

Exhibit RE-1

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
Independent Review Process Panel

In the Matter of an Independent Review Process

Between:

Booking.com B.V.

Applicant

-and-

ICDR Case No: 50-20-1400-0247

**Internet Corporation for Assigned Names
and Numbers (ICANN)**

Respondent

FINAL DECLARATION

The Panel:

Hon. A. Howard Matz
David H. Bernstein, Esq.
Stephen L. Drymer (Chair)

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DECLARATION

WE, THE UNDERSIGNED PANELISTS, members of the Independent Review Process Panel (“**IRP Panel**” or “**Panel**”), having been designated in accordance with ICANN Bylaws dated 11 April 2013, hereby issue the following Final Declaration (“**Declaration**”):¹

I. INTRODUCTION

1. This Declaration is issued in the context of an Independent Review Process (“**IRP**”) as provided for in Article IV, Section 3 of the Bylaws of the Internet Corporation for Assigned Names and Numbers (“**ICANN**”; “**ICANN Bylaws**” or “**Bylaws**”). In accordance with those Bylaws, the conduct of this IRP is governed by the International Arbitration Rules of the International Centre for Dispute Resolution as amended and in effect June 1, 2009 (“**ICDR**”; “**ICDR Rules**”) as supplemented by the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (“**Supplementary Procedures**”).
2. The subject matter of the dispute here concerns alleged conduct by the ICANN Board in relation to one particular facet of the process by which new generic top-level domains (“**gTLDs**”, also known as gTLD “**strings**”) are applied for, reviewed and delegated into the Internet’s domain name system (“**DNS**”) root zone.
3. As explained in this Declaration, the Applicant, Booking.com, alleges that, in establishing and overseeing the process by which so-called *string similarity reviews* are conducted, and in refusing to reconsider and overturn a decision to place Booking.com’s applied-for gTLD string .hotels in a so-called *string contention set*, the Board acted in a manner inconsistent with applicable policies, procedures and rules as set out in ICANN’s Articles of Incorporation, Bylaws and gTLD Applicant Guidebook (“**Guidebook**”).
4. Reading between the lines of the parties’ submissions, the Panel senses that both sides would welcome the opportunity to contribute to an exchange that might result in enabling disputants in future cases to avoid having to resort to an IRP to resolve issues such as have arisen here. Certainly the Panel considers that the present matter would ideally have been resolved amicably by the parties. This is particularly true given that the matter here concerns two of ICANN’s guiding principles – transparency and fairness – as applied to one of ICANN’s most essential activities – the delegation of new gTLDs² – in circumstances in which various members of the Internet community, including certain members of the ICANN Board’s New gTLD Program Committee, have expressed their own concerns regarding the string similarity review process. That being the case, though, the Panel does not shy away from the duty imposed by the Bylaws to address the questions before it and to render the

¹ As requested by the ICDR, the Declaration was provided to the ICDR in draft form on 26 January 2015 for non-substantive comments on the text (if any). It was returned to the Panel on 2 March 2015.

² As stated in the very first sentence of the Guidebook: “New gTLDs have been in the forefront of ICANN’s agenda since its creation.”

present Declaration, in accordance with, and within the constraints of the Bylaws, the ICDR Rules and the Supplementary Procedures.

II. THE PARTIES

A. The Applicant: Booking.com

5. The Applicant, Booking.com, is a limited liability company established under the law of the Netherlands. Booking.com describes itself as “the number one online hotel reservation service in the world, offering over 435,605 hotels and accommodations.”³ Booking.com’s primary focus is on the U.S. and other English-language markets.
6. Booking.com is represented in this IRP by Mr. Flip Petillion and Mr. Jan Janssen of the law firm *Crowell & Moring* in Brussels, Belgium.

B. The Respondent: ICANN

7. The Respondent, ICANN, is a California not-for-profit public benefit corporation, formed in 1998. As set forth in Article I, Section 1 of its Bylaws, ICANN’s mission is “to coordinate, at the overall level, the global Internet’s system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.” ICANN describes itself as “a complex organization that facilitates input from a wide variety of Internet stakeholders. ICANN has a Board of Directors and staff members from around the globe, as well as an Ombudsman. ICANN, however, is much more than just the corporation—it is a community of participants.”⁴
8. ICANN is represented in this IRP by Mr. Jeffrey A. LeVee, Esq. and Ms. Kate Wallace, Esq. of the law firm *Jones Day* in Los Angeles, California, USA.

III. FACTUAL AND PROCEDURAL BACKGROUND – IN BRIEF

9. We recount here certain uncontested elements of the factual and procedural background to the present IRP. Other facts are addressed in subsequent parts of the Declaration, where the parties’ respective claims and the Panel’s analysis are discussed.

A. ICANN’s Adoption of the New gTLD Program and the Applicant Guidebook

10. Even before the introduction of ICANN’s New gTLD Program (“**Program**”), in 2011, ICANN had, over time, gradually expanded the DNS from the original six gTLDs (.com; .edu; .gov; .mil; .net; .org) to 22 gTLDs and over 250 two-letter country-code TLDs.⁵ Indeed, as noted above, the introduction of new gTLDs has been “in the forefront of ICANN’s agenda” for as long as ICANN has existed.

³ Request, ¶ 10.

⁴ Response, ¶ 11-12.

⁵ Request, ¶ 12; see also Guidebook, *Preamble*.

11. The Program has its origins in what the Guidebook refers to as “carefully deliberated policy development work” by the ICANN community.⁶
12. In 2005, ICANN's Generic Names Supporting Organization (“GNSO”), one of the groups that coordinates global Internet policy at ICANN, commenced a policy development process to consider the introduction of new gTLDs.⁷ As noted in the Guidebook:

Representatives from a wide variety of stakeholder groups – governments, individuals, civil society, business and intellectual property constituencies, and the technology community – were engaged in discussions for more than 18 months on such questions as the demand, benefits and risks of new gTLDs, the selection criteria that should be applied, how gTLDs should be allocated, and the contractual conditions that should be required for new gTLD registries going forward.
13. In October 2007, the GNSO formally completed its policy development work on new gTLDs and approved a set of 19 policy recommendations.
14. In June 2008, the ICANN Board decided to adopt the policies recommended by the GNSO.⁸ As explained in the Guidebook, ICANN's work next focused on implementation of these recommendations, which it saw as “creating an application and evaluation process for new gTLDs that is aligned with the policy recommendations and provides a clear roadmap for applicants to reach delegation, including Board approval.”⁹
15. This process concluded with the decision by the ICANN Board in June 2011 to implement the New gTLD Program and its foundational instrument, the Guidebook.¹⁰
16. As described by ICANN in these proceedings, the Program “constitutes by far ICANN's most ambitious expansion of the Internet's naming system. The Program's goals include

⁶ Guidebook, *Preamble*

⁷ Request, ¶ 13, Reference Material 7, “Public Comment Forum for Terms of Reference for New gTLDs (6 December 2005), <http://www.icann.org/en/news/announcements/announcement-06dec05-en.htm#TOR>; Reference Material 8, “GNSO Issues Report, Introduction of New Top-Level Domains (5 December 2005) at pp. 3-4. See also Guidebook, *Preamble*. Booking.com refers to the GNSO as “ICANN's main policy-making body for generic top-level domains”. Article X of ICANN's Articles of Incorporation provides: “There shall be a policy-development body known as the Generic Names Supporting Organization (GNSO), which shall be responsible for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains” (Section 1); the GNSO shall consist of “a number of Constituencies” and “four Stakeholder Groups” (Section 2).

⁸ Guidebook, *Preamble*. A review of this policy process can be found at <http://gns0.icann.org/issues/new-gtlds> (last accessed on January 15, 2015).

⁹ Guidebook, *Preamble*: “This implementation work is reflected in the drafts of the applicant guidebook that were released for public comment, and in the explanatory papers giving insight into rationale behind some of the conclusions reached on specific topics. Meaningful community input has led to revisions of the draft applicant guidebook.”

¹⁰ RM 10 (ICANN resolution). The Guidebook (in its 30 May 2011 version) is one of seven “elements” of the Program implemented in 2011. The other elements were: a draft communications plan; “operational readiness activities”; a program to ensure support for applicants from developing countries; “a process for handling requests for removal of cross-ownership restrictions on operators of existing gTLDs who want to participate in the [Program]”; budgeted expenditures; and a timetable.

enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs ...”¹¹

17. The Guidebook is “continuously iterated and revised”, and “provides details to gTLD applicants and forms the basis for ICANN’s evaluation of new gTLD applications.”¹² As noted by Booking.com, the Guidebook “is the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs.”¹³

B. Booking.com’s Application for .hotels, and the Outcome

18. In accordance with the process set out in the Guidebook, Booking.com filed an application (Application ID 1-1016-75482) for the gTLD string .hotels.
19. At the same time, Despegar Online SRL (“Despegar”), a corporation established under the law of Uruguay, applied (Application ID 1-1249-87712) for the string .hoteis.
20. “Hoteis” is the Portuguese word for “hotels”.
21. According to Booking.com, Despegar is “a competitor of Booking.com”.¹⁴ Booking.com claims that it intends “to operate .hotels as a secure Internet environment providing hotel reservation services for consumers, hotels, and other stakeholders,”¹⁵ while Despegar similarly intends .hoteis to be dedicated primarily to “individuals that are interested in, and businesses that offer, hotel- and travel-related content.”¹⁶ That being said, a key difference between the two applications, as Booking.com acknowledges, is that Booking.com intends to focus the services it will offer under its proposed gTLD “on the U.S. (with its strongly Anglo-Saxon traditions) and other English-language markets,”¹⁷ whereas Despegar intends to target “Portuguese-speaking” markets.¹⁸
22. As part of the Initial Evaluation to which all applied-for gTLDs were subject, .hotels and .hoteis were each required to undergo so-called *string review* in accordance with the Guidebook, the first component of which is a process known as *string similarity review*. As provided by the Guidebook, the string similarity review was conducted by an independent

¹¹ Response, ¶ 14.

¹² Response, ¶ 14. The resolution (RM 10) adopting the Guidebook explicitly “authorizes staff to make further updates and changes to the Applicant Guidebook as necessary and appropriate, including as the possible result of new technical standards, reference documents, or policies that might be adopted during the course of the application process, and to prominently publish notice of such changes.”

¹³ Request, ¶ 13. See also Guidebook, Module 1-2: “This Applicant Guidebook is the implementation of Board approved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period.”

¹⁴ Request, ¶ 17.

¹⁵ Request, ¶ 5.

¹⁶ Request, ¶ 17. See also Despegar Application for .hoteis (Request, Annex 2), § 18(a).

¹⁷ Request, ¶ 16.

¹⁸ Request, ¶ 17. See also Despegar Application for .hoteis (Request, Annex 2), § 18(a).

String Similarity Panel (“SSP”) selected and engaged by ICANN for this purpose. (Extracts of the relevant provisions of the Guidebook can be found below, at Part IV of this Declaration.) ICANN engaged InterConnect Communications Ltd. (“ICC”), a company registered under the law of England and Wales, specializing in communications sector strategy, policy and associated regulatory frameworks,¹⁹ in cooperation with University College London, to act as the SSP.

23. On 26 February 2013 ICANN published the results of all of the string similarity reviews for all of the applications for new gTLDs submitted as part of the Program. The announcement revealed, among other things, that two “non-exact match” contention sets had been created: .hotels & .hoteis; and .unicorn & .unicom.²⁰ Booking.com’s applied for string .hotels (as well as the .hoteis, .uncorn and .unicom strings) had thus failed the string similarity review.
24. The results of the string similarity review were notified to Booking.com by ICANN that same day. In its letter of 26 February 2013 ICANN wrote:

After careful consideration and extensive review performed against the criteria in Section 2.2.1.1 of the Applicant Guidebook, the String Similarity Panel has found that the applied-for string (.hotels) is visually similar to another applied-for string (.hoteis), creating a probability of user confusion.

Due to this finding, the ... two strings have been placed in a contention set.²¹

25. The impact of being put into a contention set is that the proposed strings in the set will not be delegated in the root zone unless and until the applicants reach agreement on which single string should proceed (with the other proposed string therefore rejected), or until after an auction is conducted, with the highest bidder being given the right to proceed to the next step in the review process.

C. DIDP Request and Request for Reconsideration

26. On 28 March 2013 Booking.com submitted a request for information under ICANN’s Documentary Information Disclosure Policy (“**DIDP Request**”) asking for “all documents directly and indirectly relating to (1) the standard used to determine whether gTLD strings are confusingly similar, and (2) the specific determination that .hotels and .hoteis are confusingly similar.”²²
27. On the same date, Booking.com also filed a formal Request for Reconsideration (“**Request for Reconsideration**”). The “specific action(s)” that Booking.com asked to be reconsidered were: the decision to place .hotels and .hoteis in a contention set; and the decision not to

¹⁹ See <http://www.icc-uk.com/>

²⁰ Request, Annex 3. ICANN published document dated 26 February 2013. As its name suggests, a “non-exact match” connotes a determination that two different (non-identical) strings are visually similar within the meaning of the Guidebook. Another 752 applied-for gTLDs were put into 230 identical contention sets.

²¹ Request, Annex 3, ICANN letter dated 26 February 2013.

²² Request, ¶ 30 and Annex 3.

provide a “detailed analysis or a reasoned basis” for the decision to place .hotels in contention.²³

28. ICANN responded to the DIDP Request on 27 April 2013. Although ICANN provided certain information regarding the review process, in its response to the DIDP Request, ICANN also noted:

*The SSP is responsible for the development of its own process documentation and methodology for performing the string similarity review, and is also responsible for the maintenance of its own work papers. Many of the items that are sought from ICANN within the [DIDP] Request are therefore not in existence within ICANN and cannot be provided in response to the DIDP Request. ICANN will, however, shortly be posting the SSP's String Similarity Process and Workflow on the New gTLD microsite ...*²⁴

29. By letter dated 9 May 2013 Booking.com replied to ICANN, writing that “ICANN’s response fails to provide any additional information or address any of Booking.com’s concerns as conveyed in its DIDP Request or Request for Reconsideration.”²⁵ On 14 May 2013, ICANN answered that it “intends to post the string similarity process documentation on or before ... 17 May 2013.”²⁶ ICANN further informed Booking.com that “ICANN will afford you 30 days from the posting of the process document for the submission of a revised Request for Reconsideration.”²⁷
30. On 7 June 2013, ICANN published the “String Similarity New gTLD Evaluation Panel [i.e., the SSP] – Process Description” (“**SSP Process Description**”).²⁸
31. On 26 June 2013 Booking.com wrote to ICANN regarding both its DIDP Request and its 28 March 2013 Request for Reconsideration. In its letter, Booking.com noted among other things that “the generalized information ICANN thus far has provided does not explain a rationale for or analysis for the decision to put .hotels and .hoteis in a contention set and therefore does not allow Booking.com to appropriately amend its Request for Reconsideration.” The letter concluded by stating: “Considering ICANN’s obligations of transparency and accountability, there cannot be any ‘compelling reason for confidentiality’.

²³ Request, Annex 12, §3. The Request for Reconsideration (which appears to be in the form of a template) expressly states at §2 that it is a “Request for Reconsideration of ... Staff [vs. Board] action/inaction.” The cover letter attaching the Request states that, “[d]espite the fact that the origin of the decisions is unclear, this Reconsideration Request is being submitted as a reconsideration of a ‘Staff action’. In the event that the decisions referenced above are determined to be a ‘Board action’, this request may be amended.” As explained below, the Request for Reconsideration was amended on 7 July 2013. That amendment did not alter the stated nature of the request in §2 or the description of the specific actions that Booking.com sought to have reconsidered (§3). Unless otherwise indicated, all further references in this Declaration to the Request for Reconsideration are understood to be the *amended* Request for Reconsideration.

²⁴ Request, Annex 5.

²⁵ Request, Annex 6.

²⁶ Request, Annex 7.

²⁷ Request, Annex 7.

²⁸ Request, Annex 8.

And ... there are numerous compelling reasons for publication of [the information requested by Booking.com].²⁹

32. ICANN responded on 25 July 2013, explaining among other things that “the evaluation of the .hotels string by the SSP panel was performed according to the [SSP Process Description] ...” and “[t]he SSP’s work was subjected to quality review, as has been publicly discussed.”³⁰ Approximately six months later, on 9 January 2014, ICANN posted a letter dated 18 December 2013 addressed to ICANN by the SSP Manager at ICC (Mr. Mark McFadden) providing a further “summary of the process, quality control mechanisms and some considerations surrounding the non-exact contention sets for the string similarity evaluation ...” (“**SSP Manager’s Letter**”).³¹ According to that Letter:

When ALL of the following features of a pairwise comparison [of non-exact match strings] are evident the evaluators found the string pair to be confusingly similar:

- *Strings of similar visual length on the page;*
- *Strings within +/- 1 character of each other;*
- *Strings where the majority of characters are the same and in the same position in each string; and*
- *The two strings possess letter combinations that visually appear similar to other letters in the same position in each string*

o For example m~m & l~i

33. Meanwhile, on 7 July 2013 Booking.com had submitted its amended Request for Reconsideration. In its letter attaching the amended Request for Reconsideration, Booking.com stated: “Booking.com reserves the right to further amend its Request for Reconsideration upon receipt of the information it previously requested and urges ICANN to publish the requested information as specified in our letter of 26 June 2013.”³²
34. By virtue of Article IV, Section 3 of the Bylaws, ICANN’s Board Governance Committee (“**BGC**”) is charged with evaluating and making recommendation to the Board with respect to requests for reconsideration. The Board’s New gTLD Program Committee (“**NGPC**”) receives and acts on such recommendations on behalf of the ICANN Board. In accordance with this procedure, Booking.com’s Request for Reconsideration was evaluated by the BGC. In a detailed analysis dated 1 August 2013, the BGC “conclude[d] that Booking.com has not

²⁹ Request, Annex 9.

³⁰ Request, Annex 10.

³¹ Request, Annex 11.

³² Request, Annex 13.

stated proper grounds for reconsideration and we therefore recommend that Booking.com's request be denied" ("**BGC Recommendation**").³³

35. At a telephone meeting held on 10 September 2013 the NGPC, "bestowed with the powers of the Board", considered, discussed and accepted the BGC Recommendation. Booking.com's Request for Reconsideration was denied.³⁴

D. The Cooperative Engagement Process

36. Booking.com thereafter filed a request for a Cooperative Engagement Process ("**CEP**") on 25 September 2013, with a view to attempting to reach an amicable resolution of its dispute with ICANN. In its CEP request, Booking.com wrote:

*Booking.com is of the opinion that Resolution 2013.09.10.NG02 [the Board resolution denying its Request for Reconsideration] violates various provisions of ICANN's Bylaws and Articles of Incorporation. In particular Booking.com considers that ICANN's adoption of [the Resolution] is in violation of Articles I, II(3), II and IV of the ICANN Bylaws as well as Article 4 of ICANN's Articles of Incorporation. In addition, Booking.com considers that ICANN has acted in violation of Articles 3, 5, 7 and 9 of ICANN's Affirmation of Commitment ...*³⁵

37. The CEP ultimately did not result in a resolution, and Booking.com duly commenced the present IRP.
38. One further point should be made, here, prior to describing the commencement and conduct of the present IRP proceedings: The determination by the SSP that .hotels and .hoteis are so visually similar as to give rise to the probability of user confusion, and the resulting placement of those applied-for strings into a contention set, does *not* mean that Booking.com's application for .hotels has been denied or that .hotels will not proceed to delegation to the root zone. Rather, as noted above and explained in the extracts from the Guidebook reproduced below, the Guidebook establishes a process for resolving such contention, under which the applicants for the contending strings in the set – here, Booking.com and Despegar – may resolve the contention by negotiation, failing which the matter will proceed to auction. Ultimately, no matter the outcome of these IRP proceedings, Booking.com may yet be successful and .hotels may yet be delegated into the Internet root zone. However, the fact that .hotels has been put into a contention set does raise the risk that .hotels may never be delegated into the root zone, or that it may be more costly for Booking.com to obtain approval of its proposed string. It also has caused a significant delay in the potential delegation of the string into the root zone (which could prove to be detrimental to the ultimate success of Booking.com's proposed string if other applicants

³³ Request, Annex 14, BGC Recommendation dated 1 August 2013, p.9. See also Request, Annex 15, NGPC Resolution dated 10 September 2013. As noted in footnote 1 to the BGC Recommendation, the Recommendation was ultimately finalized and submitted for posting on 21 August 2013.

³⁴ Request, Annex 15, NGPC Resolution dated 10 September 2013.

³⁵ Request, Annex 17.

whose strings were not put into a contention set are able to establish themselves as pioneer providers of hotel- and travel-related services under a different new gTLD).

E. The IRP Proceedings

39. On 19 March 2014, Booking.com submitted a Notice of Independent Review, dated 18 March 2014, as well as a Request for Independent Review Process (“Request”) accompanied by numerous supporting documents and reference materials.
40. In accordance with Article IV, Section 3(9) of the ICANN Bylaws, Booking.com requested that a three-member IRP panel be constituted to consider and determine the Request. As the omnibus standing panel referred to in Article IV, Section 3(6) of the ICANN Bylaws had yet to be established, Booking.com further proposed, in accordance with Article 6 of the ICDR Rules, that each party appoint one panelist, with the third (the Chair of the panel) to be appointed by the two party-appointed panelists.
41. On 25 April 2014, ICANN submitted a Response to ICANN’s Request with supporting documents (“Response”).
42. The parties having thereafter agreed on the number of panelists and the method of their appointment, David H. Bernstein, Esq. was duly appointed as panelist by Booking.com on 1 May 2014, and the Hon. A Howard Matz was duly appointed as panelist by ICANN on 30 May 2014.
43. On 17 July 2014, the ICDR notified the parties that Mr. Stephen L. Drymer had been duly nominated by the two party-appointed panelists as Chair of the Panel. Mr. Drymer’s appointment became effective and the Panel was duly constituted as of 1 August 2014.
44. On 21 August 2014, further to consultations among the panelists and between the Panel and the parties, the Panel convened a preparatory conference with the parties (by telephone) for the purpose of discussing organizational matters, including a timetable for any further written statements or oral argument. Both parties requested the opportunity to make supplemental submissions and to present oral argument.
45. On 22 August 2014 the Panel issued Procedural Order No. 1 in which, among other things, it established a Procedural Timetable for the IRP. As specifically requested by the parties, the Procedural Order and Timetable provided for the submission of additional written statements by the parties as well as for a brief oral hearing to take place by telephone, all on dates proposed by and agreed between the parties.³⁶
46. In accordance with the Procedural Timetable, on 6 October 2014 Booking.com submitted its Reply to ICANN’s Response, accompanied by additional documents (“Reply”).

³⁶ Paragraph 6 of Procedural Order No. 1 provided that, in its forthcoming Reply to ICANN’s Response, “Booking.com shall only address two issues raised in Respondent’s Response: (1) the nature and scope of the IRP requested; (2) the nature of the relief sought by Claimant.” Paragraph 7 of Procedural Order No. 1 provided that “Respondent’s Sur-Reply ... shall address only the issues raised in the Reply.”

47. In accordance with the Procedural Timetable, ICANN submitted a Sur-Reply on 20 November 2014 (“**Sur-Reply**”).

F. The Hearing

48. As provided by Procedural Order No. 1 and the Procedural Timetable, a hearing was held (by telephone) on 10 December 2011, commencing at 9:00 PST/18:00 CET.
49. In the light of the significance of the issues raised by the parties, and given the many questions prompted by those issues and by the parties’ extensive written submissions and supporting materials, the Panel indicated that it would allow the hearing to continue beyond the approximately one hour originally envisaged. The hearing ultimately lasted two and one-half hours. Counsel for each party made extensive oral submissions, including rebuttal and sur-rebuttal submissions, and responded to the panelists’ questions.
50. Prior to the close of the hearing each party declared that it had no objection concerning the conduct of the proceedings, that it had no further oral submissions that it wished to make, and that it considered that it had had a full opportunity to present its case and to be heard.
51. As agreed and ordered prior to the close of the hearing, the parties were provided the opportunity to file limited additional materials post-hearing, in relation to a certain question asked of them by the Panel. This was done, and, on 13 December 2014, the proceedings were declared closed.

IV. ICANN ARTICLES, BYLAWS AND POLICIES – KEY ELEMENTS

52. We set out here the key elements of ICANN’s Articles of Association, Bylaws and policies on which the parties rely in their submissions and to which the Panel will refer later in this Declaration.

A. Articles of Association

4. The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.

[Underlining added]

B. Bylaws

ARTICLE I: MISSION AND CORE VALUES

Section 1. MISSION

The mission of The Internet Corporation for Assigned Names and Numbers (“ICANN”) is to coordinate, at the overall level, the global Internet’s systems of unique identifiers,

and in particular to ensure the stable and secure operation of the Internet's unique identifier systems.

[...]

Section 2. CORE VALUES

In performing its mission, the following core values should guide the decisions and actions of ICANN:

- 1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.*
- 2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.*
- 3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.*
- 4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.*
- 5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.*
- 6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.*
- 7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.*
- 8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.*
- 9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.*
- 10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.*
- 11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.*

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN

body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

[...]

ARTICLE III: TRANSPARENCY

Section 1. PURPOSE

ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.

[...]

ARTICLE IV: ACCOUNTABILITY AND REVIEW

Section 1. PURPOSE

In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions and periodic review of ICANN's structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III and the Board and other selection mechanisms set forth throughout these Bylaws.

Section 2. RECONSIDERATION

1. ICANN shall have in place a process by which any person or entity materially affected by an action of ICANN may request review or reconsideration of that action by the Board.
2. Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction ("Reconsideration Request") to the extent that he, she, or it have been adversely affected by:
 - a. one or more staff actions or inactions that contradict established ICANN policy(ies); or
 - b. one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
 - c. one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.
3. The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to:
 - a. evaluate requests for review or reconsideration;

- b. summarily dismiss insufficient requests;
- c. evaluate requests for urgent consideration;
- d. conduct whatever factual investigation is deemed appropriate;
- e. request additional written submissions from the affected party, or from other parties;
- f. make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and
- g. make a recommendation to the Board of Directors on the merits of the request, as necessary.

[...]

Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

1. In addition to the reconsideration process described in Section 2 of this Article, ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.

2. Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.

3. A request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation. Consolidated requests may be appropriate when the causal connection between the circumstances of the requests and the harm is the same for each of the requesting parties.

4. Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. did the Board act without conflict of interest in taking its decision?;
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company [ICANN]?

[...]

11. The IRP Panel shall have the authority to:

- a. summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;
- b. request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;
- c. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and
- d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;
- e. consolidate requests for independent review if the facts and circumstances are sufficiently similar; and
- f. determine the timing for each proceeding.

[...]

14. Prior to initiating a request for independent review, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. [...]

15. Upon the filing of a request for an independent review, the parties are urged to participate in a conciliation period for the purpose of narrowing the issues that are stated within the request for independent review. A conciliator will be appointed from the members of the omnibus standing panel by the Chair of that panel. [...]

16. Cooperative engagement and conciliation are both voluntary. However, if the party requesting the independent review does not participate in good faith in the cooperative engagement and the conciliation processes, if applicable, and ICANN is the prevailing party in the request for independent review, the IRP Panel must award to ICANN all reasonable fees and costs incurred by ICANN in the proceeding, including legal fees.

[...]

18. The IRP Panel should strive to issue its written declaration no later than six months after the filing of the request for independent review. The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.

[Underlining added]

53. Lest there be any misunderstanding as regards the proper subject matter of IRP proceedings or the role of the Panel, we note that, as was clearly established during the hearing, it is common ground between the parties that the term "action" (or "actions") as used in Article IV, Section 3 of the Bylaws is to be understood as action(s) or inaction(s) by the ICANN Board. The Panel observes that this understanding comports not only with the provisions of Article

IV, Section 2 of the Bylaws concerning “Reconsideration”, which expressly refer to “actions or inactions of the ICANN Board”, but with the clear intent of Section 3 itself, which stipulates at sub-section 11 that “[t]he IRP Panel shall have the authority to: ... (c) declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws.”

C. The gTLD Applicant Guidebook

54. As noted above and as understood by all, the Guidebook is (to borrow Booking.com’s phrase) “the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs.”³⁷
55. The Guidebook is divided into “Modules”, each of which contains various sections and sub-sections. The three Modules of primary relevance here are Modules 1, 2 and 4. Module 1, titled “Introduction to the gTLD Application Process,” provides an “overview of the process for applying for a new generic top-level domains.”³⁸ Module 2, titled “Evaluation Procedures,” describes the “evaluation procedures and criteria used to determine whether applied-for gTLDs are approved for delegation.”³⁹ Module 4, titled “String Contention Procedures,” concerns “situations in which contention over applied-for gTLD strings occurs, and the methods available to applicants for resolving such contention cases.”

(i) *Initial Evaluation*

56. As explained in Module 1, “[i]mmediately following the close of the application submission period, ICANN will begin checking all applications for completeness.”⁴⁰ Initial Evaluation begins “immediately after the administrative completeness check concludes. All complete applications will be reviewed during Initial Evaluation.”⁴¹
57. Initial Evaluation is comprised of two main elements or types of review: *string review*, which concerns the applied-for gTLD string; and *applicant review*, which concerns the entity applying for the gTLD and its proposed registry services. It is the first of these – string review, including more specifically the component known as *string similarity review* – that is particularly relevant.

(ii) *String Review, including String Similarity Review*

58. String review is itself comprised of several components, each of which constitutes a separate assessment or review of the applied-for gTLD string, conducted by a separate reviewing body or panel. As explained in Module 2:

The following assessments are performed in the Initial Evaluation:

³⁷ Request, ¶ 13.

³⁸ Module 1-2. Each Module of the Guidebook is paginated separately. “Module 1-2” refers to Guidebook Module 1, page 2.

³⁹ Module 2-2.

⁴⁰ Guidebook, §1.1.2.2: “Administrative Completeness Check”, Module 1-5.

⁴¹ Guidebook, §1.1.2.5: “Initial Evaluation”, Module 1-8 (underlining added).

- *String Reviews*
 - *String similarity*
 - *Reserved names*
 - *DNS stability*
 - *Geographic names*

[...]

*An application must pass all these reviews to pass the Initial Evaluation. Failure to pass any one of these reviews will result in a failure to pass the Initial Evaluation.*⁴²

59. As indicated, all complete applications are subject to Initial Evaluation, which means that all applied-for gTLD strings are subject to string review. String review is further described in Module 2 as follows:

[String review] focuses on the applied-for gTLD string to test:

- *Whether the applied-for gTLD string is so similar to other strings that it would create a probability of user confusion;*
- *Whether the applied-for gTLD string might adversely affect DNS security or stability; and*
- *Whether evidence of requisite government approval is provided in the case of certain geographic names.*⁴³

60. The various assessments or reviews (i.e., string similarity, reserved names, DNS stability, etc.) that comprise string review are elaborated at Section 2.2.1 of Module 2. As mentioned, the most relevant of these reviews for our purposes is *string similarity review*, which is described in detail at Section 2.2.1.1. Because of the central importance of the string similarity review process in the context of the present dispute, this section of the Guidebook is reproduced here at some length:

2.2.1.1 String Similarity Review

This review involves a preliminary comparison of each applied-for gTLD string against existing TLDs, Reserved Names (see subsection 2.2.1.2), and other applied-for strings. The objective of this review is to prevent user confusion and loss of confidence in the DNS resulting from delegation of many similar strings.

Note: In this Applicant Guidebook, “similar” means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone.

⁴² Module 2-2. The same is true of applicant review, which is also comprised of various assessments concerning the applicant entity.

⁴³ Guidebook, §2.2: “Initial Evaluation”, Module 2-4 (underlining added). See also Module 1-9: “String reviews include a determination that the applied-for gTLD string is not likely to cause security or stability problems in the DNS ...”

The visual similarity check that occurs during Initial Evaluation is intended to augment the objection and dispute resolution process (see Module 3, Dispute Resolution Procedures) that addresses all types of similarity.

This similarity review will be conducted by an independent String Similarity Panel.

2.2.1.1.1 Reviews Performed

The String Similarity Panel's task is to identify visual string similarities that would create a probability of user confusion.

The panel performs this task of assessing similarities that would lead to user confusion in four sets of circumstances, when comparing:

[...]

- Applied-for gTLD strings against other applied-for gTLD strings;

[...]

Similarity to Other Applied-for gTLD Strings (String Contention Sets) – All applied-for gTLD strings will be reviewed against one another to identify any similar strings. In performing this review, the String Similarity Panel will create contention sets that may be used in later stages of evaluation.

A contention set contains at least two applied-for strings identical or similar to one another. Refer to Module 4, String Contention Procedures, for more information on contention sets and contention resolution.

[...]

2.2.1.1.2 Review Methodology

The String Similarity Panel is informed in part by an algorithmic score for the visual similarity between each applied-for string and each of other existing and applied-for TLDs and reserved names. The score will provide one objective measure for consideration by the panel, as part of the process of identifying strings likely to result in user confusion. In general, applicants should expect that a higher visual similarity score suggests a higher probability that the application will not pass the String Similarity review. However, it should be noted that the score is only indicative and that the final determination of similarity is entirely up to the Panel's judgment.

The algorithm, user guidelines, and additional background information are available to applicants for testing and informational purposes. [footnote in the original: See <http://icann.sword-group.com/algorithm/>] Applicants will have the ability to test their strings and obtain algorithmic results through the application system prior to submission of an application.

[...]

The panel will examine all the algorithm data and perform its own review of similarities between strings and whether they rise to the level of string confusion. In cases of strings in scripts not yet supported by the algorithm, the panel's assessment process is entirely manual.

The panel will use a common standard to test for whether string confusion exists, as follows:

Standard for String Confusion – String confusion exists where a string so nearly resembles another visually that it is likely to deceive or cause confusion. For the likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.

2.2.1.1.3 Outcomes of the String Similarity Review

An application that fails the String Similarity review due to similarity to an existing TLD will not pass the Initial Evaluation, and no further reviews will be available. Where an application does not pass the String Similarity review, the applicant will be notified as soon as the review is completed.

An application for a string that is found too similar to another applied-for gTLD string will be placed in a contention set.⁴⁴

[Underlining added]

61. Module 4 of the Guidebook, as mentioned, concerns “situations in which contention over applied-for gTLD strings occurs, and the methods available to applicants for resolving such contention cases.” As explained in Module 4:

4.1 String Contention

String contention occurs when either:

1. Two or more applicants for an identical gTLD string successfully complete all previous stages of the evaluation and dispute resolution processes; or
2. Two or more applicants for similar gTLD strings successfully complete all previous stages of the evaluation and dispute resolution processes, and the similarity of the strings is identified as creating a probability of user confusion if more than one of the strings is delegated.

ICANN will not approve applications for proposed gTLD strings that are identical or that would result in user confusion, called contending strings. If either situation above occurs, such applications will proceed to contention resolution through either community priority evaluation, in certain cases, or through an auction. Both processes are described in this module. A group of applications for contending strings is referred to as a contention set.

⁴⁴ Module 2-5 to 2-9. As regards the concept of string contention, see also Guidebook, §1.1.2.10: “String Contention”, Module 1-13: “String contention applies only when there is more than one qualified application for the same or similar gTLD strings. String contention refers to the scenario in which there is more than one qualified application for the identical gTLD string or for similar gTLD strings. In this Applicant Guidebook, “similar” means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone.”

(In this Applicant Guidebook, “similar” means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone.)

4.1.1 Identification of Contention Sets

Contention sets are groups of applications containing identical or similar applied-for gTLD strings. Contention sets are identified during Initial Evaluation, following review of all applied-for gTLD strings. ICANN will publish preliminary contention sets once the String Similarity review is completed, and will update the contention sets as necessary during the evaluation and dispute resolution stages.

Applications for identical gTLD strings will be automatically assigned to a contention set.

[...]

The String Similarity Panel will also review the entire pool of applied-for strings to determine whether the strings proposed in any two or more applications are so similar that they would create a probability of user confusion if allowed to coexist in the DNS. The panel will make such a determination for each pair of applied-for gTLD strings. The outcome of the String Similarity review described in Module 2 is the identification of contention sets ...

[...]

As described elsewhere in this guidebook, cases of contention might be resolved by community priority evaluation [NB: community priority evaluation applies only to so-called “community” applications; it is not relevant here] or an agreement among the parties. Absent that, the last-resort contention resolution mechanism will be an auction.

[...]

62. As provided in Module 4, the two methods relevant to resolving a contention such as between .hotels and .hoteis are *self-resolution* (i.e., an agreement between the two applicants for the contending strings) and *auction*:

4.1.3 Self-Resolution of String Contention

Applicants that are identified as being in contention are encouraged to reach a settlement or agreement among themselves that resolves the contention. This may occur at any stage of the process, once ICANN publicly posts the applications received and the preliminary contention sets on its website.

Applicants may resolve string contention in a manner whereby one or more applicants withdraw their applications.

[...]

4.3 Auction: Mechanism of Last Resort

It is expected that most cases of contention will be resolved by the community priority evaluation, or through voluntary agreement among the involved applicants. Auction is a tie-breaker method for resolving string contention among the applications within a contention set, if the contention has not been resolved by other means.

63. Module 5 of the Guidebook, titled *Transition to Delegation*, describes “the final steps required of an applicant for completion of the process, including execution of a registry agreement with ICANN and preparing for delegation of the new gTLD into the root zone.”⁴⁵ Section 5.1 states:

*ICANN’s Board of Directors has ultimate responsibility for the New gTLD Program. The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application as a result of GAC Advice on New gTLDs or of the use of an ICANN accountability mechanism.*⁴⁶

[Underlining added]

V. SUMMARY OF THE PARTIES’ POSITIONS

64. The following brief summary of the parties’ respective positions is provided with a view solely to assisting the reader to understand the present Declaration. It is *not* intended to recapitulate – and it does not recapitulate – the entirety of the parties’ allegations and arguments. Additional references to the parties’ positions, including submissions made by them in the course of the proceedings, are contained in the discussion at Part VI below.

A. Booking.com’s position

(i) *The Panel’s Authority*

65. Booking.com submits that the mandate of the Panel is “to determine whether the contested actions of the ICANN Board are consistent with applicable rules”.⁴⁷ According to Booking.com:

*The set of rules against which the actions of the ICANN Board must be assessed includes: (i) ICANN’s Articles of Incorporation and Bylaws – both of which must be interpreted in light of ICANN’s Affirmation of Commitments, and both of which require compliance with inter alia International law and generally accepted good governance principles – and (ii) secondary rules created by ICANN, such as the Applicant Guidebook. In setting up, implementing and supervising its policies and processes, the Board must comply with the fundamental principles embodied in these rules. That obligation includes a duty to ensure compliance with its obligations to act in good faith, transparently, fairly, and in a manner that is non-discriminatory and ensures due process.*⁴⁸

⁴⁵ Module 5-2.

⁴⁶ Module 5-4.

⁴⁷ Reply, ¶ 3.

⁴⁸ Reply, ¶ 3.

66. Booking.com submits that IRP panels have broad authority to evaluate actions of the ICANN Board. An overly restrictive interpretation of the standard of review, such as proposed by ICANN in these proceedings, would, says Booking.com, “fail to ensure accountability on the part of ICANN and would be incompatible with ICANN’s commitment to maintain (and improve) robust mechanisms for accountability, as required by Article 9.1 of ICANN’s Affirmation of Commitments and ICANN’s core values.”⁴⁹

(ii) Booking.com’s Claims

67. The purpose of the IRP initiated by Booking.com is, in its own words, “to challenge the ICANN Board’s handling of Booking.com’s application for the new gTLD .hotels.”⁵⁰ This includes the determination of the SSP to place .hotels and .hotels in contention and the refusal of the Board (and its committees) to revise that determination. Elsewhere in its submissions, Booking.com makes an even broader claim; it asserts that it challenges the conduct of the ICANN Board in relation to what Booking.com refers to as the *setting up, implementation, supervision and review* of the entire of string similarity review process, and the Board’s alleged failure “to ensure due process and to respect its fundamental obligations to ensure good faith, transparency, fairness and non-discrimination” throughout.⁵¹
68. In effect, Booking.com’s specific claims can be divided into two broad categories: claims related to the string similarity review process generally; and claims related to the particular case of .hotels.
69. Booking.com professes that this case “is not about challenging a decision on the merits [i.e., the decision to place .hotels in contention]”; it is about “ICANN’s failure to respect fundamental [procedural] rights and principles in handling New gTLD applications, in particular in the context of String Similarity Review.”⁵²
70. Booking.com also repeatedly emphasizes – and this is crucial – that *it does not challenge the validity or fairness of the process as set out in the Guidebook*. Rather, as indicated, it contests “the way in which that process was established, implemented and supervised by (or under the authority of) the ICANN Board.”⁵³ Equally crucial, as will be seen, is Booking.com’s acknowledgment that *the established process was followed* in the case of the review of .hotels.

a. The string similarity review process

71. According to Booking.com, the problem began when the ICANN Board failed to “provide transparency in the SSP selection process,” in particular by failing “to make clear how

⁴⁹ Reply, ¶ 6.

⁵⁰ Reply, ¶ 7.

⁵¹ Reply, ¶ 15.

⁵² Reply, ¶ 14.

⁵³ Reply, ¶ 17.

[ICANN] would evaluate candidate responses or how it ultimately did so.”⁵⁴ The problem was compounded by the selection of ICC/University College London to perform string similarity reviews as the independent SSP. In Booking.com’s words:

*[T]he identities of the unsuccessful candidates (if any) to perform the String Similarity Review remain unknown. Applicants have never been given any information in relation to the candidate responses that were submitted. ... There is no indication that any other candidate expressed an interest in performing the String Similarity Review. No information has been provided as to the steps (if any) taken by ICANN to reach out to other potential candidates. Numerous questions remain: How did ICANN deal with the situation if there was only one (or only a very few) respondent(s) wishing to perform the String Similarity Review? How did this impact on the discussions with InterConnect Communications? What are the terms of ICANN’s contract with InterConnect Communications?*⁵⁵

72. Booking.com also faults ICANN for “allowing the appointed SSP to develop and perform an unfair and arbitrary review process”, specifically, by allowing the SSP “to perform the String Similarity Review (i) without any (documented) plan or methodology ... (ii) without providing any transparency regarding the evaluators or the evaluation criteria ... and (iii) without informing applicants of its reasoning ...”.⁵⁶
73. Among other things, Booking.com takes ICANN to task for establishing and posting the SSP Process Description and the SSP Manager’s Letter (see Part III.C above) only long after the string similarity review process had ended.⁵⁷
74. It also alleges that the factors identified in the SSP Manager’s Letter are “arbitrary and baseless ... not supported by any methodology capable of producing compelling and defensible conclusions ... [which] has allowed applications with at least equally serious visual string similarity concerns – such as .parts/.paris, .maif/.mail, .srt/.srl, .vote/.voto and .date/.data ... – to proceed while singling out .hotels/.hoteis.”⁵⁸ According to Booking.com: “The failure to take actual human performance into account is at odds with the standard for assessment, *i.e.*, the likelihood of confusion on the part of the average Internet user. Hence, the approach is directly contrary to ICANN’s own policy.”⁵⁹
75. Booking.com further contends that the SSP process is unfair and non-transparent due to the fact that the identity of SSP members has never been publicly disclosed.⁶⁰
76. Further, Booking.com argues that the process is unfair, non-transparent and arbitrary – and thus violates ICANN policy – for failing to provide for a “well-documented rationale” for each

⁵⁴ Reply, ¶ 20.

⁵⁵ Reply, ¶ 20.

⁵⁶ Reply, ¶ 23.

⁵⁷ Reply, ¶ 24.

⁵⁸ Reply, ¶ 25.

⁵⁹ Reply, ¶ 25.

⁶⁰ Reply, ¶ 26-27.

SSP determination. In the absence of reasons for each string similarity determination, says Booking.com, “there is no basis on which decisions can be evaluated and, where appropriate, challenged.”⁶¹

77. Another ground for Booking.com’s challenge is the alleged failure by the ICANN Board to providing “effective supervision or quality control” of the SSP: “If nobody but the evaluator has any insight into how the evaluation was carried out, no effective quality control can be performed.”⁶² Nor, according to Booking.com, does the quality review of the SSP’s work supposedly performed by JAS Advisers (the independent consultant engaged by ICANN for this purpose) overcome the problem of a lack of transparency:

*Booking.com is not aware that any selection process was put in place in relation to the appointment of JAS Advisers to perform the String Similarity Review quality control. No criteria for performing the quality control were published. When ICANN was looking for evaluators, no call for expressions of interest or similar document was issued for the selection of quality controllers.*⁶³

78. In any case, says Booking.com, the “quality control review over a random sampling of applications to, among other things, test whether the process [set out in the Guidebook] was followed,” which ICANN claims was performed on the SSP’s work,⁶⁴ could not provide adequate quality control of the string similarity review process.⁶⁵ Finally, Booking.com argues that the arbitrary and unfair result of the string similarity review concerning .hotels – *i.e.*, the decision to place .hotels and .hoteis in contention – demonstrates that, “whatever quality control review ICANN may have engaged in ... must therefore have been deficient.”⁶⁶

b. The case of .hotels

79. Booking.com argues, in part on the basis of expert evidence which it adduces in this IRP proceeding,⁶⁷ that “[t]here is no probability of user confusion if both .hotels and .hoteis were delegated as gTLD strings into the Internet root zone ... The SSP could not have reasonably found that the average reasonable Internet user is likely to be confused between the two strings.”⁶⁸ It continues:

⁶¹ Reply, ¶ 28-29.

⁶² Reply, ¶ 30.

⁶³ Reply, ¶ 31. Booking.com states that it “doubts” that any quality review was in fact performed, whether by JAS Advisers or any other entity.

⁶⁴ Response, ¶ 30.

⁶⁵ Reply, ¶ 34.

⁶⁶ Reply, ¶ 38.

⁶⁷ Request, Annex 20, Expert Report of Prof. Dr. Piet Desmet of the Faculty of Arts, Department of Linguistics of Leuven University, dated 10 March 2014. Portions of the work underlying Prof. Desmet’s report were performed by Dr. Emmanuel Keuleers, Research Fellow in the Department of Experimental Psychology at Ghent University.

⁶⁸ Request, ¶ 58.

Since .hotels and .hoteis are not confusingly similar, the determination that they are is contradictory to ICANN policy as established in the Applicant Guidebook. Acceptance of the determination, and repeated failure to remedy the wrongful determination, is a failure to act with due diligence and independent judgment, and a failure to neutrally and fairly apply established policies as required by Bylaws and Articles of Incorporation.⁶⁹

80. According to Booking.com, the Board should have acted to overturn the determination of the SSP either in the context of the Request for Reconsideration or under the authority accorded it by Module 5-4 of the Guidebook to “individually consider a gTLD application”.⁷⁰
81. Booking.com claims that its DIDP Request alerted the Board to the need to intervene to “correct the errors in the process” related to .hotels, and that its Request for Reconsideration of the SSP determination further informed the Board of the many errors in the SSP’s review of .hotels, “giving the Board ample opportunity to correct those errors.”⁷¹ Booking.com claims that the Board’s failure, when responding to the DIDP Request, “to offer any insight into the SSP’s reasoning”, its refusal to reconsider and overturn the SSP determination regarding .hotels on the sole ground (says Booking.com) that “the Reconsideration process ‘is not available as a mechanism to re-try the decisions of evaluation panels’”, and its failure to investigate Booking.com’s complaints of a lack of fairness and transparency in the SSP process, constitute violations of ICANN’s governing rules regarding string similarity review.⁷²
82. According to Booking.com, among the most compelling evidence of ICANN’s failure in this regard are the statements made on the record by several members of the NGPC during its 10 September 2013 meeting at which Booking.com’s Request for Reconsideration was denied.⁷³ Given the importance that the Panel attaches to these statements, they are addressed in some detail in the Analysis in Part VI, below.
83. In its written submissions Booking.com asks the Panel to grant the following relief:

Finding that ICANN breached its Articles of Incorporation, its Bylaws, and the gTLD Applicant Guidebook;

Requiring that ICANN reject the determination that .hotels and .hoteis are confusingly similar and disregard the resulting contention set;

Awarding Booking.com its costs in this proceeding; and

⁶⁹ Request, ¶ 59.

⁷⁰ Reply, ¶ 39.

⁷¹ Reply, ¶ 41.

⁷² Reply, ¶ 41. In the passage of Booking.com’s submissions referred to here (as elsewhere), Booking.com speaks of violations of ICANN’s obligations of “due process”, which, it says, comprise concepts such as the right to be heard, the right to receive reasons for decisions, publicity, etc. For reasons explained in Part VI, below, the Panel prefers to use the terms *fairness* and *transparency* to connote the essence of ICANN’s obligations under review in this IRP.

⁷³ See Part II.C, above.

Awarding such other relief as the Panel may find appropriate or Booking.com may request.

84. At the hearing Booking.com *further* requested that the Panel not only require ICANN to disregard the SSP determination regarding .hotels/.hoteis, but also order ICANN to “delegate both .hotels and .hoteis.”

B. ICANN’s position

85. ICANN’s position is best summed up by ICANN itself:

Booking.com’s IRP Request is really about Booking.com’s disagreement with the merits of the String Similarity Panel’s conclusion that .hotels and .hoteis are confusingly similar. But the Panel’s determination does not constitute Board action, and the Independent Review Process is not available as a mechanism to re-try the decisions of an independent evaluation panel. The IRP Panel is tasked only with comparing contested actions of the ICANN Board to ICANN’s Bylaws and Articles of Incorporation; it is not within the IRP Panel’s mandate to evaluate whether the String Similarity Panel’s conclusion that .hotels and .hoteis are confusingly similar was wrong.⁷⁴

86. According to ICANN, the Board “did exactly what it was supposed to do under its Bylaws, its Articles of Incorporation, and the Guidebook.”⁷⁵

(i) The Panel’s Authority

87. Throughout its submissions ICANN repeatedly stresses what it says is the very limited authority enjoyed by IRP panels.
88. As provided in Article IV, Section 3(4) of ICANN’s Bylaws, ICANN observes that this Panel (as all IRP panels) is charged only with “comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.”⁷⁶
89. ICANN notes that, in undertaking this *compare-and-declare* mission, the Panel is further constrained to apply the very specific “standard of review” set out in Bylaw Article IV, Section 3(4), which requires the Panel to focus on three particular questions: “did the Board act without conflict of interest in taking its decision?”; “did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?”; and “did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company [ICANN]?”⁷⁷

⁷⁴ Response, ¶ 9.

⁷⁵ Response, ¶ 8. Both parties agree that, as submitted by Booking.com, the “rules” at issue, against which the conduct of the ICANN Board is to be assessed, include the relevant provisions of the Guidebook.

⁷⁶ See for example Response, ¶2, ¶ 9.

⁷⁷ Response, ¶ 2.

90. ICANN further asserts that the IRP process “is not available as a mechanism to challenge the actions or inactions of ICANN staff or third parties that may be involved in ICANN activities,”⁷⁸ such as the action of the SSP which resulted in .hotels and .hoteis being placed in contention. Nor, says ICANN, may the IRP process be used as an “appeal mechanism” by which to overturn substantive decisions – such as the determination that .hotels and .hoteis are confusingly visually similar – with which an applicant may disagree.⁷⁹
91. In this regard ICANN states that the affirmative relief sought by Booking.com – specifically, a declaration requiring that ICANN “reject the determination that .hotels and .hoteis are confusingly similar and disregard the resulting contention set” and (as requested at the hearing) that ICANN “delegate both .hotels and .hoteis” – exceeds the authority of the Panel.⁸⁰

(ii) ICANN's Response to Booking.com's Claims

a. The string similarity review process

92. According to ICANN, “[e]arly on in the iterations of the Guidebook, it was determined that, in the initial evaluation stage, the String Similarity Panel would only examine strings for visual confusion,” and “[i]f applied-for strings are determined to so nearly resemble each other visually that it is likely to deceive or cause confusion, the string will be placed in a contention set, which is then resolved pursuant to the contention set resolution processes in Module 4 of the Guidebook.”⁸¹
93. According to ICANN, it was also determined early on that, as stated in Section 2.2.1.1 of the Guidebook, “[t]his similarity review will be conducted by an independent String Similarity Panel,” not by ICANN itself. ICC was duly selected to perform the string similarity review further to “an open and public request for proposals,” pursuant to which, as the successful bidder, “ICC was responsible for the development of its own process documents and methodology for performing the String Similarity Review consistent with the provisions of the Guidebook.”⁸² ICANN emphasizes that “the Guidebook does not provide for any process by which ICANN (or anyone else) may conduct a substantive review of ICC’s results.”⁸³
94. In ICANN’s submission, the alternative proposed by Booking.com, that “the ICANN Board – and the ICANN Board alone – was obligated to perform the String Similarity Review for the more than 1,900 new gTLD applications submitted,” is “untenable and is not supported by ICANN’s Bylaws or Articles.”⁸⁴ As noted by ICANN, the Guidebook defines six distinct

⁷⁸ Response, ¶ 3.

⁷⁹ Response, ¶ 49.

⁸⁰ Response, ¶ 55.

⁸¹ Response, ¶ 15 (underlining in original).

⁸² Response, ¶ 16.

⁸³ Response, ¶ 17.

⁸⁴ Sur-Reply, ¶ 7.

review processes that every gTLD application is required to go through, including string similarity review; each of those review processes was conducted by independent experts specifically engaged by ICANN staff for the purpose.

95. ICANN submits that “there simply is no requirement – under ICANN’s governing documents or imposed by law – that would mandate that the ICANN Board inject itself into the day-to-day affairs of the evaluation process in the manner Booking.com proposes.”⁸⁵ It asserts that, consistent with well-settled legal principles, “neither ICANN’s Bylaws, nor the Articles, nor the Guidebook requires the ICANN Board to conduct any analysis of the decisions of third party experts retained to evaluate string similarity.”⁸⁶
96. Moreover, ICANN asserts that “[s]imply because the ICANN Board has the discretion [under Section 5.1 (Module 5-4) of the Guidebook] to consider individual applications does not mean it is required to do so or that it should do so, particularly at an initial evaluation stage.”⁸⁷
97. ICANN claims that that Booking.com’s repeated invocation of the Board’s so-called obligation to ensure “due process” in the administration of the New gTLD Program is misplaced. First, neither applicable California law nor any provision of the Bylaws, Articles of Incorporation or Guidebook “specifically affords any gTLD applicant a right to procedural ‘due process’ similar to that which is afforded in courts of law.”⁸⁸ Second, because ICANN conducts its activities in the public interest it nevertheless provides “more opportunity for parties to be heard and to dispute actions taken”⁸⁹ than most private corporate entities. Third, the “decision to proceed with the New gTLD Program followed many years of discussion, debate and deliberation within the ICANN community, including participation from end users, civil society, technical experts, business groups, governments and others.”⁹⁰ Fourth, and perhaps most importantly, “ICANN adhered to the policies and procedures articulated in its Bylaws, Articles of Incorporation, and the Guidebook, the latter of which was adopted only after being publicly vetted with ICANN’s stakeholders and the broader Internet community.”⁹¹
98. ICANN’s response to Booking.com’s various allegations regarding particular elements of the string similarity review process – including for example the selection of the SSP, the publication of the SSP’s methodology, the anonymity of the individuals SSP members, the supposed lack of quality control – is essentially three-fold: first, the actions challenged by Booking.com are *not Board actions*, but actions of ICANN staff or third parties, which cannot

⁸⁵ Sur-Reply, ¶ 10.

⁸⁶ Sur-Reply, ¶ 10.

⁸⁷ Sur-Reply, ¶ 11. It was established during the hearing that the several references to this discretionary authority in ICANN’s written and oral submissions refer specifically to the authority conferred by Section 5.1 (Module 5-4) of the Guidebook.

⁸⁸ Sur-Reply, ¶ 18.

⁸⁹ Sur-Reply, ¶ 18.

⁹⁰ Sur-Reply, ¶ 18, fn 18.

⁹¹ Sur-Reply, ¶ 18, fn 18.

be challenged by means of IRP proceedings; second, in any case, Booking.com's claims are *factually incorrect*, and there has been no violation of the Bylaws, Articles of Incorporation or Guidebook; third, Booking.com's claims are *time-barred* given that Article IV, Section 3(3) of the Bylaws requires that IRP requests "must be filed within thirty days of the posting of the minutes of the Board meeting ... that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation."⁹²

b. The case of .hotels

99. ICANN's position as regards the determination to place .hotels and .hoteis in contention is similar in many respects to its position regarding the string similarity review process generally. ICANN argues that the Board played no role whatsoever in performing the review of .hotels; that the SSP's determination was in any event well supported and there was no violation of applicable rules; and that the Guidebook does not provide for any process by which ICANN (or any other body, including an IRP panel) may conduct a substantive review of a string similarity determination.
100. In any event, ICANN asserts that .hotels and .hoteis in fact meet every one of the visual similarity criteria applied by the SSP, as set out in the SSP Manager's Letter. Moreover, .hotels and .hoteis scored a stunning 99% for visual similarity under the publicly available SWORD algorithm which, as provided by Section 2.2.1.1.2 (Module 2-7) of the Guidebook, establishes "one objective measure for consideration by the [SSP]". According to ICANN (in response to a question posed by the Panel during the hearing), this was the highest algorithmic score among the comparison of all non-identical pairs within the 1917 new gTLD applications received by ICANN;⁹³ the only other pair of non-exact match strings found to be confusingly visually similar – .unicorn and .unicom – scored only 94%.⁹⁴
101. According to ICANN, "it was not clearly 'wrong,' as Booking.com argues, for the [SSP] to find that .hotels/.hoteis are confusingly similar."⁹⁵
102. In conclusion, ICANN states that its conduct with respect to Booking.com's application for .hotels, including in evaluating Booking.com's Request for Reconsideration, was fully consistent with ICANN's Articles of Incorporation, its Bylaws and the procedures established in the Guidebook; and the fact that Booking.com disagrees with the SSP's determination to put .hotels and .hoteis in a contention set does not give rise to an IRP.
103. ICANN asks the Panel to deny Booking.com's IRP Request.

VI. ANALYSIS

A. The Panel's Authority

⁹² Sur-Reply, ¶ 20-42.

⁹³ A number of these applications were subsequently withdrawn.

⁹⁴ Identical pairs, of course, received a score of 100% for visual similarity under the SWORD algorithm.

⁹⁵ Response, ¶ 53.

104. The jurisdiction and authority of an IRP panel is expressly prescribed – and expressly limited – by the ICANN Bylaws. To recap, Article IV, Section 3 of the Bylaws provides:

4. [The IRP Panel] shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. did the Board act without conflict of interest in taking its decision?;*
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company [ICANN]?*

[...]

- 11. The IRP Panel shall have the authority to:*

[...]

c. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and

d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;

[...]

18. [...] The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties [...]

[Underlining added]

105. Similarly, Article 8 of the Supplementary Procedures reads:

8. Standard of Review

The IRP is subject to the following standard of review: (i) did the ICANN Board act without conflict of interest in taking its decision; (ii) did the ICANN Board exercise due diligence and care in having sufficient facts in front of them; (iii) did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

If a requestor demonstrates that the ICANN Board did not make a reasonable inquiry to determine it had sufficient facts available, ICANN Board members had a conflict of interest in participating in the decision, or the decision was not an exercise in independent judgment, believed by the ICANN Board to be in the best interests of the company, after taking account of the Internet community and the global public interest, the requestor will have established proper grounds for review.

106. There is no dispute as regards the Panel's duty to compare the actions of the Board to ICANN's Articles of Incorporation and Bylaws (and, in this case, Guidebook) with a view to

declaring whether those actions are inconsistent with applicable policies. Where the parties disagree is with respect to the standard of review to be applied by the Panel in assessing Board conduct.

107. ICANN submits that its Bylaws “specify that a deferential standard of review be applied when evaluating the actions of the ICANN Board ... the rules are clear that the appointed IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.”⁹⁶ Booking.com argues that this “is simply wrong. No such specification is made in ICANN’s Bylaws or elsewhere, and a restrictive interpretation of the standard of review would ... fail to ensure accountability on the part of ICANN and would be incompatible with ICANN’s commitment to maintain (and improve) robust mechanisms for accountability.”⁹⁷
108. In the opinion of the Panel, there can be no question but that the provisions of the ICANN Bylaws establishing the Independent Review Process and defining the role of an IRP panel specify that the ICANN Board enjoys a large degree of discretion in its decisions and actions. So long as the Board acts without conflict of interest and with due care, it is entitled – indeed, required – to exercise its independent judgment in acting in what it believes to be the best interests of ICANN. The only substantive check on the conduct of the ICANN Board is that such conduct may not be inconsistent with the Articles of Incorporation or Bylaws – or, the parties agree, with the Guidebook. In that connection, the Panel notes that Article 1, Section 2 of the Bylaws also clearly states that in exercising its judgment, the Board (indeed “[a]ny ICANN body making a recommendation or decision”) shall itself “determine which core values are most relevant and how they apply to the specific circumstances of the case at hand.”
109. In other words, in making decisions the Board is required to conduct itself reasonably in what it considers to be ICANN’s best interests; where it does so, the only question is whether its actions are or are not consistent with the Articles, Bylaws and, in this case, with the policies and procedures established in the Guidebook.
110. There is also no question but that the authority of an IRP panel to compare contested actions of the Board to the Articles of Incorporation and Bylaws, and to declare whether the Board has acted consistently with the Articles and Bylaws, does not extend to opining on the nature of those instruments. Nor, in this case, does our authority extend to opining on the nature of the policies or procedures established in the Guidebook. In this regard it is recalled that Booking.com itself repeatedly stresses that it does not contest the validity or fairness of the string similarity review process as set out in the Guidebook, but merely whether ICANN’s actions were consistent with various elements of that process. Stated differently, our role in this IRP includes assessing whether the applicable rules – in this case, the rules regarding string similarity review – were followed, not whether such rules are appropriate or advisable.
111. Nevertheless, this does not mean that the IRP Panel may only review ICANN Board actions or inactions under the deferential standard advocated by ICANN in these proceedings. Rather, as explained below, the IRP Panel is charged with “objectively” determining whether

⁹⁶ Response, ¶ 24.

⁹⁷ Reply, ¶ 6.

or not the Board's actions are in fact consistent with the Articles, Bylaws and Guidebook, which the Panel understands as requiring that the Board's conduct be appraised independently, and without any presumption of correctness.

112. In the only other IRP of which the Panel is aware in which such questions were addressed in a published decision, the distinguished members of the IRP panel had this to say about the role of an IRP panel, and the applicable standard of review, in appraising Board action:

The Internet Corporation for Assigned Names and Numbers is a not-for profit corporation established under the law of the State of California. That law embodies the 'business judgment rule'. Section 309 of the California Corporations Code provides that a director must act 'in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders...' and shields from liability directors who follow its provisions. However ICANN is no ordinary non-profit California corporation. The Government of the United States vested regulatory authority of vast dimension and pervasive global reach in ICANN. In 'recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization' – including ICANN -- ICANN is charged with 'promoting the global public interest in the operational stability of the Internet...' ICANN 'shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law...' Thus, while a California corporation, it is governed particularly by the terms of its Articles of Incorporation and Bylaws, as the law of California allows. Those Articles and Bylaws, which require ICANN to carry out its activities in conformity with relevant principles of international law, do not specify or imply that the International [sic] Review Process provided for shall (or shall not) accord deference to the decisions of the ICANN Board. The fact that the Board is empowered to exercise its judgment in the application of ICANN's sometimes competing core values does not necessarily import that that judgment must be treated deferentially by the IRP. In the view of the Panel, the judgments of the ICANN Board are to be reviewed and appraised by the Panel objectively, not deferentially. The business judgment rule of the law of California, applicable to directors of California corporations, profit and nonprofit, in the case of ICANN is to be treated as a default rule that might be called upon in the absence of relevant provisions of ICANN's Articles and Bylaws and of specific representations of ICANN ... that bear on the propriety of its conduct. In the instant case, it is those Articles and Bylaws, and those representations, measured against the facts as the Panel finds them, which are determinative.⁹⁸

[Underlining added.]

113. While on no way bound by that decision, we agree with its conclusions in this respect.
114. At the end of the day we fail to see any significant difference between the parties' positions in this regard. The process is clear, and both parties acknowledge, that the Panel is tasked with determining whether or not the Board's actions are consistent with ICANN's Articles of Incorporation, Bylaws and the Guidebook. Such a determination calls for what the panel in

⁹⁸ ICDR Case No. 50 117 T 00224 08, *ICM Registry, LLC v. ICANN*, Declaration dated 19 February 2010 ("*ICM Registry*"), ¶ 136.

the *ICM Registry* matter called an “objective” appraisal of Board conduct as measured against the policies and rules set out in those instruments; all agree that it is the Articles, Bylaws and Guidebook which are determinative.

115. That being said, we also agree with ICANN to the extent that, in determining the consistency of Board action with the Articles, Bylaws and Guidebook, an “IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.” In other words, it is not for the Panel to opine on whether the Board could have acted differently than it did; rather, our role is to assess whether the Board’s action was consistent with applicable rules found in the Articles, Bylaws and Guidebook. Nor, as stated, is it for us to purport to appraise the policies and procedures established by ICANN in the Guidebook (since, again, this IRP is not a challenge to those policies and procedures themselves⁹⁹), but merely to apply them to the facts.
116. With the foregoing firmly in mind, the Panel turns now to the issues to be determined in order to resolve the present dispute.

B. The String Similarity Review Process

117. The Panel is not unsympathetic to Booking.com’s complaints regarding the string similarity review process as established by the Guidebook. There is no question but that that process lacks certain elements of transparency and certain practices that are widely associated with requirements of fairness. For example, the Guidebook provides no means for applicants to provide evidence or make submissions to the SSP (or any other ICANN body) and so be fully “heard” on the substantive question of the similarity of their applied-for gTLD strings to others.
118. Indeed, as stated at the outset of this Declaration, these observations and the concerns that they engender were voiced by several members of the ICANN Board’s New gTLD Program Committee which voted to accept the BGC’s Recommendation to deny Booking.com’s Request for Reconsideration. The Panel can do no better than reproduce the statements made by the NGPC members in this respect, as recorded in the minutes of the NGPC’s 10 September 2013 meeting:¹⁰⁰

⁹⁹ As discussed in more detail in the following section (at para. 117 and following) and again at Part IV of this Declaration, the important questions that Booking.com highlights in its pleadings, as to whether the string similarity review process is consistent with ICANN’s guiding principles of transparency and fairness, and regarding the published views of various members of ICANN’s NGPC in this respect, are matters which the ICANN Board, in its discretion, may wish to consider on its own motion in the context of the present case, in accordance with its authority under Section 5.1 (Module 5-4) of the Guidebook, or when it issues the Guidebook for round two of the New gTLD Program. Those questions include a lack of clarity surrounding the way in which the string similarity review is conducted by the SSP, and the absence of any means for applicants to be heard in the string similarity review process where they may have evidence to adduce or arguments to make (such as the evidence and arguments presented by Booking.com to this Panel), which could in fact be relevant to the SSP’s determination.

¹⁰⁰ Request, Annex 16.

- Mr. George Sadowski stated his intention to abstain from the vote because, although “he understood that the BGC did the right thing, [he] thought the end result that was contrary to ICANN’s ... and the user’s best interests.”
 - Ms. Olga Madruga-Forti also stated her intention to abstain from voting on the BGC recommendation “because there was not sufficient rationale provided for why the string similarity review panel made its determination.”
 - In response to a comment by the Chair that the Request for Reconsideration deserved to be denied “[b]ecause the process was followed,” Mr. Ray Plzak “agreed that the process was followed, but noted that the process needs to be reviewed to potentially add a mechanism that would allow persons who don’t agree with the outcome to make an objection, other than using a Reconsideration Request.”
 - Mr. Plzak “recommended the Committee send a strong signal to the BGC, or adopt a resolution recommending that the BGC consider development of a different mechanism to provide an avenue for the community to appeal the outcome of a decision based on the merits.”
 - Ms. Madruga-Forti agreed and “recommended that in the future, a remand or appeals mechanism may help alleviate the concerns noted.”
 - Mr. Bill Graham also agreed with Mr. Plzak’s suggestion, and noted that “generally, there is a considerable level of discomfort and dissatisfaction with the process as expressed by Committee members.”
 - The Chair “agreed with [Mr. Graham’s] sentiment.”
 - The General Counsel and Secretary noted that ICANN ... “has tried to encourage more use of the ombudsman, or other accountability mechanisms for these types of concerns.”
119. Ultimately, five members of the NGPC voted in favour of the resolution accepting the BGC’s Recommendation; two members were unavailable to vote; and four members abstained. The abstaining members offered the following voting statements:
- Mr. Plzak stated that he abstained from voting “because he is disappointed in what is being done to remedy the situation. [He] would like to see more resolve to fix the process.”
 - Ms. Madruga-Forti stated that:

[T]he BGC has done an appropriate job of applying a limited review standard to the application for reconsideration, but unfortunately, in this circumstance, to apply that limited review accompanied by a lack of information regarding the rationale of the string similarity review panel is not possible in a logical and fair manner. The public interest would not be served by applying the limited review standard without proper information on the basis and reasoning for the decision of the panel. In my opinion, the public interest would be better served by abstaining and continuing to explore ways to

establish a better record of the rationale of the string similarity review panel in circumstances such as this.

- Mr. Kuo-Wei Wu agreed with Ms. Madruga-Forti's and Mr. Plzak's voting statements.
- Mr. Sadowsky provided the following detailed statement:

I have a strong concern regarding the ratification of the BGC recommendation to deny the reconsideration request regarding string contention between .hoteis and .hotels, and I therefore have therefore abstained when the vote on this issue was taken.

The reconsideration process is a very narrowly focused instrument, relying solely upon investigating deviations from established and agreed upon process. As such, it can be useful, but it is limited in scope. In particular, it does not address situations where process has in fact been followed, but the results of such process have been regarded, sometimes quite widely, as being contrary to what might be best for significant or all segments of the ... community and/or Internet users in general.

The rationale underlying the rejection of the reconsideration claim is essentially that the string similarity process found that there was likely to be substantial confusion between the two, and that therefore they belonged in a contention set. Furthermore, no process has been identified as having been violated and therefore there is nothing to reconsider. As a Board member who is aware of ICANN's ... Bylaws, I cannot vote against the motion to deny reconsideration. The motion appears to be correct based upon the criteria in the Bylaws that define the reconsideration process and the facts in this particular case. However, I am increasingly disturbed by the growing sequence of decisions that are based upon a criterion for user confusion that, in my opinion, is not only both incomplete and flawed, but appears to work directly against the concept that users should not be confused. I am persuaded by the argument made by the proponents of reconsideration in this case that users will in fact not be confused by .hoteis and .hotels, since if they enter the wrong name, they are very likely to be immediately confronted by information in a language that they did not anticipate.

Confusion is a perceptual issue. String similarity is only one consideration in thinking about perceptual confusion and in fact it is not always an issue. In my opinion, much more perceptual confusion will arise between .hotel and .hotels than between .hotels and .hoteis. Yet if we adhere strictly to the Guidebook and whatever instructions have or have not been given to string similarity experts, it is my position that we work against implementing decisions that assist in avoiding user confusion, and we work in favor of decisions that are based upon an incorrect, incomplete and flawed ex ante analysis of the ICANN Network real issues with respect to user confusion.

The goal of the string similarity process is the minimization of user confusion and ensuring user trust in using the DNS ... The string similarity exercise is one of the means in the new gTLD ... process to minimize such confusion and to strengthen user trust. In placing our emphasis, and in fact our decisions, on string similarity only, we are unwittingly substituting the means for the goal, and making decisions regarding the goal on the basis of a means test. This is a disservice to the Internet user community.

I cannot and will not vote in favor of a motion that reflects, directly or indirectly, an unwillingness to depart from what I see as such a flawed position and which does not reflect in my opinion an understanding of the current reality of the situation.

120. These statements reflect to an important degree the Panel's own analysis.
121. The elements of the string similarity review process were established and widely published several years ago, after extensive consultation and debate among ICANN stakeholders and the Internet community. Booking.com correctly describes the process established (or "crystallized") in the Guidebook as a component of "a consensus policy" concerning the introduction of new gTLDs.¹⁰¹
122. The Guidebook makes clear that, as part of the initial evaluation to which all applied-for gTLDs are subject, each string would be reviewed for a number of factors, one of which is "string similarity", which involves a determination of "whether the applied-for gTLD string is so similar to other strings that it would create a probability of user confusion"¹⁰². The term "user" is elaborated elsewhere in the Guidebook, which speaks of confusion arising "in the mind of the average, reasonable Internet user."¹⁰³
123. The Guidebook explains that string similarity review comprises merely a "visual similarity check",¹⁰⁴ with a view to identifying only "visual string similarities that would create a probability of user confusion."¹⁰⁵
124. The Guidebook makes clear that string similarity reviews would be conducted by an independent third party – the SSP – that would have wide (though not complete) discretion both in formulating its methodology and in determining string similarity on the basis of that methodology.
125. Section 2.2.1.1.2 of the Guidebook, titled "Review Methodology", provides that the SSP "is informed in part by an algorithmic score for ... visual similarity," which "will provide one objective measure for consideration by the [SSP]." Section 2.2.1.1.2 further states that, in addition to "examin[ing] all the algorithm data," the SSP will "perform its own review of similarities between strings and whether they rise to the level of string confusion." It is noted that the objective algorithmic score is to be treated as "only indicative". Crucially, "the final determination of similarity is entirely up to the [SSP's] judgment." (Underlining added)
126. In sum, the Guidebook calls for the SSP to determine whether two strings are so "visually similar" as to create a "probability of confusion" in the mind of an "average, reasonable Internet user." In making this determination, the SSP is informed by an "algorithmic score", to ensure that the process comprises at least one "objective measure". However, the algorithmic score is not determinative. The SSP also develops and performs "its own review". At the end of the day, the determination is entirely a matter of "the [SSP's] judgment."

¹⁰¹ Request, ¶ 13.

¹⁰² Guidebook, §2.2 (Module 2-4).

¹⁰³ Guidebook, §2.2.1.1.2. (Underlining added)

¹⁰⁴ Guidebook, §2.2.1.1. (Underlining added)

¹⁰⁵ Guidebook, §2.2.1.1.1. (Underlining added)

127. By its very nature this process is highly discretionary. It is also, to an important degree, subjective. The Guidebook provides no definition of “visual similarity”, nor any indication of how such similarity is to be objectively measured other than by means of the SWORD algorithm. The Guidebook provides no definition of “confusion,” nor any definition or description of an “average, reasonable Internet user.” As Mr. Sadowski of the NGPC put it: “Confusion is a perceptual issue.” (Mr. Sadowski further noted: “String similarity is only one consideration in thinking about perceptual confusion, and in fact it is not always an issue.) The Guidebook mandates the SSP to develop and apply “its own review” of visual similarity and “whether similarities rise to the level of user confusion”, in addition to SWORD algorithm, which is intended to be merely “indicative”, yet provides no substantive guidelines in this respect.
128. Nor does the process as it exists provide for gTLD applicants to benefit from the sort of procedural mechanisms – for example, to inform the SSP’s review, to receive reasoned determinations from the SSP, or to appeal the merits of those determinations – which Booking.com claims are required under the applicable rules. Clearly, certain ICANN NGPC members themselves consider that such input would be desirable and that changes to the process are required in order for the string similarity review process to attain its true goal, which Mr. Sadowski referred to as “the minimization of user confusion and ensuring user trust in using the DNS”. However, as even the abstaining members of the NGPC conceded, the fact is that the sort of mechanisms that Booking.com asserts are required (and which those NGPC members believe should be required) are simply not part of the string similarity review process as currently established. As to whether they *should* be, it is not our place to express an opinion, though we note that such additional mechanisms surely would be consistent with the principles of transparency and fairness.
129. We add that we agree with ICANN that the time has long since passed for Booking.com or any other interested party to ask an IRP panel to review the actions of the ICANN Board in relation to the establishment of the string similarity review process, including Booking.com’s claims that specific elements of the process and the Board decisions to implement those elements are inconsistent with ICANN’s Articles and Bylaws. Any such claims, even if they had any merit, are long since time-barred by the 30-day limitation period set out in Article IV, Section 3(3) of the Bylaws. As ICANN expressed during the hearing, if Booking.com believed that there were problems with the Guidebook, it should have objected at the time the Guidebook was first implemented.
130. When asked during the hearing about its failure to object timely, Booking.com argued that it could not have known how the Board’s actions – that is, how the process established in the Guidebook – would affect it prior to the submission of its application for .hotels. However, that is not a persuasive or meritorious answer. As did all stakeholders, Booking.com had the opportunity to challenge the Board’s adoption of the Guidebook, at the time, if it considered any of its elements to be inconsistent with ICANN’s Articles of Incorporation or Bylaws.

C. The Case of .hotels

131. In the light of the preceding analysis of Booking.com’s challenge concerning the ICANN Board’s actions in relation to the string similarity review process generally, the Panel is not

persuaded by its challenge concerning the Board’s conduct in relation to the review of .hotels specifically.

132. There are two principal elements to this part of Booking.com’s case: a challenge in relation to the process followed by the SSP; and a challenge in relation to the Board’s handling of Booking.com’s Request for Reconsideration of the SSP’s determination. However, the fundamental obstacle to Booking.com’s case is that *the established process was followed* in all respects.
133. Booking.com itself acknowledges that “the process was followed” by the SSP, which determined that .hotels and .hotels were so visually similar as to warrant being placed in a contention set. So too did all of the NGPC members who commented on the matter recognize that “the process was followed” – for all their stated misgivings concerning the outcome of the process.
134. The same is true of the Request for Reconsideration. The Panel is struck by the extent and thoughtfulness not only of the NGPC’s consideration of the issue, certain aspects of which are discussed above, but of the BGC’s detailed analysis and its Recommendation to the NGPC, on the basis of which Booking.com’s Request for Reconsideration was denied. Contrary to Booking.com’s allegations, in neither instance was this merely a blind acceptance of a decision of a subordinate body. In fact, the reconsideration process itself, however limited and perhaps imperfect it may be, is inconsistent with Booking.com’s claims of lack of “due process”.
135. Although not addressed in great detail by the parties, the Panel considers several observations made by the BGC in its 1 August 2013 Recommendation to be particularly apposite:
- *These standing requirements [for Requests for Reconsideration] are intended to protect the reconsideration process from abuse and to ensure that it is not used as a mechanism simply to challenge an action with which someone disagrees, but that it is limited to situations where the staff [or the Board] acted in contravention of established policies.¹⁰⁶*
 - *Although the String Similarity Review was performed by a third party, ICANN has determined that the Reconsideration process can properly be invoked for challenges of the third party’s decisions where it can be stated that either the vendor failed to follow its process in reaching the decision, or that ICANN staff failed to follow its process in accepting that decision.¹⁰⁷*
 - *Booking.com does not suggest that the process for String Similarity Review set out in the Applicant Guidebook was not followed, or that ICANN staff violated any established ICANN policy in accepting the [SSP] decision on placing .hotels and .hotels in contention sets. Instead, Booking.com is supplanting what it believes the review*

¹⁰⁶ BGC Recommendation, p. 2.

¹⁰⁷ BGC Recommendation, p. 4. The BGC explains that “Because the basis for the Request is not Board conduct, regardless of whether the 20 December 2012 version, or the 11 April 2013 version, of the Reconsideration Bylaws is operative, the BGC’s analysis and recommendation below would not change.”

methodology for assessing visual similarity should have been, as opposed to the methodology set out at Section 2.2.1.1.2 of the Applicant Guidebook. In asserting a new review methodology, Booking.com is asking the BGC (and the Board through the New gTLD Program Committee (NGPC)) to make a substantive evaluation of the confusability of the strings and to reverse the decision. In the context of the New gTLD Program, the Reconsideration process is not however intended for the Board to perform a substantive review of [SSP] decisions. While Booking.com may have multiple reasons as to why it believes that its application for .hotels should not be in contention set with .hoteis, Reconsideration is not available as a mechanism to re-try the decisions of the evaluation panels.¹⁰⁸

▪ Booking.com also claims that its assertions regarding the non-confusability of the .hotels and .hoteis strings demonstrate that “it is contrary to ICANN policy to put them in a contention set.” (Request, pages 6-7.) This is just a differently worded attempt to reverse the decision of the [SSP]. No actual policy or process is cited by Booking.com, only the suggestion that – according to Booking.com – the standards within the Applicant Guidebook on visual similarity should have resulted in a different outcome for the .hotels string. This is not enough for Reconsideration.¹⁰⁹

▪ Booking.com argues that the contention set decision was taken without material information, including Booking.com’s linguistic expert’s opinion, or other “information that would refute the mistaken contention that there is likely to be consumer confusion between ‘.hotels’ and ‘.hoteis.’” (Request, page 7.) However, there is no process point in the String Similarity Review for applicants to submit additional information. This is in stark contrast to the reviews set out in Section 2.2.2 of the Applicant Guidebook, including the Technical/Operational review and the Financial Review, which allow for the evaluators to seek clarification or additional information through the issuance of clarifying questions. (AGB, Section 2.2.2.3 (Evaluation Methodology).)¹¹⁰

▪ Just as the process does not call for additional applicant inputs into the visual similarity review, Booking.com’s call for further information on the decision to place .hotels and .hoteis in a contention set ... is similarly not rooted in any established ICANN process at issue.[...] While applicants may avail themselves of accountability mechanism to challenge decisions, the use of an accountability mechanism when there is no proper ground to bring a request for review under the selected mechanism does not then provide opportunity for additional substantive review of decisions already taken.¹¹¹

▪ [W]hile we understand the impact that Booking.com faces by being put in a contention set, and that it wishes for more narrative information regarding the [SSP’s] decision, no such narrative is called for in the process.¹¹²

▪ The Applicant Guidebook sets out the methodology used when evaluating visual similarity of strings. The process documentation provided by the String Similarity Review Panel describes the steps followed by the [SSP] in applying the methodology

¹⁰⁸ BGC Recommendation, p. 5.

¹⁰⁹ BGC Recommendation, p. 6.

¹¹⁰ BGC Recommendation, p. 6.

¹¹¹ BGC Recommendation, pp. 6-7.

¹¹² BGC Recommendation, p. 7.

set out in the Applicant Guidebook. ICANN then coordinates a quality assurance review over a random selection of [SSP's] reviews to gain confidence that the methodology and process were followed. That is the process used for a making and assessing a determination of visual similarity. Booking.com's disagreement as to whether the methodology should have resulted in a finding of visual similarity does not mean that ICANN (including the third party vendors performing String Similarity Review) violated any policy in reaching the decision (nor does it support a conclusion that the decision was actually wrong).¹¹³

▪ The [SSP] reviewed all applied for strings according to the standards and methodology of the visual string similarity review set out in the Applicant Guidebook. The Guidebook clarifies that once contention sets are formed by the [SSP], ICANN will notify the applicants and will publish results on its website. (AGB, Section 2.2.1.1.1.) That the [SSP] considered its output as "advice" to ICANN (as stated in its process documentation) is not the end of the story. Whether the results are transmitted as "advice" or "outcomes" or "reports", the important query is what ICANN was expected to do with that advice once it was received. ICANN had always made clear that it would rely on the advice of its evaluators in the initial evaluation stage of the New gTLD Program, subject to quality assurance measures. Therefore, Booking.com is actually proposing a new and different process when it suggests that ICANN should perform substantive review (instead of process testing) over the results of the String Similarity Review Panel's outcomes prior to the finalization of contention sets.¹¹⁴

▪ As there is no indication that either the [SSP] or ICANN staff violated any established ICANN policy in reaching or accepting the decision on the placement of .hotels and .hoteis in a non-exact contention set, this Request should not proceed.¹¹⁵

136. These excerpts of the BGC Recommendation not only illustrate the seriousness with which Booking.com's Request for Reconsideration was heard, they mirror considerations to which we fully subscribe and which we find apply as well, with equal force and effect, in the context of Booking.com's IRP Request.
137. It simply cannot be said – indeed, it is not even alleged by Booking.com – that the established process was not followed by the ICANN Board or any third party either in the initial string similarity review of .hotels or in the reconsideration process.
138. Booking.com was asked at the hearing to identify *with particularity* the ICANN Board's actions (including inactions) in this case that it claims are inconsistent with ICANN's Articles of Incorporation, Bylaws or the Guidebook and regarding which it asks the Panel to render a declaration. It identified four:
- The Board's adoption of certain provisions of the Guidebook, including the allegedly ill-defined, unfair and non-transparent procedures for selecting the SSP and supervising the SSP's performance of the string similarity review process. As discussed, any claims in this regard are time-barred.

¹¹³ BGC Recommendation, p. 7.

¹¹⁴ BGC Recommendation, p. 8.

¹¹⁵ BGC Recommendation, p. 10.

- The Board's acceptance of the SSP determination. As ICANN argues, there was no action (or inaction) by the Board here, no decision made (or not made) by the Board or any other body to accept the SSP's determination. The Guidebook provides that applied-for strings "will be placed in contention set" where the SSP determines the existence of visual similarity likely to give rise to user confusion. Simply put, under the Guidebook the Board is neither required nor entitled to intervene at this stage to accept or not accept the SSP's determination. Booking.com is correct that the Board could nevertheless have stepped in and reversed the SSP determination under Section 5.1 (Module 5-4) of the Guidebook, but did not do so; that inaction is addressed below.
 - The Board's denial of Booking.com's Request for Reconsideration. As discussed above, there is nothing in the evidence that even remotely suggests that ICANN's conduct in this regard was inconsistent with its Articles, Bylaws or the Guidebook. On the contrary, we have already stated that the detailed analysis performed by the BGC and the extensive consideration of the BGC Recommendation by the NGPC undermine any claim that ICANN failed to exercise due care and independent judgment, or that its handling of the Request for Reconsideration was inconsistent with applicable rules or policy. As discussed above, just as in the present IRP, the question in the reconsideration process is whether the established process was followed. This was the question that the BGC and NGPC asked themselves in considering Booking.com's Request for Reconsideration, and which they properly answered in the affirmative in denying Booking.com's request.
 - The Board's refusal to "step in" and exercise its authority under Section 5.1 (Module 5-4) of the Guidebook to "individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community." As pointed out by ICANN during the hearing, the fact that the ICANN Board enjoys such discretion and may choose to exercise it any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded by Booking.com. In any case, the Panel does not believe that the Board's inaction in this respect was inconsistent with ICANN's Articles of Incorporation or Bylaws or indeed with ICANN's guiding principles of transparency and fairness, given (1) Booking.com's concession that the string similarity review process was followed; (2) the indisputable conclusion that any challenge to the adoption of the SSP process itself is time-barred; (3) the manifestly thoughtful consideration given to Booking.com's Request for Reconsideration by the BGC; and (4), the fact that, notwithstanding its protestations to the contrary, Booking.com's real dispute seems to be with the process itself rather than how the process was applied in this case (given that, as noted, Booking.com concedes that the process was indeed followed).
139. The Panel further considers that these – in addition to any and all other potential (and allegedly reviewable) actions identified by Booking.com during the course of these proceedings – fail on the basis of Booking.com's dual acknowledgement that it does not challenge the validity or fairness of the string similarity review process, and that that process was duly followed in this case.

140. Finally, the panel notes that Booking.com's claim – largely muted during the hearing – regarding alleged “discrimination” as regards the treatment of its application for .hotels also founders on the same ground. Booking.com acknowledges that the established string similarity review process was followed; and there is absolutely no evidence whatsoever that .hotels was treated any differently than any other applied-for gTLD string in this respect. The mere fact that the *result* of the string similarity review of .hotels differed from the results of the reviews of the vast majority of other applied-for strings does not suggest discriminatory treatment. In any event, the Panel cannot but note the obvious, which is that .hotels is not alone in having been placed in contention by the SSP. So too was .hoteis; and so too were .unicom and .unicorn. Moreover, and once again, it is recalled that Booking.com does not claim to challenge the merits of the string similarity review, that is, the determination that .hotels and .hoteis are so visually similar as to warrant placement in a contention set.

D. Conclusion

141. In launching this IRP, Booking.com no doubt realized that it faced an uphill battle. The very limited nature of IRP proceedings is such that any IRP applicant will face significant obstacles in establishing that the ICANN Board acted inconsistently with ICANN's Articles of Incorporation or Bylaws. In fact, Booking.com acknowledges those obstacles, albeit inconsistently and at times indirectly.
142. Booking.com purports to challenge “the way in which the [string similarity review] process was established, implemented and supervised by (or under the authority of) the ICANN Board”; yet it also claims that it *does not challenge the validity or fairness of the string similarity review process as set out in the Guidebook*. It asks the Panel to overturn the SSP's determination in this case and to substitute an alternate result, in part on the basis of its own “expert evidence” regarding similarity and the probability of user confusion as between .hotels and .hoteis; yet it claims that it *does not challenge the merits of the SSP determination and it acknowledges that the process set out in the Guidebook was duly followed* in the case of its application for .hotels.
143. In sum, Booking.com has failed to overcome the very obstacles that it recognizes exist.
144. The Panel finds that Booking.com has failed to identify any instance of Board action or inaction, including any action or inaction of ICANN staff or a third party (such as ICC, acting as the SSP), that could be considered to be inconsistent with ICANN's Articles of Incorporation or Bylaws or with the policies and procedures established in the Guidebook. This includes the challenged actions of the Board (or any staff or third party) in relation to what Booking.com calls the implementation and supervision of the string similarity review process generally, as well as the challenged actions of the Board (or any staff or third party) in relation to the string similarity review of .hotels in particular.
145. More particularly, the Panel finds that the string similarity review performed in the case of .hotels was not inconsistent with the Articles or Bylaws or with what Booking.com refers to as the “applicable rules” as set out in the Guidebook.
146. To the extent that the Board's adoption and implementation of specific elements of the new gTLD Program and Guidebook, including the string similarity review process, could

potentially be said to be inconsistent with the principles of transparency or fairness that underlie ICANN's Articles and Incorporation and Bylaws (which the Panel does not say is the case), the time to challenge such action has long since passed.

147. Booking.com's IRP Request must be denied.

VII. THE PREVAILING PARTY; COSTS

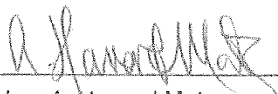
148. Article IV, Section 3(18) of the Bylaws requires that the Panel "specifically designate the prevailing party." This designation is germane to the allocation of costs, given that Article IV, Section 3(18) provides that the "party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider."
149. The same provision of the Bylaws also states that "in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses."
150. Similarly, the Supplementary Procedures state, at Article 11:
- The IRP PANEL shall fix costs in its DECLARATION. The party not prevailing in an IRP shall ordinarily be responsible for bearing all costs of the proceedings, but under extraordinary circumstances the IRP PANEL may allocate up to half of the costs to the prevailing party, taking into account the circumstances of the case, including the reasonableness of the parties' positions and their contribution to the public interest.*
- In the event the Requestor has not availed itself, in good faith, of the cooperative engagement or conciliation process, and the requestor is not successful in the Independent Review, the IRP PANEL must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.*
151. The "IRP Provider" is the ICDR, and, in accordance with the ICDR Rules, the costs to be allocated between the parties – what the Bylaws call the "costs of the IRP Provider", and the Supplementary Procedures call the "costs of the proceedings" – include the fees and expenses of the Panel members and of the ICDR (we refer to all of these costs as "IRP costs").
152. ICANN is undoubtedly the prevailing party in this case. That being said, the Panel considers that the nature and significance of the issues raised by Booking.com, and the contribution to the "public interest" of its submissions, are such that it is appropriate and reasonable that the IRP costs be shared equally by the parties. We consider that the extraordinary circumstances of case – in which some members of ICANN's New gTLD Program Committee have publicly declared that, in their view, the rules on the basis of which Booking.com's claims fail should be reconsidered by ICANN – warrants such a holding.
153. The Panel cannot grant Booking.com the relief that it seeks. A panel such as ours can only declare whether, on the facts as we find them, the challenged actions of ICANN are

or are not inconsistent with ICANN's Articles of Incorporation and Bylaws. We have found that the actions in question are not inconsistent with those instruments. The process established by ICANN under its Articles of Incorporation and Bylaws and set out in the Guidebook was followed, and the time to challenge that process (which Booking.com asserts is not its intention in these proceedings in any event) has long passed.

154. However, we can – and we do – acknowledge certain legitimate concerns regarding the string similarity review process raised by Booking.com, discussed above, which are evidently shared by a number of prominent and experienced ICANN NGPC members. And we can, and do, encourage ICANN to consider whether it wishes to address these issues in an appropriate manner and forum, for example, when drafting the Guidebook for round two of the New gTLD Program or, more immediately, in the exercise of its authority under Section 5.1 (Module 5-4) of the Guidebook (which it may choose to exercise at any time, in its discretion) to consider whether, notwithstanding the result of the string similarity review of .hotels and .hotels, approval of both of Booking.com's and Despegar's proposed strings would be in the best interest of the Internet community.

FOR THE FOREGOING REASONS, the Panel hereby declares:

- (1) Booking.com's IRP Request is denied;
- (2) ICANN is the prevailing party;
- (3) In view of the circumstances, each party shall bear one-half of the costs of the IRP Provider, including the fees and expenses of the Panel members and the fees and expenses of the ICDR. As a result, the administrative fees and expenses of the ICDR, totaling US\$4,600.00, as well as the compensation and expenses of the Panelists totaling US\$163,010.05 are to be borne equally. Therefore, ICANN shall pay to Booking.com the amount of US\$2,300.00 representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Booking.com
- (4) This Final Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Final Declaration of this IRP Panel.



Hon. A. Howard Matz
Date: March 2, 2015

David H. Bernstein
Date:

Stephen L. Drymer,
Chair of the IRP Panel
Date:

I, Hon. A. Howard Matz, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Final Declaration of the IRP Panel.

March 2, 2015
Date


Hon. A. Howard Matz

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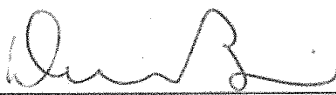
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March 2, 2015
Date



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Stephen L. Drymer

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FOR THE FOREGOING REASONS, the Panel hereby declares:

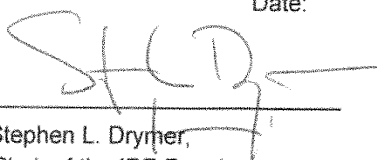
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Hon. A. Howard Matz

Date:

David H. Bernstein

Date:



Stephen L. Drymer,
Chair of the IRP Panel

Date: 3 March 2015

I, Hon. A. Howard Matz, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Final Declaration of the IRP Panel.

Date

Hon. A. Howard Matz

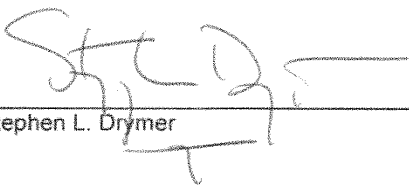
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Date

David H. Bernstein

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3 March 2015
Date



Stephen L. Drymer

Exhibit RE-2

12/17/2018

ICANN New gTLD Application



New gTLD Application Submitted to ICANN by: Afilias Limited

String: MEET

Originally Posted: 13 June 2012

Application ID: 1-868-85241

Applicant Information

1. Full legal name

Afilias Limited

2. Address of the principal place of business

Contact information Redacted

3. Phone number

Contact Information Redacted

4. Fax number

Contact Information Redacted

5. If applicable, website or URL

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12/17/2018

ICANN New gTLD Application

16. Describe the applicant's efforts to ensure that there are no known operational or rendering problems concerning the applied-for gTLD string. If such issues are known, describe steps that will be taken to mitigate these issues in software and other applications.

Afilias anticipates the introduction of this TLD without operational or rendering problems. Based on a decade of experience launching and operating new TLDs, Afilias, the back-end provider of registry services for this TLD, is confident the launch and operation of this TLD presents no known challenges. The rationale for this opinion includes:

- The string is not complex and is represented in standard ASCII characters and follows relevant technical, operational and policy standards;
- The string length is within lengths currently supported in the root and by ubiquitous Internet programs such as web browsers and mail applications;
- There are no new standards required for the introduction of this TLD;
- No onerous requirements are being made on registrars, registrants or Internet users, and;
- The existing secure, stable and reliable Afilias SRS, DNS, WHOIS and supporting systems and staff are amply provisioned and prepared to meet the needs of this TLD.

17. (OPTIONAL) Provide a representation of the label according to the International Phonetic Alphabet (<http://www.langsci.ucl.ac.uk/ipa/>).

Mission/Purpose

18(a). Describe the mission/purpose of your proposed gTLD.

Mission and purpose

There is currently a proliferation of online dating and companionship services on the Internet. Research shows that there are over 1,500 Internet dating sites in the U.S. alone, creating confusing choices for consumers. Most consumers do not have the time, money, or desire to use the services of more than a few dating services. As a result of this fragmented industry, consumers have limited choices of people to select from when they seek their ideal date or the perfect companion.

The purpose of .MEET is to create an Internet namespace which could be used by visionary entrepreneurs and/or the existing online dating and companionship matching providers to become the gathering place on the Internet for many of the more than 40 million online companionship seekers.

This new online namespace could be used to create a .MEET portal destination to facilitate the creation of secure, confidential and easily accessible Internet identities to enable Internet users to find registrars to become registrants of .MEET.

.MEET domains could also appeal to organizations supporting the online dating and companion industry. Online dating and companionship services may be interested in obtaining a .MEET domain to differentiate their services from other businesses that are now using a .COM, .NET, .INFO or other all-purpose TLD.

Registrars could collaborate with leading industry vendors to create new and never-before possible services to leverage the unique and easily identifiable .MEET registrant. Using existing or new offerings, .MEET registrants may want to create personalized, secure and anonymous Internet identities to make themselves easily discoverable by the entire universe of online relationship seekers.

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12/17/2018

ICANN New gTLD Application

The .MEET domain name and the registrants that obtain the .MEET TLD would help to catalyze a more efficient online dating and companionship service on the Internet. Using simple match-making features, large numbers of .MEET registrants, over time, could motivate visionary entrepreneurs or a visionary industry player to provide a more complete, market-driven service for consumers.

People would quickly come to know that others are actively seeking relationships and they can become easily discoverable under a .MEET domain. Over time, facilitated by new apps and virtual communities, visionary entrepreneurs, registrars and new and existing industry players, using proven social media capabilities, could help .MEET registrants to create more and better content to expand the size of the virtual community they serve. As the .MEET TLD is increasingly adopted and content accrues, search engines could modify their algorithms to specifically target .MEET sites and content, making the TLD even more accessible, relevant and useful. Due to these dynamics, we anticipate that we could have 15,000 domains under management (DUMs) after three years.

18(b). How do you expect that your proposed gTLD will benefit registrants, Internet users, and others?

Afilias plans to make the .MEET namespace the most popular, accessible, and innovative destination on the Internet where people seeking online dating and companionship services can learn about dating, companionship services and registrars that offer .MEET domain names. The .MEET destination portal shall be designed to facilitate communications, e-commerce and to catalyze relationships between registrars, registrants and vendors serving the new .MEET ecosystem.

Internet users and registrants shall benefit from learning from experts and each other about joining and accessing the various online dating and companionship services, where to find certified registrars that offer .MEET domain names.

.MEET vendors shall have a ready-made portal destination to sponsor venues and to recruit and sell their services to .MEET registrants and members.

In the future, new business models, infomediary services and advertising models can be created where, for instance, .MEET members could be offered rewards or additional value added services for watching relevant commercials. Additionally, new rating services and aggregated buying services could be enabled by online entrepreneurs and app developers.

i. General goals

Afilias intends to launch and sustain the .MEET portal and the business ecosystem it supports so registrants, registrars and key industry players can benefit from the sustainable growth of this new TLD. The initial investments may include logo and brand development, the .MEET portal development, and business development meetings with key industry players and other stakeholders.

Afilias then intends to sign up key registrars to register the first waves of .MEET registrants. We intend to invest in a new TLD launch, complete with media outreach, PR campaigns and social media programs. To support the new TLD launch and to sustain ongoing marketing investments, Afilias intends to work closely specific online dating services to showcase the benefits of a .MEET domain.

ii. How .MEET adds to the current space

.MEET will create an instantly recognizable and easily accessed set of domains with a clearly articulated purpose for online relationship seekers. This could potentially alleviate the state of confusion in the current proliferation of online dating services, randomly scattered throughout the existing, all-purpose TLDs.

iii. User experience goals

.MEET shall be designed with user experiences and concerns in mind as the main design goals.

While registrants may design and operate their domains under this TLD as they see fit, it is anticipated that the level of professionalism, creativity and quality of experience for consumers will be voluntarily enhanced by registrants. One of the primary benefits to registrants of

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participation in the .MEET TLD would be that they can build a clear, easily accessible identity that would facilitate potential relationship seekers to be more likely to find the information they are seeking.

iv. Registry policies

.MEET will be an open TLD, generally available to all registrants (except in the Sunrise period).

In general, domains will be offered for periods of one to ten years, but no greater than ten years. Initial registrations made in the Sunrise period may have a minimum number of years required. For example, there may be a policy that all Sunrise names must be registered for an initial term of at least one year.

The roll-out of our TLD is anticipated to feature the following phases:

- Reservation of reserved names and premium names, which will be distributed through special mechanisms (detailed below).
- Sunrise – the required period for trademark owners to secure their domains before availability to the general public. This phase will feature applications for domain strings, verification of trademarks via Trademark Clearinghouse and a trademark verification agent, auctions between qualified parties who wish to secure the same string, and a Trademark Claims Service.
- General Availability period – real-time registrations, made on a first-come first-served basis. Trademark Claims Service will be in use at least for the first 60 days after General Availability applications open.

The registration of domain names in the .MEET TLD will follow the standard practices, procedures and policies Afiliias, the back-end provider of registry services, currently has in place. This includes the following:

- Domain registration policies (for example, grace periods, transfer policies, etc.) are defined in response #27.
- Abuse prevention tools and policies, for example, measures to promote WHOIS accuracy and efforts to reduce phishing and pharming, are discussed in detail in our response #28.
- Rights protection mechanisms and dispute resolution mechanism policies (for example, UDRP, URS) are detailed in #29.

Other detailed policies for this domain include policies for reserved names.

Reserved names

Registry reserved names

We will reserve the following classes of domain names, which will not be made generally available to registrants via the Sunrise or subsequent periods:

- All of the reserved names required in Specification 5 of the new gTLD Registry Agreement;
- The geographic names required in Specification 5 of the new gTLD Registry Agreement, and may be released to the extent that Registry Operator reaches agreement with the government and country-code manager;
- The registry operator's own name and variations thereof, and registry operations names (such as registry.tld, and www.tld), for internal use;
- Names related to ICANN and Internet standards bodies (iana.tld, ietf.tld, w3c.tld, etc.), and may be released to the extent that Registry Operator reaches agreement with ICANN.

The list of reserved names will be published publicly before the Sunrise period begins, so that registrars and potential registrants will know which names have been set aside.

Premium names

The registry will also designate a set of premium domain names, set aside for distribution via special mechanisms. The list of premium names will be published publicly before the Sunrise period begins, so that registrars and potential registrants will know that these names are not available. Premium names may be distributed via mechanisms such as requests for proposals, contests, direct sales, and auctions.

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For the auctioning of premium names, we intend to contract with an established auction provider that has successfully conducted domain auctions. This will ensure that there is a tested, trustworthy technical platform for the auctions, auditable records, and reliable collection mechanisms. With our chosen auction provider, we will create and post policies and procedures that ensure clear, fair, and ethical auctions. As an example of such a policy, all employees of the registry operator and its contractors will be strictly prohibited from bidding in auctions for domains in the TLD. We expect a comprehensive and robust set of auction rules to cover possible scenarios, such as how domains will be awarded if the winning bidder does not make payment.

v. Privacy and confidential information protection

As per the New gTLD Registry Agreement, we will make domain contact data (and other fields) freely and publicly available via a Web-based WHOIS server. This default set of fields includes the mandatory publication of registrant data. Our Registry-Registrar Agreement will require that registrants consent to this publication.

We shall notify each of our registrars regarding the purposes for which data about any identified or identifiable natural person ("Personal Data") submitted to the Registry Operator by such registrar is collected and used, and the intended recipients (or categories of recipients) of such Personal Data (the data in question is essentially the registrant and contact data required to be published in the WHOIS). We will require each registrar to obtain the consent of each registrant in the TLD for the collection and use of such Personal Data. The policies will be posted publicly on our TLD web site. As the registry operator, we shall not use or authorize the use of Personal Data in any way that is incompatible with the notice provided to registrars.

Our privacy and data use policies are as follows:

- As registry operator, we do not plan on selling bulk WHOIS data. We will not sell contact data in any way. We will not allow, enable, or otherwise support the transmission by e-mail, telephone, or facsimile of mass unsolicited, commercial advertising or solicitations.
- We may use registration data in the aggregate for marketing purposes.
- DNS query data will never be sold in a way that is personally identifiable.
- We may from time to time use the demographic data collected for statistical analysis, provided that this analysis will not disclose individual Personal Data and provided that such use is compatible with the notice provided to registrars regarding the purpose and procedures for such use.

As the registry operator we shall take significant steps to protect Personal Data collected from registrars from loss, misuse, unauthorized disclosure, alteration, or destruction. In our responses to Question 30 ("Security Policy") and Question 38 ("Escrow") we detail the security policies and procedures we will use to protect the registry system and the data contained therein from unauthorized access and loss.

Please see our response to Question 26 ("WHOIS") regarding "searchable WHOIS" and rate-limiting. That section contains details about how we will limit the mining of WHOIS data by spammers and other parties who abuse access to the WHOIS.

In order to acquire and maintain accreditation for our TLD, we will require registrars to adhere to certain information technology policies designed to help protect registrant data. These will include standards for access to the registry system and password management protocols. Our response to Question 30, "Security Policy" provides details of implementation.

We will allow the use of proxy and privacy services, which can protect the personal data of registrants from spammers and other parties that mine zone files and WHOIS data. We are aware that there are parties who may use privacy services to protect their free speech rights, or to avoid religious or political persecution.

18(c). What operating rules will you adopt to eliminate or minimize social costs?

Afilias has adopted the above-mentioned and other policies to ensure fair and equitable access and cost structures to the Internet community, including:

- no new burdens placed on the Internet community to resolve name disputes
- utilization of standard registration practices and policies (as detailed in responses to questions #27, #28, #29)
- protection of trademarks at launch and on-going operations (as detailed in the response to question

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#29)

- fair and reasonable wholesale prices
- fair and equitable treatment of registrars

As per the ICANN Registry Agreement, we will use only ICANN-accredited registrars, and will provide non-discriminatory access to registry services to those registrars.

Pricing Policies and Commitments

Pricing for domain names at General Availability will be \$12 per domain year for the first year. Applicant reserves the right to reduce this pricing for promotional purposes in a manner available to all accredited registrars. Registry Operator reserves the right to work with ICANN to initiate an increase in the wholesale price of domains if required. Registry Operator will provide reasonable notice to the registrars of any approved price increase.

Community-based Designation

19. Is the application for a community-based TLD?

No

20(a). Provide the name and full description of the community that the applicant is committing to serve.

20(b). Explain the applicant's relationship to the community identified in 20(a).

20(c). Provide a description of the community-based purpose of the applied-for gTLD.

20(d). Explain the relationship between the applied-for gTLD string and the community identified in 20(a).

20(e). Provide a description of the applicant's intended registration policies in support of the community-based purpose of the applied-for gTLD.

Exhibit RE-3

Confidential Information Redacted

Confidential Information Redacted

Confidential Information Redacted

Confidential Information Redacted

Confidential Information Redacted

Confidential Information Redacted

Confidential Information Redacted

Confidential Information Redacted

Confidential Information Redacted

Exhibit RE-4

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 2 Aaron M. McKown (SBN 208781)
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11 Attorneys for Plaintiff
 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’S AMENDED
 COMPLAINT FOR:**

- 1) **BREACH OF CONTRACT**
- 2) **BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING**
- 3) **NEGLIGENCE**
- 4) **UNFAIR COMPETITION (VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE § 17200)**
- 5) **DECLARATORY RELIEF**

1 Plaintiff RUBY GLEN, LLC (hereinafter, “Plaintiff”) alleges as follows:

2 **INTRODUCTION**

3 1. Plaintiff was formed for the purpose of applying to the Internet
4 Corporation for Assigned Names and Numbers (“ICANN”) for the right to operate the
5 .WEB generic top-level domain (“gTLD”). In reliance on ICANN’s agreement to
6 administer the bid process in accordance with the rules and guidelines contained in its
7 gTLD Applicant Guidebook (“Applicant Guidebook”), Plaintiff paid ICANN a
8 mandatory \$185,000 application fee for the opportunity to secure the rights to the .WEB
9 gTLD.

10 2. Throughout every stage of the four years it has taken to bring the .WEB
11 gTLD to market, Plaintiff worked diligently to follow the rules and procedures
12 promulgated by ICANN. In the past month, ICANN has done just the opposite. Instead
13 of functioning as a disinterested regulator of a fair and transparent gTLD bid process,
14 ICANN used its authority and oversight to unfairly benefit an applicant who is in
15 admitted violation of a number of provisions of the Applicant Guidebook. ICANN’s
16 conduct, tainted by an inherent conflict of interest, ensured that it would be the sole
17 beneficiary of the \$135 million proceeds from the .WEB auction—a result that
18 ICANN’s own guidelines identify as a “last resort” outcome. Even more problematic,
19 ICANN allowed a third party to make an eleventh-hour end run around the application
20 process to the detriment of Plaintiff, the other legitimate applicants for the .WEB gTLD
21 and the Internet community at large.

22 3. ICANN’s failure to administer the gTLD application process in a fair,
23 proper, and transparent manner is not unique to the .WEB gTLD applicants. To the
24 contrary, in the days following the filing of this action, ICANN was publicly rebuked
25 by an independent review panel for its “cavalier” and seemingly routine dismissal of
26 concerns raised by gTLD applicants without “mak[ing] any reasonable investigation”
27 into the facts underlying those concerns as required by ICANN’s Bylaws, Articles of
28

1 Incorporation and the Applicant Guidebook. The independent review panel also
2 highlighted what it deemed to be improper influence by ICANN staff on purportedly
3 independent ICANN accountability mechanisms established to handle concerns raised
4 by gTLD applicants.

5 4. As set forth more fully herein, ICANN deprived Plaintiff and the other
6 applicants for the .WEB gTLD of the right to compete for the .WEB gTLD in
7 accordance with established ICANN policy and guidelines. Court intervention is
8 necessary to ensure ICANN's compliance with its own accountability and transparency
9 mechanisms in the ongoing .WEB bid process and to prevent the assignment of the
10 .WEB gTLD to an entity that is in admitted violation of ICANN's own policies.

11 **PARTIES**

12 5. Plaintiff Ruby Glen, LLC is a limited liability company, duly organized
13 and existing under the laws of the State of Delaware and operated by Donuts Inc., an
14 affiliate located in Bellevue, Washington. The sole member of Ruby Glen, LLC is
15 Covered TLD, LLC ("Covered TLD"). Covered TLD is a limited liability company,
16 duly organized and existing under the laws of the State of Delaware. Covered TLD has
17 a sole member, Donuts Inc. ("Donuts"). Donuts is a for-profit corporation, duly
18 organized and existing under the laws of the State of Delaware, with its principal place
19 of business in Bellevue, Washington.

20 6. Defendant Internet Corporation for Assigned Names and Numbers
21 ("ICANN") is a nonprofit corporation, organized and existing under the laws of the
22 State of California, with its principal place of business in Los Angeles, California.

23 7. Defendants Does 1-10 are persons who instigated, encouraged, facilitated,
24 acted in concert or conspiracy with, aided and abetted, and/or are otherwise responsible
25 in some manner or degree for the breaches and wrongful conduct averred herein.
26 Plaintiff is presently ignorant of the true names and capacities, whether individual,
27 corporate, associate, or otherwise, of DOES 1 through 10, and will amend this
28

1 Complaint to allege their true names and capacities when the same have been
2 ascertained.

3 JURISDICTION AND VENUE

4 8. This Court has subject matter jurisdiction over this action under 28 U.S.C.
5 § 1332(a) as the parties are completely diverse in citizenship and the amount in
6 controversy exceeds \$75,000.

7 9. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and (c), in
8 that Defendant ICANN resides and transacts business in this judicial district. Moreover,
9 a substantial part of the events, omissions, and acts that are the subject matter of this
10 action occurred within the Central District of California.

11 FACTS COMMON TO ALL CAUSES OF ACTION

12 **A. ICANN'S FORMATION AND PURPOSE**

13 10. ICANN is a non-profit corporation originally established to assist in the
14 transition of the Internet domain name system from one of a single domain name
15 operator to one with multiple companies competing to provide domain name
16 registration services to Internet users “in a manner that w[ould] permit market
17 mechanisms to support competition and consumer choice in the technical management
18 of the [domain name system].”

19 11. ICANN's ongoing role is to provide technical coordination of the
20 Internet's domain name system by introducing and promoting competition in the
21 registration of domain names, while ensuring the security and stability of the domain
22 name system. In that role, and as relevant here, ICANN was delegated the task of
23 administering generic top level domains (“gTLDs”) such as .COM, .ORG, or, in this
24 case, .WEB.

25 12. Article 4 of ICANN's Articles of Incorporation requires ICANN to
26 “operate for the benefit of the Internet community as a whole, carrying out its activities
27 in conformity with relevant principles of international law and applicable international
28

1 conventions and local law and, to the extent appropriate and consistent with these
2 Articles and its Bylaws, through open and transparent processes that enable competition
3 and open entry in Internet-related markets.” A true and correct copy of ICANN’s
4 Articles of Incorporation is attached hereto as Exhibit A and incorporated herein by
5 reference.

6 13. ICANN is accountable to the Internet community for operating in a manner
7 consistent with its Bylaws and Articles of Incorporation as a whole. ICANN’s Bylaws
8 require ICANN, its Board of Directors and its staff to act in an open, transparent and
9 fair manner with integrity. A true and correct copy of ICANN’s Bylaws are attached
10 hereto as Exhibit B and incorporated herein by reference. Specifically, the ICANN
11 Bylaws require ICANN, its Board of Directors, and staff to:

12 a. “Mak[e] decisions by applying documented policies neutrally and
13 objectively, with integrity and fairness.”

14 b. “[Act] with a speed that is responsive to the needs of the Internet
15 while, as part of the decision-making process, obtaining informed input
16 from those entities most affected.”

17 c. “Remain[] accountable to the Internet community through
18 mechanisms that enhance ICANN’s effectiveness.”

19 d. Ensure that it does “not apply its standards, policies, procedures, or
20 practices inequitably or single out any particular party for disparate
21 treatment unless justified by substantial and reasonable cause, such as the
22 promotion of effective competition.”

23 e. “[O]perate to the maximum extent feasible in an open and
24 transparent manner and consistent with procedures designed to ensure
25 fairness.”

26 ///

27 ///

1 **B. THE NEW gTLD PROGRAM AND APPLICANT GUIDEBOOK**

2 14. ICANN is the sole organization worldwide with the power and ability to
3 administer the bid processes for, and assign rights to, gTLDs. As of 2011, there were
4 only 22 gTLDs in existence; the most common of which are .COM, .NET, and .ORG.

5 15. In or about 2011, ICANN approved the expansion of a number of the
6 gTLDs available to eligible applicants as part of its 2012 Generic Top Level Domains
7 Internet Expansion Program (the “New gTLD Program”).

8 16. In January 2012, as part of the New gTLD Program, ICANN invited
9 eligible parties to submit applications to obtain the rights to operate various new gTLDs,
10 including, the .WEB and .WEBS gTLDs (collectively referred to herein as “.WEB” or
11 the “.WEB gTLD”). In return, ICANN agreed to (a) conduct the bid process in a
12 transparent manner and (b) abide by its own bylaws and the rules and guidelines set
13 forth in ICANN’s gTLD Applicant Guidebook (“Applicant Guidebook”). A true and
14 correct copy of the Applicant Guidebook is attached hereto as Exhibit C and
15 incorporated herein by reference.

16 17. The Applicant Guidebook obligates ICANN to, among other things,
17 conduct a thorough investigation into each of the applicants’ backgrounds. This
18 investigation is necessary to ensure the integrity of the application process, including a
19 potential auction of last resort, and the existence of a level playing field among those
20 competing to secure the rights to a particular new gTLD. It also ensures that each
21 applicant is capable of administering any new gTLD, whether secured at the auction of
22 last resort or privately beforehand, thereby benefiting the public at large.

23 18. ICANN has broad authority to investigate all applicants who apply to
24 participate in the New gTLD Program. This investigative authority, willingly provided
25 by each applicant as part of the terms and conditions in the guidelines contained in the
26 Applicant Guidebook, is set forth in relevant part in Section 6 as follows:

27 ///

1 8. ... In addition, Applicant acknowledges that [sic] to allow
2 ICANN to conduct thorough background screening
3 investigations:

4 ...

5 c. Additional identifying information may be required to
6 resolve questions of identity of individuals within the applicant
7 organization; ...

8 ...

9 11. Applicant authorizes ICANN to:

10 a. Contact any person, group, or entity to request, obtain,
11 and discuss any documentation or other information that, in
12 ICANN's sole judgment, may be pertinent to the application;

13 b. Consult with persons of ICANN's choosing regarding
14 the information in the application or otherwise coming into
15 ICANN's possession...

16 19. To aid ICANN in fulfilling its investigatory obligations, "applicant[s]
17 (including all parent companies, subsidiaries, affiliates, agents, contractors, employees
18 and any and all others acting on [their] behalf)" are required to provide extensive
19 background information in their respective applications. In addition to serving the
20 purposes noted above, this information also allows ICANN to determine whether an
21 entity applicant or individuals associated with an entity applicant have engaged in the
22 automatically disqualifying conduct set forth in Section 1.2.1 of the Applicant
23 Guidebook, including convictions of certain crimes or disciplinary actions by
24 governments or regulatory bodies. Finally, this background information is important to
25 provide transparency to other applicants competing for the same gTLD.

26 20. Indeed, ICANN deemed transparency into an applicant's background so
27 important when drafting the Applicant Guidebook that applicants submitting a new
28

1 gTLD application are required to undertake a continuing obligation to notify ICANN
2 of “any change in circumstances that would render any information provided in the
3 application false or misleading,” including “applicant-specific information such as
4 changes in financial position and changes in ownership or control of the applicant.”

5 21. As a further condition of participating in the .WEB auction, ICANN
6 required Plaintiff and other applicants to agree to a broad covenant not to sue in order
7 to apply for the .WEB contention set (the “Purported Release”). The Purported Release
8 applies to all new gTLD applicants and states, in relevant part:

9 Applicant hereby releases ICANN . . . from any and all claims by applicant
10 that arise out of, are based upon, or are in any way related to, any action,
11 or failure to act, by ICANN . . . in connection with ICANN’s . . . review of
12 this application. . . . Applicant agrees not to challenge . . . and irrevocably
13 waives any right to sue or proceed in court.

14 22. The Purported Release is not subject to negotiation. If a potential applicant
15 does not agree to the release, it cannot be considered for participation in the .WEB
16 auction. The Purported Release is also entirely one-sided in that it allows ICANN to
17 absolve itself of wrongdoing while affording no remedy to applicants. Moreover, the
18 Purported Release does not apply equally as between ICANN and the applicants
19 because it does not prevent ICANN from proceeding with litigation against an applicant.

20 23. In lieu of the rights ICANN claims are waived by the Purported Release,
21 ICANN purports to provide applicants with an independent review process, as a means
22 to challenge ICANN’s actions with respect to a gTLD application. The IRP is
23 effectively an arbitration, operated by the International Centre for Dispute Resolution
24 of the American Arbitration Association, comprised of an independent panel of
25 arbitrators. The IRP is officially identified by ICANN as an Accountability Mechanism.

26 24. In accordance with the IRP, any entity materially affected by a decision or
27 action by the Board that the entity believes is inconsistent with the Articles of
28

1 Incorporation or Bylaws may submit a request for independent review of that decision
2 or action. In order to be materially affected, the person must suffer injury or harm that
3 is directly and causally connected to the Board's alleged violation of the Bylaws or the
4 Articles of Incorporation, and not as a result of third parties acting in line with the
5 Board's action.

6 **C. THE AUCTION PROCESS FOR NEW gTLDs**

7 25. A large number of new gTLDs made available by ICANN in 2012 received
8 multiple applications. In accordance with the Applicant Guidebook, where multiple
9 new gTLD applicants apply to obtain the rights to operate the same new gTLD, those
10 applicants are grouped into a "contention set."

11 26. Pursuant to the Applicant Guidebook, a contention set may be resolved
12 privately among the members of a contention set or facilitated by ICANN as an auction
13 of last resort. Applicants are encouraged to privately resolve a new gTLD contention
14 set (i.e., reach a determination as to which applicant will ultimately be assigned the right
15 to operate the new gTLD at issue). An ICANN auction of last resort will only be
16 conducted when the members of a contention cannot reach agreement privately. By
17 refusing to agree to resolve a contention set privately, one member of a contention set
18 has the ability to force the other members, all of whom may be willing to resolve the
19 contention set privately, to an ICANN auction of last resort.

20 27. For purposes of this matter, it is important to understand that the manner
21 in which a contention set is resolved—whether by private agreement or ICANN
22 auction—determines which entities will receive the proceeds from the winning bid.
23 When a contention set is resolved privately, ICANN receives no financial benefit; in an
24 ICANN auction, the entirety of the auction proceeds go to ICANN.

25 ///

26 ///

27 ///

1 **D. PLAINTIFF’S APPLICATION FOR THE .WEB gTLD**

2 28. In May 2012, Plaintiff submitted application 1-1527-54849 for the .WEB
3 contention set. Plaintiff also submitted with its application the sum of \$185,000—the
4 mandatory application fee.

5 29. In consideration of Plaintiff paying the \$185,000 application fee, ICANN
6 agreed to conduct the application process for the .WEB gTLD in a manner consistent
7 with its own Bylaws, Articles of Incorporation, and the rules and procedures set forth
8 in both the Applicant Guidebook and the Auction Rules, and in conformity with the
9 laws of fair competition. Plaintiff would not have paid the \$185,000 mandatory
10 application fee absent the mutual consideration and promises set forth above.

11 30. Plaintiff’s application passed ICANN’s “Initial Evaluation” process on
12 July 19, 2013. It is an approved member of the .WEB contention set and qualified to
13 participate in the ICANN auction process for .WEB.

14 **E. NDC’S APPLICATION FOR THE .WEB gTLD**

15 31. On June 13, 2012, NDC submitted application number 1-1296-36138 for
16 the .WEB contention set.

17 32. Among other things, the application required NDC to provide “the
18 identification of directors, officers, partners, and major shareholders of that entity.” As
19 relevant here, NDC provided the following response to Sections 7 and 11 of the
20 application:

21 **Secondary Contact**

22 **7(a). Name**

23 Mr. Nicolai Bezsonoff

24 **7(b). Title**

25 Manager
26
27
28

1 **Applicant Background**

2

3 **11(a). Name(s) and position(s) of all directors**

Jose Ignacio Rasco III	Manager
Juan Diego Calle	Manager
Nicolai Bezsonoff	Manager

4

5

6 **11(b). Name(s) and position(s) of all officers and partners**

Jose Ignacio Rasco III	CFO
Juan Diego Calle	CEO
Nicolai Bezsonoff	COO

7

8

9

10 **11(c). Name(s) and position(s) of all shareholders holding at least 15% of shares**

Domain Marketing Holdings, LLC	Not Applicable
NUCO LP, LLC	Not Applicable

11

12

13

14 33. By submitting its application for the .WEB gTLD and electing to

15 participate in the .WEB contention set, NDC expressly agreed to the terms and

16 conditions set forth in the Applicant Guidebook as well as Auction Rules, including

17 specifically, and without limitation, Sections 1.2.1, 1.2.7, 6.1 and 6.10 of the Applicant

18 Guidebook.

19 34. The Applicant Guidebook requires an applicant to notify ICANN of any

20 changes to its application, including the applicant background screening information

21 required under Section 1.2.1; the failure to do so can result in the denial of an

22 application. For example, Section 1.2.7 imposes an ongoing duty to update “applicant-

23 specific information such as changes in financial position and changes in ownership or

24 control of the applicant.” Similarly, pursuant to Section 6.1, “[a]pplicant agrees to

25 notify ICANN in writing of any change in circumstances that would render any

26 information provided in the application false or misleading.”

27 35. In addition to a continuing obligation to provide complete, updated, and

28 accurate information related to its application, Section 6.10 of the Applicant Guidebook,

1 strictly prohibits an applicant from “resell[ing], assign[ing], or transfer[ing] any of
2 applicant’s rights or obligations in connection with the application.” An applicant that
3 violates this prohibition is subject to disqualification from the contention set.

4 36. ICANN failed to investigate credible evidence supporting a determination
5 that NDC violated each of these guidelines—evidence that it held for over a month prior
6 to the .WEB auction date. Despite the urging of multiple .WEB applicants and NDC’s
7 written admissions of potentially disqualifying changes to NDC’s application, ICANN
8 continues to turn a blind eye to the direct detriment of other .WEB applicants and to
9 ICANN’s foundational duties to administer the New gTLD Program with fairness and
10 transparency.

11 **F. NDC’S FAILURE TO NOTIFY ICANN OF CHANGES TO ITS**
12 **APPLICATION**

13 37. On or about June 1, 2016, Plaintiff learned that NDC was the only member
14 of the .WEB contention set unwilling to resolve the contention set in advance and in
15 lieu of the ICANN auction.

16 38. At the time, Plaintiff found the decision unusual given NDC’s historical
17 willingness and enthusiasm to participate in the private resolution process. Overall,
18 NDC has applied for 13 gTLDs in the New gTLD Program; nine of those gTLDs were
19 resolved privately with NDC’s agreement. The auction for the .WEB gTLD is the first
20 auction in which NDC has pushed for an ICANN auction of last resort.

21 39. On June 7, 2016, Plaintiff contacted NDC in writing to inquire as to
22 whether NDC might reconsider its recent decision to forego resolution of the .WEB
23 contention set prior to ICANN’s auction of last resort. In response, NDC stated that its
24 position had not changed. NDC also advised, however, that Nicolai Bezsonoff, who is
25 identified on NDC’s .WEB application as Secondary Contact, Manager, and COO, is
26 “no longer involved with [NDC’s] applications.” NDC also made statements indicating
27 a potential change in the ownership of NDC, including an admission that the board of
28

1 NDC had changed to add “several others” and that he had to check with the “powers
2 that be,” implying that he and his associate on the email were no longer in control. The
3 email communication containing these statements is set forth in pertinent part below:
4

5 **From:** Jose Ignacio Rasco Contact Information Redacted
6 **Subject:** Re: .web
7 **Date:** June 7, 2016 at 11:32:17 AM EDT
8 **To:** Jon Nevett Contact Information Redacted
9 **Cc:** Juan Diego Calle Contact Information Redacted

10 Jon,

11 [Redacted]

12 Nicolai is at NSR full time and no longer involved with our TLD applications. I'm still running our
13 program and Juan sits on the board with me and several others.

14 [Redacted]

15 Best,
16 Jose

17 40. Noting that NDC's conduct and statements (a) appeared to directly
18 contradict information in NDC's .WEB application and (b) suggested that NDC had
19 either resold, assigned, or transferred its rights in the application in violation of its duties
20 under the Applicant Guidebook, Plaintiff diligently contacted ICANN staff in writing
21 with the discrepancy on or about June 22, 2016 to understand who it was competing
22 against for .WEB and to improve transparency over the process for ICANN and the
23 other .WEB applicants.

24 41. After engaging in a series of discussions with ICANN staff, Plaintiff
25 decided to formally raise the issue with the ICANN Ombudsman on or about June 30,
26 2016; as of the initiation of this lawsuit, Plaintiff's most recent correspondence with the
27 ICANN Ombudsman, dated July 10, 2016, in which it provided further information
28 related to the statements made by NDC, remains unanswered.

42. At every opportunity, Plaintiff raised the need for a postponement of the
.WEB auction to allow ICANN time to fulfill its obligations to (a) investigate the

1 contradictory representations made by NDC in relation to its pending application; (b)
2 address NDC's continued status as an auction participant; and (c) provide all the other
3 .WEB applicants the necessary transparency into who they were competing against. It
4 also discussed the matter with ICANN staff and the Ombudsman at ICANN's most
5 recent meeting in Helsinki, Finland, which took place from June 27-30, 2016.

6 43. On July 11, 2016, Radix FZC (on behalf of DotWeb Inc.) and Schlund
7 Technologies GmbH, each members of the .WEB contention set, sent correspondence
8 to ICANN stating their own concerns in proceeding with the auction of last resort
9 scheduled for July 27, 2016. The correspondence stated:

10
11 We support a postponement of the auction, to give ICANN and the other
12 applicants time to investigate whether there has been a change of
13 leadership and/or control of another applicant, NU DOT CO LLC. To do
14 otherwise would be unfair, as we do not have transparency into who leads
and controls that applicant as the auction approaches.

15 **G. ICANN'S DECISION TO PROCEED WITH THE .WEB AUCTION**

16 44. On July 13, 2016, ICANN issued a statement denying the collective
17 request of multiple members of the .WEB contention set to postpone the July 27, 2016
18 auction to allow for a full and transparent investigation into apparent discrepancies in
19 the NDC application, as highlighted by NDC's own statements. Without providing any
20 detail, ICANN simply stated as follows:

21
22 Secondly, in regards to potential changes of control of NU DOT CO LLC, we have investigated the matter,
23 and to date we have found no basis to initiate the application change request process or postpone the
24 auction.

25 45. Contrary to its obligations of accountability and transparency, ICANN's
26 decision did not address the manner or scope of the claimed investigation nor did it
27 address whether a specific inquiry was made into (a) Mr. Bezsonoff's current status, if
28 any, with NDC, (b) the identity of "several other[]" new and unvetted members of

1 NDC's board, or (c) any change in ownership—the very issues raised by NDC's own
2 statements. The correspondence was also silent as to any investigation into whether
3 NDC had either resold, assigned, or transferred all or some of the rights to its .WEB
4 application.

5 46. Plaintiff was unable to learn any further information regarding the extent
6 of the investigation undertaken by ICANN, other than it was limited to inquiries only
7 to NDC and no independent corroboration was sought or obtained.

8 47. Despite the clear credibility issues raised by NDC's own contradictory
9 statements, ICANN conducted no further investigation. Indeed, ICANN informed
10 Plaintiff that it never even contacted Mr. Bezsonoff or interviewed the other individuals
11 identified in Sections 7 and 11 of NDC's application prior to reaching its conclusion.

12 48. To be clear, the financial benefit to ICANN of resolving the .WEB
13 contention set by way of an ICANN auction is no small matter—as of the filing of this
14 lawsuit, ICANN's stated net proceeds from the 15 ICANN auctions conducted since
15 June 2014 total \$101,357,812. The most profitable gTLDs from those auctions
16 commanded winning bids of \$41,501,000 (.SHOP), \$25,001,000 (.APP), \$6,706,000
17 (.TECH), \$5,588,888 (.REALTY), \$5,100,175 (.SALON) and \$3,359,000 (.MLS).
18 ICANN has not yet determined what it will do with the enormous proceeds from these
19 auctions.

20 **H. PLAINTIFF'S REQUEST FOR RECONSIDERATION**

21 49. ICANN's Bylaws provide an established accountability mechanism by
22 which an entity that believes it was materially affected by an action or inaction by
23 ICANN staff that contravened established policies and procedures may submit a request
24 for reconsideration or review of the conduct at issue. The review is conducted by
25 ICANN's Board Governance Committee.

26 50. On July 17, 2016, Plaintiff and Radix FZC, an affiliate of another member
27 of the .WEB contention set, jointly submitted a Reconsideration Request to ICANN, in
28

1 response to the actions and inactions of ICANN staff in connection with the decision
2 set forth in the ICANN's July 13, 2016 correspondence.

3 51. The Reconsideration Request sought reconsideration of (a) ICANN's
4 determination that it "found no basis to initiate the application change request process"
5 in response to the contradictory statements of NDC and (b) ICANN's improper denial
6 of the request made by multiple contention set members to postpone the .WEB auction
7 of last resort, which would have provided ICANN the time necessary to conduct a full
8 and transparent investigation into material discrepancies in NDC's application and its
9 eligibility as a contention set member.

10 52. The Reconsideration Request highlighted the following issues:

- 11 a. ICANN's failure to forego a full and transparent investigation into
12 the material representations made by NDC is a clear violation of the
13 principles and procedures set forth in the ICANN Articles of
14 Incorporation, Bylaws and the Applicant Guidebook.
- 15 b. ICANN is the party with the power and resources necessary to delay
16 the ICANN auction of last resort while the accuracy of NDC's
17 current application is evaluated utilizing the broad investigatory
18 controls contained in the Applicant Guidebook, to which all
19 applicants, including NDC, agreed.
- 20 c. Postponement of the .WEB auction of last resort provides the most
21 efficient manner for resolving the current dispute for all parties by
22 (i) sparing ICANN and the many aggrieved applicants the time and
23 expense of legal action while (ii) avoiding the very real likelihood
24 of a court-mandated unwinding of the ICANN auction of last resort
25 should it proceed.
- 26 d. ICANN'S July 13, 2016 decision raises serious concerns as to
27 whether the scope of ICANN's investigation was impacted by the
28

1 inherent conflict of interest arising from a perceived financial
2 benefit to ICANN if the Auction goes forward as scheduled.

- 3 e. ICANN’s New gTLD Program Auctions guidelines state that a
4 contention set would only proceed to auction where all active
5 applications in the contention set have “**no pending ICANN**
6 **Accountability Mechanisms,**” i.e., no pending Ombudsman
7 complaints, Reconsideration Requests or IRPs.

8 53. The issues raised by Plaintiff were similar to those raised by applicants for
9 other gTLDs in similar contexts; issues that were deemed well-founded by an
10 independent panel assigned to review ICANN’s compliance with its mandatory
11 obligations and bylaws in relation to its administration of the application processes for
12 the New gTLD Program.

13 54. On July 21, 2016, ICANN denied the Request for Reconsideration. In
14 doing so, ICANN relied solely on statements from NDC that directly contradicted those
15 contained in NDC’s earlier correspondence—a clear red flag. Once again, despite the
16 credibility issues raised by NDC’s own contradictory statements, ICANN failed and
17 refused to contact Mr. Bezsonoff or interview the other individuals identified in
18 Sections 7 and 11 of NDC’s application prior to reaching its conclusion. ICANN also
19 failed to investigate whether NDC had either resold, assigned, or transferred all or some
20 of its rights to its .WEB application.

21 55. On July 22, 2016, Plaintiff initiated ICANN’s Independent Review
22 Process by filing ICANN’s Notice of Independent Review. The IRP remains pending.

23 **I. THE .WEB AUCTION RESULTS**

24 56. On July 27, 2016, the .WEB auction proceeded as scheduled. The
25 following day, ICANN reported NDC as the winning bidder of the .WEB gTLD.
26 According to ICANN, NDC’s winning bid amount was \$135 million, more than *triple*
27
28

1 the previous highest price paid for a new gTLD and a sum greater than all of the prior
2 ICANN auction proceeds combined.

3 57. On July 28, 2016, non-party VeriSign, Inc. (“VeriSign”), the registry
4 operator for the .COM and .NET gTLDs, filed a Form 10-Q with the Securities and
5 Exchange Commission in which it disclosed that “[s]ubsequent to June 30, 2016, the
6 Company incurred a commitment to pay approximately \$130.0 million for the future
7 assignment of contractual rights, which are subject to third-party consent. The payment
8 is expected to occur during the third quarter of 2016.”

9 58. On August 1, 2016, VeriSign confirmed via a press release that the
10 approximately \$130 million “commitment” referred to in its Form 10-Q was, in fact, an
11 agreement entered into with NDC “wherein [VeriSign] provided funds for [NDC]’s bid
12 for the .web TLD” in an effort to acquire the rights to the .WEB gTLD. VeriSign stated
13 that its acquisition of the .WEB gTLD would be complete after NDC “execute[s] the
14 .web Registry Agreement with [ICANN]” and then “assign[s] the Registry Agreement
15 to VeriSign upon consent from ICANN.”

16 59. VeriSign did not apply for the .WEB gTLD and was not a disclosed
17 member of the .WEB contention set. At no point prior to the .WEB auction did NDC
18 disclose (a) its relationship with VeriSign; (b) the fact that NDC had effectively become
19 a proxy for VeriSign as a result of VeriSign agreeing to fund NDC’s .WEB auction
20 bids; or (c) the fact that NDC had either resold, assigned, or transferred all or some of
21 its rights to its .WEB application to VeriSign.

22 60. As alleged above, VeriSign is the registry operator for the .COM and .NET
23 gTLDs, which together account for the greatest market share among all gTLDs. Indeed,
24 on July 28, 2016, VeriSign reported combined registrations for the .COM and .NET
25 registries of 143.2 million domains, *more than six times greater* than the combined total
26 registrations of approximately 23 million for all other existing gTLDs.

27 ///

1 61. On information and belief, VeriSign did not apply for, or disclose its
2 interest in, the .WEB gTLD in an effort to avoid heightened scrutiny of its application
3 by ICANN, the other .WEB applicants, the domain name industry at large and, most
4 importantly, the U.S. Department of Justice; specifically, VeriSign's apparent
5 acquisition of NDC's application rights was an attempt to avoid allegations of anti-
6 competitive conduct and antitrust violations in applying to operate the .WEB gTLD,
7 which is widely viewed by industry analysts as the strongest competitor to the .COM
8 and .NET gTLDs.

9 62. Had VeriSign's apparent acquisition of NDC's application rights been
10 fully disclosed to ICANN by NDC, as required by Sections 1.2.7, 6.1 and 6.10 of the
11 Applicant Guidebook, among other provisions, the relationship would have also
12 triggered heightened scrutiny of VeriSign's Registry Agreements with ICANN for
13 .COM and .NET, as well as its Cooperative Agreement with the Department of
14 Commerce.

FIRST CAUSE OF ACTION

(Breach of Contract against Defendant ICANN)

17 63. Plaintiff incorporates the allegations set forth in Paragraphs 1 – 62 above
18 as though fully set forth herein.

19 64. In June 2012, ICANN invited eligible parties to submit applications to
20 obtain the rights to, among others, the .WEB gTLD as part of the New gTLD Program.
21 In doing so, ICANN promised the potential applicants that it would (a) conduct the bid
22 process in a transparent manner, (b) ensure competition, and (c) abide by its own
23 Bylaws and the rules set forth in the Applicant Guidebook.

24 65. On or about June 13, 2012, Plaintiff submitted an application to ICANN
25 to obtain the rights to the .WEB gTLD. In consideration of ICANN's promise to abide
26 by its own Bylaws, Articles of Incorporation, and the rules and procedures set forth in
27

1 the Applicant Guidebook in its administration of the .WEB auction process, Plaintiff
2 paid ICANN a sum of \$185,000—the mandatory application fee.

3 66. In consideration of Plaintiff paying the sum of \$185,000, ICANN promised
4 to conduct the application process for the .WEB gTLD in a manner consistent with its
5 own Bylaws, Articles of Incorporation, and the rules and procedures set forth in both
6 the Applicant Guidebook and the Auction Rules, and in conformity with the laws of fair
7 competition.

8 67. Plaintiff would not have paid the \$185,000 mandatory application fee or
9 spent time and other resources absent the mutual consideration and promises set forth
10 above. Plaintiff performed all conditions, covenants, and promises on its part to be
11 performed in accordance with the agreed upon terms of participating in the New gTLD
12 Program, except those obligations, if any, that it has been prevented or excused from
13 performing as a result of the misconduct set forth in this Complaint.

14 68. ICANN has materially breached its obligations to Plaintiff, as set forth in
15 ICANN’s Bylaws and Articles of Incorporation, and the Applicant Guidebook by (a)
16 failing to thoroughly investigate the issues raised by NDC’s own statements and (b)
17 refusing to postpone the .WEB auction of last resort to allow for a full and transparent
18 investigation into the apparent discrepancies in NDC’s .WEB application.

19 69. Specifically, ICANN’s acts and omission violated, among other things:

- 20 a. Article 1, section 2.8 and Article III, Section 1 of ICANN’s Bylaws,
21 which require ICANN to “[m]ak[e] decisions by applying
22 documented policies neutrally and objectively, with integrity and
23 fairness” and “operate to the maximum extent feasible in an open
24 and transparent manner and consistent with procedures designed to
25 ensure fairness.” ICANN obligates each applicant who seeks to
26 participate in the New gTLD auction process to affirm that the
27 statements and representations contained in the application are true
28

1 and accurate; applicants also undertake a continuing obligation to
2 update their application when changes in circumstance affect an
3 application’s accuracy. By failing to engage in a thorough, open,
4 and transparent investigation of the contradictory statements made
5 by NDC in relation to its application, as well as an apparent change
6 of control with potential antitrust implications, ICANN plainly—
7 and inexplicably—failed to reach its decisions by “applying
8 documented policies neutrally and objectively, with integrity and
9 fairness.”

- 10 b. Article 1, section 2.9 of ICANN’s Bylaws, which requires ICANN
11 to “[act] with a speed that is responsive to the needs of the Internet
12 while, as part of the decision-making process, obtaining informed
13 input from those entities most affected.” In undertaking only a
14 cursory examination of the contradictory statements made by NDC
15 and the apparent change in NDC’s rights to its application, ICANN
16 failed to balance ICANN’s interest in a swift resolution of the
17 concerns raised by the members of the .WEB contention set with its
18 obligation to obtain sufficient assurances and information from the
19 individuals and entities at the center of the statements made by
20 NDC; at the very least, ICANN should have (a) conducted
21 interviews with Mr. Bezsonoff and all other individuals identified in
22 Section 11 of NDC’s application prior to reaching its conclusion and
23 (b) investigated whether NDC had either resold, assigned, or
24 transferred all or some of its rights to its .WEB application.
- 25 c. Article 1, section 2.10 of ICANN’s Bylaws, which requires ICANN
26 to “[r]emain[] accountable to the Internet community through
27 mechanisms that enhance ICANN’s effectiveness.” By failing to
28

1 make use of the processes established in Sections 6.8 and 6.11 to the
2 Applicant Guidebook in investigating an admitted failure by NDC
3 to abide by its continuing obligation to update its application,
4 ICANN staff disregarded the very accountability mechanisms put in
5 place to serve and protect the .WEB contention set, the Internet
6 community, and the public at large. This error was compounded by
7 the cursory dismissal of the concerns raised by multiple members of
8 the .WEB contention set relating to the accuracy of the
9 representations made in NDC's application. By failing to apprise
10 the members of the contention set as to the manner and scope of the
11 investigation conducted by ICANN staff, ICANN failed to ensure
12 that it would hold itself accountable to any gTLD applicant, let alone
13 the Internet community and the public.

- 14 d. Article II, section 3 of ICANN's Bylaws, which states that "ICANN
15 shall not apply its standards, policies, procedures, or practices
16 inequitably or single out any particular party for disparate treatment
17 unless justified by substantial and reasonable cause, such as the
18 promotion of effective competition." There can be no questioning
19 the fact that the Staff Action resulted in disparate treatment in favor
20 of NDC. On one hand, there are clear statements from NDC that
21 representations made in its application are inaccurate and there is
22 ample evidence that NDC has either resold, assigned, or transferred
23 all or some of its rights to its .WEB application. On the other hand,
24 when pressed by multiple members of the contention set to fully
25 investigate the matter, ICANN provided only a conclusory
26 statement that raises more questions than it resolves. To the extent
27 it had reason to engage in such disparate treatment of the members
28

1 of the .WEB contention set, ICANN failed to provide such a reason
2 in reaching the determinations at issue in this Request.

3 70. ICANN also promised that a contention set would only proceed to auction
4 where all active applications in the contention set have “**no pending ICANN**
5 **Accountability Mechanisms.**” ICANN breached this promise by refusing to postpone
6 the .WEB auction of last resort while Plaintiff’s Reconsideration Request remains
7 pending and its Ombudsman complaint remains unresolved. ICANN further breached
8 this promise by moving forward with the .WEB auction of last resort while Plaintiff’s
9 IRP, initiated on July 22, 2016, remains pending.

10 71. On information and belief, Plaintiff alleges that the breaches set forth
11 above resulted from a pre-textual “investigation” into the admissions made by NDC and
12 ICANN’s issuance of its subsequent July 13, 2016 decision. Specifically, Plaintiff
13 alleges that ICANN intentionally failed to abide by its contractual obligations to
14 conduct a full and open investigation into NDC’s admission because it was in ICANN’s
15 interest that the .WEB contention set be resolved by way of an ICANN auction. As
16 such, Plaintiff alleges that ICANN willfully and intentionally committed the wrongful
17 acts described above.

18 72. As a direct and proximate result of ICANN’s breaches, Plaintiff has
19 suffered, and will continue to suffer, without limitation, losses of revenue from third
20 parties, profits, consequential costs and expenses, market share, reputation, and
21 goodwill, in an amount to be determined at trial but not less than twenty-two million,
22 five hundred thousand dollars (\$22,500,000) plus interest.

23 SECOND CAUSE OF ACTION

24 **(Breach of the Covenant of Good Faith and Fair Dealing against Defendant** 25 **ICANN)**

26 73. Plaintiff incorporates the allegations set forth in Paragraphs 1 – 62 above
27 as though fully set forth herein.

1 74. An implied covenant of good faith and fair dealing exists between Plaintiff
2 and ICANN as a result of the contractual relationship entered into as part of the .WEB
3 gTLD application process.

4 75. ICANN breached the covenant of good faith and fair dealing when it acted
5 in a way that deprived Plaintiff of the benefits of the agreement as set forth in the
6 Applicant Guidebook, namely that the administration of the bid process for the .WEB
7 gTLD would be founded on the principles of fairness and transparency.

8 76. ICANN breached the covenant of good faith and fair dealing when it:

- 9 a. Failed to conduct due diligence and an adequate investigation into
10 apparent violations of the Applicant Guidebook raised by NDC's
11 admissions, including but not limited to failing to investigate
12 whether NDC had either resold, assigned, or transferred all or some
13 of its rights to its .WEB application;
- 14 b. Failed to conduct interviews with Mr. Bezsonoff and all other
15 individuals identified in Sections 7 and 11 of NDC's application as
16 part of an investigation into apparent violations of the Applicant
17 Guidebook raised by NDC's admissions;
- 18 c. Failed to provide a necessary level of transparency into the identity
19 and leadership of a competing applicant;
- 20 d. Refused to postpone the ICANN auction of last resort to allow for a
21 full and transparent investigation into the apparent violations of the
22 Applicant Guidebook raised by NDC's admissions; and
- 23 e. Failed to conduct a reasonable inquiry into NDC's impermissible
24 resale, transfer, or assignment of its rights in the .WEB application
25 to VeriSign.

26 77. On information and belief, Plaintiff alleges that the breaches set forth
27 above resulted from a pre-textual "investigation" into the admissions made by NDC and
28

1 ICANN's issuance of its subsequent July 13, 2016 decision. Specifically, Plaintiff
2 alleges that ICANN intentionally failed to abide by its obligations to conduct a full and
3 open investigation into NDC's admission because it was in ICANN's interest that the
4 .WEB contention set be resolved by way of an ICANN auction. As such, Plaintiff
5 alleges that ICANN willfully and intentionally committed the wrongful acts described
6 above.

7 78. As a direct and proximate result of ICANN's breaches as set forth above,
8 Plaintiff has suffered, and will continue to suffer, without limitation, losses of revenue
9 from third parties, profits, consequential costs and expenses, market share, reputation,
10 and good will.

11 **THIRD CAUSE OF ACTION**

12 **(Negligence against Defendant ICANN)**

13 79. Plaintiff incorporates the allegations set forth in Paragraphs 1 – 62 above
14 as though fully set forth herein.

15 80. ICANN owed Plaintiff a duty to act with proper care and diligence in
16 administering the .WEB auction process in accordance with its own Bylaws, Articles
17 of Incorporation, and the rules and procedures as stated in the Applicant Guidebook.

18 81. ICANN breached the duty owed Plaintiff by, among other things:

- 19 a. Failing to conduct due diligence and an adequate investigation into
20 apparent violations of the Applicant Guidebook raised by NDC's
21 admissions, including whether NDC resold, assigned or transferred
22 any of its rights or obligations in connection with the application to
23 VeriSign;
- 24 b. Failing to conduct interviews with Mr. Bezsonoff and all other
25 individuals identified in Sections 7 and 11 of NDC's application as
26 part of an investigation into apparent violations of the Applicant
27 Guidebook raised by NDC's admissions;

- 1 c. Refusing to postpone the ICANN auction of last resort to allow for
2 a full and transparent investigation into the apparent violations of
3 the Applicant Guidebook raised by NDC's admissions; and
4 d. Failing to provide a rationale for the decision set forth in the July
5 13, 2016 correspondence.

6 82. As a direct and proximate result of ICANN's breaches as set forth above,
7 Plaintiff has suffered, and will continue to suffer, without limitation, losses of revenue
8 from third parties, profits, consequential costs and expenses, market share, reputation,
9 and good will.

10 **FOURTH CAUSE OF ACTION**

11 **(Unfair Competition in Violation of Cal. Bus. & Prof. Code §17200 against**
12 **Defendant ICANN)**

13 83. Plaintiff incorporates the allegations set forth in Paragraphs 1 – 62 above
14 as though fully set forth herein.

15 84. The California Unfair Competition Law ("UCL") protects both consumers
16 and competitors by prohibiting "unfair competition," which is defined, in the
17 disjunctive, by Business and Professions Code section 17200 as including "any
18 unlawful, unfair or fraudulent business act or practice" as well as "unfair, deceptive,
19 untrue or misleading advertising."

20 85. Plaintiff has standing to pursue this claim under Business and Professions
21 Code section 17204 because Plaintiff has suffered injury in fact and has lost money or
22 property as a result of ICANN's actions as set forth above. The losses include, but are
23 not limited to, expenses incurred by Plaintiff in exhausting every available formal and
24 informal avenue of recourse with ICANN prior to the filing of the above-captioned
25 action, including legal fees related to the preparation and submission of the
26 Reconsideration Request. Losses also include the \$185,000 application fee paid to
27 ICANN to participate as an application in the .WEB contention set.

1 86. The following acts and omissions of ICANN, among others, were unlawful
2 under the UCL:

- 3 a. ICANN's imposition of the unenforceable contract terms contained
4 in the Purported Release, in violation of California Civil Code
5 section 1668, which declares violative of public policy those
6 contracts that "have for their object, directly or indirectly, to exempt
7 anyone from the responsibility for his own fraud, or willful injury to
8 the person or property of another, or violation of law, whether
9 willful or negligent...."
- 10 b. ICANN's imposition of the unenforceable contract terms contained
11 in the Purported Release, in violation of California Civil Code §
12 1770(a)(19), which defines as unlawful, the "[i]nser[tion] of an
13 unconscionable provision in [a] contract."

14 87. The following acts and omissions of ICANN, among others, were unfair
15 under the UCL:

- 16 a. Plaintiff hereby incorporates by this reference the allegations of
17 Paragraph 86 and its subparts as stated herein; each act therein
18 alleged is also an unfair act or practice under the UCL;
- 19 b. ICANN's decision to conduct a cursory investigation into the
20 apparent violations of the Applicant Guidebook raised by NDC's
21 admissions without regard for rights of the other .WEB contention
22 set members;
- 23 c. ICANN's decision to forego a postponement of the ICANN auction
24 of last resort scheduled for July 27, 2016 without conducting an
25 open and transparent investigation into the apparent violations of the
26 Applicant Guidebook raised by NDC's admissions; and
- 27 d. ICANN's decision to allow NDC to continue to participate as a
28

1 .WEB contention set member despite NDC's own admission of
2 inaccuracies contained in its application, in violation of the
3 guidelines contained in the Applicant Guidebook.

4 88. The following acts and omissions of ICANN, among others, were
5 fraudulent under the UCL in that they were likely to deceive, and in fact did deceive,
6 members of the public:

- 7 a. Plaintiff hereby incorporates by this reference the allegations of
8 Paragraph 86 and its subparts as if restated herein; each is also a
9 fraudulent act or practice under the UCL;
- 10 b. ICANN's false representation that it would make all decisions in
11 administering the .WEB auction process "by applying documented
12 policies neutrally and objectively, with integrity and fairness";
- 13 c. ICANN's false representation that in administering the .WEB
14 auction process, it would "[act] with a speed that is responsive to the
15 needs of the Internet while, as part of the decision-making process,
16 obtaining informed input from those entities most affected";
- 17 d. ICANN's false representation that in administering the .WEB
18 auction process, it would "[r]emain[] accountable to the Internet
19 community through mechanisms that enhance ICANN's
20 effectiveness";
- 21 e. ICANN's false representation that in administering the .WEB
22 auction process, it would "apply its standards, policies, procedures,
23 or practices inequitably or single out any particular party for
24 disparate treatment";
- 25 f. ICANN's false representation that all applicants would be subject to
26 the same agreement, rules, and procedures;
- 27 g. ICANN's false representation that it would require applicants to
28

1 update their applications with “any change in circumstances that
2 would render any information provided in the application false or
3 misleading,” including “applicant-specific information such as
4 changes in financial position and changes in ownership or control of
5 the applicant”;

- 6 h. ICANN’s false representation that a contention set would only
7 proceed to auction where all active applications in the contention set
8 have “**no pending ICANN Accountability Mechanisms**”; and
9 i. ICANN’s false representation that an applicant would be
10 disqualified from participating in the .WEB contention set for
11 “resell[ing], assign[ing], or transfer[ring] any of [the] applicant’s
12 rights or obligations in connection with the application.”

13 89. On information and belief, the conduct identified in Paragraphs 86-88 and
14 their subparts resulted from the intentional conduct of ICANN.

15 90. With specific reference to the conduct identified in Paragraphs 87-88 and
16 their subparts above, Plaintiff alleges that ICANN’s “investigation” into the admissions
17 made by NDC and ICANN’s subsequent issuance of its July 13, 2016 decision were
18 pre-textual in nature, the goal of which was to ensure ICANN secured a windfall from
19 the .WEB contention set being resolved by way of an ICANN auction of last resort.
20 Specifically, Plaintiff alleges that ICANN intentionally failed to abide by its contractual
21 obligations to conduct a full and open investigation into NDC’s admission because it
22 was in ICANN’s interest that the .WEB contention set be resolved by way of an ICANN
23 auction. As such, Plaintiff alleges that it was in ICANN’s interest to willfully and
24 intentionally commit the wrongful acts described above. Pursuant to Business and
25 Professions Code section 17203 and the equitable powers of the Court, Plaintiff seeks
26 an order (a) enjoining ICANN from proceeding with the .WEB ICANN auction of last
27 resort until the claims presented by way of the above-captioned action are resolved; (b)
28

1 enjoining ICANN from entering into a Registry Agreement with any party for the .WEB
2 gTLD pending a final decision on the merits of this matter; and (c) enjoining ICANN
3 from engaging in the unlawful, unfair and fraudulent business acts and practices
4 described above. Plaintiff also seeks an order requiring ICANN to comply with its own
5 Bylaws, Articles of Incorporation, and the rules and procedures set forth in the
6 Applicant Guidebook, in the continued administration of the .WEB contention set
7 process and to take such corrective actions and adopt such remedial measures as are
8 necessary to prevent the further occurrence of the acts or practices alleged herein.

9 91. Plaintiff also seeks an order requiring restitution of any and all monies
10 obtained by ICANN from Plaintiff as a result of the intentionally unlawful, unfair, and
11 fraudulent described above. Plaintiff's request includes, but is not limited to, the
12 restitution of any and all fees paid by or monies received from Plaintiff in relation to
13 the .WEB contention set process.

14 92. Preventing the unlawful business practices engaged in by ICANN will
15 ensure a significant benefit to the other .WEB contention set members as well as the
16 public at large. Moreover, the financial burden of pursuing private enforcement
17 substantially exceeds the financial benefit to Plaintiff. Thus, in the interest of justice,
18 Plaintiff seeks attorneys' fees in bringing this private attorney general claim pursuant
19 to Civil Code section 1021.5 in an amount subject to proof.

20 **FIFTH CAUSE OF ACTION**

21 **(Declaratory Relief—Against Defendant ICANN)**

22 93. Plaintiff incorporates the allegations set forth in Paragraphs 1 – 62 above
23 as though fully set forth herein.

24 94. An actual and justiciable controversy has arisen, and now exists, between
25 Plaintiff, on one hand, and ICANN, on the other, regarding the legality and effect of the
26 Purported Release contained in the Applicant Guidebook.

1 95. As a condition of participating in the .WEB contention set process, ICANN
2 required Plaintiff and other applicants to sign the Applicant Guidebook, which
3 contained a covenant not to sue in order to apply for the .WEB contention set. The
4 Purported Release applies to all New gTLD applicants and states, in relevant part:

5 Applicant hereby releases ICANN . . . from any and all claims by applicant
6 that arise out of, are based upon, or are in any way related to, any action,
7 or failure to act, by ICANN . . . in connection with ICANN's . . . review of
8 this application. . . . Applicant agrees not to challenge . . . and irrevocably
9 waives any right to sue or proceed in court.

10 96. The Purported Release is not subject to negotiation: If a potential applicant
11 does not agree to the release, it cannot be considered for participation in the .WEB
12 contention set process. The Purported Release is also entirely unilateral in that it allows
13 ICANN to absolve itself of wrongdoing while affording no remedy to applicants.
14 Moreover, the Purported Release does not apply equally as between ICANN and the
15 applicants because it does not prevent ICANN from proceeding with litigation against
16 an applicant.

17 97. Plaintiff seeks a declaration of its rights regarding the enforceability of the
18 Purported Release in light of California Civil Code Section 1668, which prohibits the
19 type of broad exculpatory clauses contained in the Purported Release: "All contracts
20 which have for their object, directly or indirectly, to exempt anyone from responsibility
21 for his own fraud, or willful injury to the person or property or another, or violation of
22 law, whether willful or negligent, are against the policy of the law."

23 98. Plaintiff maintains that, on its face, the Release is "against the policy of the
24 law" because it exempts ICANN from any and all claims arising out of the application
25 process, even those arising from fraudulent or willful conduct.

26 99. As such, an actual controversy has arisen and now exists between Plaintiff
27 and ICANN as to the enforceability of the Purported Release. Plaintiff desires a judicial
28

1 determination and declaration that the Purported Release is unenforceable,
2 unconscionable, and/or void as a matter of public policy. Such a declaration is
3 necessary and appropriate at this time so that Plaintiff may ascertain its rights with
4 respect to the enforceability of the Purported Release.

5
6 **WHEREFORE**, Plaintiff RUBY GLEN, LLC prays for relief as follows:

- 7 1. For compensatory damages according to proof at the time trial;
 - 8 2. For general damages according to proof;
 - 9 3. For restitutionary damages according to proof;
 - 10 4. An injunction requiring ICANN to refrain from conducting the auction of
11 last resort for the .WEB gTLD pending a final decision on the merits of
12 this matter;
 - 13 5. An injunction requiring ICANN to refrain from entering into a Registry
14 Agreement with any party for the .WEB gTLD pending a final decision
15 on the merits of this matter;
 - 16 6. An injunction requiring ICANN to refrain from assigning the rights to the
17 .WEB gTLD to any party pending a final decision on the merits of this
18 matter;
 - 19 7. Attorneys' fees and costs to the extent permitted by law; and
 - 20 8. For such other relief as the Court deems just and proper against all
21 Defendants.
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1 Dated: August 8, 2016

By: s/ Paula L. Zecchini

Paula L. Zecchini (SBN 238731)

Aaron M. McKown (SBN 208781)

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Facsimile: 206.621.8783

Attorneys for Ruby Glen, LLC

9
10 **CERTIFICATE OF SERVICE**

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

15 **Electronic Mail Notice List**

16 •Eric P Enson
epenson@jonesday.com,dfutrowsky@jonesday.com

17 •Jeffrey A LeVee
18 jlevec@jonesday.com,vcrawford@jonesday.com,cmcdaniel@jonesday.com

19 •Charlotte Wasserstein
20 cswasserstein@jonesday.com,lltouton@jonesday.com,flumlee@jonesday.com,kkelly@jonesday.com

21 SIGNED AND DATED this 8th day of August, 2016 at Seattle, Washington.

22 COZEN O'CONNOR

23
24 By: /s/ Paula Zecchini
Paula Zecchini

Exhibit RE-5

[PLEASE NOTE EMERGENCY REQUEST FOR RELIEF CONTAINED IN SECTION 9]**Reconsideration Request by Ruby Glen, LLC and Radix FZC**

Regarding Staff Action Taken in Response to Concerns Raised by Multiple Members of the .WEB/.WEBS Contention Set in Relation to Apparent Discrepancies in the Application of Contention Set Member, NU DOT CO LLC

Introductory Summary

Ruby Glen, LLC and Radix FZC (on behalf of its applicant affiliate DotWeb Inc.), applicants for the .WEB/.WEBS gTLD contention set (hereinafter, the "Applicants"), submit this Request for Reconsideration (the "Request") to provide ICANN with an opportunity to correct the actions and inactions of its staff (collectively, the "Staff Action") that (a) violate established ICANN policy and guidelines, (b) materially affect the rights of the contention set members, and (c) compromise the integrity of ICANN's administration of the .WEB/.WEBS auction.

The Staff Action at issue arises from apparent discrepancies in the application of NU DOT CO LLC ("NDC") to participate in the upcoming .WEB/.WEBS contention set auction. Specifically, on June 7, 2016, when explaining NDC's decision to forego agreement to resolve the .WEB/.WEBS contention set prior to ICANN auction (as it had done before with its other applied-for gTLDs), NDC stated that (a) Nicolai Bezsonoff, who is identified as NDC's Secondary Contact, Manager, and COO, is "no longer involved with [NDC's] applications" and (b) there were "several other[]" new members of the NDC "board" not listed in its application. NDC also advised of a potential change in the ownership and/or leadership of NDC.¹ Noting that NDC's statements directly

¹ In the time since NDC made these statements, Applicants have learned of speculation within the industry that NDC has sold its application to Neustar, Inc. or Verisign, Inc. See e.g., Kevin Murphy, *Is Verisign .web applicant's secret sugar*

contradict information contained in its application, Applicants and other members of the contention set diligently reached out to alert both ICANN staff and the ICANN ombudsman to the apparent changes in leadership and/or control of NDC.

On July 13, 2016, in response to the concerns raised by multiple .WEB applicants, ICANN staff issued a statement acknowledging that it had received multiple requests to investigate “potential changes of control of [NDC]” and postpone the .WEB/.WEBS auction of last resort. Despite the gravity of the concerns raised by these applicants, ICANN staff summarily dismissed the requests with a blunt three-line statement that ICANN had “investigated the matter” and “found no basis to initiate the application change request process or postpone the auction.” Notably, ICANN’s statement made no mention of having conducted an inquiry into (a) Mr. Bezsonoff’s current status, if any, with NDC; (b) any new board members or managers not listed in the application; or (c) any change in ownership or leadership of NDC.

The decision by ICANN staff to forego a full and transparent investigation into the material representations made by NDC is a clear violation of the principles and procedures set forth in the ICANN Articles of Incorporation and Bylaws (the “ICANN Bylaws”) and the ICANN gTLD Applicant Guidebook (the “Applicant Guidebook”). Indeed, the unceremonious nature of the statement provided by ICANN raises serious issues as to the thoroughness of any investigation undertaken by ICANN staff and the impartiality with which ICANN administers its own guidelines and policies. The curt

daddy?, DOMAIN INCITE (July 14, 2016) <http://domainincite.com/20748-is-verisign-web-applicants-secret-sugar-daddy>. Although Applicants are unaware of the legitimacy of these reports, they cannot help but observe that such a transfer would explain NDC’s statements regarding an apparent change of control and its decision to deviate from prior auction behavior by pushing the .WEB/.WEBS contention set to an ICANN auction of last resort.

dismissal also provokes suspicion as to whether the inherent conflict of interest presented by the benefit to ICANN of conducting an auction of last resort impacted the manner in which NDC's change of leadership and control was "investigated."

The Staff Action has placed ICANN in a position of having to defend against questions of accountability and self-interest in the face of clearly contradictory statements provided by a gTLD applicant in the .WEB/.WEBS contention set. Applicants respectfully request that the Board remedy the missteps presented by the Staff Action and restore integrity to the transparency, accountability mechanisms, and rules upon which Applicants relied in applying to participate in the .WEB/.WEBS auction.

1. Requester Information

Name: Ruby Glen, LLC ("Ruby Glen")

Address: c/o Donuts Inc., Contact Information Redacted

Email: Contact Information Redacted

Counsel: Alvaro Alvarez – Donuts Inc. SVP, General Counsel & Secretary

Name: Radix FZC on behalf of applicant affiliate DotWeb Inc. ("Radix")

Address: c/o Brijesh Joshi, Contact Information Redacted

Email: Contact Information Redacted

2. Request for Reconsideration of (check one only):

Board action/inaction

Staff action/inaction

3. Description of specific action you are seeking to have reconsidered.

Applicants seek reconsideration of (a) ICANN's determination that it "found no basis to initiate the application change request process" in response to the contradictory statements of NDC and (b) ICANN's improper denial of Applicants' (and at least one other .WEB applicant's) request to postpone the .WEB/.WEBS auction, currently scheduled for July 27, 2016. The requested postponement would have provided ICANN and the .WEB/.WEBS applicants the time necessary to conduct a full and transparent investigation into material discrepancies in NDC's application and its eligibility as a contention set member.

4. Date of action/inaction:

July 13, 2016. The Staff Action was set forth in a statement from Christine Willett, Vice President of gTLD Operations for ICANN to the members of the .WEB/.WEBS contention set.

5. On what date did you become aware of the action or that action would not be taken?

July 13, 2016. Notice of the Staff Action was provided to the .WEB/.WEBS contention set members via electronic mail.

6. Describe how you believe you are materially affected by the action or inaction:

Applicants and other members of the .WEB/.WEBS contention set, with the exception of NDC, continue to be adversely affected by ICANN's (a) failure to thoroughly investigate the issues raised by NDC's own statements and (b) refusal to postpone the .WEB/.WEBS auction of last resort to allow for a full and transparent investigation into the apparent discrepancies in NDC's .WEB/.WEBS application.

Applicants applied for the .WEB gTLD in reliance on ICANN's representations that, in accordance with well-established ICANN policies and procedures, the application, evaluation, and auction processes would be administered in a fair and transparent manner. Applicants also relied on ICANN's representations that applicants would be held accountable for the accuracy of their submissions. Just as Applicants understood that they were bound to the obligations set forth in the Applicant Guidebook to preserve a level playing field, Applicants understood and relied upon ICANN's representations that each of the other members of the contention set would be required to abide by the same obligations. By failing to hold NDC accountable for its own contradictory statements, ICANN has placed all other .WEB applicants in a situation where they will be forced to bid against a party that has violated ICANN guidelines by being less than transparent as to changes in its ownership and/or leadership and, as a result, may be subject to disqualification.

Proceeding to the ICANN auction of last resort now would also ensure that Applicants and the remaining members continue to face an unsettled result. Applicants anticipate that if NDC is the successful bidder at the .WEB/.WEBS auction, multiple members of the contention set will renew their calls for ICANN to investigate and perhaps even take legal action to enforce their rights. This is especially true if it later comes to light that there was any truth to the rumors that NDC has sold or otherwise transferred its interest in the .WEB application to an ineligible third party—rumors that could be easily vetted by ICANN in the process of investigating NDC's recent and undisputed statements at issue in this Request. There exists the very real likelihood that ICANN will be forced to unwind the transaction, further delaying the release of the

.WEB/.WEBS gTLD to the public, eroding ICANN's legitimacy and reputation, and causing ICANN and the members of the contention set to expend additional time, money, and resources in resolving an issue that could have easily been addressed at this juncture with a modest delay.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

The damage caused by ICANN's failure to adhere to the accountability and transparency mechanisms by which it agreed to administer the .WEB/.WEBS auction is not limited to Applicants and the members of the contention set. As stated above, it is more than likely that absent an investigation into the contradictory statements made by NDC, a successful bid by NDC at an auction of last resort will ultimately be challenged by way of an appeal within the ICANN process, a multi-party lawsuit filed in the court system, and potentially, an antitrust review conducted by the U.S. Department of Justice. By proceeding with the .WEB/.WEBS auction, in the face of admissions by NDC and other credible evidence of discrepancies in NDC's application and an apparent change of control, leadership and/or ownership, there is a strong likelihood of a further and more significant delay in releasing these domains, thereby adversely affecting the public at large.

More fundamentally, ICANN's decision to forego a harmless postponement of the .WEB/.WEBS auction to conduct a transparent investigation into these issues does nothing to dispel questions surrounding ICANN's ability to be accountable and transparent in its administration of the gTLD program—questions that were raised recently by a federal court in California regarding the .AFRICA gTLD. The ramifications

of yet another breakdown in ICANN's transparency and accountability obligations will further harm ICANN and the Internet community at large by (a) broadening the public perception that ICANN lacks either the ability or the willingness to effectively combat the appearance of disparate treatment among gTLD applicants and (b) advising gTLD applicants that there will be neither penalty nor recourse for failing to abide by the obligations set forth in the Application Guidebook. Each of these results will severely affect ICANN, the Internet community, and the public at large.

8. Detail of Board or Staff Action – Required Information

The Staff Action at issue arises from apparent discrepancies in NDC's .WEB/.WEBS application and recent statements regarding an apparent change of control, leadership and/or ownership over its application. As relevant here, Section 1.2.7 of the Applicant Guidebook requires an applicant to notify ICANN of any changes to its application; the failure to do so can result in the denial of an application. See e.g., Applicant Guidebook at § 1.2.7 (stating ongoing duty to update "applicant-specific information such as changes in financial position and changes in ownership or control of the applicant"); § 6.1 (confirming that "[a]pplicant agrees to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading"). Similarly, under Section 6.10 of the Applicant Guidebook, an applicant may not "resell, assign, or transfer any of applicant's rights or obligations in connection with the application"; violating this provision may result in the disqualification of an active application. *Id.* at § 6.10. As set forth below, there is significant evidence that NDC may have violated each of these guidelines.

On June 13, 2012, NDC submitted application number 1-1296-36138 for the

.WEB/.WEBS contention set. Among other things, the application required NDC to provide “the identification of directors, officers, partners, and major shareholders of that entity.” See Applicant Guidebook at § 1.2.1. As relevant here, NDC provided the following response to Sections 7 and 11 of the application:

Secondary Contact

7(a). Name

Mr. Nicolai Bezsonoff

7(b). Title

Manager

Applicant Background

11(a). Name(s) and position(s) of all directors

Jose Ignacio Resco III	Manager
Juan Diego Calle	Manager
Nicolai Bezsonoff	Manager

11(b). Name(s) and position(s) of all officers and partners

Jose Ignacio Resco III	CFO
Juan Diego Calle	CEO
Nicolai Bezsonoff	COO

11(c). Name(s) and position(s) of all shareholders holding at least 15% of shares

Domain Marketing Holdings, LLC	Not Applicable
NUCO LP, LLC	Not Applicable

By submitting its application for the .WEB gTLD and electing to participate in the .WEB/.WEBS auction, NDC expressly agreed to the terms and conditions set forth in the Applicant Guidebook as well as ICANN's Auction Rules for New gTLDs (“Auction Rules”), including specifically, and without limitation, Sections 1.2.1, 1.2.7, 6.1 and 6.10

of the Applicant Guidebook.

On June 7, 2016, Ruby Glen contacted NDC to inquire as to whether NDC might reconsider its then-recent decision to forego resolution of the .WEB/.WEBS contention prior to ICANN's auction of last resort.² In response, NDC stated that its position had not changed. NDC also advised, however, that Nicolai Bezsonoff, who is identified on NDC's .WEB application (see above) as Secondary Contact, Manager, and COO, is "no longer involved with [NDC's] applications." NDC also made statements indicating a potential change in the ownership of NDC, including an admission that the board of NDC had changed to add "several others." The email communication³ containing these statements is set forth in pertinent part below:

From: Jose Ignacio Rasco · Contact Information Redacted
 Subject: Re: .web
 Date: June 7, 2016 at 11:32:17 AM EDT
 To: Jon Nevett · Contact Information Redacted
 Cc: Juan Diego · Contact Information Redacted

Jon,

[Redacted]

Nicolai is at NSR full time and no longer involved with our TLD applications. I'm still running our program and Juan sits on the board with me and several others.

[Redacted]

Best,
 Jose

Noting that (a) NDC's statements appeared to directly contradict information in

² To the extent it may be relevant to this Request, NDC applied for 13 gTLDs in the New gTLD Program. As of the date of this submission, nine of those gTLDs were resolved with NDC's agreement to participate in a private resolution. NDC did not become the registry operator for any of the gTLDs it resolved to date. The auction for the .WEB gTLD is the first auction in which NDC has pushed for an ICANN auction of last resort.

³ An unredacted copy of the embedded email was previously provided by Ruby Glen to the ICANN Ombudsman.

NDC's .WEB application and (b) strong direct and circumstantial evidence shows that NDC has either resold, assigned or transferred its rights in the application in violation of its duties under the Applicant Guidebook, Ruby Glen diligently contacted ICANN staff in writing with the discrepancy on or about June 22. Ruby Glen also formally raised the issue with the ICANN Ombudsman on or about June 30, 2016. It also discussed the matter with ICANN staff and the Ombudsman at ICANN's most recent meeting in Helsinki, Finland. At the time of submission of this Request, Ruby Glen's most recent correspondence with the ICANN Ombudsman, dated July 10, 2016, in which it provided further information related to the statements made by NDC, remains unanswered.

At every opportunity, Ruby Glen raised the need for a postponement of the .WEB/.WEBS auction to allow ICANN (and the other applicants) time to investigate and address the contradictory representations made by NDC in relation to its pending application and status as an auction participant. On July 11, 2016, Radix (on behalf of DotWeb Inc.) and Schlund Technologies GmbH, each members of the .WEB/.WEBS contention set, sent correspondence to ICANN stating their own concerns in proceeding with the .WEB/.WEBS auction as currently scheduled. The correspondence stated:

We support a postponement of the auction, to give ICANN and the other applicants time to investigate whether there has been a change of leadership and/or control of another applicant, NU DOT CO LLC. To do otherwise would be unfair, as we do not have transparency into who leads and controls that applicant as the auction approaches.

On July 13, 2016, ICANN issued a statement denying the collective request of multiple members of the .WEB/.WEBS contention set to postpone the July 27, 2016 auction to allow for a full and transparent investigation into apparent discrepancies in the NDC application, as highlighted by NDC's own statements. Without providing any

detail, ICANN simply stated as follows:

Secondly, in regards to potential changes of control of NU DOT CO LLC, we have investigated the matter, and to date we have found no basis to initiate the application change request process or postpone the auction.

ICANN's decision did not address the manner or scope of the claimed investigation nor did it specifically address whether specific inquiry was made into (a) Mr. Bezsonoff's current status, if any, with NDC, (b) the identity of "several other[]" new and unvetted members of NDC's board or (c) any change in ownership—the very issues raised by NDC's own statements.

As set forth more fully in Section 10, *infra*, the brief statement provided by ICANN in response to the applicants' concerns—without any explanation to resolve the issues presented by NDC's provision of contradictory information or to address the failure to grant the requested postponement—is inconsistent with ICANN's stated commitment to accountability and transparency in the auction process, and innumerable provisions of the rules and regulations governing ICANN's administration of the New gTLD Program.

9. What are you asking ICANN to do now?

Applicants respectfully request ICANN (1) delay the ICANN auction of last resort for the .WEB/.WEBS contention set on an emergency basis and (2) conduct a thorough and transparent investigation into the apparent discrepancies and/or changes in NDC's .WEB/.WEBS application in accordance with ICANN's Bylaws (including ICANN's guiding principles to ensure transparency, openness and accountability), the Auction Rules, and the Applicant Guidebook.

A. Urgent Request for Immediate Stay of .WEB/.WEBS Auction

In light of the rapidly approaching .WEB/.WEBS auction date, Applicants request

a stay of the pending .WEB/.WEBS auction of last resort until (45) days after the issuance of a ruling on the merits of this Request. This Request for stay is supported by the factual background underlying the Staff Action, the grounds upon which the Request is based, and the ongoing harm to the affected parties. *See supra* Sections 6-8 and *infra* Section 10.

More to the point, the stay requested by Applicants is mandated by ICANN's own rules governing Auction Eligibility given the pendency of (a) Ruby Glen's complaint to the ICANN Ombudsman and (b) this Request. As plainly stated on ICANN's "New gTLD Program Auctions", a string contention set will be eligible to enter into a New gTLD Program auction only where all active applications in the contention set have "**no pending ICANN Accountability Mechanisms.**" See ICANN's New gTLD Program Auctions page, available at <https://newgtlds.icann.org/en/applicants/auctions> (emphasis added).⁴

Pursuant to Article IV of ICANN's Bylaws, entitled "Accountability and Review of ICANN's By-Laws," both the ongoing Ombudsman investigation and the Reconsideration Request process constitute ICANN Accountability Mechanisms. As

⁴ Applicants are aware of the position taken by ICANN with regard to a similar argument advanced in connection with the "DETERMINATION OF THE BOARD GOVERNANCE COMMITTEE (BGC) RECONSIDERATION REQUESTS 16-1 AND 16-2" dated 25 February 2016. As an initial matter, Applicants believe that the position taken by ICANN in response to Requests 16-1 and 16-2 is limited to the facts presented by the underlying request, which are wholly distinguishable from those presented here. Specifically, Applicants' Request is supported by (a) good cause, as established by NDC's own contradictory statements, and (b) Applicants' diligent efforts to address this issue in the month and half preceding the July 27, 2016 auction date. Moreover, Applicants respectfully disagree with ICANN's awkward attempt to rewrite the phrase "enter into a New gTLD Program Auction" as "enter[] into the auction process." ICANN's argument in support of the proffered interpretation is contradicted not only by the plain language of the Auction Eligibility statement, but also by ICANN's historical administration of the New gTLD Program. It is also unlikely to pass legal muster.

such, ICANN must refrain from proceeding with the .WEB/.WEBS auction until the resolution of Ruby Glen's Ombudsman complaint, this Request and any other ICANN Accountability Mechanisms that may currently be in process or outstanding.

The stay is further supported by the fact that NDC's statements have called into question whether, under the New gTLD Auction Bidder Agreement for the .WEB/.WEBS contention set (the "ICANN Auction Agreement"), NDC meets the standard of a "Qualified Applicant." In light of these questions, the requested stay will also allow ICANN the opportunity to "conduct due diligence on the Qualified Applicant...in an effort to ensure compliance with all applicable laws, regulations and rules governing the [ICANN auction of last resort]." See ICANN Auction Agreement at § 2.7.

Applicants' request to stay the .WEB/.WEBS auction of last resort for an additional (45) days after the issuance of a ruling on the merits of this Request will provide the members of the contention set, as well as ICANN, with a reasonable opportunity to re-engage with each other in advance of the auction and give ICANN the time it needs to conduct the investigation this matter deserves. As addressed above, the failure to grant the requested stay will have wide-ranging repercussions that extend far beyond the .WEB/.WEBS auction.

B. Request for ICANN to Conduct Thorough Investigation into Issues Raised by NDC's Contradictory Statements

Concurrent with the above request, Applicants ask ICANN to utilize the broad investigatory controls described in the Applicant Guidebook—notably, those under Sections 6.8 and 6.11 that seemingly exist precisely for situations such as this—to investigate (a) changes in Mr. Bezsonoff's status, if any, with NDC and (b) changes in

the control, ownership, or leadership of NDC since the time of NDC's original gTLD application. Such inquiry should include, at the very least, interviews with Mr. Bezsonoff and all other individuals identified in Section 11 of NDC's application.

10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.

Applicants are approved members of the .WEB/.WEBS contention set, with a scheduled auction for July 27, 2016. As approved members, and as set forth more fully throughout this Request, Applicants have been "adversely affected by ... one or more staff actions or inactions that contradict established ICANN policy." ICANN Bylaws, Art. IV, § 2.2(a). Specifically, the Staff Action was taken in contradiction of various policy provisions contained in ICANN's Bylaws (including ICANN's guiding principles to ensure transparency, openness and accountability), the Auction Rules, and the Applicant Guidebook, all of which require a full and transparent investigation into the discrepancies presented by NDC's application and its current status as an auction participant.

A. The Staff Action Contradicted Established Policy By Failing to Utilize the Broad Investigative Powers at ICANN's Disposal in Investigating NDC's Potential Violation of Guidelines Contained in the Applicant Guidebook

As set forth in the Applicant Guidebook, ICANN has broad authority to investigate all applicants who apply to participate in the New gTLD Auction Program. This investigative authority, willingly provided by each applicant as part of the terms and

conditions set forth in the guidelines contained in the Applicant Guidebook, is set forth in relevant part below:

8. ... In addition, **Applicant acknowledges that [sic] to allow ICANN to conduct thorough background screening investigations:**

...

c. **Additional identifying information may be required to resolve questions of identity of individuals within the applicant organization; ...**

...

11. **Applicant authorizes ICANN to:**

- a. **Contact any person, group, or entity to request, obtain, and discuss any documentation or other information that, in ICANN's sole judgment, may be pertinent to the application;**
- b. **Consult with persons of ICANN's choosing regarding the information in the application or otherwise coming into ICANN's possession . . .**

See Applicant Guidebook at §§ 6.8, 6.10 (emphasis added).

ICANN's obligation to conduct a thorough investigation is necessary to ensure the integrity of the auction process and the existence of a level playing field among the ultimate members of a contention set. Background investigations into "applicants (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any all others acting on [their] behalf)" also ensure that each applicant is capable of administering any new gTLD that it may secure at auction, thereby benefiting the public at large. See Applicant Guidebook, § 6 at Introduction. This information also allows ICANN to determine whether an entity applicant, or an individual associated with an entity applicant, has engaged in the *automatically disqualifying* conduct set forth in Section 1.2.1 of the Applicant Guidebook. Indeed, ICANN requires those submitting a

gTLD application to provide warranties as to the truth and accuracy of their representations, even going so far as to mandate a continuing obligation to notify ICANN of “any change in circumstances that would render any information provided in the application false or misleading.” *See id.* at 1.

In spite of the above, when faced with recent statements by NDC that expressly contradict those contained in its gTLD application—and directly affect its ability to participate in the .WEB/.WEBS auction—ICANN appears to have engaged in only a cursory examination of the issue. The only available conclusion is that the Staff Action was taken without attention to, in contravention of, and with apparent disregard for its obligation to investigate the veracity of the representations made by NDC and its potential changes of control, leadership, and/or ownership.⁵

In light of the noted deficiencies identified in relation to the Staff Action, Applicants respectfully request ICANN now take the time to engage in a full and transparent investigation into material discrepancies in NDC’s application and its status as a contention set member and postpone the .WEB/.WEBS auction, currently scheduled for July 27, 2016. All .WEB/.WEBS applicants deserve to participate in an auction with transparency as to the competition and integrity as to the process.

B. The Staff Action Contradicted Established Policy By Failing to Adhere to the Transparency and Accountability Guidelines Set Forth in ICANN’s Bylaws

⁵ Because the Staff Action also contradicted established policy relating to transparency, as set forth *infra*, Applicants are unfortunately forced to presume that a thorough background investigation of the nature described in Sections 6.8 and 6.11 of the Applicant Guidebook did not occur during the course of the decision-making process.

In addition to ICANN's failure to adhere to the specific guidelines established for the administration of gTLD auctions, the Staff Action (and the events leading thereto) were taken in contravention of multiple provisions of the ICANN Bylaws, all of which require ICANN to administer the .WEB/.WEBS auction process with transparency, accountability, good faith and fair dealing. Collectively, these violations not only provide a solid basis for granting this Request but also revive serious doubts as to ICANN's ability to process and manage the New gTLD Program in a transparent and accountable manner.

i. The Staff Action Contradicts ICANN Bylaws, Art. I, § 2.8:

Article 1, section 2.8 of ICANN's Bylaws requires ICANN to "[m]ak[e] decisions by applying documented policies neutrally and objectively, with integrity and fairness." As set forth above, ICANN obligates each applicant who seeks to participate in the gTLD auction process to affirm that the statements and representations contained in the application are true and accurate; applicants also undertake a continuing obligation to update their application when changes in circumstance affect an application's accuracy. See Applicant Guidebook at § 6.1. In turn, ICANN represents to the applicants that it will safeguard the entire gTLD application process, including any auctions of last resort, by taking steps to diligently investigate the information provided by each applicant to ensure its accuracy. By failing to engage in a thorough, open and transparent investigation of the contradictory statements made by NDC in relation to its application, as well as an apparent change of control with potential antitrust implications, the Staff Action plainly—and *inexplicably*—failed to reach its decisions by "applying documented policies neutrally and objectively, with integrity and fairness." See ICANN Bylaws, Art. I,

§ 2.8.

ii. The Staff Action Contradicts ICANN Bylaws, Art. I, § 2.9:

Article 1, section 2.9 of ICANN's Bylaws requires ICANN to “[act] with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.” In undertaking only a cursory examination of the contradictory statements made by NDC and the apparent change in NDC's rights to its application, the Staff Action failed to balance ICANN's interest in a swift resolution of the concerns raised by the members of the .WEB/.WEBS contention set with its obligation to obtain sufficient assurances and information from the individuals and entities at the center of the statements made by NDC; at the very least, ICANN staff should have conducted interviews with Mr. Bezsonoff and all other individuals identified in Section 11 of NDC's application prior to reaching its conclusion.

iii. The Staff Action Contradicts ICANN Bylaws, Art. I, § 2.10

Article 1, section 2.10 of ICANN's Bylaws requires ICANN to “[r]emain[] accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.” By failing to make use of the processes established in Sections 6.8 and 6.10 to the Applicant Guidebook in investigating an admitted failure by NDC to abide by its continuing obligation to update its application, ICANN staff disregarded the very accountability mechanisms put in place to serve and protect not only the Internet community but the public at large. This error was compounded by the cursory dismissal of the concerns raised by multiple members of the .WEB/.WEBS contention set relating to the accuracy of the representations made in NDC's application. By failing to apprise

the members of the contention set as to the manner and scope of the investigation conducted by ICANN staff, ICANN failed to ensure that it would hold itself accountable to any gTLD applicant, let alone the broader Internet community.

iv. The Staff Action Contradicts ICANN Bylaws, Art. II, § 3:

Article II, section 3 of ICANN's Bylaws states that "ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition." There can be no questioning the fact that the Staff Action resulted in disparate treatment in favor of NDC. On one hand, there are clear statements from NDC that representations made in its application are, at best, misleading and there is ample evidence that NDC has either resold, assigned or transferred all or some of its rights to the application. On the other hand, when pressed by multiple members of the contention set to fully investigate the matter, ICANN provided only a conclusory statement that raises more questions than it resolves. To the extent it had reason to engage in such disparate treatment of the members of the .WEB/.WEBS contention set, ICANN failed to provide such a reason in reaching the determinations at issue in this Request. Certainly, Applicants can think of no "substantial and reasonable cause," to justify the Staff Action. *Id.* at ICANN Bylaws, Art. II, § 3.

v. The Staff Action Contradicts ICANN Bylaws, Art. III, § 1:

Article 3, section 1 ICANN's Bylaws states the "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness." Over the course of its

existence, ICANN has repeatedly prevailed upon the stakeholders in the ICANN policy process to trust that it will administer its obligations in a fair and transparent manner. The continued trust of ICANN's stakeholders, however, can only extend as far as ICANN is willing to honor its stated commitments to accountability and transparency in every aspect of its work.

If any situation demanded the full transparency to which ICANN has repeatedly committed itself, it must certainly be the one presented here, where a single, hasty backroom decision effectively ensures that the proceeds from the .WEB/.WEBS auction will flow to ICANN under an unfortunate cloud of suspected conflicts of interest and disparate treatment. Applicants respectfully request that ICANN reconsider the Staff Action and provide relief in the manner set forth in Section 8 of its Request.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

Yes

No

11a. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

Applicants have joined together to submit this Request. Moreover, as of date of the submission of this Request, Applicants are aware that other members of the .WEB/.WEBS contention set also may join in Applicants' Request. With the exception of NDC, both the circumstances of this Request and the harm described herein is the same for Applicants and all other contention members.

Terms and Conditions for Submission of Reconsideration Requests

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious. Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

DATED: 17 July 2016

Respectfully submitted,

/ama/

Alvaro Alvarez

SVP, General Counsel & Secretary
Donuts Inc./bj/

Brijesh Joshi

Director, Radix FZC, on behalf of its
applicant affiliate DotWeb Inc.

Exhibit RE-6

**DETERMINATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 16-9**

21 JULY 2016

The Requesters, Ruby Glen, LLC and Radix FZC, submitted a reconsideration request seeking urgent reconsideration of ICANN's decision not to delay the .WEB/.WEBS auction (scheduled for 27 July 2016) following ICANN's investigation into alleged material changes in Nu Dot Co LLC's (Nu Dot's) application for .WEB.

I. Brief Summary.

Seven applications for .WEB and one application for .WEBS are currently in a contention set (.WEB/.WEBS Contention Set) and scheduled to participate in an auction of last resort on 27 July 2016 (Auction). The Requesters and Nu Dot each submitted an application for .WEB and are Auction participants. The Requesters contacted ICANN staff on or about 23 June 2016 and submitted a complaint to the Ombudsman during ICANN56 in June 2016 alleging that Nu Dot had experienced changes in leadership and/or control without notifying ICANN, as it is obligated to do. The Requesters then submitted an urgent Reconsideration Request on 17 July 2016 (Request 16-9) claiming that: (a) the Auction should be postponed because there are pending accountability mechanisms (initiated by the Requesters); and (b) reconsideration is warranted because ICANN's investigation of the alleged changes in Nu Dot's application was insufficient and, in the Requesters' view, comprises "a clear violation of the principles and procedures set forth in the ICANN Articles of Incorporation and Bylaws[,] and the ICANN gTLD Applicant Guidebook."¹

¹ Request, Pg. 2.

The Requesters' claims do not warrant postponement of the Auction or reconsideration. First, the Requesters argue that their pending complaint with the Ombudsman and initiation of Request 16-9 require ICANN to postpone the Auction. However, there is no policy requiring ICANN to postpone the Auction here because these accountability mechanisms were not initiated before the .WEB/.WEBS Contention Set entered into the Auction process on 27 April 2016. Indeed, the timing parameters within the auction rules were established specifically so that auction participants could not game the system by filing last-minute accountability mechanisms. Second, reconsideration is not warranted because the Requesters do not identify any misapplication of policy or procedure by ICANN staff in its investigation of the allegations regarding Nu Dot's application.

Contrary to the Requesters' claims, ICANN diligently investigated the alleged potential changes to Nu Dot's application and found no basis to initiate the application change request process.² Because the Requesters have failed to show that ICANN staff acted in contravention of established policy or procedure, the BGC concludes that Request 16-9 be denied.

II. Facts.

A. Background Facts.

In June 2012, Ruby Glen, LLC, DotWeb Inc. (an affiliate of Radix FZC), Nu Dot, Charleston Road Registry, Inc., Web.com Group, Inc., Afilias Domains No. 3 Limited, and Schlund Technologies GmbH each submitted an application for .WEB; Vistaprint Limited filed two applications for .WEBS (one standard, and one community-based that was later withdrawn).

² Furthermore, even if ICANN *had* determined that an applicant change request was necessary, ICANN has discretion to determine whether a change request warrants postponing an auction.

Nu Dot's application listed three officers/directors: Jose Ignacio Rasco II, CFO; Juan Diego Calle, CEO; and Nicolai Bezsonoff, COO.³

The seven applications for .WEB and the remaining application for .WEBS are in the .WEB/.WEBS Contention Set.⁴

On 27 April 2016, ICANN initiated the Auction process by notifying all active members of the .WEB/.WEBS Contention Set that the Auction had been scheduled and providing instructions and deadlines to participate in the Auction.

According to the Requesters, on or about 7 June 2016 they contacted Nu Dot and asked Nu Dot to reconsider its decision to forego private resolution of the .WEB/.WEBS Contention Set. The Requesters have indicated that Nu Dot's reply included the following statement: "Nicolai [Bezsonoff] is at NSR full-time and is no longer involved with our TLD applications. [Jose Ignacio Rasco II is] still running our program and Juan [Diego Calle] sits on the board with me and several others."⁵ This communication apparently led the Requesters to believe that Nu Dot had experienced some change in ownership and/or leadership. Thereafter, on or about 23 June 2016, the Requesters contacted ICANN staff regarding their apparent belief that changes to Nu Dot's application were required. The Requesters also formally raised the issue with the ICANN Ombudsman during ICANN56 in June 2016.

After receiving the Requesters' notification that they believed Nu Dot's application needed to be changed, ICANN staff proceeded to investigate the claims. On 27 June 2016, ICANN sent Nu Dot's authorized primary contact a message to determine whether there had been any "changes to your application or the [Nu Dot] organization that need to be reported to

³ Nu Dot Application for .WEB, *available at* <https://gtldresult.icann.org/applicationstatus/applicationdetails/1053>.

⁴ Contention Set for .WEB/.WEBS, *available at* <https://gtldresult.icann.org/applicationstatus/contentionsetdiagram/233>.

⁵ Request, § 8, Pg. 9.

ICANN. This may include any information that is no longer true and accurate in the application, including changes that occur as part of regular business operations (e.g., changes to officers and directors, application contacts).” Jose Ignacio Rasco, CFO of Nu Dot, replied that same day to “confirm that there have been no changes to the [Nu Dot] organization that would need to be reported to ICANN.”

Subsequently, both ICANN staff and the Ombudsman reached out to Mr. Rasco to again inquire about the claims of potential changes in Nu Dot’s organization that the Requesters believed required notification to ICANN. Specifically, ICANN staff conducted a telephone conversation with Mr. Rasco on 8 July 2016 regarding the allegations. During that call, and later in a confirming email on 11 July 2016, Mr. Rasco stated that: “Neither the ownership nor the control of Nu Dotco, LLC has changed since we filed our application. The Managers designated pursuant to the company’s LLC operating agreement (the LLC equivalent of a corporate Board) have not changed. And there have been no changes to the membership of the LLC either.” Mr. Rasco also confirmed to ICANN that he provided this same information to the ICANN Ombudsman in responding to the Ombudsman’s investigation of the complaint lodged with him. According to Mr. Rasco, he informed the Ombudsman that there had been no changes to Nu Dot’s ownership, operating agreement, or LLC membership. After receiving information from Nu Dot and ICANN, the Ombudsman informed ICANN that, in his opinion, there was nothing to justify a postponement of the .WEB/.WEBS Auction based on unfairness to the other applicants.

On 11 July 2016, the Requesters sent an email to ICANN “support[ing] a postponement of the .WEB auction to give ICANN and the other applicants time to investigate whether there has been a change of leadership and/or control of another applicant, [Nu Dot,]” and stating that,

“[t]o do otherwise would be unfair, as we do not have transparency into who leads and controls that applicant as the auction approaches.”⁶

After completing its investigation of the allegations regarding Nu Dot’s application, ICANN sent a letter to the members of the .WEB/.WEBS Contention Set on 13 July 2016 stating, among other things, that “in regards to potential changes of control of [Nu Dot], we have investigated the matter, and to date we have found no basis to initiate the application change request process or postpone the auction.”⁷

On 17 July 2016, the Requesters filed Request 16-9, seeking postponement of the .WEB/.WEBS Auction and requesting a “thorough and transparent investigation into the apparent discrepancies and/or changes in [Nu Dot’s] .WEB/.WEBS application.”⁸

The .WEB/.WEBS Auction is scheduled to occur on 27 July 2016.⁹

B. Relief Requested.

The Requesters ask ICANN to:

1. “[D]elay the ICANN auction of last resort for the .WEB/.WEBS contention set *on an emergency basis*”, and;
2. “[C]onduct a thorough and transparent investigation into the apparent discrepancies and/or changes in [Nu Dot’s] .WEB/.WEBS application in accordance with ICANN’s Bylaws (including ICANN’s guiding principles to ensure transparency, openness and accountability), the Auction Rules, and the

⁶ Email from Brijesh Joshi to Akram Atallah, Christine Willett, and John Jeffrey, dated 11 July 2016, *available at* <https://www.icann.org/en/system/files/correspondence/joshi-to-atallah-et-al-11jul16-en.pdf>.

⁷ Letter from Christine Willett to Members of the .WEB/.WEBS Contention Set, dated 13 July 2016, *available at* <https://newgtlds.icann.org/en/program-status/correspondence>.

⁸ Request, § 9, Pg. 11. On 20 July 2016, ICANN received a letter of support from Donuts Inc. regarding Request 16-9. Donuts requested that the letter not be published.

⁹ Auction Schedule, *available at* <https://newgtlds.icann.org/en/applicants/auctions>.

Applicant Guidebook.”¹⁰

III. The Relevant Standard For Reconsideration Requests.

ICANN’s Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.¹¹ The Requesters challenge staff action. Dismissal of a request for reconsideration of staff action or inaction is appropriate only if the BGC concludes, and the Board agrees to the extent that the BGC deems that further consideration by the Board is necessary, that the requesting party does not have standing because the party failed to satisfy the reconsideration criteria set forth in the Bylaws.

IV. Analysis and Rationale.

A. No Established Policy Requires ICANN to Postpone the .WEB/.WEBS Auction.

The Requesters argue that the Auction should be postponed because of the pending accountability mechanisms. Those accountability mechanisms, however, were not pending at the required time—namely, the time when the .WEB/.WEBS Contention Set entered into the Auction process—and do not warrant postponement of the Auction.

The Requesters argue that a stay is “mandated by ICANN’s own rules governing Auction Eligibility given the pendency of (a) [the Requesters’] complaint to the ICANN Ombudsman and (b) this Request.”¹² In particular, the Requesters assert that “[a]s plainly stated on ICANN’s ‘New gTLD Program Auctions’, a string contention set will be eligible to enter into a New gTLD

¹⁰ Request, § 9, Pg. 11 (emphasis in original).

¹¹ Bylaws, Art. IV, § 2. Article IV, § 2.2 of ICANN’s Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

(a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
(b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board’s consideration at the time of action or refusal to act; or
(c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board’s reliance on false or inaccurate material information.

¹² Request, § 9, Pg. 12.

Program auction only where all active applications in the contention set have ‘no pending ICANN Accountability Mechanisms.’”¹³

Contrary to what the Requesters argue, there were no pending accountability mechanisms when the .WEB/.WEBS Contention Set entered into the Auction process. ICANN initiated the Auction process on 27 April 2016 by notifying all active members of the .WEB/.WEBS Contention Set that the Auction had been scheduled and providing instructions and deadlines to participate in the Auction. The Requesters did not lodge a complaint with the Ombudsman until two months later (and less than one month before the Auction) during ICANN56 in June 2016. Similarly, Request 16-9 was not filed until 17 July 2016. As such, there were no accountability mechanisms pending on the date that the .WEB/.WEBS Contention Set entered the Auction process. Indeed, the auction rules were designed to, among other things, prevent exactly this sort of last-minute attempt to delay. The Requesters have not identified any violation of process or procedure. The .WEB/.WEBS Auction will therefore proceed as scheduled on 27 July 2016.

B. ICANN Staff Complied with Established Policy when Investigating the Requesters’ Allegations Regarding Nu Dot.

The Requesters contend that ICANN’s investigation regarding Nu Dot “was taken without attention to, in contravention of, and with apparent disregard for its obligation to investigate the veracity of the representations made by [Nu Dot] and its potential changes of control, leadership, and/or ownership.”¹⁴ However, there is no established policy or procedure requiring ICANN to undertake an investigation in the manner that the Requesters would prefer. Nevertheless, ICANN did diligently investigate the Requesters’ claims and found nothing to support them.

¹³ Request, § 9, Pg. 12 (quoting ICANN’s New gTLD Program Auctions page, *available at* <https://newgtlds.icann.org/en/applicants/auctions>).

¹⁴ Request, § 10, Pg. 16.

The Requesters cite the “Top-Level Domain Application –Terms and Conditions”

(Guidebook Terms and Conditions) in which gTLD applicants authorize ICANN to:

8. ... [C]onduct thorough background screening[s] ... [including] identifying information may be required to resolve questions of identity of individuals within the applicant organization investigations[; and]

10. (a) Contact any person, group, or entity to request, obtain, and discuss any documentation or other information that, *in ICANN’s sole judgment*, may be pertinent to the application; (b) Consult with persons of ICANN’s choosing regarding the information in the application or otherwise coming into ICANN’s possession, provided, however, that ICANN will use reasonable efforts to ensure that such persons maintain the confidentiality of information in the application that this Applicant Guidebook expressly states will be kept confidential.¹⁵

These provisions of the Guidebook Terms and Conditions do not support the Requesters’ argument. In the course of evaluating Nu Dot’s application, ICANN performed the above referenced background screening in accordance with the Applicant Guidebook and standard procedures, and the results were released with the Initial Evaluation Report on 7 June 2013.¹⁶ Thus, there is no dispute that ICANN performed all necessary checks of the application.

Rather, just one month before the scheduled Auction, the Requesters seemingly are suggesting that ICANN should have conducted another in-depth investigation and background check of Nu Dot because, according to the Requesters, certain unknown changes *may* have occurred with respect to Nu Dot’s organization which *might* require changes to Nu Dot’s application. Specifically, the Requesters claim that ICANN was obligated to investigate Nu Dot because the Applicant Guidebook grants ICANN “broad authority to investigate all applicants who apply to participate in the New gTLD Auction Program.”¹⁷ But the Requesters’ proposed level of investigation is not what is required at this stage of the process. While the Requesters

¹⁵ Guidebook, §§ 6.8, 6.10 (emphasis supplied).

¹⁶ Nu Dot New gTLD Program Initial Evaluation Report, *available at* ICANN’s New gTLD Program Auctions page, available at <https://newgtlds.icann.org/en/applicants/auctions>.

¹⁷ Request, § 10, Pg. 14.

are correct that the Applicant Guidebook gives ICANN the authority to conduct investigations, the Applicant Guidebook does not require ICANN to investigate the Requesters' claims regarding Nu Dot in the manner that the Requesters suggest. Furthermore, the Guidebook Terms and Conditions cited by the Requesters confirm that it is within "ICANN's sole judgment" to determine whether additional information may be pertinent to an application and, consequently, to determine whether any investigation is warranted.¹⁸ Accordingly, the Requesters fail to identify any policy or procedure that would require ICANN to investigate their claims.

Nevertheless, in response to the Requesters' allegations, ICANN *did* diligently investigate the claims regarding potential changes to Nu Dot's leadership and/or ownership. Indeed, on several occasions, ICANN staff communicated with the primary contact for Nu Dot both through emails and a phone conversation to determine whether there had been any changes to the Nu Dot organization that would require an application change request. On each occasion, Nu Dot confirmed that no such changes had occurred, and ICANN is entitled to rely upon those representations. For example, on 27 June 2016, ICANN sent Nu Dot's authorized primary contact a message to determine whether there had been any "changes to your application or the [Nu Dot] organization that need to be reported to ICANN ... [including] changes to officers and directors, [or] application contacts." Jose Ignacio Rasco, CFO of Nu Dot, replied that same day to "confirm that there have been no changes to the [Nu Dot] organization that would need to be reported to ICANN." Shortly thereafter, both ICANN staff and the Ombudsman reached out to Mr. Rasco to again inquire about the claims of potential changes requiring notification to ICANN. Specifically, ICANN staff conducted a telephone conversation with Mr. Rasco on 8 July 2016 regarding the allegations. During that call, and later in a confirming email on 11 July 2016, Mr. Rasco stated that "[n]either the ownership nor the control of Nu Dotco, LLC has

¹⁸ Guidebook, §§ 6.8, 6.10.

changed since we filed our application. The Managers designated pursuant to the company's LLC operating agreement (the LLC equivalent of a corporate Board) have not changed. And there have been no changes to the membership of the LLC either." Mr. Rasco also confirmed that he had provided this same information to the ICANN Ombudsman in responding to the Ombudsman's investigation of the complaint lodged with him. After completing its investigation of the Requesters' allegations regarding Nu Dot's organization, ICANN informed the Requesters that "we have investigated the matter, and to date we have found no basis to initiate the application change request process or postpone the auction."¹⁹

C. ICANN Staff Complied with Established Policy when Determining that No Changes Were Necessary to Nu Dot's Application.

The Requesters also suggest that ICANN violated its established policy of non-discriminatory treatment by allowing Nu Dot's application to proceed without a change request.²⁰ Specifically, the Requesters claim that ICANN engaged in "disparate treatment in favor of Nu Dot" by allowing Nu Dot's application to proceed despite "clear statements from [Nu Dot] that representations made in its application are, at best, misleading."²¹

The Applicant Guidebook provides that, "[i]f at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, the applicant must promptly notify ICANN."²² First, Nu Dot never notified ICANN that there were any changes to the information provided in the application. Second, as discussed above, after investigating the Requesters' allegations that there were changes in Nu Dot's organization requiring changes to the application, ICANN concluded that there was no evidence to suggest

¹⁹ Letter from Christine Willett to Members of the .WEB/.WEBS Contention Set, dated 13 July 2016, *available at* <https://newgtlds.icann.org/en/program-status/correspondence>.

²⁰ Bylaws, Article II, § 3 ("ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.")

²¹ Request, § 10, Pg. 20.

²² Guidebook, § 1.2.7.

that Nu Dot's application was no longer accurate. Thus, as ICANN explained to the Requesters, there was no need for Nu Dot to "initiate the application change request process."²³

Finally, the Requesters' claims rest upon one email (provided in redacted form), purportedly received from Nu Dot, stating that: "Nicolai [Bezsonoff] is at NSR full-time and is no longer involved with our TLD applications. [Jose Ignacio Rasco II is] still running our program and Juan [Diego Calle] sits on the board with me and several others."²⁴ This email does not indicate that these persons have left the organization or that the organization has "resold, assigned or transferred its rights in the application."²⁵ Moreover, after investigating the Requesters' allegations, ICANN found no evidence to suggest that Nu Dot experienced a change of leadership and/or control, and in fact received explicit confirmation from the primary contact for Nu Dot, Jose Ignacio Rasco, that no such changes had occurred, which ICANN is entitled to rely upon. Thus, there appears to be no need for an application change request, and ICANN acted in accordance with established policy and procedure in reaching this conclusion.

V. Determination.

Based on the foregoing, the BGC concludes that the Requesters have not stated proper grounds for reconsideration, and therefore denies Request 16-9. If the Requesters believe that they have somehow been treated unfairly here, they are free to ask the Ombudsman to review this matter.

The Bylaws provide that the BGC is authorized to make a final determination for all Reconsideration Requests brought regarding staff action or inaction and that no Board consideration is required. As discussed above, Request 16-9 seeks reconsideration of a staff

²³ Letter from Christine Willett to Members of the .WEB/.WEBS Contention Set, dated 13 July 2016, *available at* <https://newgtlds.icann.org/en/program-status/correspondence>.

²⁴ Request, § 8, Pg. 9.

²⁵ *Id* at 10.

action or inaction. As such, after consideration of Request 16-9, the BGC concludes that this determination is final and that no further consideration by the Board is warranted.

In terms of the timing, because the BGC agreed to consider the matter on an urgent basis, Section 2.19 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a reconsideration request within seven days, or as soon thereafter as feasible.²⁶ The Requesters submitted this Request on 17 July 2016. By issuing its Determination on 21 July 2016, the BGC has acted within the established time limit for urgent reconsideration requests.

²⁶ Bylaws Article IV, Section 2.19.

Exhibit RE-7

ACCO,TRO,(ASx),CLOSED,DISCOVERY,MANADR

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA (Western Division – Los Angeles)
CIVIL DOCKET FOR CASE #: 2:16-cv-05505-PA-AS**

Ruby Glen, LLC v. Internet Corporation For Assigned Names
And Numbers et al
Assigned to: Judge Percy Anderson
Referred to: Magistrate Judge Alka Sagar
Demand: \$9,999,000
Case in other court: 9th CCA, 16-56890
Cause: 28:1332 Diversity-Breach of Contract

Date Filed: 07/22/2016
Date Terminated: 11/28/2016
Jury Demand: Plaintiff
Nature of Suit: 190 Contract: Other
Jurisdiction: Diversity

Plaintiff**Ruby Glen, LLC**

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Defendant**Does**

1-10

Date Filed	#	Docket Text
07/22/2016	<u>1</u>	COMPLAINT with filing fee previously paid (\$400.00 paid on 07/22/2016, receipt number 18234524), filed by Plaintiff Ruby Glen, LLC. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C) (Attorney Paula L Zecchini added to party Ruby Glen, LLC(pty:pla))(Zecchini, Paula) (Entered: 07/22/2016)
07/22/2016	<u>2</u>	Request for Clerk to Issue Summons on Complaint (Attorney Civil Case Opening), <u>1</u> filed by Plaintiff Ruby Glen, LLC. (Zecchini, Paula) (Entered: 07/22/2016)
07/22/2016	<u>3</u>	CIVIL COVER SHEET filed by Plaintiff Ruby Glen, LLC. (Zecchini, Paula) (Entered: 07/22/2016)
07/22/2016	<u>4</u>	CORPORATE DISCLOSURE STATEMENT filed by Plaintiff Ruby Glen, LLC identifying Covered TLD, LLC as Corporate Parent. (Zecchini, Paula) (Entered: 07/22/2016)
07/22/2016	<u>5</u>	NOTICE of Interested Parties filed by Plaintiff Ruby Glen, LLC, identifying Covered TLD, LLC. (Zecchini, Paula) (Entered: 07/22/2016)
07/22/2016	<u>6</u>	EX PARTE APPLICATION for Temporary Restraining Order filed by Plaintiff Ruby Glen, LLC. (Zecchini, Paula) (Entered: 07/22/2016)
07/22/2016	<u>7</u>	DECLARATION of Paula Zecchini re EX PARTE APPLICATION for Temporary Restraining Order <u>6</u> filed by Plaintiff Ruby Glen, LLC. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C, # <u>4</u> Exhibit D, # <u>5</u> Exhibit E, # <u>6</u> Exhibit F, # <u>7</u> Exhibit G, # <u>8</u> Exhibit H, # <u>9</u> Exhibit I, # <u>10</u> Exhibit J)(Zecchini, Paula) (Entered: 07/22/2016)
07/22/2016	<u>8</u>	DECLARATION of Jonathon Nevett re EX PARTE APPLICATION for Temporary Restraining Order <u>6</u> filed by Plaintiff Ruby Glen, LLC. (Attachments: # <u>1</u> Exhibit A)(Zecchini, Paula) (Entered: 07/22/2016)
07/25/2016	<u>9</u>	NOTICE OF ASSIGNMENT to District Judge Percy Anderson and Magistrate Judge Alka Sagar. (car) (Entered: 07/25/2016)
07/25/2016	<u>10</u>	NOTICE TO PARTIES OF COURT-DIRECTED ADR PROGRAM filed. (car) (Entered: 07/25/2016)
07/25/2016	<u>11</u>	NOTICE OF PRO HAC VICE APPLICATION DUE for Non-Resident Attorney Jeffrey M. Monhait. A document recently filed in this case lists you as an out-of-state attorney of record. However, the Court has not been able to locate any record that you are admitted to the Bar of this Court, and you have not filed an application to appear Pro Hac Vice in this case. Accordingly, within 5 business days of the date of this notice, you must either (1) have your local counsel file an application to appear Pro Hac Vice (Form G-64) and pay the applicable fee, or (2) complete the next section of this form and return it to the court at caed_attyadm@caed.uscourts.gov . You have been removed as counsel of record from the docket in this case, and you will not be added back to the docket until your Pro Hac Vice status has been resolved. (car) (Entered: 07/25/2016)
07/25/2016	<u>12</u>	21 DAY Summons Issued re Complaint (Attorney Civil Case Opening), <u>1</u> as to Defendant Internet Corporation for Assigned Names and Numbers. (car) (Entered: 07/25/2016)
07/25/2016	<u>13</u>	NOTICE of Appearance filed by attorney Eric P Enson on behalf of Defendant Internet Corporation for Assigned Names and Numbers (Attorney Eric P Enson added to party Internet Corporation for Assigned Names and Numbers(pty:dft))(Enson, Eric) (Entered: 07/25/2016)

07/25/2016	<u>14</u>	CORPORATE DISCLOSURE STATEMENT filed by Defendant Internet Corporation for Assigned Names and Numbers (Enson, Eric) (Entered: 07/25/2016)
07/25/2016	<u>15</u>	NOTICE OF INTENT TO FILE OPPOSITION TO EX PARTE APPLICATION FOR TRO filed by Defendant Internet Corporation for Assigned Names and Numbers. (Enson, Eric) (Entered: 07/25/2016)
07/25/2016	<u>16</u>	NOTICE of Appearance filed by attorney Jeffrey A LeVee on behalf of Defendant Internet Corporation for Assigned Names and Numbers (Attorney Jeffrey A LeVee added to party Internet Corporation for Assigned Names and Numbers(pty:dft))(LeVee, Jeffrey) (Entered: 07/25/2016)
07/25/2016	<u>17</u>	NOTICE of Appearance filed by attorney Charlotte Wasserstein on behalf of Defendant Internet Corporation for Assigned Names and Numbers (Attorney Charlotte Wasserstein added to party Internet Corporation for Assigned Names and Numbers(pty:dft))(Wasserstein, Charlotte) (Entered: 07/25/2016)
07/25/2016	<u>18</u>	Opposition re: EX PARTE APPLICATION for Temporary Restraining Order <u>6</u> filed by Defendant Internet Corporation for Assigned Names and Numbers. (Attachments: # <u>1</u> Willett Decl., # <u>2</u> Exs. to Willett Decl., # <u>3</u> Weinstein Decl., # <u>4</u> Exs. to Weinstein Decl., # <u>5</u> Bezsonoff Decl., # <u>6</u> Rasco Decl., # <u>7</u> Proof of Service)(Enson, Eric) (Entered: 07/25/2016)
07/26/2016	<u>19</u>	PROOF OF SERVICE Executed by Plaintiff Ruby Glen, LLC, upon Defendant Internet Corporation for Assigned Names and Numbers served on 7/25/2016, answer due 8/15/2016. Service of the Summons and Complaint were executed upon Gladys Aguilera, CT Corporation Systems in compliance with Federal Rules of Civil Procedure by service on a domestic corporation, unincorporated association, or public entity. Original Summons NOT returned. (Zecchini, Paula) (Entered: 07/26/2016)
07/26/2016	<u>20</u>	NOTICE Of Service Of Process filed by Defendant Internet Corporation for Assigned Names and Numbers. (Enson, Eric) (Entered: 07/26/2016)
07/26/2016	<u>21</u>	MINUTE ORDER (IN CHAMBERS) – COURT ORDER by Judge Percy Anderson denying <u>6</u> EX PARTE APPLICATION for TRO. (mrgo) (Entered: 07/26/2016)
07/26/2016	<u>22</u>	STANDING ORDER by Judge Percy Anderson. READ THIS ORDER CAREFULLY. IT CONTROLS THE CASE AND DIFFERS IN SOME RESPECTS FROM THE LOCAL RULES. (lom) (Entered: 07/27/2016)
08/08/2016	<u>23</u>	First AMENDED COMPLAINT against Defendant Internet Corporation for Assigned Names and Numbers amending Complaint (Attorney Civil Case Opening), <u>1</u> , filed by Plaintiff Ruby Glen, LLC (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C)(Zecchini, Paula) (Entered: 08/08/2016)
08/22/2016	<u>24</u>	Joint STIPULATION Extending Time to Answer the complaint as to Internet Corporation for Assigned Names and Numbers answer now due 9/26/2016, re Amended Complaint/Petition, <u>23</u> filed by defendant Internet Corporation for Assigned Names and Numbers. (Attachments: # <u>1</u> Proposed Order Proposed Order)(Enson, Eric) (Entered: 08/22/2016)
08/23/2016	<u>25</u>	ORDER ON STIPULATION ON DEFENDANTS RESPONSE DATE TO AMENDED COMPLAINT by Judge Percy Anderson, re Stipulation Extending Time to Answer, <u>24</u> . Defendants time to answer, move to dismiss or otherwise respond to the Amended Complaint shall be extended by thirty (30) days to Monday, September 26, 2016. (kss) (Entered: 08/24/2016)
09/16/2016	<u>26</u>	Second STIPULATION for Extension of Time to File Answer re Amended Complaint/Petition, <u>23</u> filed by Defendant Internet Corporation for Assigned Names and Numbers. (Attachments: # <u>1</u> Proposed Order)(Enson, Eric) (Entered: 09/16/2016)
09/16/2016	<u>27</u>	ORDER ON SECOND STIPULATION ON DEFENDANTS RESPONSE DATE TO AMENDED COMPLAINT by Judge Percy Anderson, re Stipulation to Extend Time to Answer <u>26</u> . Defendants time to answer, move to dismiss or otherwise respond to the Amended Complaint shall be extended by an additional thirty (30) days, to Wednesday, October 26, 2016. There will be no further extensions. (kss) (Entered: 09/19/2016)

10/26/2016	<u>28</u>	[DOCUMENT ORDER STRICKEN PER DOC. NO. 35] NOTICE OF MOTION AND MOTION to FOR LEAVE TO TAKE THIRD PARTY DISCOVERY OR, IN THE ALTERNATIVE, MOTION FOR THE COURT TO ISSUE A SCHEDULING ORDER filed by Plaintiff Ruby Glen, LLC. (Zecchini, Paula) Modified on 10/31/2016 (mrgo). (Entered: 10/26/2016)
10/26/2016	<u>29</u>	DECLARATION of Paula Zecchini in Support of NOTICE OF MOTION AND MOTION to FOR LEAVE TO TAKE THIRD PARTY DISCOVERY OR, IN THE ALTERNATIVE, MOTION FOR THE COURT TO ISSUE A SCHEDULING ORDER <u>28</u> filed by Plaintiff Ruby Glen, LLC. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C)(Zecchini, Paula) (Entered: 10/26/2016)
10/26/2016	<u>30</u>	NOTICE OF MOTION AND MOTION to Dismiss Case filed by Defendant Internet Corporation for Assigned Names and Numbers. Motion set for hearing on 11/28/2016 at 01:30 PM before Judge Percy Anderson. (Attachments: # <u>1</u> Memorandum of Points and Authorities, # <u>2</u> Proposed Order) (Enson, Eric) Modified on 10/28/2016 (mrgo). Modified on 11/1/2016 (smo). (Entered: 10/26/2016)
10/27/2016	<u>31</u>	NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents RE: NOTICE OF MOTION AND MOTION to FOR LEAVE TO TAKE THIRD PARTY DISCOVERY OR, IN THE ALTERNATIVE, MOTION FOR THE COURT TO ISSUE A SCHEDULING ORDER <u>28</u> . The following error(s) was found: Hearing information is missing, incorrect, or not timely. In response to this notice the court may order (1) an amended or correct document to be filed (2) the document stricken or (3) take other action as the court deems appropriate. You need not take any action in response to this notice unless and until the court directs you to do so. (mrgo) (Entered: 10/27/2016)
10/28/2016	<u>32</u>	NOTICE OF MOTION AND MOTION to to Take Third Party Discovery or, in the Alternative, Motion for the Court to Issue a Scheduling Order filed by Plaintiff Ruby Glen, LLC. Motion set for hearing on 11/28/2016 at 01:30 PM before Judge Percy Anderson. (Zecchini, Paula) (Entered: 10/28/2016)
10/28/2016	<u>33</u>	NOTICE filed by Plaintiff Ruby Glen, LLC. <i>of Errata</i> (Attachments: # <u>1</u> Attachment)(Zecchini, Paula) (Entered: 10/28/2016)
10/28/2016	<u>34</u>	RESPONSE BY THE COURT TO NOTICE TO FILER OF DEFICIENCIES IN ELECTRONICALLY FILED DOCUMENTS RE: NOTICE OF MOTION AND MOTION to Dismiss Case <u>30</u> by Clerk of Court. The document is stricken and counsel is ordered to file an amended or corrected document by 10/31/16. (mrgo) (Entered: 10/28/2016)
10/28/2016	<u>35</u>	AMENDED RESPONSE BY THE COURT TO NOTICE TO FILER OF DEFICIENCIES IN ELECTRONICALLY FILED DOCUMENTS RE: Response By Court to Notice of Deficiencies (G-112B), <u>34</u> by Clerk of Court. The document is stricken and counsel is ordered to file an amended or corrected document by 10/31/16. (mrgo) (Entered: 10/31/2016)
10/31/2016	<u>36</u>	NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents RE: NOTICE OF MOTION AND MOTION to to Take Third Party Discovery or, in the Alternative, Motion for the Court to Issue a Scheduling Order <u>32</u> . The following error(s) was found: Proposed Document was not submitted as separate attachment. In response to this notice the court may order (1) an amended or correct document to be filed (2) the document stricken or (3) take other action as the court deems appropriate. You need not take any action in response to this notice unless and until the court directs you to do so. (mrgo) (Entered: 10/31/2016)
11/01/2016	<u>37</u>	RESPONSE BY THE COURT TO NOTICE TO FILER OF DEFICIENCIES IN ELECTRONICALLY FILED DOCUMENTS RE: Notice of Deficiency in Electronically Filed Documents (G-112A), <u>36</u> by Judge Percy Anderson. The document is accepted as filed. Plaintiff must file the missing proposed order as an attachment to an efiled notice of lodging. (mrgo) (Entered: 11/01/2016)
11/01/2016	<u>38</u>	NOTICE OF LODGING filed re NOTICE OF MOTION AND MOTION to to Take Third Party Discovery or, in the Alternative, Motion for the Court to Issue a Scheduling Order <u>32</u> (Attachments: # <u>1</u> Attachment)(Zecchini, Paula) (Entered: 11/01/2016)

11/07/2016	<u>39</u>	OPPOSITION to NOTICE OF MOTION AND MOTION to Dismiss Case <u>30</u> filed by Plaintiff Ruby Glen, LLC. (Zecchini, Paula) (Entered: 11/07/2016)
11/07/2016	<u>40</u>	REQUEST FOR JUDICIAL NOTICE <i>in Support of Plaintiff Ruby Glen, LLC's Opposition to Defendant Internet Corporation for Assigned Names and Numbers' Motion to Dismiss First Amended Complaint</i> filed by Plaintiff Ruby Glen, LLC. (Attachments: # <u>1</u> Exhibit A, # <u>2</u> Exhibit B, # <u>3</u> Exhibit C, # <u>4</u> Exhibit D)(Zecchini, Paula) (Entered: 11/07/2016)
11/07/2016	<u>41</u>	OPPOSITION re: NOTICE OF MOTION AND MOTION to to Take Third Party Discovery or, in the Alternative, Motion for the Court to Issue a Scheduling Order <u>32</u> filed by Defendant Internet Corporation for Assigned Names and Numbers. (Attachments: # <u>1</u> Proposed Order)(Enson, Eric) (Entered: 11/07/2016)
11/07/2016	<u>42</u>	NOTICE OF LODGING filed re Response in Opposition to Motion <u>39</u> (Attachments: # <u>1</u> Proposed Order)(Zecchini, Paula) (Entered: 11/07/2016)
11/10/2016	<u>43</u>	NOTICE OF ERRATA filed by Defendant Internet Corporation for Assigned Names and Numbers. correcting NOTICE OF MOTION AND MOTION to Dismiss Case <u>30</u> (Enson, Eric) (Entered: 11/10/2016)
11/14/2016	<u>44</u>	REPLY IN SUPPORT OF NOTICE OF MOTION AND MOTION to Dismiss Case <u>30</u> filed by Defendant Internet Corporation for Assigned Names and Numbers. (Enson, Eric) (Entered: 11/14/2016)
11/14/2016	<u>45</u>	REPLY in Support of NOTICE OF MOTION AND MOTION to to Take Third Party Discovery or, in the Alternative, Motion for the Court to Issue a Scheduling Order <u>32</u> filed by Plaintiff Ruby Glen, LLC. (Zecchini, Paula) (Entered: 11/14/2016)
11/15/2016	<u>46</u>	NOTICE TO PARTIES by District Judge Percy Anderson. Effective November 21, 2016, Judge Anderson will be located at the 1st Street Courthouse, COURTROOM 9A on the 9th floor, located at 350 W. 1st Street, Los Angeles, California 90012. All Court appearances shall be made in Courtroom 9A of the 1st Street Courthouse, and all mandatory chambers copies shall be hand delivered to the judge's mail box outside the Clerk's Office on the 4th floor of the 1st Street Courthouse. The location for filing civil documents in paper format exempted from electronic filing and for viewing case files and other records services remains at the United States Courthouse, 312 North Spring Street, Room G-8, Los Angeles, California 90012. The location for filing criminal documents in paper format exempted from electronic filing remains at Edward R. Roybal Federal Building and U.S. Courthouse, 255 East Temple Street, Room 178, Los Angeles, California 90012. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (rrp) TEXT ONLY ENTRY (Entered: 11/15/2016)
11/23/2016	<u>47</u>	TEXT ONLY ENTRY by Judge Percy Anderson. On the Court's own motion, the Court vacates the hearing on the Motion to Dismiss <u>30</u> and the Motion to Take Third Party Discovery or, in the Alternative, Motion for the Court to Issue a Scheduling Order <u>32</u> , both previously scheduled for 11/28/2016 at 1:30 p.m. No appearance is necessary. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (smo) (Entered: 11/23/2016)
11/28/2016	<u>48</u>	MINUTES (IN CHAMBERS) – COURT ORDER by Judge Percy Anderson re: <u>30</u> MOTION to Dismiss Case ; <u>32</u> MOTION. The Court declines to address the additional arguments contained in ICANN's Motion to Dismiss. Plaintiff's Motion to Begin Discovery is denied as moot. The Court will issue a Judgment consistent with this Order. (See document for specifics) (mrgo) (Entered: 11/28/2016)
11/28/2016	<u>49</u>	JUDGMENT by Judge Percy Anderson, Related to: Order on Motion to Dismiss Case., Order on Motion for Leave, <u>48</u> . IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that ICANN shall have judgment in its favor against Plaintiff. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff's claims are dismissed with prejudice. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff take nothing and that ICANN shall have its costs of suit. (MD JS-6, Case Terminated). (mrgo) (Entered: 11/28/2016)
12/22/2016	<u>50</u>	NOTICE OF APPEAL to the 9th Circuit Court of Appeals filed by Plaintiff Ruby Glen, LLC. Appeal of Judgment, <u>49</u> . (Appeal Fee – \$505 Fee Paid, Receipt No. 0973-19100100.) (Attachments: # <u>1</u> Exhibit 1, # <u>2</u> Exhibit 2)(Zecchini, Paula) (Entered: 12/22/2016)

12/23/2016	<u>51</u>	Notice of Appearance or Withdrawal of Counsel: for attorney Charlotte Wasserstein counsel for Defendant Internet Corporation for Assigned Names and Numbers. Charlotte S. Wasserstein is no longer counsel of record for the aforementioned party in this case for the reason indicated in the G-123 Notice. Filed by defendant Internet Corporation for Assigned Names and Numbers. (Wasserstein, Charlotte) (Entered: 12/23/2016)
12/23/2016	<u>52</u>	NOTIFICATION from Ninth Circuit Court of Appeals of case number assigned and briefing schedule. Appeal Docket No. 16-56890 assigned to Notice of Appeal to 9th Circuit Court of Appeals <u>50</u> as to Plaintiff Ruby Glen, LLC. (mat) (Entered: 12/28/2016)
10/15/2018	<u>53</u>	MEMORANDUM from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals <u>50</u> filed by Ruby Glen, LLC. CCA # 16-56890. The decision of the district court is AFFIRMED. (mrgo) (Entered: 10/17/2018)
11/06/2018	<u>54</u>	MANDATE of Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals <u>50</u> , CCA # 16-56890. The judgment of the 9th Circuit Court, entered October 15, 2018, takes effect this date. This constitutes the formal mandate of the 9th CCA issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure. [See USCA Memorandum <u>53</u> , AFFIRMED.] (mat) (Entered: 11/08/2018)

Exhibit RE-8

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 ASSIGNED NAMES AND NUMBERS
 9

10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA
 12

13 RUBY GLEN, LLC ,
 14 Plaintiff,

15 v.

16 INTERNET CORPORATION FOR
 ASSIGNED NAMES AND
 17 NUMBERS,

18 Defendant.
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Case No. 2:16-cv-5505 PA (ASx)

Assigned for all purposes to the
 Honorable Percy Anderson

**OPPOSITION TO *EX PARTE*
 APPLICATION FOR
 TEMPORARY RESTRAINING
 ORDER**

[Declarations of J. Rasco, N.
 Bezsonoff, C. Willett and R.
 Weinstein filed concurrently
 herewith]

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1 **I. INTRODUCTION**

2 Plaintiff Ruby Glen LLC and six other applicants are all vying to operate the
3 “.WEB” Internet generic top-level domain (“gTLD”). After a detailed review,
4 started in 2012, the Internet Corporation for Assigned Names and Numbers
5 (“ICANN”), the nonprofit public benefit corporation responsible for evaluating
6 such applications, determined that all .WEB applications met the established
7 criteria. But, because each unique gTLD can only have one operator, ICANN
8 placed the .WEB applications into a “Contention Set” according to procedures in
9 place since 2012. On April 27, 2016, again according to procedures in place since
10 2012, ICANN scheduled an auction for July 27, 2016 (“Auction”) to resolve which
11 application in the Contention Set will proceed. Now, to avoid this competition and
12 the auction procedures it agreed to, Plaintiff seeks a temporary restraining order
13 (“TRO”) against ICANN to halt the Auction.¹ But there is no basis in either the
14 Auction procedures, the law or the evidence to grant Plaintiff the relief it seeks.

15 In submitting their applications, Plaintiff and all other applicants agreed to a
16 detailed set of procedures for the application process, which ICANN developed
17 over several years with extensive public participation, including from Plaintiff’s
18 ultimate parent company Donuts, Inc., which through its subsidiaries like Plaintiff,
19 submitted over 300 new gTLD applications. Those procedures are embodied in a
20 338-page New gTLD Applicant Guidebook (“Guidebook”) and, of particular
21 importance here, a 22-page set of “Auction Rules.” Per the Auction Rules, an
22 auction *may* be postponed if all participants agree and each submits such a request
23 to ICANN at least 45 days before the auction. In addition, an ICANN auction can

24 ¹ Despite filing over three days ago, ***Plaintiff still has not served ICANN***
25 with the Complaint or TRO application. ICANN’s counsel had to obtain copies on
26 PACER. Moreover, it is inexplicable why Plaintiff, with its claims of such urgency,
27 would not serve ICANN in the hope of making its TRO application ripe for
28 decision under the Court’s Standing Order, which requires such service. (Standing
Order at ¶ 11 (“The Court will not rule on any application for [TRO] for at least 24
hours after the party subject to the requested order has been served; such party may
file opposing or responding papers in the interim.”).)

1 be avoided altogether, as ICANN encourages in the Guidebook, if all participants
2 agree to private resolution of a contention set.

3 Here, at least one Auction participant, Nu Dotco LLC (“Nu Dotco”), refused
4 to agree to postpone the Auction or private resolution of the Contention Set. As a
5 result, no postponement request was made by the deadline, and ultimately only
6 three participants requested a delay after the deadline. Plaintiff has nonetheless
7 sought to delay, and perhaps ultimately avoid, the Auction by making
8 unsubstantiated claims regarding Nu Dotco’s application for .WEB, arguing that
9 ICANN’s investigation of those claims was insufficient. Specifically, Plaintiff
10 asserts that, on June 7, 2016, it received an email from Nu Dotco’s CFO that,
11 according to Plaintiff, “indicated a potential change in both [Nu Dotco’s]
12 management and ownership.” Plaintiff contends that this – and this alone – should
13 have caused ICANN to postpone the Auction for further investigation.

14 But three separate ICANN bodies – ICANN’s staff, ICANN’s Ombudsman,
15 and ICANN’s Board – have already looked into the alleged change in Nu Dotco’s
16 ownership or management. All three found no credible evidence that any such
17 change had occurred within Nu Dotco, and therefore nothing supported a delay of
18 the Auction. Plaintiff’s TRO application, filed nearly three months after the
19 Auction was scheduled and just two business days before bidding is set to officially
20 begin, relies solely on a strained, and now completely discredited, interpretation of
21 the Nu Dotco CFO’s June 7 email. However, the evidence accompanying this
22 opposition – sworn declarations from ICANN and Nu Dotco executives – confirms
23 that Nu Dotco has not made any change in its ownership or management, much less
24 a “disqualifying” change that should derail the Auction processes already under
25 way or the official start of bidding.

26 Separate and apart from the fact that ICANN performed a thorough
27 investigation of Plaintiff’s allegations and confirmed that nothing had changed,
28 Plaintiff’s TRO application is deficient for other reasons. First, the “emergency”

1 that Plaintiff invokes is an emergency of Plaintiff's own making. *By June 7, 2016*,
2 Plaintiff had the email from Nu Dotco's CFO that forms the entire basis of this suit,
3 and which made clear that Nu Dotco did not consent to private resolution or
4 postponement. Yet Plaintiff waited over two weeks to raise the matter with
5 ICANN. *By July 13, 2016*, Plaintiff was well aware that, based on its investigation,
6 ICANN concluded that the Auction should proceed as scheduled. Yet Plaintiff
7 waited over another week to bring this action. Second, Plaintiff fails to satisfy any
8 of the four requirements for emergency injunctive relief: (1) Plaintiff is not likely
9 to succeed on the merits of its claims because its claims have no merit, particularly
10 since Plaintiff agreed to the Auction Rules that it now seeks to avoid; (2) Plaintiff
11 will not suffer irreparable harm in the absence of injunctive relief because the
12 Auction Rules provide means to address these issues post-Auction and any injuries
13 can be compensated by financial adjustments; (3) the balance of equities weighs
14 against injunctive relief because it would disrupt long-agreed gTLD-assignment
15 procedures that provide needed certainty to applicants; and (4) the public interest
16 strongly favors denying the TRO because the Guidebook and Auction Rules that
17 Plaintiff now seeks to upend have been in place for years and have been relied upon
18 by hundreds of applicants. Third, in its application for .WEB, like the over 300
19 applications submitted by other subsidiaries of Plaintiff's ultimate parent, Plaintiff
20 agreed to a covenant not to sue ICANN for claims associated with Plaintiff's
21 application. This lawsuit plainly violates Plaintiff's contractual obligation and bars
22 the relief sought.

23 To be clear, everything that Plaintiff complains about in this suit is an
24 express term or aspect of the New gTLD Program agreed to by Plaintiff when it
25 applied for .WEB in 2012. For instance, the contention set procedures, the auction
26 provisions, and the covenant not to sue ICANN, were acknowledged and accepted
27 by Plaintiff when it submitted its application pursuant to the Guidebook. Likewise,
28 the principle that ICANN will consider postponing an auction only when *all*

1 participants make such a request is express in the very Auction Rules that Plaintiff
2 accepted when it executed a “Bidder Agreement,” in May 2016, stating that
3 Plaintiff ***agrees to be bound by the Auction Rules***.

4 ICANN, as a nonprofit, has no financial motivation in the Auction
5 proceeding. As has been widely publicized, all auction funds will be utilized for
6 charitable goals to be determined by the broader Internet community. ICANN’s
7 only motivation in the Auction proceeding is ensuring that the Guidebook and
8 Auction Rules are followed, as Plaintiff and all applicants agreed long ago.

9 **II. FACTUAL BACKGROUND**

10 **A. ICANN AND THE NEW GTLD PROCESS.**

11 ICANN is a California non-profit public benefit corporation that oversees the
12 technical coordination of the Internet’s domain name system (“DNS”) on behalf of
13 the Internet community, ensuring the DNS’s continued security, stability and
14 integrity. *See Name.Space, Inc. v. Internet Corp. for Assigned Names & Nos.*, 795
15 F.3d 1124, 1127–28 (9th Cir. 2015). The DNS’s essential function is to convert
16 easily-remembered domain names, such as “uscourts.gov” or “icann.org,” into
17 numeric IP addresses understood by computers. (Willett Decl. ¶ 2.) The portion of
18 a domain name to the right of the last dot (such as, “.gov” and “.org”) is known as a
19 generic top-level domain (“gTLD”). *Name.Space, Inc.*, 795 F.3d at 1127.

20 Throughout its history, ICANN has sought to expand the number of gTLDs
21 to promote consumer choice and competition. (Willett Decl. ¶ 3.) In 2012, ICANN
22 launched a “New gTLD Program” application round, in which it invited any
23 interested party to apply for the creation of a new gTLD and for the opportunity to
24 be designated as the operator of that gTLD. (Willett Decl. ¶ 3.) As the operator,
25 the applicant would be responsible for managing the assignment of names within
26 the gTLD and maintaining the gTLD’s database of names and IP addresses.
27 (Willett Decl. ¶ 3.)

28 In connection with the New gTLD Program, ICANN published the

1 Guidebook, which prescribes the requirements for new gTLD applications to be
2 approved, and the criteria by which they are evaluated. (Willett Decl. ¶ 4.) The
3 Guidebook was developed in a years-long public consultation process in which
4 numerous versions were published for public comment and revised based on
5 comments received from the public. (Willett Decl. ¶ 4.)

6 Because technical, operational and financial capabilities are critical to an
7 applicant's suitability to run a gTLD, applicants are required to identify the entities
8 and people who will be involved in the management of the gTLD applied for.
9 (Zecchini Decl., Ex. C [Guidebook § 2].) Each applicant must also be screened and
10 submit to certain background checks. (*Id.*, §§ 1.2.1, 2.1.) Important to this lawsuit
11 is the Guidebook's provision that, "[i]f at any time during the evaluation process
12 information previously submitted by an applicant becomes untrue or inaccurate, the
13 applicant must promptly notify ICANN." (*Id.*, § 1.2.7.)

14 In the event that more than one application for the same or similar gTLDs
15 passes all of the prescribed levels of evaluation, the applications are placed in a
16 string contention set (since only one registry operator can operate a gTLD
17 consisting of the exact same letters) that can be resolved through a number of
18 processes. (Zecchini Decl., Ex. C [Guidebook § 1.1.2.10].) The Guidebook
19 "encourage[s applicants] to resolve string contention cases among themselves prior
20 to the string contention resolution stage." (*Id.*) Should such a private resolution not
21 occur, the contention set will proceed to an auction of last resort governed by the
22 Auction Rules that all applicants agreed to by applying. (*Id.*)

23 The Auction Rules provide that an auction will be scheduled after ICANN
24 reviews and investigates the applications in a contention set. Then, to facilitate
25 private resolution, "if each and every member of the Contention Set submits a
26 postponement request through the ICANN Customer Portal, ICANN at its sole
27 discretion may postpone the Auction for that Contention Set to a future date."
28 (Zecchini Decl., Ex. J [Auction Rules ¶ 10].) The Auction Rules elaborate that the

1 request “must be submitted at least 45 days prior to the scheduled Auction Date [in
2 this instance, June 13, 2016] and ICANN must receive a request from each member
3 of the contention set.”

4 Any financial proceeds of such an auction initially flow to ICANN. (*Id.* §
5 4.3.) However, these auction proceeds have been fully segregated in separate bank
6 and investment accounts, and earmarked until the community develops and the
7 ICANN Board authorizes a plan for the appropriate use of the funds. (Weinstein
8 Decl. ¶ 12; *see also* Zecchini Decl., Ex. C [Guidebook § 4.3, n.1].) The ICANN
9 community has indicated that it will create a Cross-Community Working Group to
10 develop a proposal for eventual consideration by the ICANN Board on the manner
11 in which the new gTLD auction proceeds should be allocated, and the formation of
12 that working group was discussed at a June 28, 2016 meeting during the ICANN56
13 Public Meeting in Helsinki. (Weinstein Decl. ¶ 13.)²

14 The Guidebook includes critical terms and conditions that all applicants,
15 including Plaintiff, acknowledged and accepted by submitting a gTLD application.
16 (Zecchini Decl., Ex. C [Guidebook § 6].) For instance, the Guidebook contains a
17 release (the “Covenant Not to Sue”), which bars lawsuits against ICANN arising
18 out of its evaluation of any new gTLD application:

19 Applicant hereby releases ICANN and the ICANN Affiliated Parties
20 from any and all claims by applicant that arise out of, are based upon,
21 or are in any way related to, any action, or failure to act, by ICANN or
22 any ICANN Affiliated Party in connection with ICANN’s or an
23 ICANN Affiliated Party’s review of this application, investigation or
24 verification, any characterization or description of applicant or the
25 information in this application, any withdrawal of this application or

26
27 ² See [https://icann562016.sched.org/event/7NE0/cross-community-session-
28 charter-for-the-ccwg-on-auction-
proceeds?iframe=no&w=i:100;&sidebar=yes&bg=no](https://icann562016.sched.org/event/7NE0/cross-community-session-charter-for-the-ccwg-on-auction-proceeds?iframe=no&w=i:100;&sidebar=yes&bg=no).

1 the decision by ICANN to recommend, or not to recommend, the
2 approval of applicant's gTLD application. APPLICANT AGREES
3 NOT TO CHALLENGE, IN COURT OR IN ANY OTHER
4 JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN
5 WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY
6 WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR
7 ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER
8 LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED
9 PARTIES WITH RESPECT TO THE APPLICATION. . . .

10 (*Id.* § 6.6 (emphasis in original).)

11 Although all gTLD applicants agreed not to file lawsuits against ICANN
12 related to their applications, applicants are not left without recourse. ICANN's
13 Bylaws provide for several accountability mechanisms to ensure that ICANN
14 operates in accordance with its Articles of Incorporation ("Articles"), Bylaws,
15 policies and procedures. (Zecchini Decl., Ex. B [Bylaws, Art. IV].) One such
16 provision establishes an Ombudsman to informally resolve disputes. In addition,
17 reconsideration requests may be used to challenge ICANN Board actions alleged to
18 have been undertaken "without consideration of material information" or with
19 "reliance on false or inaccurate material information," or may be used to challenge
20 staff action alleged to contravene ICANN's established policies. (*Id.*, Art. IV, § 2].)

21 Another accountability mechanism provided for in ICANN's Bylaws is a
22 request for an independent review process ("IRP"), under which an aggrieved
23 applicant can ask independent panelists to evaluate whether an action of ICANN's
24 Board was inconsistent with ICANN's Articles and Bylaws. (*Id.*, Art. IV, § 2.)

25 **B. THE APPLICATIONS FOR .WEB AND PLAINTIFF'S CLAIMS**
26 **REGARDING NU DOTCO.**

27 In June 2012, Plaintiff, Nu Dotco, and five other applicants applied for .WEB.
28 Another applicant applied for .WEBS. The seven applications for .WEB and the

1 remaining application for .WEBS passed all applicable evaluations and were placed
2 in the Contention Set, pursuant to the procedures set forth in the Guidebook.
3 (Willet Decl. ¶ 6.)

4 Nu Dotco's application stated that it was a Delaware Limited Liability
5 Company, and listed three people as its officers: Jose Ignacio Rasco III, CFO; Juan
6 Diego Calle, CEO; and Nicolai Bezsonoff, COO. (Zecchini Decl., Ex. E.) It listed
7 Mr. Rasco as its "Primary Contact" and Mr. Bezsonoff as its "Secondary Contact."
8 (*Id.*) It identified two owners having at least 15% interests: Domain Marketing
9 Holdings, LLC and Nuco LP, LLC. (*Id.*)

10 On April 27, 2016, ICANN scheduled the Auction, notified all active
11 members of the Contention Set, and provided them with instructions and deadlines
12 to participate in the Auction. (Willet Decl. ¶ 7.) On May 24, 2016, Plaintiff
13 executed the Bidder Agreement thereby "agree[ing] to be bound by the Auction
14 Rules as published on ICANN's website." (Weinstein Decl., Exs. B-C.) Plaintiff
15 alleges that Nu Dotco is the only applicant in the Contention Set that did not agree
16 to resolve the Contention Set privately. (Compl. ¶ 36.) Thus, on or about June 7,
17 2016, Plaintiff contacted Nu Dotco and asked it to reconsider its decision to forego
18 private resolution of the Contention Set.

19 On June 7, 2016, Mr. Rasco, Nu Dotco's CFO, made clear in his response
20 that Nu Dotco would not be changing its position, explaining: "Nicolai [Bezsonoff]
21 is at NSR full-time and is no longer involved with our TLD applications. I am still
22 running our program and Juan [Diego Calle] sits on the board with me and several
23 others. Based on your request, I went back to check with all the powers that be and
24 there was no change in response and will not be seeking an extension." (Nevett
25 Decl., Ex. A.) Over two weeks later, on June 23, 2016, based solely on this email
26 from Nu Dotco's CFO, Plaintiff suggested to ICANN that Nu Dotco had changed
27 its ownership and/or management structure, but had not reported the change to
28 ICANN, as required. (Willet Decl. ¶ 12.) Plaintiff requested that the Auction be

1 delayed pending further investigation. Plaintiff also formally raised the issue with
2 the ICANN Ombudsman during the ICANN56 Public Meeting in late June 2016.
3 (Compl. ¶ 40; Willet Decl. ¶ 16.)

4 After receiving Plaintiff's allegations regarding Nu Dotco and the request to
5 postpone the Auction, ICANN investigated Plaintiff's claims. (Willett Decl. ¶¶ 12-
6 13.) On June 27, 2016, ICANN sent an email to Nu Dotco, asking it to confirm that
7 there had not been any "changes to your application or the [Nu Dotco] organization
8 that need to be reported to ICANN. This may include any information that is no
9 longer true and accurate in the application, including changes that occur as part of
10 regular business operations (*e.g.*, changes to officers and directors, application
11 contacts)." (Willett Decl. ¶ 13, Ex. B.) Mr. Rasco responded that same day to
12 "confirm that there have been no changes to the [Nu Dotco] organization that would
13 need to be reported to ICANN." (Willett Decl. ¶ 13, Ex. B.)

14 Subsequently, both ICANN staff and the Ombudsman contacted Mr. Rasco
15 to again inquire about the claims of potential changes in Nu Dotco's organization.
16 Specifically, ICANN staff interviewed Mr. Rasco by telephone on July 8, 2016
17 regarding the allegations. (Willett Decl. ¶ 18.) During that call, and later in a
18 confirming email on July 11, 2016, Mr. Rasco stated that: "Neither the ownership
19 nor the control of Nu Dotco, LLC has changed since we filed our application. The
20 Managers designated pursuant to the company's LLC operating agreement (the
21 LLC equivalent of a corporate Board) have not changed. And there have been no
22 changes to the membership of the LLC either." (Willett Decl. ¶ 18, Ex. F.) Mr.
23 Rasco also stated that he had already provided this same information to the ICANN
24 Ombudsman in responding to the Ombudsman's investigation of the complaint
25 lodged with him. (Willett Decl. ¶ 18.) After receiving information from Nu Dotco
26 and ICANN, the Ombudsman informed ICANN that, in his opinion, there was
27 nothing to justify a postponement of the Auction based on unfairness to the other
28 applicants. (Willett Decl. ¶ 21, Ex. G.)

1 After completing its investigation of the allegations regarding Nu Dotco's
2 application, on July 13, 2016, ICANN sent a letter to the members of the
3 Contention Set stating, among other things, that "in regards to potential changes of
4 control of [Nu Dotco], we have investigated the matter, and to date we have found
5 no basis to initiate the application change request process or postpone the auction."
6 (Zecchini Decl., Ex. G.)

7 On 17 July 2016, Plaintiff filed a reconsideration request ("Reconsideration
8 Request"), seeking postponement of the Auction and requesting a "thorough and
9 transparent investigation into the apparent discrepancies and/or changes in [Nu
10 Dotco's] .WEB/.WEBS application." (Zecchini Decl., Ex. H., § 9, Pg. 11.) On
11 July 21, 2016, ICANN's Board Governance Committee ("BGC") issued a twelve-
12 page determination denying Plaintiff's Reconsideration Request. ("Reconsideration
13 Request Determination," Zecchini Decl., Ex. I.) The Reconsideration Request
14 Determination explained that no postponement of the Auction was warranted
15 because: (1) ICANN had thoroughly investigated Plaintiff's claims and found that
16 Nu Dotco had not undergone a change in leadership or control; and (2) there was no
17 pending accountability mechanism (*i.e.*, a reconsideration request or IRP) that could
18 support a postponement of the Auction, because the accountability mechanisms
19 were not initiated before April 27, 2016, the day on which the Auction was
20 scheduled. As the BGC pointed out, under the agreed-upon Auction Rules, an
21 auction postponement is only warranted if there is a pending accountability
22 mechanism "prior to the scheduling of an Auction." (Zecchini Decl., Ex. J ¶ 10.)

23 Plaintiff is correct that the Auction is scheduled to officially begin on July 27,
24 2016 at 6:00 am Pacific time. But as Plaintiff knows well, many facets of the
25 Auction process *are already underway*. For instance, by July 20, the Auction
26 participants transferred deposits into escrow accounts overseen by the Auction
27 provider, which may amount to as much as \$16 million in total. (Weinstein Decl. ¶
28 7.) Likewise, on July 20, the "blackout period" began, which is a period of time

1 called for in the Auction Rules during which auction participants are prohibited
2 from communicating, or cooperating, with one another in terms of the auction.
3 (Weinstein Decl. ¶ 7.) Tomorrow, on July 26, around 6:00 am Pacific time, the
4 Auction provider will conduct a “mock auction” in order to allow participants to
5 test connectivity and familiarize themselves with the system, if they are not already
6 familiar with it. (Weinstein Decl. ¶ 7.) About an hour later, the Auction provider
7 will open “early bidding,” which allows participants to submit their first round bids
8 in preparation for the start of the Auction. (Weinstein Decl. ¶ 7.) These early bids,
9 however, will not be accepted until after the Auction officially begins at 6:00 am
10 Pacific time on July 27. (Weinstein Decl. ¶ 7.)

11 **III. LEGAL STANDARD**

12 “The opportunities for legitimate ex parte applications are extremely
13 limited.” *Horne v. Wells Fargo Bank*, 969 F. Supp. 2d 1203, 1205 (C.D. Cal. 2013)
14 (citation and internal quotation marks omitted). A successful ex parte application
15 must demonstrate that there is good cause to allow the moving party to “go to the
16 head of the line in front of all other litigants and receive special treatment.”
17 *Mission Power Eng’g Co. v. Cont’l Cas. Co.*, 883 F. Supp. 488, 492 (C.D. Cal.
18 1995). “The use of such a procedure is justified only when (1) there is a threat of
19 immediate or irreparable injury; (2) there is danger that notice to the other party
20 may result in the destruction of evidence or the party’s flight; or (3) the party seeks
21 a routine procedural order that cannot be obtained through a regularly noticed
22 motion (*i.e.*, to file an overlong brief or shorten the time within which a motion may
23 be brought).” *Horne*, 969 F. Supp. 2d at 1205.

24 A temporary restraining order is available when the applicant may suffer
25 irreparable injury before the court can hear the application for a preliminary
26 injunction. 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal*
27 *Practice and Procedure* § 2951 (3d. 1998); *see* Fed. R. Civ. P. 65(b). But requests
28 for temporary restraining orders are governed by the same general standards that

1 govern the issuance of a preliminary injunction. *See New Motor Vehicle Bd. Of*
2 *Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1347 n.2 (1977); *L.A. Unified Sch. Dist. v.*
3 *U.S. Dist. Ct.*, 650 F.2d 1004, 1008 (9th Cir. 1981).

4 A preliminary injunction is an “extraordinary and drastic remedy” that is
5 never awarded as of right. *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (citation
6 omitted). The court must determine whether the plaintiff has established *all* of the
7 following: (1) it is likely to succeed on the merits; (2) it is likely to suffer
8 irreparable harm in the absence of preliminary relief; (3) the balance of equities tips
9 in its favor; and (4) an injunction is in the public interest. *Winter v. Nat. Res. Def.*
10 *Council, Inc.*, 555 U.S. 7, 20 (2008).

11 Before these standards were announced in *Winter*, courts in the Ninth Circuit
12 applied an alternative “sliding-scale” test for evaluating preliminary injunctions that
13 allowed the movant to offset the weakness of a showing on one factor with the
14 strength of another, which is what Plaintiff erroneously relies upon as an
15 “alternative” test. *See Mot. at 20-21; Alliance for Wild Rockies v. Cottrell*, 632
16 F.3d 1127, 1132-35 (9th Cir. 2011). The Ninth Circuit has since held, however,
17 that “[t]o the extent our cases have suggested a lesser standard, they are no longer
18 controlling, or even viable.” *Am. Trucking Assocs. v. City of L.A.*, 559 F.3d 1046,
19 1052 (9th Cir. 2009). Accordingly, Plaintiff must show it can meet all four of the
20 preliminary injunction requirements set forth above. Plaintiff has not.

21 **IV. ARGUMENT**

22 **A. PLAINTIFF SEEKS EMERGENCY RELIEF ONLY BECAUSE** 23 **OF ITS OWN DELAY.**

24 *Ex parte* relief may not be awarded if the “emergency” nature of the request
25 is of the plaintiff’s “own making.” *See, e.g., Pascascio v. New Century Mortg.*
26 *Corp.*, No. CV 12-839 PSG (FMOx), 2012 U.S. Dist. LEXIS 68533, at *7 (C.D.
27 Cal. May 16, 2012) (denying temporary restraining order). Here, the urgent timing
28 of Plaintiff’s *ex parte* TRO was caused by its own delay.

1 Plaintiff's Complaint squarely admits that as of June 7, 2016, it was in
2 possession of all facts that it now submits as support for this dispute. Namely, that
3 as of at least June 7, 2016, Plaintiff purportedly believed there was a discrepancy
4 between Nu Dotco's application and its current ownership or management, and that
5 Nu Dotco would not agree to postpone the Auction. (Compl. ¶ 38.) On June 29,
6 2016, ICANN met with Mr. Nevett to discuss a number of business matters,
7 including his claims regarding Nu Dotco's management. (Willett Decl. ¶ 15.)
8 During that meeting, Mr. Nevett requested that the Auction be postponed because
9 of his claimed concerns that Nu Dotco had undergone a change in ownership or
10 management. (Willett Decl. ¶ 15.) ICANN informed him that it had already
11 investigated the alleged management changes with Nu Dotco's representative, who
12 had confirmed that no such changes had occurred. (Willett Decl. ¶ 15.) Based on
13 the fact that ICANN had no evidence of such a management change, ICANN was
14 continuing to proceed with the Auction as scheduled. Thus, in *early June* Plaintiff
15 could have filed its action and sought the relief it now seeks on an *ex parte* basis.
16 And at the very latest, Plaintiff could have sought relief shortly after ICANN
17 informed Plaintiff, on July 13, 2016, that ICANN "has investigated the matter" and
18 had no intention of postponing the Auction. (Compl. ¶ 43.) Instead, Plaintiff
19 waited until July 22 to file this matter, after many facets of the Auction process had
20 already begun (*see* Weinstein Decl. ¶ 7), and just two business days before bidding
21 officially begins.

22 ICANN and the Court are both therefore forced to rush into this matter,
23 which Plaintiff could have commenced weeks earlier. Because the emergency
24 Plaintiff invokes is entirely of Plaintiff's own making, the relief must be denied.
25 *See, e.g., Carnero v. Wash. Mut.*, No. C 09-5330 JF (RS), 2009 U.S. Dist. LEXIS
26 123532, at *4 (N.D. Cal. Dec. 30, 2009) ("Plaintiffs would have had to receive
27 notice of any sale some time ago; accordingly, the 'emergency' nature of their
28 application appears to be of their own making.").

1 **B. PLAINTIFF DOES NOT MEET THE REQUIREMENTS FOR**
2 **THE ISSUANCE OF A TEMPORARY RESTRAINING ORDER.**

3 1. **Plaintiff Is Unlikely To Succeed On The Merits Of Its**
4 **Claims.**

5 Plaintiff is not likely to succeed on the merits of its claims. Each of
6 Plaintiff's causes of action is completely dependent on the assertion that there was a
7 change to Nu Dotco's ownership or management that required ICANN to halt the
8 Auction. The evidence submitted by ICANN with this Opposition—in particular,
9 the sworn declarations of Nu Dotco's officers—demonstrate that Plaintiff's
10 assertion is false and that ICANN reached the correct conclusion in finding no basis
11 to delay the Auction. For instance, Nu Dotco's CFO, Mr. Rasco, has again
12 confirmed, now under penalty of perjury, that "[t]here have been no changes or
13 amendments made to Nu Dotco's management since the time that Nu Dotco
14 submitted its .WEB application to ICANN" and that "[t]here have been no changes
15 or amendments made to Nu Dotco's membership, nor has any transfer of
16 membership otherwise occurred, since the time that Nu Dotco submitted its
17 application to ICANN." (Rasco Decl. ¶¶ 6, 8.) Nu Dotco's COO, Mr. Bezsonoff,
18 confirms the same in his declaration and explains that even though he is employed
19 by another company currently, he is still performing his duties as an officer of Nu
20 Dotco while they await resolution of the .WEB Contention Set. (Bezsonoff Decl.
21 ¶¶ 5-6, 8-9.) Finally, Mr. Rasco explains in his declaration that the single email
22 Plaintiff relies upon to support its claims was taken completely out of context and
23 in no way communicated a change of ownership or management at Nu Dotco
24 because there was no such change. (Rasco Decl. ¶¶ 11-15.)

25 Because there is no evidence justifying postponement of the Auction, each of
26 Plaintiff's claims fail. And each claim is further deficient for the following reasons.

27 **(a) Plaintiff Is Unlikely To Succeed On The Merits Of The**
28 **Contract Claim.**

 Plaintiff's breach of contract claim alleges that ICANN did not fulfill its

1 obligations set forth in the Bylaws, Articles or Guidebook in two ways, yet Plaintiff
2 will not succeed on the merits of either. (Compl. ¶¶ 54-63.)

3 First, Plaintiff alleges that ICANN breached its commitments under the
4 Bylaws to operate in a transparent, expedient, neutral and prompt manner. (Compl.
5 ¶ 60.) To start, the only contractual relationship between ICANN and Plaintiff is by
6 virtue of its status as an applicant for .WEB; Plaintiff does not cite any reasoning or
7 authority that suggests the terms of ICANN's Bylaws are incorporated into the
8 contractual relationship between Plaintiffs and ICANN. *See Klein v. Chevron*
9 *U.S.A., Inc.*, 202 Cal. App. 4th 1342, 1384 (2012) (courts “must determine whether
10 the alleged agreement is ‘reasonably susceptible’ to the meaning ascribed to it in
11 the complaint” for breach of contract claims) (citation omitted); *Republic Bank v.*
12 *Marine Nat'l Bank*, 45 Cal. App. 4th 919, 923 (1996) (“A secondary document
13 becomes part of a contract as though recited verbatim *when it is incorporated into*
14 *the contract by reference* provided that the terms of the incorporated document are
15 readily available to the other party.”) (emphasis added and citation omitted).
16 Indeed, this Court has considered this precise issue in connection with another case
17 filed by a disappointed applicant against ICANN, and held that ICANN is only
18 bound by the contractual obligations set forth in the application documents to which
19 ICANN agreed to be bound, not other extraneous materials. *See Image Online*
20 *Design, Inc. v. Internet Corp. for Assigned Names & Nos.*, No. CV 12-08968 DDP
21 (JCx), 2013 U.S. Dist. LEXIS 16896, at *9, 11 (C.D. Cal. Feb. 7, 2013) (dismissing
22 breach of contract claim because the contract's “provisions give ICANN no
23 responsibilities with respect to [the plaintiff's new gTLD] Application beyond its
24 initial consideration of the Application . . . [the applicant] has pointed to no contract
25 terms that ICANN has breached.”) (Pregerson, J.).

26 Moreover, ICANN did **not** breach any of the cited Bylaws. As discussed
27 above, and as is replete in the evidence, ICANN engaged in a thorough and
28 transparent investigation of Plaintiff's claims about Nu Dotco's ownership or

1 management. Through multiple steps, ICANN staff verified that this claim was
2 factually inaccurate, and transparently informed Plaintiff of the results of its
3 investigation in its July 13, 2016 letter. (Compl. ¶ 43.) In addition, ICANN’s
4 Ombudsman investigated Plaintiff’s claims and found there was no support for
5 them. (Willett Decl. ¶¶ 11, 17, 19, 21.) Finally, ICANN’s BGC independently
6 evaluated Plaintiff’s assertions and concluded that there was no evidence showing
7 that postponement was necessary. (Zecchini Decl., Ex. I.) And, tellingly, each of
8 these separate findings have been confirmed by the declarations of Nu Dotco
9 executives stating, under penalty of perjury, that no ownership or management
10 change has occurred. (*See generally* Rasco Decl.; Bezsonoff Decl.)

11 As to the second portion of Plaintiff’s breach of contract claim, Plaintiff
12 alleges that “ICANN also promised that a contention set would only proceed to
13 auction where all active applications in the contention set have ‘no pending ICANN
14 Accountability Mechanisms’.” (Compl. ¶ 61.) This argument ignores the plain text
15 of the Auction Rules. All applicants agreed to the terms of the Guidebook when
16 they applied, and Plaintiff has recently signed a Bidder’s Agreement agreeing that
17 the Auction is governed by the Auction Rules. The operative Auction Rules, dated
18 February 24, 2015, state that all “*pending* ICANN Accountability Mechanisms”
19 must be resolved “prior to the *scheduling* of an Auction.” (Zecchini Decl., Ex. J ¶
20 10 (emphasis added).) Here, the Auction was *scheduled* on April 27, well before
21 Plaintiff invoked any ICANN accountability mechanism. Plaintiff did not lodge a
22 complaint with the Ombudsman until late June, two months after the Auction was
23 scheduled. (Compl. ¶ 40.) Similarly, Plaintiff did not submit a Reconsideration
24 Request until July 17. (Compl. ¶ 49.) And Plaintiff did not even attempt to initiate
25 a Request for Independent Review until July 22, 2016. (Nevett Decl. ¶ 9.) Thus,
26 no ICANN accountability mechanisms were pending on April 27, 2016 when the
27 Auction was scheduled. Indeed, the Auction Rules were designed to, among other
28 things, prevent exactly this sort of late, unilateral attempt to delay an auction.

1 Finally, Plaintiff's allegation that ICANN was motivated by money to not
2 investigate Plaintiff's claims regarding Nu Dotco because ICANN receives the
3 financial proceeds of all new gTLD auctions (Compl. ¶ 62), is misguided. As a
4 nonprofit, ICANN has no interest in financial gain for its own sake. The plain text
5 of the Guidebook makes clear that ICANN will put all proceeds stemming from
6 new gTLD auctions toward charitable purposes: "Any proceeds from auctions will
7 be reserved and earmarked until the uses of funds are determined. Funds must be
8 used in a manner that supports directly ICANN's Mission and Core Values and also
9 allows ICANN to maintain its not for profit status." (Guidebook § 4.3, n.1.) More
10 specifically, the Guidebook provides that "[p]ossible uses of auction funds include
11 formation of a foundation with a clear mission and a transparent way to allocate
12 funds to projects that are of interest to the greater Internet community" (*Id.*)
13 As has been widely publicized, the auction proceeds will be utilized in a manner to
14 be determined by the community, which is likely to predominantly include various
15 global charitable purposes, as the Guidebook suggests. These auction proceeds
16 have been reserved until the ICANN Board authorizes a plan for the appropriate use
17 of the funds. (Weinstein Decl. ¶ 7.) The ICANN community has indicated that it
18 wants to create a Cross-Community Working Group to develop proposals for
19 eventual consideration by the ICANN Board. (Weinstein Decl. ¶ 7.) During the
20 ICANN56 Public Meeting, a meeting took place on June 28, 2016 to discuss the
21 formation of that Cross-Community Working Group.³

22 **(b) Plaintiff Is Unlikely To Succeed On The Merits Of The**
23 **Breach Of Implied Covenant Of Good Faith And Fair**
24 **Dealing Claim.**

25 Plaintiff's breach of the implied covenant of good faith and fair dealing claim
26 relies on the same allegations asserted in the breach of contract claims—that

27 ³ See <https://icann562016.sched.org/event/7NE0/cross-community-session-charter-for-the-ccwg-on-auction-proceeds?iframe=no&w=i:100;&sidebar=yes&bg=no>.

1 ICANN did not conduct an “adequate investigation” of Nu Dotco and improperly
2 failed to postpone the Auction. (Compl. ¶ 67.) Thus, Plaintiff’s breach of the
3 implied covenant claims is as deficient as its breach of contract claim.

4 **(c) Plaintiff Is Unlikely To Succeed On The Merits Of The**
5 **Negligence Claim.**

6 Plaintiff is on even less firm footing with respect to its negligence claim.
7 “Actionable negligence is traditionally regarded as involving the following: (a) a
8 legal duty to use due care; (b) a breach of such legal duty; (c) the breach as the
9 proximate or legal cause of the resulting injury.” *Jackson v. AEG Live, Inc.*, 233
10 Cal. App. 4th 1156, 1173 (2015) (citation omitted). ICANN, however, owes
11 Plaintiff no legal duty of care, and, in any event, ICANN did not breach any duty
12 owed to Plaintiff.

13 To start, the economic loss rule bars Plaintiff’s negligence claim, because
14 ICANN owes no legal duty to Plaintiff above and beyond its contractual
15 obligations. As the California Supreme Court has recognized, “[t]he economic loss
16 rule requires a [contractual party] to recover in contract for purely economic loss
17 due to disappointed expectations, unless he can demonstrate harm above and
18 beyond a broken contractual promise.” *Robinson Helicopter Co. v. Dana Corp.*, 34
19 Cal. 4th 979, 988 (2004); *In re iPhone Application Litig.*, 844 F. Supp. 2d 1040,
20 1064 (N.D. Cal. 2012) (“Purely economic damages to a plaintiff which stem from
21 disappointed expectations from a commercial transaction must be addressed
22 through contract law; negligence is not a viable cause of action for such claims.”).
23 Plaintiff has not alleged any harm other than purported damages stemming from its
24 contractual relationship with ICANN. The negligence claim must therefore fail as a
25 matter of law. *See In re Sony Gaming Networks & Customer Data Sec. Breach*
26 *Litig.*, 996 F. Supp. 2d 942, 973 (S.D. Cal. 2014) (granting motion to dismiss
27 negligence claim with prejudice based on economic loss rule).

28

1 **(d) Plaintiff Is Unlikely To Succeed On The Merits Of The**
2 **Unfair Competition Claim.**

3 Plaintiff makes allegations under all three prongs of Section 17200. First,
4 Plaintiff claims that ICANN acted in an “unlawful” manner by the including the
5 Covenant Not to Sue in the Guidebook. (Compl. ¶ 77.) Second, Plaintiff alleges
6 that ICANN acted “unfair[ly] when it conducted what Plaintiff views as a “cursory
7 investigation” into Plaintiff’s claims about Nu Dotco, and decided based on that
8 investigation not to postpone the Auction. (Compl. ¶ 78.) Third, Plaintiff alleges
9 that ICANN acted in a fraudulent manner when it represented that it would adhere
10 to the terms of its Bylaws and the Auction Rules. (Compl. ¶ 79.) All three claims
11 fail because there is nothing unlawful about the Covenant Not to Sue, as discussed
12 below, ICANN fully investigated Plaintiff’s claims regarding Nu Dotco and
13 ICANN’s conduct at all times complied with its obligations under its Bylaws and
14 the Guidebook. In addition, Plaintiff has not established standing to assert its
15 Section 17200 claim because Plaintiff has not “lost money or property” because of
16 the alleged violations of the statute, as required. Cal. Bus. & Prof. Code § 17203.

17 **(e) Plaintiff Is Unlikely To Succeed On The Merits Of The**
18 **Declaratory Relief Claim.**

19 Plaintiff’s declaratory relief claim seeks a judicial declaration concerning one
20 and only one matter: “the legality and effect” of the Covenant Not to Sue. Yet for
21 all of the reasons discussed below, the Covenant Not to Sue is fully enforceable.
22 *See generally Commercial Connect v. Internet Corp. for Assigned Names & Nos.*,
23 No. 3:16-cv-00012-JHM, 2016 U.S. Dist. LEXIS 8550 (W.D. Ky. Jan. 26, 2016)
24 (denying an application for emergency injunctive relief seeking to prevent a new
25 gTLD auction from taking place the next day). Moreover, the enforceability of the
26 Covenant Not to Sue has no bearing on whether the Auction should proceed. Even
27 if Plaintiff were successful in challenging the Covenant Not to Sue, Plaintiff has no
28 cause of action against ICANN. In other words, the Auction could and should

1 proceed while Plaintiff litigates whether it can litigate with ICANN.

2 **2. Plaintiff Will Not Suffer Irreparable Harm In The Absence**
3 **Of The Requested Injunctive Relief.**

4 Plaintiff will *not* suffer irreparable harm in the absence of the requested
5 injunctive relief. To start, monetary loss does not comprise irreparable injury for
6 purposes of assessing the propriety of injunctive relief. *Amylin Pharms., Inc. v. Eli*
7 *Lilly & Co.*, 456 F. App'x 676, 678 (9th Cir. 2011) (affirming denial of preliminary
8 injunction because “harm that is fully compensable through money damages . . .
9 does not support injunctive relief”). Whatever the results of the Auction, any harm
10 Plaintiff might claim to have suffered is purely financial. Indeed, Plaintiff may well
11 win the Auction for .WEB. Should that occur, its only claim would arise from the
12 presence of Nu Dotco in the Auction, possibly raising Plaintiff’s winning bid. But
13 the risk that an auction might include a participant subject to later disqualification is
14 already fully addressed in the agreed Auction Rules. In particular, paragraph 62 of
15 the Auction Rules concerns “Effect of Ineligibility of Winner To Sign a Registry
16 Agreement or To Be Delegated the Contention String.” It provides mechanisms to
17 address the situation when an auction took place with a participant that is later
18 disqualified. Having agreed to these mechanisms, Plaintiff has no basis to assert
19 that losses from such circumstances are irreparable. To the extent it is concerned
20 about “disclosure of how each of the applicant’s [sic] valued .WEB as well as the
21 bidding strategies for each bidder,” (Mot. at 28) it has already agreed that such
22 disclosure does not justify cancelling an auction.

23 Moreover, the results of an auction “could be undone” if a disqualification is
24 discovered even long afterward. (*Cf.* Mot. at 28.) There is no technological barrier
25 that would prevent the transfer of the Registry Agreement for a gTLD from one
26 registry operator to another after the gTLD is contracted or even delegated into the
27 root zone and in operation. (Weinstein Decl. ¶ 15.) In fact, Section 7.5 of the
28 Registry Agreement defines the rules and regulations regarding the process for

1 transferring a gTLD from one registry operator to another. (Weinstein Decl. ¶ 15.)
2 For that reason as well, Plaintiff cannot demonstrate that it will suffer irreparable
3 harm if the Auction goes forward.

4 Plaintiff has not shown irreparable harm, and that failure alone serves as a
5 basis to deny the requested relief. *ET Trading, Ltd. v. ClearPlex Direct, LLC*, No.
6 15-CV-00426-LHK, 2015 U.S. Dist. LEXIS 25894, at *8 (N.D. Cal. Mar. 2, 2015)
7 (“The Court need not address all of the *Winter* factors because the Court finds that
8 Plaintiff has failed to carry its burden of demonstrating that it would be irreparably
9 harmed absent a temporary restraining order”).

10 **3. The Balance Of The Equities Weighs Against The Issuance**
11 **Of Injunctive Relief.**

12 As for the balance of the harms, Plaintiff claims that “ICANN cannot claim
13 any actual harm” were the Auction to be postponed. Not so. If ICANN postpones
14 the Auction with no basis (and there is none here), it would be manifestly unfair to
15 the other applicants that have invested time and money in their applications, and
16 have deposited funds into an escrow account in preparation for the Auction. In
17 addition, should the Auction be cancelled, ICANN would suffer a monetary loss of
18 at least \$10,000, in the form of a fee the Auction provider would charge ICANN,
19 and then pay more fees and invest more administrative expense when the Auction is
20 almost certainly re-scheduled. (See Weinstein Decl. ¶ 13.) Others of the scheduled
21 participants, many of which did not join Plaintiff’s request to postpone, would also
22 be harmed by delay. They have made large deposits (up to \$2 million each) in
23 anticipation of the auction and have otherwise engaged in significant preparation.
24 (Weinstein Decl. ¶ 7.) In short, a delay in the Auction and resolution of the
25 Contention Set will disrupt the orderly progression of the New gTLD Program.

26 **4. The Public Interest Strongly Favors Denying Plaintiff’s**
27 **Application For A Temporary Restraining Order.**

28 Plaintiff bears the burden of showing that its requested injunctive relief is in

1 the public interest. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009).
2 Indeed, where rules are at play that all relevant parties have relied upon, the public
3 interest weighs in favor of enforcing those rules. *Id.* at 1140. Here, there is no
4 authority in the Guidebook, Auction Rules, elsewhere that requires ICANN to
5 postpone the Auction. Such delay would set a precedent that would upset the
6 orderly expansion of gTLDs. Should the Court award Plaintiff the relief it seeks,
7 any applicant headed to auction could concoct a minor discrepancy it claims exists
8 with respect to another applicant within the same contention set, and seek to rely on
9 this Court’s ruling to support postponement of the auction. When such widespread
10 harm could result from the issuance of injunctive relief, affecting public rights as
11 well as those of the parties to the lawsuit, “the court may in the public interest
12 withhold relief until a final determination of the rights of the parties, though the
13 postponement [of the requested relief] may be burdensome to the plaintiff.”
14 *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (citation omitted).

15 **C. THE COVENANT NOT TO SUE BARS THIS LAWSUIT.**

16 Apart from Plaintiff’s delay in bring this action and Plaintiff’s inability to
17 satisfy the elements required for issuance of the TRO, Plaintiff’s claims against
18 ICANN are barred by the Covenant Not to Sue, which Plaintiff acknowledged and
19 Plaintiff’s ultimate parent company accepted over 300 times through its
20 subsidiaries. Indeed, as the district court in the Western District of Kentucky
21 recently held under nearly identical circumstances, the Covenant Not to Sue is
22 “clear and comprehensive” and bars claims “aris[ing] out of ICANN’s review of [a
23 new gTLD application]” *Commercial Connect*, 2016 U.S. Dist. LEXIS 8550,
24 at *9-10.

25 A written release extinguishes any claim covered by its terms. *Skrbina v.*
26 *Fleming Cos.*, 45 Cal. App. 4th 1353, 1366 (1996). Further, “a general release can
27 be completely enforceable and act as a complete bar to all claims (known or
28 unknown at the time of the release) despite protestations by one of the parties that

1 he did not intend to release certain types of claims.” *San Diego Hospice v. Cty. of*
2 *San Diego*, 31 Cal. App. 4th 1048, 1053 (1995).

3 Plaintiff recognizes these principles, and argues that the Covenant Not to Sue
4 is unenforceable for one and only one reason: California Civil Code § 1668
5 (“Section 1668”). (See Mot. at 25, 27.) But Section 1668 only invalidates contracts
6 that “exempt anyone from responsibility for his own fraud, or willful injury to the
7 person or property of another.” Cal. Civ. Code § 1668. Courts have interpreted
8 Section 1668’s phrase “willful injury to the person or property of another” to mean
9 more than merely intentional conduct (such as breach of the contract), but instead
10 “**intentional wrongs**.” *Frittelli, Inc. v. 350 N. Canon Drive, LP*, 202 Cal. App. 4th
11 35, 43 (2011) (“Ordinarily, the statute invalidates contracts that purport to exempt
12 an individual or entity from liability for future intentional wrongs and gross
13 negligence.”) (emphasis added and citations omitted).

14 The most Plaintiff alleges in its Complaint is that ICANN failed to
15 thoroughly investigate Nu Dotco’s ownership and management because ICANN
16 preferred the Auction to proceed. (Compl. ¶ 68.) But even such wild accusations
17 do not comprise the kind of intentional wrongs covered by Section 1668. Indeed,
18 *Food Safety Net Servs. v. Eco Safe Sys. USA, Inc.*, 209 Cal. App. 4th 1118 (2012),
19 is on point. There, a food-disinfectant equipment manufacturer alleged that a food-
20 safety equipment tester failed to test the equipment using agreed-upon standards, in
21 bad faith, and employed “slovenly procedures which seemed to be slanted towards
22 a preconceived conclusion.” *Id.* at 1125 (citation omitted). Despite these
23 allegations and an invocation of Section 1668, the court held that a limitation of
24 liability clause in the parties’ contract was enforceable and barred not only the
25 plaintiff’s claim for breach of contract but also plaintiff’s “bad faith” claim. *Id.* at
26 1125–27, 1130.

27 In addition, interpreting Section 1668 to invalidate the Covenant Not to Sue
28 runs contrary to the public interest. The Guidebook is not merely a contract

1 between two parties. It was adopted through an extensive public comment process
2 to govern the nearly 2,000 applications that ICANN received and was tasked with
3 evaluating—including competing applications for the same gTLD such as those of
4 Plaintiff and Nu Dotco. The Covenant Not to Sue ensures that the processing of
5 these applications does not get ensnared in endless litigation by disappointed
6 applicants. If Plaintiff’s argument is accepted, the Covenant Not to Sue could
7 become dead letter—and the important purposes it serves frustrated.

8 Plaintiff argues that the recent, unpublished district court decision in
9 *DotConnectAfrica Trust v. ICANN* supports its position. (See Mot. at 9 (citing
10 *DotConnectAfrica Trust v. Internet Corporation for Assigned Names & Nos., et al.*,
11 Case No. 2:16-cv-00862-RGK-JC (C.D. Cal. Apr. 12, 2016) (“DCA”).) That
12 argument is unavailing for three reasons. First, it cannot be squared with another
13 recent ruling upholding the Covenant Not to Sue, namely *Commercial Connect,*
14 *LLC v. Internet Corp. for Assigned Names and Numbers*, No. 3:16CV-00012-JHM,
15 2016 U.S. Dist. LEXIS 8550, at *1 (W.D. Ky. Jan. 26, 2016). In *Commercial*
16 *Connect*—which, unlike *DCA*, involved an effort to enjoin an auction – the court
17 denied a temporary restraining order requested by an applicant for the .SHOP gTLD
18 one day before the auction was to take place. *Id.* at *1, 11. The district court ruled
19 that the Covenant Not to Sue appeared enforceable and for that reason denied the
20 requested injunctive relief. *Id.* at *10-11. That Plaintiff does not cite the case from
21 Kentucky in its TRO is telling; it comprises a well-reasoned, directly on point
22 decision. Second, the district court’s ruling in *DCA* was issued at the preliminary
23 injunction stage, so it is merely the view of one court that there are “serious
24 questions” as to its enforceability. Third, that very ruling is currently on appeal to
25 the Ninth Circuit on an expedited basis.

26 **V. PLAINTIFF’S EXPEDITED DISCOVERY REQUEST MUST ALSO**
27 **BE DENIED.**

28 Plaintiff’s request for expedited discovery, from both ICANN and non-

1 parties alike, is unjustifiably onerous and there is no legal basis for the request.

2 Such an extreme demand may only be granted with good cause, which
3 exists only where the need for expedited discovery, in consideration of the
4 administration of justice, outweighs the prejudice to the responding party.

5 *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002).

6 Here there is no good cause. To put it simply, whether Nu Dotco changed
7 ownership or management is a yes or no question. After a reasonable investigation,
8 ICANN determined that the answer is no.⁴ Now, Nu Dotco's managers have
9 declared the same under penalty of perjury. No discovery could possibly aid the
10 Court in resolving the baseless claims Plaintiff raises here, and the request for
11 expedited discovery should therefore be denied, along with the TRO application.

12 *See Dimension Data N. Am., Inc. v. Netstar-1, Inc.*, 226 F.R.D. 528, 532 (E.D.N.C.
13 2005) (denying expedited discovery where requests not narrowly tailored to obtain
14 information relevant to requested preliminary injunction).

15 **VI. CONCLUSION**

16 For the foregoing reasons, Plaintiff's TRO application must be denied.

17 Dated: July 25, 2016

JONES DAY

18 By: /s/ Eric P. Enson

19 Eric P. Enson

20 Attorneys for Defendant
21 INTERNET CORPORATION FOR
22 ASSIGNED NAMES AND NUMBERS

23 ⁴ Even if the answer were "yes," the ordinary response would be to allow Nu
24 Dotco to amend its application. And even if Nu Dotco had submitted a change
25 request because it had undergone a change of control or ownership, it would not
26 have been disqualified from the auction set to take place on July 27, 2016. (Willett
27 Decl. ¶ 11.) In fact, a large number of applications have made a change the
28 questions pertaining to ownership or control of the applicant, and no application has
been disqualified to date over one of these changes. (Willett Decl. ¶ 11.) The
Auction Rules also provide that "ICANN reserves the right . . . to postpone a
scheduled Auction if a change request by one or more applicants in the Contention
Set is pending, *but believes that in most instances the Auction should be able to
proceed without further delay.*" (Zecchini Decl., Ex. C ¶ 8 (emphasis added).)

Exhibit RE-9

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 16-5505 PA (ASx)	Date	July 26, 2016
Title	Ruby Glen, LLC v. Internet Corp. for Assigned Names & Numbers		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE		
Stephen Montes Kerr	None		N/A
Deputy Clerk	Court Reporter		Tape No.
Attorneys Present for Plaintiffs:		Attorneys Present for Defendants:	
None		None	

Proceedings: IN CHAMBERS — COURT ORDER

Before the Court is an Ex Parte Application for Temporary Restraining Order (“Application for TRO”) filed by plaintiff Ruby Glen, LLC (“Plaintiff”). Plaintiff seeks to temporarily enjoin defendant Internet Corporation for Assigned Names and Numbers (“ICANN”) from conducting an auction for the rights to operate the registry for the generic top level domain (“gTLD”) for .web. Currently, that auction is set for 6:00 a.m. on July 27, 2016. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument.

Plaintiff applied to ICANN in 2012 to operate the registry for the .web gTLD. Because other entities also applied to operate the .web gTLD, ICANN’s procedures require all of the applicants, what are referred to as “contention sets,” to first attempt to resolve their competing claims, but if they cannot do so, ICANN will conduct an auction and award the rights to operate the registry to the winning bidder. According to Plaintiff, one of the competing entities, Nu Dotco, LLC (“NDC”) is unwilling to informally resolve the competing claims and has instead insisted on proceeding to an auction. Plaintiff asserts that it learned on June 7, 2016, that NDC has experienced recent changes in its management and ownership since it initially submitted its application to ICANN but that NDC has not provided ICANN with updated information as required by ICANN’s application requirements. Specifically, the email from NDC’s Jose Ignacio Rasco stated:

The three of us are still technically the managers of the LLC, but the decision goes beyond just us. Nicolai [Bezsonoff]^{1/} is at [Neustar, Inc.] full time and no longer involved with our TLD applications. I’m still running our program and Juan [Diego Calle] sits on the board with me and several others. Based on your request, I went back to check with all the powers that be and there was no change in the response and [we] will not be seeking an extension.

(Docket No. 8, Decl. of Jonathon Nevett, Ex. A.)

^{1/} According to Plaintiff, Bezsonoff was identified on NDC’s ICANN application as NDC’s “secondary contact.”

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 16-5505 PA (ASx)	Date	July 26, 2016
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Plaintiff alleges that it requested that ICANN conduct an investigation regarding the discrepancies in NDC's application beginning on June 22, 2016 and requested a postponement of the auction. At least one other applicant seeking to operate the .web registry has also requested that ICANN postpone the auction and investigate NDC's current management and ownership structure. ICANN denied the requests on July 13, 2016, and stated that "in regards to potential changes of control of Nu DOT CO LLC, we have investigated the matter and to date we have found no basis to initiate the application change request process or postpone the auction." Plaintiff and another of the applicants then submitted a request for reconsideration to ICANN on July 17, 2016. ICANN denied the request for reconsideration on July 21, 2016.

Plaintiff, relying on the Court's diversity jurisdiction, filed this action in this Court on July 22, 2016. According to the Complaint, Plaintiff "is a limited liability company, duly organized and existing under the laws of the State of Delaware and operated by an affiliate located in Bellevue, Washington." (Compl. ¶ 4.) The Complaint alleges that ICANN "is a nonprofit corporation, organized and existing under the laws of the State of California, with its principal place of business in Los Angeles, California." (*Id.* ¶ 5.) Plaintiff asserts claims for: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) negligence; (4) unfair competition pursuant to California Business and Professions Code section 17200; and (5) declaratory relief. Plaintiff filed its Application for TRO at the same time it filed its Complaint.

As an initial matter, the Court notes that the Application for TRO fails to satisfy the requirements for a valid Ex Parte Application. Specifically, under Local Rule 7-19.1, an attorney making an ex parte application has a duty to give notice by making reasonable good faith efforts to orally advise counsel for the other parties, if known, of the proposed ex parte application, and "to advise the Court in writing of efforts to contact other counsel and whether any other counsel, after such advice, opposes the application or has requested to be present when the application is presented to the Court." Here, Plaintiff did not notify the Court in writing of its efforts to notify opposing counsel of the Application for TRO or if ICANN intended to file an Opposition. These violations of the Local Rules are themselves sufficient to deny Plaintiff's Application for TRO. *See* Standing Order 6:5-7 ("Applications which fail to conform with Local Rules 7-19 and 7-19.1, including a statement of opposing counsel's position, will not be considered."). Additionally, Plaintiff did not submit a proposed order with the Application for TRO as required by Local Rule 7-20. *See* Local Rule 7-20 ("A separate proposed order shall be lodged with any motion or application requiring an order of the Court, pursuant to L.R. 52-4.1."). Finally, the Application for TRO was not accompanied by a proof of service as required by Local Rule 5-3.1. Indeed, according to ICANN, as of July 25, 2016, Plaintiff had not served ICANN with the Complaint or Application for TRO. Had ICANN not filed its Notice of Intent to File Opposition, the Court would have denied the Application for TRO as a result of these procedural deficiencies and violations of the Local Rules. *See, e.g., Reno Air Racing Ass'n, Inc. v. McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006) ("[C]ourts have recognized very few circumstances justifying the issuance of an ex parte TRO [without notice]."). Despite these violations of the Local Rules, the Court will address the merits of Plaintiff's Application for TRO because ICANN filed an Opposition. Future violations of the Local Rules, this Court's Orders, or the Federal Rules of Civil Procedure may result in the striking of the offending documents or the imposition of sanctions.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 16-5505 PA (ASx)	Date	July 26, 2016
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The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction. See Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co., 887 F. Supp. 1320, 1323 (N.D. Cal. 1995). “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” Winter v. Natural Resources Defense Council, 555 U.S. 7, 20, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008). “A preliminary injunction is an extraordinary remedy never awarded as of right.” Id. The Ninth Circuit employs a “sliding scale” approach to preliminary injunctions as part of this four-element test. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011). Under this “sliding scale,” a preliminary injunction may issue “when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff’s favor,” as long as the other two Winter factors have also been met. Id. (internal citations omitted). “[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.” Mazurek v. Armstrong, 520 U.S. 968, 972, 117 S. Ct. 1865, 1867, 138 L. Ed. 2d 162 (1997).

Plaintiff’s breach of contract, breach of the implied covenant of good faith and fair dealing, and negligence claims are all based on provisions in ICANN’s bylaws and the ICANN Applicant Guidebook stating, for instance, that ICANN will make “decisions by applying documented policies neutrally and objectively, with integrity and fairness,” that ICANN will remain “accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness,” and that no contention set will proceed to auction unless there is “no pending ICANN accountability mechanism.” Plaintiff’s unlawful business practices act and declaratory relief claims allege that a covenant not to sue contained in the ICANN Application Guidebook is invalid and unlawful under California law. That release states:

Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN’s or an ICANN Affiliated Party’s review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant’s gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION . . .

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 16-5505 PA (ASx)	Date	July 26, 2016
Title	Ruby Glen, LLC v. Internet Corp. for Assigned Names & Numbers		

Even if, as Plaintiff contends, this release is not valid, and Plaintiff could therefore be considered likely to prevail on its unlawful business practices and declaratory relief claims, the potential invalidity of the release — an issue the Court does not reach — is a separate issue that is not related to the propriety of proceeding with the auction for the .web registry. As a result, those claims, and Plaintiff's likelihood of success on them, are not relevant to Plaintiff's Application for TRO and do not provide a basis for enjoining the .web auction.

In its Opposition to the Application for TRO, ICANN contends that Plaintiff has not established the requisite likelihood of success on the merits or irreparable harm to justify the issuance of the preliminary injunctive relief it seeks. Specifically, ICANN has provided evidence that it has conducted investigations into Plaintiff's allegations concerning potential changes in NDC's management and ownership structure at each level of Plaintiff's appeals to ICANN for an investigation and postponement of the auction. During those investigations, NDC provided evidence to ICANN that it had made no material changes to its management and ownership structure. Additionally, ICANN's Opposition is supported by the Declarations of Nicolai Bezsonoff and Jose Ignacio Rasco, who declare under penalty of perjury that there have been no changes to NDC's management, membership, or ownership since NDC first filed its application with ICANN.

Based on the strength of ICANN's evidence submitted in opposition to the Application for TRO, and the weakness of Plaintiff's efforts to enforce vague terms contained in the ICANN bylaws and Applicant Guidebook, the Court concludes that Plaintiff has failed to establish that it is likely to succeed on the merits, raise serious issues, or show that the balance of hardships tips sharply in its favor on its breach of contract, breach of the implied covenant of good faith and fair dealing, and negligence claims. Moreover, because the results of the auction could be unwound, Plaintiff has not met its burden to establish that it will suffer irreparable harm in the absence of the preliminary injunctive relief it seeks. The Court additionally concludes that the public interest does not favor the postponement of the auction.

Finally, the Court notes that Plaintiff's Complaint has not adequately alleged a basis for this Court's jurisdiction. Jurisdiction may be based on complete diversity of citizenship, requiring all plaintiffs to have a different citizenship from all defendants and for the amount in controversy to exceed \$75,000.00. See 28 U.S.C. § 1332; Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373, 98 S. Ct. 2396, 2402, 57 L. Ed. 2d 274 (1978). To establish citizenship for diversity purposes, a natural person must be a citizen of the United States and be domiciled in a particular state. Kantor v. Wellesley Galleries, Ltd., 704 F.2d 1088, 1090 (9th Cir. 1983). Persons are domiciled in the places they reside with the intent to remain or to which they intend to return. See Kanter v. Warner-Lambert Co., 265 F.3d 853, 857 (9th Cir. 2001). "A person residing in a given state is not necessarily domiciled there, and thus is not necessarily a citizen of that state." Id. A corporation is a citizen of both its state of incorporation and the state in which it has its principal place of business. 28 U.S.C. § 1332(c)(1); see also New Alaska Dev. Corp. v. Guetschow, 869 F.2d 1298, 1300-01 (9th Cir. 1989). Finally, the citizenship of a partnership or other unincorporated entity is the citizenship of its members. See Johnson v. Columbia Props. Anchorage, LP, 437 F.3d 894, 899 (9th Cir. 2006) ("[L]ike a partnership, an LLC is a citizen of every state of which its owners/members are citizens."); Marseilles Hydro Power, LLC v. Marseilles Land & Water Co., 299 F.3d 643, 652 (7th Cir. 2002) ("the relevant citizenship [of an LLC] for

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 16-5505 PA (ASx)	Date	July 26, 2016
Title	Ruby Glen, LLC v. Internet Corp. for Assigned Names & Numbers		

diversity purposes is that of the members, not of the company”); Handelsman v. Bedford Village Assocs., Ltd. P’ship, 213 F.3d 48, 51-52 (2d Cir. 2000) (“a limited liability company has the citizenship of its membership”); Cosgrove v. Bartolotta, 150 F.3d 729, 731 (7th Cir. 1998); TPS Utilicom Servs., Inc. v. AT & T Corp., 223 F. Supp. 2d 1089, 1101 (C.D. Cal. 2002) (“A limited liability company . . . is treated like a partnership for the purpose of establishing citizenship under diversity jurisdiction.”).

The Complaint fails to establish that the parties are completely diverse. Specifically, by failing to identify and allege the citizenship of its own members, Plaintiff, a limited liability company, has not properly alleged its own citizenship. Accordingly, the Court is unable to ascertain whether it may exercise subject matter jurisdiction over this action. Without Plaintiff having adequately alleged a proper jurisdictional basis, the Court would not grant Plaintiff’s Application for TRO even if Plaintiff had otherwise satisfied the requirements for injunctive relief.

Despite Plaintiff’s failure to properly allege the Court’s subject matter jurisdiction, a district court may, and should, grant leave to amend when it appears that subject matter jurisdiction may exist, even though the complaint inadequately alleges jurisdiction. See 28 U.S.C. § 1653; Trentacosta v. Frontier Pacific Aircraft Industries, Inc., 813 F.2d 1553, 1555 (9th Cir. 1987). Therefore, the Court grants Plaintiff leave to amend the Complaint to attempt to establish federal subject matter jurisdiction. Plaintiff’s First Amended Complaint, if any, is to be filed by August 8, 2016. The failure to file a First Amended Complaint by that date or to adequately allege the Court’s jurisdiction may result in the dismissal of this action without prejudice.

For all of the foregoing reasons, the Court concludes that Plaintiff is not entitled to the injunctive relief it seeks. The Court therefore denies the Application for TRO.

IT IS SO ORDERED.

Exhibit RE-10



ICANN New gTLD Contention Set Resolution Auction

Final Results for WEB / WEBS

Winners:

String Won	Applicant	Application ID	Winning Price	Date of Auction
WEB	NU DOT CO LLC	1-1296-36138	\$135,000,000	27-July-2016
WEBS	Vistaprint Limited	1-1033-73917	\$1	27-July-2016

Applicants:

Applicant	Application ID	Position	Submitted Deposit (Participated in Auction)
Afilias Domains No. 3 Limited	1-1013-6638	A	Yes
Charleston Road Registry Inc.	1-1681-58699	A	Yes
DotWeb Inc.	1-956-26846	A	Yes
NU DOT CO LLC	1-1296-36138	A	Yes
Ruby Glen, LLC	1-1527-54849	A	Yes
Schlund Technologies GmbH	1-1013-77165	A	Yes
Vistaprint Limited	1-1033-73917	C	Yes
Web.com Group, Inc.	1-1009-97005	B	Yes

Round Information:

Round #	Start of Round Price	End of Round Price	Number of Eligible Bidders	Aggregate Demand	Enduring Applications
1	\$1	\$1,000,000	8	6	7
2	\$1,000,000	\$2,000,000	7	6	7
3	\$2,000,000	\$3,000,000	7	6	7
4	\$3,000,000	\$4,000,000	7	6	7
5	\$4,000,000	\$5,400,000	7	6	7
6	\$5,400,000	\$7,200,000	7	6	7
7	\$7,200,000	\$9,600,000	7	6	7
8	\$9,600,000	\$12,000,000	7	5	6
9	\$12,000,000	\$15,000,000	6	5	6
10	\$15,000,000	\$18,800,000	6	4	4
11	\$18,800,000	\$23,500,000	4	4	4
12	\$23,500,000	\$29,400,000	4	4	4
13	\$29,400,000	\$36,800,000	4	4	4
14	\$36,800,000	\$46,000,000	4	4	4
15	\$46,000,000	\$57,500,000	4	4	4

16	\$57,500,000	\$71,900,000	4	2	2
17	\$71,900,000	\$82,000,000	2	2	2
18	\$82,000,000	\$92,000,000	2	2	2
19	\$92,000,000	\$102,000,000	2	2	2
20	\$102,000,000	\$112,000,000	2	2	2
21	\$112,000,000	\$122,000,000	2	2	2
22	\$122,000,000	\$132,000,000	2	2	2
23	\$132,000,000	\$142,000,000	2	*	*

Notes:

- This was an Indirect Contention.
- Aggregate Demand: The number of Bids placed at the End of Round Price. The Aggregate Demand is available for all Rounds except the final Round.
- Enduring Application: An Application for which a Continue Bid has been submitted or which satisfies the condition of clause 34(c) of the Auction Rules (Version 2015-02-24), but which has not been deemed to be a Winning Application pursuant to clause 35(b). The number of Enduring Applications is available for all Rounds except the final Round.
- All prices are displayed in United States Dollars (USD) with a comma denoting the thousands separator.
- The results shown reflect the outcome of the Auction commenced on 27 July 2016 and do not necessarily reflect the final resolution of the Contention Set. Being declared the ultimate winner of the Contention String is contingent upon timely payment of the Winning Price per the Auction Rules and eligibility to sign a Registry Agreement as determined by ICANN.
- The Application in the “B” position was eliminated after Round 10, causing the Contention Set to divide and causing the Application of Vistaprint Limited to be deemed a Winning Application.
- The outcome of the Auction does not guarantee that Registry Agreements will be signed or that the TLDs will be delegated. These results do not constitute a waiver or amendment of any provision of the Applicant Guidebook, the Registry Agreement, the Bidder Agreement or the Auction Rules.

Exhibit RE-11

**COOPERATIVE ENGAGEMENT AND INDEPENDENT REVIEW PROCESSES
STATUS UPDATE – 20 JUNE 2018**

RE-11

ACTIVE COOPERATIVE ENGAGEMENT PROCESS (CEP) PROCEEDINGS¹

Request Date	Requestor	Subject Matter
17-Feb-2014	GCCIX, W.L.L.	.GCC
20-Jan-2015	Asia Green IT System Ltd.	.PERSIANGULF
20-Jan-2016	Donuts Inc.	.SPA
11-Jul-2016	American Institute of Certified Public Accountants (AICPA)	.CPA
17-Jul-2016	CPA Australia Ltd.	.CPA
14-Sep-2016	DotMusic Limited	.MUSIC
6-Oct-2017		
7-Nov-2017		
6-Oct-2017	dotgay LLC	.GAY
7-Nov-2017		
18-June-2018	Afilias plc and Afilias Domains No. 3 Limited	.WEB

¹ The Cooperative Engagement Process (CEP) is a process voluntarily invoked by a complainant prior to the filing of an Independent Review Process (IRP) for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. (See Bylaws, Art. 4 § 4.3(e).) The requesting party may invoke the CEP by providing written notice to ICANN, noting the invocation of the process, identifying the Board action(s) at issue, identifying the provisions of the ICANN Bylaws or Articles of Incorporation that are alleged to be violated, and designating a single point of contact for the resolution of the issue. Further information regarding the CEP is available at: <https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf>.

**COOPERATIVE ENGAGEMENT AND INDEPENDENT REVIEW PROCESSES
STATUS UPDATE – 20 JUNE 2018**

RE-11

RECENTLY CLOSED COOPERATIVE ENGAGEMENT PROCESS (CEP) PROCEEDINGS

Request Date	Requestor	Subject Matter	IRP Filing Deadline²
2-Aug-2016	Donuts Inc. and Ruby Glen, LLC	.WEB	14-Feb-2018

² The CEP process provides that “[i]f ICANN and the requestor have not agreed to a resolution of the issues upon the conclusion of the cooperative engagement process, or if issues remain for a request for independent review, the requestor’s time to file a request for independent review designated in the Bylaws shall be extended for each day of the cooperative engagement process, but in no event, absent mutual written agreement by the parties, shall the extension be for more than fourteen (14) days.” (<https://www.icann.org/en/system/files/files/cep-11apr13-en.pdf>)

**COOPERATIVE ENGAGEMENT AND INDEPENDENT REVIEW PROCESSES
STATUS UPDATE – 20 JUNE 2018**

RE-11

ACTIVE INDEPENDENT REVIEW PROCESS (IRP) PROCEEDINGS³

Date ICANN Received Notice of IRP	Date IRP Commenced by ICDR	Requestor	Subject Matter	Status
There are no active IRPs				

³ IRP proceedings initiated before 1 October 2016 are subject to the Bylaws in effect before 1 October 2016: The Independent Review Process (IRP) is a process by which any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. (See Bylaws, Art. IV, § 3.) In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action. Further information regarding the IRP is available at: <https://www.icann.org/resources/pages/mechanisms-2014-03-20-en>.

IRP proceedings initiated on or after 1 October 2016 are subject to the Bylaws in effect as of 1 October 2016: The IRP is intended to hear and resolve Disputes for the following purposes: (i) ensure that ICANN does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws; (ii) empower the global Internet community and Claimants to enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable and accessible expert review of Covered Actions (as defined in § 4.3(b)(i)); (iii) ensure that ICANN is accountable to the global Internet community and Claimants; (iv) address claims that ICANN has failed to enforce its rights under the IANA Naming Function Contract (as defined in Section 16.3(a)); (v) provide a mechanism by which direct customers of the IANA naming functions may seek resolution of PTI (as defined in Section 16.1) service complaints that are not resolved through mediation; (vi) reduce Disputes by creating precedent to guide and inform the Board, Officers (as defined in Section 15.1), Staff members, Supporting Organizations, Advisory Committees, and the global Internet community in connection with policy development and implementation; (vii) secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes; (viii) lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction; and (ix) provide a mechanism for the resolution of Disputes, as an alternative to legal action in the civil courts of the United States or other jurisdictions. (See Bylaws, Art. 4, § 4.3)

**COOPERATIVE ENGAGEMENT AND INDEPENDENT REVIEW PROCESSES
STATUS UPDATE – 20 JUNE 2018**

RE-11

RECENTLY CLOSED INDEPENDENT REVIEW PROCESS (IRP) PROCEEDINGS

Date ICANN Received Notice of IRP	Date IRP Commenced by ICDR	Requestor	Subject Matter	Date IRP Closed	Date of Board Consideration of IRP Panel’s Final Declaration⁴
5-Dec-2014	8-Dec-2014	Gulf Cooperation Council https://www.icann.org/resources/pages/gcc-v-icann-2014-12-06-en	.PERSIANGULF	24-Oct-2016	16-Mar-2017 (See here) 23-Sep-2017 (See here) 15-Mar-2018 (See here)
1-Mar-2016	2-Mar-2016	Amazon EU S.à.r.l. https://www.icann.org/resources/pages/irp-amazon-v-icann-2016-03-04-en	.AMAZON	11-Jul-2017	23-Sep-2017 (See here) 29-Oct-2017 (See here)
15-Dec-2016	16-Dec-2016	Asia Green IT Systems Bilgisayar San. ve Tic. Ltd. Sti. https://www.icann.org/resources/pages/irp-agit-v-icann-2015-12-23-en	.ISLAM .HALAL	30-Nov-2017	15-Mar-2018 (See here)

⁴ IRP proceedings initiated before 1 October 2016 are subject to the Bylaws in effect before 1 October 2016: Pursuant to Article IV, Section 3.21 of the ICANN Bylaws, “[w]here feasible, the Board shall consider the IRP Panel declaration at the Board’s next meeting. The declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value.” (<https://www.icann.org/resources/pages/governance/bylaws-en#IV>)

IRP proceedings initiated on or after 1 October 2016 are subject to the Bylaws as of 1 October 2016: IRP proceedings initiated Pursuant to Article 4, § 4.3(x)(iii)(A) of the ICANN Bylaws, “[w]here feasible, the Board shall consider its response to IRP Panel decisions at the Board’s next meeting, and shall affirm or reject compliance with the decision of the public record based on an expressed rationale. The decision by the IRP Panel, or en banc Standing Panel, shall be final regardless of such Board action, to the fullest extent allowed by law. (<https://www.icann.org/resources/pages/governance/bylaws-en/#article4>)

Exhibit RE-12



Afilias Plc
 4th Floor, International House
 3 Harbourmaster Place
 IFSC, Dublin 1, D01 K8F1, Ireland
 T +353.1.854.1100
 F +353.1.791.8569
 www.Afilias.info

9 September 2016

Via E-Mail

Mr Akram Attallah
 President, Global Domains Division
 Internet Corporation for Assigned Names and Numbers
 12025 Waterfront Drive, Suite 300
 Los Angeles, CA 90094

Re: .WEB auction

Dear Mr. Atallah:

On behalf of Afilias Domains No. 3 Limited ("Afilias"), a wholly-owned subsidiary of Afilias plc, I write with reference to our letter of 8 August 2016, in which we requested that ICANN disqualify and reject Nu Dot Co LLC's ("NDC") application for .WEB.

Specifically, NDC entered into an agreement to transfer any rights it acquired in connection with its application for .WEB to VeriSign, Inc. ("VeriSign"), which it did not disclose prior to the .WEB auction. The evidence strongly suggests that NDC acted as a front for and participated in the .WEB auction (the "Auction") for and on behalf of Verisign. Given ICANN's failure to respond to our prior letter, we request that ICANN promptly, and by no later than 16 September, 2016, (1) disclose the steps (if any) that it has taken to disqualify NDC's bid on the basis that NDC violated the rules applicable to its application; and (2) provide an undertaking that it has not, and will not, enter into a registry agreement for .WEB with NDC until (a) the Ombudsman has completed his investigation; (b) ICANN's Board has reviewed NDC's conduct and determined whether or not to disqualify NDC's bid and reject its application; and, (c) to the extent Afilias seeks review of any decision of ICANN relating to .WEB through ICANN's accountability mechanisms, such mechanisms are completed. We nonetheless emphasize that Afilias reserves all of its rights to pursue any and all rights or remedies available to it in any forum against ICANN, NDC or VeriSign in connection with the delegation of the .WEB gTLD.

We take the opportunity of this letter to further explain the reasons why ICANN must disqualify NDC's application for .WEB and proceed to contract for .WEB with Afilias, the next highest bidder in the Auction, in compliance with its obligations under ICANN's Articles of Incorporation and Bylaws (as well as principles of international law and California law), as set forth below.



NDC violated the New gTLD Applicant Guidebook and the Auction Rules for New gTLDs

First, NDC violated Paragraph 10 of the Terms and Conditions in Module 6 of the New gTLD Applicant Guidebook (the "Guidebook"), which expressly prohibits any applicant for a gTLD to "*resell, assign or transfer any of applicant's rights or obligations in connection with the application*". As we explained in our letter of August 8, 2016, Verisign publicly disclosed that it "*provided funds*" for NDC's bid for .WEB and that NDC would "*seek to assign the Registry Agreement to VeriSign*." Although the specific terms of the agreement between VeriSign and NDC have not been disclosed, it is clear from Verisign's own press release and its disclosure in its Form 10-Q filed with the U.S. Securities and Exchange Commission for the quarter ended June 30, 2016, that both companies entered into an arrangement well in advance of the Auction to transfer NDC's rights and obligations regarding its .WEB application to VeriSign.

Second, NDC violated Section 1.2.7 of the Guidebook, which requires applicants to "*promptly notify ICANN via submission of the appropriate forms*" "*if at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate,*" including "*changes in financial position and changes in ownership or control of the applicant*". In this regard, we find remarkable that the Form 10-Q VeriSign filed with the U.S. Securities and Exchange Commission on 28 July, 2016—the day after the Auction—contained the following statement: "*Subsequent to June 30, 2016, the Company incurred a commitment to pay approximately \$130.0 million for the future assignment of contractual rights, which are subject to third-party consent. The payment is expected to occur during the third quarter of 2016.*" When rumors surfaced that another company was behind NDC's application for .WEB, NDC sent a note to ICANN's Ombudsman on 8 July 2016, stating merely that "*neither the governance, management nor the ownership in NuDotcoco [sic] has changed.*" Clearly, by then, relevant changes concerning NDC's financial position had, at a minimum, been agreed to and should have been reported to ICANN, namely, that the VeriSign had agreed to fund NDC's bid for .WEB.

Third, NDC violated the Auction Rules for New gTLDs ("Auction Rules"). Rule 12 provides that "*participation in an Auction is limited to Bidders, which is defined by the Auction Rules as a "Qualified Applicant" or a "party designated by a Qualified Applicant to bid on its behalf*". This rule prohibits bids placed on behalf of a third-party that is not a "Qualified Applicant", defined by the Auction Rules as "*an entity that has submitted an Application for a new gTLD, has received all necessary approvals from ICANN, and which is included within a Contention Set to be resolved by an Auction.*" Accordingly, Rule 40(b) provides that "*in order to be valid*" "*a Bid must be placed by a Bidder for its Application in an Open Contention Set.*"



ICANN has the duty to deny NDC's application, disqualify its bid and proceed to contract with the next highest bidder in the Auction

ICANN's governing documents clearly dictate the appropriate response ICANN should take in connection with NDC's improper conduct:

- ICANN is required to *"...operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets."* [Articles of Incorporation, Art.4]
- ICANN is required to *"mak[e] decisions by applying documented policies neutrally and objectively, with integrity and fairness"* [Bylaws, Art.I § 2 (8)]
- ICANN is required to *"not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition."* [Bylaws, Art. II3]
- ICANN is required to *"Act[] with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected."* [Bylaws, Art. I§ 2 (9)]
- ICANN is directed to *"operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness"* [Bylaws, Art. III § 1].
- ICANN is required to *"promot[e] competition in the registration of domain names where practicable and beneficial in the public interest"* [Bylaws, Art. I. § 2 (6)]
- ICANN is required to *"Remain[] accountable to the Internet community through mechanisms that enhance ICANN's effectiveness."* [Bylaws, Art. I. § 2 (10)]

VeriSign chose not to apply for .WEB, as it could have done. Instead, VeriSign improperly and surreptitiously funded NDC's application. NDC's and VeriSign's attempt to game the system and obtain control over .WEB for VeriSign (which already controls.COM), must be sanctioned by ICANN by disqualifying NDC's bid and rejecting its application.

In these circumstances, we submit that ICANN should disqualify NDC's bid and offer to accept the application of Afilias, which placed the second highest exit bid. Consistent with Auction Rules No. 46 and No. 47, the winning price should be deemed to be the second-highest remaining exit bid after disqualifying NDC and striking its exit bid as invalid.

This course of action is consistent not only with ICANN's Guidebook and Auction Rules, but also with the principles of due process and fairness that ICANN is obligated to observe pursuant to its governing documents. In this regard, we note that NDC's violations must not affect the rights of other applicants that participated in the Auction in full compliance with the applicable rules, and that a new auction would be improper since the bidders have already



seen the outcome of the first Auction. Thus, ICANN must protect the integrity of the gTLD auction and delegation process from being tainted by the actions of one bidder. The only way to do this is to disqualify NDC and proceed as we have outlined above.

Finally, we remind ICANN that "ICANN's Board of Directors has ultimate responsibility for the New gTLD Program" (Bylaws, Art. II, § 1; Guidebook, Section 5.1), and that "material changes in circumstances" require "additional Board review" before "formal approval" of a registry agreement for the delegation of a gTLD. We therefore request that ICANN provide us with an undertaking that it has not, and will not, enter into a registry agreement for .WEB with NDC until ICANN's Board has reviewed NDC's conduct and reached a considered decision on whether or not to disqualify NDC's bid and reject its application; the Ombudsman has completed his investigation and the Board has considered and reached a decision on his report; and, to the extent Afilias seeks review of any decision of ICANN relating to .WEB through ICANN's accountability mechanisms, Afilias has exhausted such mechanisms.

Conclusion

For the reasons set out above, ICANN's Board and officers are obligated under the Articles of Incorporation, Bylaws and the Guidebook (as well as international law and California law) to disqualify NDC's bid immediately and proceed with the contracting of a registry agreement with Afilias, the second highest bidder. We look forward to receiving a response from ICANN by no later than 16 September 2016.

Afilias reserves all of its rights at law and in equity, including, without limitation, relating to the issues raised in this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Scott Hemphill", written over a horizontal line.

M. Scott Hemphill
Vice President & General Counsel

cc: Steve Crocker, Chairman of the ICANN Board
Göran Marby, President and Chief Executive Officer
Arif Hyder Ali, Dechert LLP

Exhibit RE-13

**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549**

FORM 10-K

(Mark One)

ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the fiscal year ended December 31, 2017

OR

TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the transition period from _____ to _____

Commission File Number: 000-23593

VERISIGN, INC.

(Exact name of registrant as specified in its charter)

Delaware

(State or other jurisdiction of incorporation or organization)

94-3221585

(I.R.S. Employer Identification No.)

12061 Bluemont Way, Reston, Virginia

(Address of principal executive offices)

20190

(Zip Code)

Registrant's telephone number, including area code: (703) 948-3200

Securities registered pursuant to Section 12(b) of the Act:

<u>Title of each class</u>	<u>Name of each exchange on which registered</u>
Common Stock \$0.001 Par Value Per Share	NASDAQ Global Select Market

Securities registered pursuant to Section 12(g) of the Act: None

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act: YES NO

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act: YES NO

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period as the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days: YES NO

Indicate by check mark whether the registrant has submitted electronically and posted on its corporate website, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period as the registrant was required to submit and post such files): YES NO

Indicate by check mark if disclosure of delinquent filings pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, other than those of the registrant's knowledge, in definitive proxy information statements incorporated by reference in Part III of this Form 10-K or any amendments to this Form 10-K:

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act.

Large accelerated filer	<input checked="" type="checkbox"/>	Accelerated filer	<input type="checkbox"/>
Non-accelerated filer	<input type="checkbox"/>	Smaller reporting company	<input type="checkbox"/>
		Emerging growth company	<input type="checkbox"/>

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards pursuant to Section 13(a) of the Exchange Act:

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act): YES NO

The aggregate market value of the voting and non-voting common equity stock held by non-affiliates of the registrant as of June 30, 2017, was \$3.3 billion based upon the last sale price reported for such date on the NASDAQ Global Select Market. For purposes of this disclosure, shares of Common Stock held by persons known to the registrant (based on information provided by such persons and other means) or beneficially owned more than 5% of the registrant's Common Stock and shares held by officers and directors of the registrant have been excluded because such persons may be deemed to be affiliates. This determination is not necessarily a conclusive determination on the part of the registrant.

Number of shares of Common Stock, \$0.001 par value, outstanding as of the close of business on February 9, 2018: 97,120,531 shares

DOCUMENTS INCORPORATED BY REFERENCE

Portions of the definitive Proxy Statement to be delivered to stockholders in connection with the 2018 Annual Meeting of Stockholders are incorporated by reference in Part III

ITEM 2. PROPERTIES

Our corporate headquarters are located in Reston, Virginia. We have administrative, sales, marketing, research and development and operations facilities located in the U.S., Europe, Asia, and Australia. As of December 31, 2017, we owned approximately 454,000 square feet of space, which includes facilities in Reston and Dulles, Virginia and New Castle, Delaware. As of December 31, 2017, we leased approximately 7,000 square feet of space in Europe, Australia and Asia. These facilities are under lease agreements that expire at various dates through 2022.

We believe that our existing facilities are well maintained and in good operating condition, and are sufficient for our needs for the foreseeable future. The following table lists our major locations and primary use as of December 31, 2017:

<u>Major Locations</u>	<u>Approximate Square Footage</u>	<u>Use</u>
United States:		
Reston, Virginia	22,000	Corporate Headquarters
New Castle, Delaware	5,000	Data Center
Dulles, Virginia	60,000	Data Center
Europe:		
Fribourg, Switzerland	7,000	Data Center and Corporate Services

The table above does not include approximately 68,000 square feet of space owned by us and leased to third parties.

ITEM 3. LEGAL PROCEEDINGS

On January 18, 2017, the Company received a Civil Investigative Demand from the Antitrust Division of the United States Department of Justice (“DOJ”) requesting certain material related to the Company becoming the registry operator for the *web* gTLD. On January 9, 2018, the DOJ notified the Company that this investigation was closed.

ITEM 4. MINE SAFETY DISCLOSURES

Not applicable.

Exhibit RE-14

NOT FOR PUBLICATION**FILED**

UNITED STATES COURT OF APPEALS

OCT 15 2018

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

RUBY GLEN, LLC,

Plaintiff-Appellant,

v.

INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS and
DOES, 1-10,

Defendants-Appellees.

No. 16-56890

D.C. No.
2:16-cv-05505-PA-AS

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Percy Anderson, District Judge, PresidingArgued and Submitted October 9, 2018
Pasadena, California

Before: SCHROEDER, M. SMITH, and NGUYEN, Circuit Judges.

Ruby Glen, LLC (“Ruby Glen”) appeals the district court’s dismissal of its First Amended Complaint (“FAC”) against Internet Corporation for Assigned Names and Numbers (“ICANN”). We have jurisdiction under 28 U.S.C. § 1291. “We review de novo dismissals for failure to state a claim under Rule 12(b)(6).”

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

McKesson HBOC, Inc. v. N.Y. State Common Ret. Fund, Inc., 339 F.3d 1087, 1090 (9th Cir. 2003). We affirm.

The district court properly dismissed the FAC on the ground that Ruby Glen’s claims are barred by the covenant not to sue contained in the Applicant Guidebook. As the district court found, the covenant not to sue is not void under California Civil Code section 1668. Ruby Glen is not without recourse—it can challenge ICANN’s actions through the Independent Review Process, which Ruby Glen concedes “is effectively an arbitration, operated by the International Centre for Dispute Resolution of the American Arbitration Association, comprised of an independent panel of arbitrators.” Thus, the covenant not to sue does not exempt ICANN from liability, but instead is akin to an alternative dispute resolution agreement falling outside the scope of section 1668. *See* Cal. Civ. Code. § 1668 (“All contracts which have for their object . . . to exempt anyone from responsibility for his own fraud, or willful injury . . . , or violation of law . . . are against the policy of the law.” (emphasis added)); *see also Cont’l Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1527 (9th Cir. 1987) (holding that an “exculpatory clause” does not violate California Civil Code section 1668 where the clause bars suit, but “[o]ther sanctions remain in place”); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (“By agreeing to

arbitrate . . . , a party does not forgo [its] substantive rights . . . ; it only submits to their resolution in an arbitral, rather than a judicial, forum.”).

The district court also properly rejected Ruby Glen’s argument that the covenant not to sue is unconscionable. Even assuming that the adhesive nature of the Guidebook renders the covenant not to sue procedurally unconscionable, it is not substantively unconscionable. *See Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899, 910 (2015) (explaining that procedural and substantive unconscionability “must *both* be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability” (emphasis in original) (internal quotation marks omitted)); *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, 232 Cal. App. 4th 1332, 1347–48 (2015) (holding that procedural unconscionability “may be established by showing the contract is one of adhesion”). Because Ruby Glen may pursue its claims through the Independent Review Process, the covenant not to sue is not “so one-sided as to shock the conscience.” *See Walnut Producers of Cal. v. Diamond Foods, Inc.*, 187 Cal. App. 4th 634, 647–48 (2010) (internal quotation marks omitted).

Finally, the district court did not abuse its discretion in denying Ruby Glen leave to amend because any amendment would have been futile. *See Carrico v. City & Cty. of San Francisco*, 656 F.3d 1002, 1008 (9th Cir. 2011).¹

AFFIRMED.

¹ Ruby Glen raises several additional arguments that it failed to raise below. We decline to consider those arguments because they were raised for the first time on appeal. *See Dream Palace v. Cty. of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004).

Exhibit RE-15

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Exhibit RE-16



ABOUT US

Afilias' specialized technology makes Internet addresses more accessible and useful through a wide range of applications, including Internet domain registry services, Managed DNS and award-winning mobile Web services.

About Afilias

Afilias is the world's second largest Internet domain name registry, with more than 20 million names under management. Afilias powers a wide variety of top-level domains, and will soon support hundreds of new TLDs (top level domains) now preparing for launch, including TLDs for cities, brands, communities and generic terms. Afilias' specialized technology makes Internet addresses more accessible and useful through a wide range of applications, including Internet [domain registry services](#), [Managed DNS](#) and [Mobile & Web services](#) like [goMobi®](#) and [DeviceAtlas®](#).

Afilias Domains

Afilias is the ICANN Designated Registry Operator for a wide range of gTLDs, including the following:

[.INFO](#), [.MOBI](#), [.PRO](#), [.PINK](#), [.BLUE](#), [.BLACK](#), [.RED](#), [.KIM](#), [.SHIKSHA](#),
[.ORGANIC](#), [.dotCHINESEMobile](#), [.LGBT](#), [.VOTE](#), [.VOTO](#), [.GREEN](#), [.POKER](#),

[.PROMO](#), [.BET](#), [.PET](#), [.BIO](#), [.SKI](#), [.ARCHI](#), [.LLC](#)

Each TLD is targeted to a specific audience and is designed to fill a niche in the market. Registration in these domains is available at a wide range of registrars. To learn more about a particular TLD, click on the logos above to visit the site for that TLD).

Afilias Registry Services

Afilias is a global leader in advanced [registry services](#) that power successful domains. Afilias began operations in July 2001 with the launch of .INFO -- the most successful new TLD ever launched. Today, Afilias supports a wide range of TLDs under contract to various Registry Operators, including:

Established gTLDs

.ORG, .AERO, .ASIA, .XXX, .POST

Afilias supports nearly 12M names for established gTLD operators, and has a long track record of enabling these operators to meet their ICANN technical requirements. We proudly support this wide range of gTLDs, some of which have specialized eligibility requirements.

Established ccTLDs

.AG (Antigua and Barbuda), **.BZ** (Belize), **.GI** (Gibraltar), **.IN** (India), **.LC** (St. Lucia), **.ME** (Montenegro), **.MN** (Mongolia), **.SC** (the Seychelles), and **.VC** (St. Vincent and the Grenadines), **.PR** (Puerto Rico), **.AU** (Australia), **.BM** (Bermuda).

Afilias supports nearly 7M names under contract to the domain authorities for 12 ccTLDs. Each has its own policies and other features, and Afilias provides the same stable, secure, and efficient service to these TLDs as it does for larger gTLDs. For ccTLDs looking for an efficient world class platform from which to grow, Afilias is the #1 choice.

New gTLDs

.GLOBAL, .VEGAS, .ONL, .RICH, .dotCHINESEOnline, .dotCHINESEWebsite, .LTDA

Afilias is the number one choice for new gTLD Registry Operators because it has

more experience than anyone else in supporting the applications and launches of TLDs on behalf of others. Further, Afilias provides not only turnkey technical services, it also offers value-added services designed to make it easier and less costly for new operators to navigate the ICANN ecosystem and get their new TLD to market. Afilias supports all types of new TLDs, including dotBrands, dotCities, dotCommunities as well as dotGenerics. For more information about our new TLD services, visit our [New TLD Services page](#).

Afilias Managed DNS Services

Afilias' DNS system provides for the resolution for billions of queries for over 20M domain names today on a globally diverse and secure platform. Our system ensures security through diversity. Afilias' technology ensures 100% up-time and is among the most reliable and stable services available for domain names. Afilias' systems operate on a global, multi-layered, diverse infrastructure which provides security against even the most malicious attacks. With the launch of [Afilias' Managed DNS Services](#), our world-class network is now available to the public to ensure the resiliency and security of your Web presence. Afilias also provides primary and secondary DNS [resolution services](#) for gTLD and ccTLD registries.

Afilias Mobile & Web Services

Afilias' [mobile and Web technology division](#) is focused on helping our customers harness the complexity of the Web to provide a competitive advantage in today's multi-screen world. Award-winning products including the [DeviceAtlas®](#) device intelligence solution and the [goMobi®](#) web publishing platform help thousands of companies across the globe reach and engage their audiences, no matter what the device, content, or context. Our vision is to turn the diversity of the web into a strategic opportunity, rather than a technological challenge.

Organizational Structure

Afilias, Inc is a US Multinational Corporation with international headquarters outside of Philadelphia in Horsham, PA. Afilias maintains a number of global wholly owned subsidiaries in offices located in Dublin Ireland, Toronto Canada, New Delhi India, Melbourne Australia, Vista California, and Beijing China.

Newest Dynamic Coalition Launched at IGF 2018 to Drive Resolution of
DNS Issues

Nov 19, 2018

Afilias celebrates .org's 15 years of technical excellence

Jan 30, 2018

[MORE](#)

Ab

Products & Services

Careers

Directors of the Company

Management

Policies

Sustainability

gTLDs

ccTLDs

IDN e-mail

ZoneHawk

Ne

Afilias' New Domains

dotBrand Services

Managed Registry Services

Device Atlas

goMobi

mobiReady

mobiForge

M

One-Click DNSSEC

FlexDNSSM Platform

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Exhibit RE-17

UNCITRAL Model Law on International Commercial Arbitration

1985

With amendments
as adopted in 2006



UNITED NATIONS

The United Nations Commission on International Trade Law (UNCITRAL) is a subsidiary body of the General Assembly. It plays an important role in improving the legal framework for international trade by preparing international legislative texts for use by States in modernizing the law of international trade and non-legislative texts for use by commercial parties in negotiating transactions. UNCITRAL legislative texts address international sale of goods; international commercial dispute resolution, including both arbitration and conciliation; electronic commerce; insolvency, including cross-border insolvency; international transport of goods; international payments; procurement and infrastructure development; and security interests. Non-legislative texts include rules for conduct of arbitration and conciliation proceedings; notes on organizing and conducting arbitral proceedings; and legal guides on industrial construction contracts and countertrade.

Further information may be obtained from:

UNCITRAL secretariat, Vienna International Centre,
P.O. Box 500, 1400 Vienna, Austria

Telephone: (+43-1) 26060-4060
Internet: <http://www.uncitral.org>

Telefax: (+43-1) 26060-5813
E-mail: uncitral@uncitral.org

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

UNCITRAL Model Law on International Commercial Arbitration

1985

With amendments
as adopted in 2006



UNITED NATIONS
Vienna, 2008

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matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

CHAPTER IV A. INTERIM MEASURES AND PRELIMINARY ORDERS

(As adopted by the Commission at its thirty-ninth session, in 2006)

Section 1. Interim measures

Article 17. Power of arbitral tribunal to order interim measures

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

Article 17 A. Conditions for granting interim measures

(1) The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under article 17(2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

Section 2. Preliminary orders*Article 17 B. Applications for preliminary orders and conditions for granting preliminary orders*

(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

(3) The conditions defined under article 17A apply to any preliminary order, provided that the harm to be assessed under article 17A(1)(a), is the harm likely to result from the order being granted or not.

Article 17 C. Specific regime for preliminary orders

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for

the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

Section 3. Provisions applicable to interim measures and preliminary orders

Article 17 D. Modification, suspension, termination

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

Article 17 E. Provision of security

(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.