allows.

22 Pursuant to L.R. 7-3, this motion is made following the conference of  
23 counsel which took place on September 7, 2016.

24 Dated: October 4, 2016

Respectfully submitted

**BROWN NERI SMITH & KHAN, LLP**

25  
26 By: /s/ Ethan J. Brown

Ethan J. Brown

27  
28 *Attorneys for Plaintiff, DotConnectAfrica Trust*

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1                                   **MEMORANDUM OF POINTS AND AUTHORITIES**

2           **I. INTRODUCTION**

3           Plaintiff DCA moves this Court for leave to amend to add a cause of action  
4 against Defendant ICANN for violating DCA’s Fifth Amendment Rights to Due  
5 Process. As a result of ICANN’s contract with the U.S. Government, ICANN has  
6 a substantial nexus with the U.S. Government and is performing a traditional and  
7 exclusive government function of regulating the Internet. Therefore, ICANN must  
8 provide applicants with all Constitutional Protections.

9           In ICANN’s own words, it “coordinates the Internet Assigned Numbers  
10 Authority (“IANA”) functions, which are key technical services critical to the  
11 continued operations of the Internet’s underlying address book, the Domain Name  
12 System (“DNS”). ICANN performs the IANA functions **under a U.S.**  
13 **Government contract.**”

14           Indeed, the contract between ICANN and the U.S. Government notes that  
15 before ICANN was granted management authority over the IANA functions, the  
16 IANA functions “were performed on behalf of the Government under a contract  
17 between the Defense Advanced Research Projects Agency (DARPA) and the  
18 University of Southern California (USC)...[and] in 1999, the Government  
19 recognized the need for the continued performance of the IANA functions as vital  
20 to the stability and correct functioning of the internet.”

21           In 1998, the Department of Commerce drafted a “Green Paper” proposing  
22 the very organization that became ICANN for the purpose of taking over the  
23 management of the Internet. After ICANN’s creation, Internet management has  
24 been authorized to ICANN through a contract with the U.S. Government.

25           As a result, ICANN is acting as an arm of the U.S. government, operating  
26 within a close nexus and providing a traditional government function. ICANN is  
27 effectively a government actor and ICANN must therefore afford all gTLD  
28 applicants with Due Process pursuant to the Fifth Amendment of the U.S.

1 Constitution.

2 ICANN has violated DCA's Due Process rights throughout its review of  
3 DCA's application for .Africa for the reasons described in the proposed second  
4 amended complaint, including by accepting the faulty GAC advice and ceasing to  
5 review DCA's application, by failing to follow the IRP declaration, by  
6 disregarding DCA's valid endorsements, by aiding and favoring ZACR in its  
7 application for .Africa when ICANN promised to act as a neutral and treat  
8 applicants fairly, and by ultimately rejecting DCA's application for .Africa. DCA  
9 seeks to amend its complaint to add a cause of action against ICANN for a  
10 violation of DCA's right to Due Process under the Fifth Amendment. DCA has  
11 not been dilatory in bringing this new cause of action, nor is DCA bringing the  
12 cause of action to delay or cause ICANN prejudice, instead DCA merely seeks to  
13 vindicate its rights and recover for all of the misdeeds that ICANN is liable for.

## 14 **II. FACTS**

15 ICANN maintains the DNS of the Internet - indisputably one of the largest  
16 and most used public forums in the world. But ICANN has not always held this  
17 role.

18 Prior to ICANN's creation in 1998, the U.S. Government – and specifically,  
19 the Department of Commerce – held the role of management and creation of the  
20 Internet. After the Internet continued to grow, the Department of Commerce  
21 drafted a “Green Paper” that proposed the creation of a new entity – ICANN -  
22 responsible for the traditional role that the Department of Commerce took in  
23 regulating the Internet.<sup>1</sup> ICANN was officially created shortly after.

24 To this very day, ICANN continues to hold its authority for management and  
25 expansion of the Internet through a contract with the U.S. Government. (*See*  
26 Exhibit 1 - Second Amended Complaint (“SAC”), Ex. A.) ICANN admits this. In  
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28 <sup>1</sup><https://www.icann.org/resources/unthemed-pages/white-paper-2012-02-25-en>

1 ICANN’s own words, it “coordinates the Internet Assigned Numbers Authority  
2 (IANA) functions, which are key technical services critical to the continued  
3 operations of the Internet’s underlying address book, the Domain Name System  
4 (DNS). The IANA functions include: (1) the coordination of the assignment of  
5 technical protocol parameters including the management of the address and routing  
6 parameter area (ARPA) top-level domain; (2) the administration of certain  
7 responsibilities associated with Internet DNS root zone management such as  
8 generic (gTLD) and country code (ccTLD) Top-Level Domains; (3) the allocation  
9 of Internet numbering resources; and (4) other services. ICANN performs the  
10 IANA functions **under a U.S. Government contract.**”<sup>2</sup>

11 The contract itself notes that the IANA functions “were performed on behalf  
12 of the Government under a contract between the Defense Advanced Research  
13 Projects Agency (DARPA) and the University of Southern California (USC), as  
14 part of a research project known as the Tera-node Network Technology (TNT). As  
15 the TNT project neared completion and the DARPA/USC contract neared  
16 expiration in 1999, the Government recognized the need for the continued  
17 performance of the IANA functions as vital to the stability and correct functioning  
18 of the internet.” *Id.*, p. 4, ¶C.1.2.

19 In addition to the contract, the U.S. Government continues to supervise the  
20 regulation of ICANN. Lennard G. Kruger, *The Future of Internet Governance:  
21 Should the United States Relinquish Its Authority over ICANN?*, p. 2,  
22 Congressional Research Service (June 10, 2016),  
23 <https://www.fas.org/sgp/crs/misc/R44022.pdf>.) The U.S. Government also sits on  
24 the Governmental Advisory Committee of ICANN, and “arguably has had more  
25 influence over ICANN and the DNS than other governments.” *Id.*, p. 3. ICANN  
26 indisputably replaced the U.S. Government in providing the IANA functions and  
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<sup>2</sup> <https://www.icann.org/resources/pages/welcome-2012-02-25-en>



1 holds this role as an agent for the U.S. Government by way of its contract with the  
2 U.S. Government.

3 ICANN promises to act in a fair and transparent matter, and refrain from  
4 treating applicants in a disparate or discriminatory matter. In terms of ICANN's  
5 principles and policies, ICANN's Bylaws state that it will: (a) preserve and  
6 enhance the operational stability, reliability, security and global interoperability of  
7 the Internet; (b) employ open and transparent policy development mechanisms that  
8 promote well-informed decision based on expert advice and ensure that those  
9 entities most affected can assist in the policy development process; (c) make  
10 decisions by applying documented policies neutrally and objectively with integrity  
11 and fairness; and (d) *remain accountable* to the Internet community through  
12 mechanisms that enhance ICANN's effectiveness. In addition to those principles,  
13 ICANN's Bylaws state that it shall not apply its standards, policies, procedures, or  
14 practices inequitably or single out any particular party for disparate treatment  
15 (emphasis added).<sup>3</sup> Therefore, ICANN effectively promises gTLD applicants that  
16 they will be afforded Due Process.

17 In 2008, ICANN adopted and approved recommendations for implementing  
18 the new gTLD program. Three years later, ICANN approved the new gTLD  
19 Guidebook that governed applications for new gTLDs and authorized the launch of  
20 the new gTLD program. DCA submitted an application for the gTLD .Africa and  
21 also submitted the required \$185,000 fee. After spending years and resources  
22 meeting the requirements of the Guidebook, ICANN arbitrarily rejected DCA's  
23 application in favor of another applicant – ZACR.

24 As a result, DCA challenged ICANN's actions through ICANN's  
25 independent review process ("IRP"). DCA succeeded. The IRP held that  
26 ICANN's actions and inactions with respect to DCA's application were

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28 <sup>3</sup> ICANN Bylaws, Article 1, Section 2 (<https://www.icann.org/resources/pages/governance/bylaws-en#I>)

1 inconsistent with ICANN’s Bylaws and Articles of Incorporation. The IRP also  
2 held that ICANN should “continue to refrain from delegating the .Africa gTLD and  
3 permit DCA Trust’s application to proceed through the remainder of the new  
4 gTLD application process.

5 Although DCA succeed at the IRP, ICANN failed to follow its ruling. DCA  
6 initiated suit to obtain the redress that it was denied. In addition to failing to  
7 follow the IRP ruling, ICANN has held at all times – and continues to – that the  
8 IRP is a non-binding advisory process.

9 More pertinent to this Motion, is ICANN’s arbitrary and capricious denial of  
10 gTLD applicants due process rights by failing to fairly and adequately process  
11 applications. ICANN lures applicants into the gTLD application process by  
12 claiming it will adhere to its established rules, takes the significant application fee,  
13 then denies applications for whatever reasons, or no reasons at all. ICANN denies  
14 applicants their due process rights because it believes it acts with impunity.

15 **III. PROCEDURAL HISTORY**

16 On January 20, 2015 DCA filed suit in Los Angeles Superior Court against  
17 ICANN for (among other claims) improperly denying DCA’s application for the  
18 gTLD .Africa. ICANN removed DCA’s Complaint to this Court on February 8,  
19 2016. (Dkt. No. 1) DCA substituted in new counsel, amended its Complaint, and  
20 filed the First Amended Complaint on February 26, 2016. (Dkt. No. 10)

21 On June 7, 2016, this court issued its scheduling order. (Dkt. No. 110.) In  
22 its scheduling order the Court set trial for February 28, the pretrial conference for  
23 February 13, discovery cut-off on November 30, and set the last day to add parties  
24 or amend the complaint for August 1, 2016.

25 **IV. ARGUMENT**

26 **A. DCA establishes “good cause” to modify the scheduling order**

27 DCA’s amendment is not made after delay or dilatory actions, and  
28 vindicating DCA’s meritorious claims is sufficient good cause to justify an

1 amendment after the scheduling order deadline. “To amend the Scheduling Order’s  
2 ‘[n]o further . . . amendments to pleadings’ provision, Plaintiff must show good  
3 cause exists for the amendment under Rule 16(b)”. *Minnard v. Rotech Healthcare,*  
4 *Inc.*, No. 2:06-cv-1460-GEB-GGH, 2007 U.S. Dist. LEXIS 53520, at \*4 (E.D.Cal.  
5 July 6, 2007). “Rule 16(b)’s ‘good cause’ standard focuses on the diligence of the  
6 party seeking the amendment. *Id.* Good cause may be found to exist where the  
7 moving party shows, for example, that it: (1) diligently assisted the court in  
8 recommending and creating a workable scheduling order, (2) is unable to comply  
9 with the deadlines contained in the scheduling order due to issues not reasonably  
10 foreseeable at the time of the scheduling order, and (3) was diligent in seeking an  
11 amendment once the party reasonably knew that it could not comply with the  
12 scheduling order. *Bever v. CitiMortgage, Inc.*, No. 1:11-cv-01584-AWI-SKO,  
13 2014 U.S. Dist. LEXIS 54390, at \*18 (E.D. Cal. Apr. 17, 2014).

14 Here DCA’s good cause exists because it did not contemplate bringing the  
15 proposed cause of action until after the scheduling order was entered. When  
16 DCA’s intention arose, DCA extensively researched its proposed Fifth  
17 Amendment claim to determine the viability and lack of frivolousness in bringing  
18 the claim in good faith. Had DCA contemplated the proposed cause of action and  
19 known of its viability when the scheduling order was created, DCA would have  
20 brought it to the Court’s attention.

21 DCA also expected to receive discovery through ICANN’s deposition  
22 regarding ICANN’s contract with the U.S. Government – ICANN sent the  
23 deposition notice on April 23, 2016 for a deposition date of June 3, 2016. But  
24 ICANN moved for a protective order and argued that the discovery was irrelevant  
25 as there were no allegations regarding the contract in the First Amended Complaint  
26 (*See* Dkt. No. 121-1, pp. 14:15-15:15). On August 23, 2016 the Magistrate Judge  
27 granted ICANN’s protective order on the topic of the contract at ICANN’s  
28 deposition. (Dkt. No. 127)

1 As stated below, “the purpose of the litigation process is to  
2 vindicate meritorious claims” and DCA should not be denied redress when it will  
3 have no effect on the scheduling of this matter and no prejudice to other parties.  
4 Such justification is good cause to allow DCA to amend and add the proposed  
5 cause of action.

6 Accordingly, DCA has demonstrated the good cause necessary to justify the  
7 slight modification of the scheduling order.

8 **B. Leave to Amend Should be Given Freely**

9 DCA should be granted leave to amend because such leave is to be granted  
10 liberally and the factors considered in granting leave favor DCA. Federal Rule of  
11 Civil Procedure 15 requires that a party obtain leave to amend after one  
12 amendment as a matter of course has been made and that this leave is to be  
13 “freely” given when “justice so requires.” *Id.*, subsection (a)(2) [...a party may  
14 amend its pleading only with the opposing party’s written consent or the court’s  
15 leave. The court should freely give leave when justice so requires.] The Ninth  
16 Circuit has held that “rule 15’s policy of favoring amendments to pleadings should  
17 be applied with extreme liberality. *DCD Programs, Ltd. v. Leighton*, 833 F.2d  
18 183, 186 (9th Cir. 1987).

19 In deciding whether justice requires granting leave to amend, factors to be  
20 considered include: (1) the presence or absence of undue delay; (2) bad faith or  
21 dilatory motive; (3) repeated failure to cure deficiencies by previous amendments;  
22 (4) prejudice to the opposing party; and (5) futility of the proposed amendment.  
23 *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 538 (9th Cir. 1989).  
24 “These factors are to be applied with a view toward “the strong policy in favor of  
25 allowing amendment.” *Lockheed Martin Corp. v. Network Solutions, Inc.*, 175  
26 F.R.D. 640, 643 (C.D. Cal. 1997). “Where there is a lack of prejudice to the  
27 opposing party and the amended complaint is obviously not frivolous, or made as a  
28 dilatory maneuver in bad faith, it is an abuse of discretion to deny such a motion.

1 The purpose of the litigation process is to vindicate meritorious claims. Refusing,  
2 solely because of delay, to permit an amendment to a pleading in order to state a  
3 potentially valid claim would hinder this purpose while not promoting any other  
4 sound judicial policy. *Howey v. United States*, 481 F.2d 1187, 1190-1191 (9th Cir.  
5 1973). Finally, “[The Courts] differentiate between pleadings attempting to amend  
6 claims from those seeking to amend parties. Amendments seeking to add claims  
7 are to be granted more freely than amendments adding parties.” *Union P.R. Co. v.*  
8 *Nevada Power Co.*, 950 F.2d 1429, 1432 (9th Cir. 1991).

9 DCA seeks to add one claim against ICANN for a violation of DCA’s Fifth  
10 Amendment rights. All factors weigh in favor of amendment.

11 1. An Amendment will have no effect on the scheduling of this  
12 proceeding

13 There is no undue delay on DCA’s behalf and an amendment will not alter  
14 the scheduling of this proceeding. “Considerable delay with no reasonable  
15 explanation is relevant where a proposed amendment would cause prejudice to the  
16 other party or would significantly delay resolution of the case.” *Id.*, at 644;  
17 *Contrast Solomon v. N. Am. Life & Cas. Ins. Co.*, 151 F.3d 1132, 1139 (9th Cir.  
18 1998) [affirming denial of a motion to amend made on the eve of the discovery  
19 deadline.] However, “delay alone [if present] does not provide sufficient grounds  
20 for denying leave to amend.” *Hurn v. Retirement Fund Trust of Plumbing,*  
21 *Heating & Piping Industry*, 648 F.2d 1252, 1254 (9th Cir. 1981).

22 As of the filing of this motion, this case has been active for only 9 months,  
23 and active in this Court for 8 months. DCA seeks to amend the complaint and add  
24 one cause of action for a violation of Fifth Amendment Due Process rights, with  
25 sufficient time remaining for the parties to conduct relevant discovery, if  
26 necessary. As the connection between ICANN and the U.S. Government is very  
27 familiar to ICANN, ICANN will have limited discovery to conduct, if any at all,  
28 related to this proposed cause of action. Moreover, the wrongdoing DCA

1 complains of in this cause of action is the same wrongdoing that forms the basis of  
2 DCA's other causes of action, therefore discovery is already ongoing on these  
3 issues.

4 DCA has not delayed in adding this claim, but did not contemplate the  
5 proposed cause of action prior to bringing this Motion as described in Section IV  
6 (A). Still months before trial and the close of discovery, the filing of DCA's  
7 Second Amended Complaint at this stage does not constitute undue delay.

8 Accordingly, the first factor weighs in favor of granting leave to amend.

9 2. No bad faith or improper motive is present

10 No indications of bad faith are present in DCA's actions. "Bad faith exists  
11 were, inter alia, the proposed amendment 'will not save the complaint or the  
12 plaintiff merely is seeking to prolong the litigation by adding new but baseless  
13 legal theories.' Bad faith may also exist when a party repeatedly represents to the  
14 court that the party will not move to amend its complaint, and subsequently moves  
15 to amend once 'the proverbial writing was on the wall' that the party will suffer an  
16 adverse judgment.' A court may also find bad faith when the moving party has a  
17 'history of dilatory tactics.'" *Naranjo v. Bank of Am. N.A.*, 2015 U.S. Dist. LEXIS  
18 25899, \*15 (N.D. Cal. Feb. 27, 2015). "To determine whether bad faith exists, the  
19 Court looks to the evidence in the record." *Id.*

20 None of these facts are present in DCA's actions. DCA has many viable  
21 claims in this matter presently. DCA is not prolonging the litigation by adding  
22 baseless legal theories. Moreover, DCA is not facing an adverse judgment nor has  
23 it represented to the Court that it would not further amend its complaint. As there  
24 are no dilatory tactics from DCA, this factor weighs in favor of granting leave to  
25 amend.

26 3. ICANN suffers no prejudice as a result of Amendment

27 An amendment adding a Fifth Amendment Due Process claim does not  
28 change the course of this litigation and should be allowed. "Prejudice is the



1 ‘touchstone of the inquiry under rule 15(a). Absent prejudice, or a strong showing  
2 of any of the remaining...factors, there exists a *presumption* under Rule 15(a) in  
3 favor of granting leave to amend. *Eminence Capital, LLC v. Aspeon, Inc.*, 316  
4 F.2d 1048, 1052 (9th Cir. 2003). “It is within the district court’s discretion to deny  
5 leave to amend where new claims radically shift the nature of the case, requiring  
6 the opposing party to engage in substantial new discovery or to undertake an  
7 entirely new course of argument late in the case.” *Lockheed Martin Corp., supra*,  
8 175 F.R.D. at 644.

9 No prejudice will occur to ICANN as a result of DCA’s proposed  
10 amendment. ICANN acknowledges that its Internet management authority exists  
11 pursuant to a contract with the U.S. Government. Neither the existence nor the  
12 scope of the contract is at dispute and all of the same allegations that DCA has put  
13 forth in its First Amended Complaint apply to the proposed claim here. No new  
14 discovery will be necessary.

15 DCA does not add this claim late in the litigation. This case was filed on  
16 January 20, 2016 and removed to this Court on February 8. Discovery does not  
17 close until November 30 and trial is set for February 28, 2017. (Dkt. No. 110.)  
18 DCA does not believe ICANN needs to propound further discovery on this point,  
19 but there remains sufficient time to do so. *Contrast Kaplan v. Rose*, 49 F.3d 1363,  
20 1370 (9th Cir. 1994) [affirming denial of leave to amend where the parties had  
21 already engaged in voluminous discovery]. Regardless of whether ICANN needs  
22 further discovery, such a need is not the equivalent of prejudice. *See Genentech,*  
23 *Inc. v. Abbott Laboratories*, 127 F.R.D. 529, 531 (N.D. Cal. 1989).

24 Finally, “any prejudice to the non-movant must be weighed against the  
25 prejudice to the moving party by not allowing amendment.” *Bell v. Allstate Life*  
26 *Ins. Co.*, 160 F.3d 452, 454 (8th Cir. 1998). DCA seeks to add a claim for a  
27 violation of substantive due process based on ICANN’s inadequate relief afforded  
28 to applicants for gTLDs. The prejudice to DCA is the denial of its right to relief.

1 Weighed against the limited (if any) prejudice to ICANN, DCA would suffer  
2 greater prejudice if leave to amend is denied.<sup>4</sup>

3 Although ICANN will be unable to demonstrate any prejudice as described  
4 above, it is their burden to do so in opposing amendment. *See DCD Programs,*  
5 *supra*, 833 F.2d at 187. There will be no radical shift in the course of this case or  
6 an inability to obtain any additional discovery that might be relevant to DCA's  
7 proposed cause of action.

8 This factor favors granting DCA leave to amend.

9 4. DCA's Prior Amendment is not grounds for denying leave

10 DCA has not sought leave to amend to address any prior deficiencies or  
11 dismissed claims. "The mere fact that the [moving party] could have moved at an  
12 earlier time to amend does not by itself constitute an adequate basis for denying  
13 leave to amend." *Howey, supra*, 481 F.2d at 1191. "Even assuming the basis for  
14 Plaintiffs' amendment was known at the time of the initial complaint, that is not, by  
15 itself, objective evidence of bad faith or tactical gamesmanship."  
16 *Naranjo v. Bank of Am. N.A., supra*, 2015 U.S. Dist. LEXIS 25899, at \*19. DCA  
17 did not contemplate the claim when the First Amended Complaint was filed.

18 This factor also weighs in favor of granting leave to amend.

19 5. An amendment is not futile

20 DCA sufficiently states a claim for a violation of substantive due process  
21 based on ICANN's relationship with the U.S. Government. "Where the underlying  
22 facts or circumstances of a case 'may be a proper subject to of relief' [a plaintiff]  
23 ought to be afforded an opportunity to test his claims on the merits." *DCD*  
24 *Programs, supra*, 833 F2d. at 188 [citing *Foman v. Davis*, 371 U.S. 178, 182  
25 (1962)]. "[A]n amendment is 'futile' only if it would clearly be subject to  
26 dismissal. While courts determine the legal sufficiency of a proposed amendment  
27

28 <sup>4</sup> If ZACR is determined to be an indispensable party, the Court will retain jurisdiction pursuant to 28 U.S.C. §1331 if leave to amend is granted.



1 using the same standard applied on a Rule 12(b)(6) motion, such issues are often  
2 more appropriately raised in a motion to dismiss rather than in an opposition to a  
3 motion for leave to amend. *Saes Getters S.P.A. v. Aeronex*, 219 F.Supp.2d 1081,  
4 1086 (2002) [citations omitted].

5 ICANN was created by the U.S. Government in order to take over  
6 management of the IANA functions from the U.S. Government. ICANN's power  
7 continues to this day to be authorized by a contract with the U.S. Government. In  
8 addition to the present contract governing ICANN's authority, the U.S.  
9 Government also sits on ICANN's board and ICANN's governmental advisory  
10 committee, imposing significant influence over the decisions of ICANN to manage  
11 the Internet. Kruger, *supra*, *The Future of Internet Governance: Should the United*  
12 *States Relinquish Its Authority over ICANN?*, pp. 2-3. As a result, ICANN is  
13 subject to constitutional limitations on state action either by performing a  
14 traditional and exclusive government function or through the close nexus that  
15 exists from the contract between the U.S. Government and ICANN. *See Lee v.*  
16 *Katz*, 376 F.3d 550, 557 (9th Cir. 2002); *Jensen v. Lane Cty.*, 222 F.3d 570, 576  
17 (9th Cir. 2000).

18 Nor are *Register.com, Inc. v. Verio, Inc.* (126 F.Supp.2d 238 (S.D.N.Y.  
19 2000)) or *Frogface v. Network Solutions, Inc.*, (No. C-00-3854 WHO, 2002 U.S.  
20 Dist. LEXIS 2594 (N.D. Cal. Jan. 14, 2002) dispositive. In both of those cases, the  
21 plaintiff sought to attribute ICANN's regulations under accreditation agreements  
22 with certain domain registries as regulatory in nature. *Register.com, Inc. v. Verio*,  
23 126 F.Supp.2d 238, 247; *Frogface v. Network Solutions, Inc.*, 2002 U.S. Dist.  
24 LEXIS 2594, at \*9. DCA is not proposing this claim based on a registry  
25 agreement with a register, DCA is basing this claim on ICANN's contract with the  
26 U.S. Government. In any respect, the language of those cases was simply dicta,  
27 and the issue of whether ICANN was either performing a traditional and exclusive  
28 government function, or entwined with the government through a close nexus were

1 neither discussed or raised at all. *See also McNeil v. Verisign, Inc.* No. 03-16946,  
2 2005 U.S. App. LEXIS 5450 at \*2-3 (9th Cir. Apr. 1, 2005) [dismissing claim  
3 against ICANN without discussion of ICANN’s status as a state actor]

4 DCA’s claim is not futile and this factor also weighs in favor of amendment.

5 **V. CONCLUSION**

6 Accordingly, DCA respectfully requests this Court grant leave for DCA to  
7 amend.

8  
9 Dated: October 4, 2016

**BROWN NERI SMITH & KHAN LLP**

10  
11 By: /s/ Ethan J. Brown

Ethan J. Brown

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13 *Attorneys for Plaintiff*

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**CERTIFICATE OF SERVICE**

I, Ethan J. Brown, hereby declare under penalty of perjury as follows:

I am a partner at the law firm of Brown Neri Smith & Khan, LLP, with offices at 11766 Wilshire Boulevard, Suite 1670, Los Angeles, California 90025. On October 4, 2016, I caused the foregoing **PLAINTIFF’S NOTICE OF AND MOTION FOR LEAVE TO AMEND; MEMORANDUM OF POINTS AND AUTHORITIES** to be electronically filed with the Clerk of the Court using the CM/ECF system which sent notification of such filing to counsel of record.

Executed on October 4, 2016.

/s/ Ethan J. Brown