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July 23, 2021

VIA E-MAIL AND FEDEX

Mr. Maarten Botterman
Chair, Board of Directors
Internet Corporation for Assigned Names
and Numbers
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Re: *Afilias Domains No. 3 Limited v. Internet Corporation for Assigned Names and Numbers, ICDR Case No. 01-18-0004-2702 - Request that Afilias be disqualified from all .WEB proceedings based on violations of the Blackout Period*

Dear Mr. Botterman, Chair, and Members of the ICANN Board:

This letter is submitted on behalf of Nu Dotco, LLC (“NDC”), Awardee of the new .WEB gTLD, and VeriSign, Inc. (“Verisign”), an interested party, together *Amici* in the .WEB Independent Review Proceedings (“IRP”) initiated by Afilias and subject to the Panel’s 20 May 2021 Final Decision. This letter requests that ICANN reject any and all claims and objections by Afilias regarding the auction, Award or assignment of .WEB on the grounds that Afilias should be disqualified from all such proceedings and thus lacks standing to assert any objections with respect to the auction, Award or any related assignment.¹

The grounds for this request are that Afilias intentionally committed serious violations of the Blackout Period rules mandated by the Auction Rules Clause 6, and the new gTLD Bidder Agreement Section 2.6, by engaging in negotiations and other prohibited conduct with other contention set members during the Blackout Period. The Blackout Rules are clear on their face and admit of no exception. The violation by Afilias is confirmed in written documents authored by Afilias and is beyond dispute.

This request is further made on grounds that Afilias’ Blackout Period violations were in furtherance of an improper scheme to coerce another contention set member, NDC, to accept terms of a “private auction” in which (i) pricing would be fixed in advance of the auction and (ii) Afilias would guarantee that proceeds of the auction be paid to other participants in exchange for losing the auction. The conduct by Afilias and others in furtherance of their collusive scheme included,

¹ NDC and Verisign reserve the right to submit at a later date additional evidence and argument relevant to other issues raised by ICANN’s review of the Panel’s Final Decision.

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among other acts: (a) coordinated, serial objections to the .WEB auction based on false representations to ICANN regarding a change in ownership or control of NDC—properly rejected by ICANN in a decision confirmed by the Panel in its Final Decision; (b) baseless litigation against ICANN to delay the public auction for .WEB—dismissed by two courts as without merit; and (c) attempts to rig the .WEB auction by dividing auction participants into “strong” and “weak” participants, with “weak” participants predetermined to lose the auction in exchange for the payment of a pre-defined sum.

These collusive schemes by Afilias and other members of the contention set have delayed the delegation of .WEB for almost 5 years. This has operated to the detriment of the entire DNS community.

NDC refused to be part of Afilias’ collusive schemes. A fair and competitive public auction thus proceeded on 27-28 July 2016. NDC submitted the highest bid at the auction, approximately \$142,000,000, and the Award was in its favor.

As a result of NDC’s successful bid, the proceeds of the auction were deposited with ICANN to be used for the benefit of the entire Internet community through their investment in the Domain Name System as determined by ICANN and the community. Contrary to Afilias’ Blackout Period scheme, those proceeds were *not* paid to participants who had colluded in advance that they would lose the auction.²

I. The Final Decision by the IRP Panel

In its Final Decision, the Panel dismissed Afilias’ requests that the Panel should either (i) order the disqualification of NDC’s bid or (ii) order ICANN “to disqualify NDC’s bid for .WEB, proceed with contracting the Registry Agreement for .WEB with the Claimant ..., and specify the bid price to be paid by the Claimant.” (Final Decision, 20 May 2021, ¶ 126.) The Panel further rejected Afilias’ demand that the Panel *not* remand those issues to the ICANN Board for its determination as required by the Bylaws.³ Instead, the Panel directed that all remaining

² The relevant correspondence and other documents evidencing the conduct of Afilias and other members of the .WEB contention set described herein are submitted as exhibits to this letter. In addition, the particulars regarding Afilias’ violations of the Blackout Period are set forth herein and previously have been described in detail in *Amici’s* briefs submitted in the IRP and in *Amici’s* October 2016 responses to ICANN’s Topics for Comment. *Amici* refer ICANN to those submissions for further information regarding Afilias’ Blackout Period violations.

³ Afilias falsely argued -- an argument rejected by the Panel -- that the Panel should not “remand the matter to the very ICANN Board that sought to rubber-stamp Verisign’s acquisition of .WEB.” (Afilias’ 24 July 2020 Claimant’s Response to *Amicus Curiae* Briefs, ¶ 3). “Given ICANN’s conduct that led to these proceedings, and the positions that ICANN has adopted in these proceedings -- to say nothing of its conduct -- the only fair and final way for Afilias’ claims to be considered is for the Panel to resolve this Dispute.” (*Id.* ¶ 216.)

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objections by Afilias or NDC regarding the auction and/or Award be directed to the ICANN Board for decision. (*Id.* ¶ 319.)

Pursuant to the Final Decision, ICANN should determine NDC’s objection that Afilias violated the Blackout Period and should be disqualified from all proceedings related to the auction or any potential assignment of the .WEB Registry Agreement. ICANN already has acknowledged the importance of the Blackout violations to the relief sought by Afilias in the IRP. ICANN’s List of Issues for the IRP dated 12 October 2020 provides the following: “Are [Afilias’] remedies appropriate in light of all relevant circumstances, *including Afilias’ alleged violation of the Auction Rules and Bidder Agreement?*” (Emphasis added.) According to the Panel, ICANN should now consider these issues whether or not they have been raised through a formal accountability mechanism in order to preserve and promote the integrity of the New gTLD Program. (Final Decision, 20 May 2021, ¶ 319.)

The Panel further decided on the merits, and rejected, Afilias’ claim that the Auction Award to NDC, or a subsequent assignment of the .WEB Registry Agreement to Verisign, would be contrary to ICANN’s Bylaw commitments to promote competition. As explained in dispositive terms by the Panel: “ICANN does not have the power, authority, or expertise to act as a competition regulator by challenging or policing anticompetitive transactions or conduct.”⁴

II. Afilias’ Violations of the Blackout Period

Afilias’ Blackout Period violations were part of a broader effort by Afilias and certain other members of the .WEB contention set to coerce NDC to agree to resolve the contention set in a rigged manner where pre-determined auction losers would be paid for their losing bids. While NDC instead pursued a public auction administered by ICANN—where the proceeds of the auction would be invested in the improvement of the Domain Name System—Afilias and others repeatedly sought to derail the public auction at any cost and by any means in order to coerce an agreement

⁴ Final Decision, 20 May 2021, ¶ 60. The Panel found ICANN’s evidence “compelling” that it fulfills its mission to promote competition through the expansion of the domain name space and facilitation of innovative approaches to the delivery of domain name registry services -- not by acting as an antitrust regulator. The Panel further quoted Afilias’ own statements to this effect, which were made outside of the IRP proceedings when Afilias had different interests it wished to pursue. Emphasizing Afilias’ contradictory positions, the Panel quoted Afilias’ earlier statement, placing emphasis on Afilias’ contradictory language outside the IRP:

While ICANN’s mission includes the promotion of competition, this role is best fulfilled through the measured expansion of the name space and the facilitation of innovative approaches to the delivery of domain name registry services. *Neither ICANN nor the GNSO have the authority or expertise to act as anti-trust regulators.* Fortunately, many governments around the world do have this expertise and authority, and do not hesitate to exercise it in appropriate circumstances. *Id.* ¶ 349 (emphasis in original).

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to a “private auction,” in which they could control the winner and share the auction proceeds. Afilias’ violation of the Blackout Period was part of its continuation of these efforts to settle .WEB and represents a serious and culpable breach of community ethics and ICANN policy.

A. *Afilias’ Improper Attempt to Induce NDC to Abandon a Public Auction in Favor of a Private Auction*

Prior to the auction, Afilias, Donuts, and other members of the .WEB contention set agreed to settle the contention set via a private auction and undertook efforts to coerce NDC to join that agreement. Private resolution of contention sets is permitted under the New gTLD Program and may be perfectly acceptable, depending on the terms of the accompanying agreement. A private auction, however, cannot be used as a disguise for collusive behavior that violates ICANN’s rules or price fixing.⁵ Indeed, ICANN’s Board has recognized, in connection with its ongoing review of the New gTLD Program rules for future new gTLD rounds, that private auctions increase the risks of “gaming” the system in a manner that may be inconsistent with ICANN’s Commitments and Core Values.⁶

On 27 April 2016, ICANN scheduled a public auction for the .WEB gTLD, notified all members of the contention set, and provided them with instructions and deadlines to participate in the auction. Thereafter, the members of the .WEB contention set other than NDC reached an agreement to resolve the contention set by private auction, and pressured NDC to join that agreement.⁷ NDC declined.

On 6 June 2016, Donuts again asked NDC to agree to a private resolution of the contention set and to postpone the auction, scheduled for 27 July 2016, by two months. NDC declined again.⁸

⁵ Authorities cited at Section II. E., *infra*.

⁶ See Ex. A (26 Sept. 2018 Letter from C. Chalaby, Chair, ICANN Board of Directors, to C. Langon-Orr and J. Neuman, Co-Chairs GNSO New gTLD Subsequent Procedures PDP Working Group re: New gTLD Subsequent Procedures PDP WG Initial Report (“[T]he Board believes that applications should not be submitted as a means to engage in private auctions, including for the purpose of using private auctions as a method of financing their other applications . . . [W]e are concerned about how gaming for the purpose of financing other applications, or with no intent to operate the gTLD as stated in the application, can be reconciled with ICANN’s Commitments and Core Values”); see also Ex. B (30 Sept. 2020 Letter from M. Botterman, Chair, ICANN Board of Directors, to C. Langon-Orr and J. Neuman, Co-Chairs GNSO New gTLD Subsequent Procedures PDP Working Group re: New gTLD Subsequent Procedures PDP WG Initial Report (“The Board encourages the PDP WG to provide a rationale why the resolution of contention sets should not be conducted in a way such that any net proceeds would benefit the global Internet community rather than other competing applicants.”)).

⁷ Witness Statement of John L. Kane (“Kane Witness Statement”), <https://www.icann.org/en/system/files/files/irp-afilias-witness-statement-kane-redacted-26nov18-en.pdf>, ¶¶ 20-21.

⁸ See Ex. C (6-7 June 2016 emails between Juan Calle of NDC and Jon Nevett of Donuts); see also Witness Statement of Jose Ignacio Rasco III, 1 June 2020 (“Rasco Witness Statement”), <https://www.icann.org/en/system/files/files/irp-afilias-witness-statement-rasco-iii-redacted-01jun20-en.pdf>, ¶ 6.

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The following day, 7 June 2016, Afilius asked NDC to reconsider, stating that *Afilius would “guarantee” that NDC would “score at least 16 mil if you go into the private auction and lose.”* NDC again declined, whereupon *Afilius offered to increase the payment to NDC to “\$17.02” million.* NDC again declined.⁹

When NDC refused Afilius’ latest offer, Afilius and other members of the contention set undertook concerted efforts to interfere with the scheduled auction.

B. *False Claims of a Change in Management or Control of NDC -- Rejected by ICANN and the IRP Panel*

On 23 June 2016, in an effort to interfere with the upcoming auction, Donuts and its wholly-owned subsidiary Ruby Glen falsely represented to ICANN that NDC had changed its ownership and/or management structure, but had not reported that change to ICANN as required. Donuts and Ruby Glen moved ICANN to delay the public auction based on these misrepresentations.¹⁰ On or about 30 June 2016, Donuts filed a complaint with ICANN’s Ombudsman repeating its false allegations against NDC.¹¹

On 11 July 2016, Schlund Technologies GmbH (“Schlund”) and Radix FZC (“Radix”)—both members of the .WEB contention set—submitted separate yet identically worded letters to ICANN requesting postponement of the Auction to allow ICANN to investigate NDC and potentially disqualify it. Both Schlund and Radix misrepresented to ICANN: “We support a postponement of the .WEB auction to give ICANN and the other applicants time to investigate where 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 the applicant as the auction approaches.”¹²

Despite these concerted efforts, on 13 July 2016, ICANN properly denied the requests for a postponement of the .WEB public auction. ICANN found “no basis to initiate the application change request process or postpone the auction” based on any alleged change in NDC’s

⁹ See Ex. D (7 June 2016 text messages between Juan Calle of NDC and Steve Heflin of Afilius); see also Ex. E (Text messages between Jose Rasco of NDC and John Kane of Afilius).

¹⁰ See Ex. F (23 June 2016 email from Jon Neveit of Donuts to ICANN’s customer portal).

¹¹ Witness Statement of Christine A. Willett, 31 May 2019 (“Willett Witness Statement”), <https://www.icann.org/en/system/files/files/irp-afilius-witness-statement-willett-31may19-en.pdf>, ¶ 24.

¹² See Ex. G (11 July 2016 letter from Thomas Moarz of Schlund to Akram Attallah, Christine Willett and John Jeffrey of ICANN); Ex. H (11 July 2016 email from Brijesh Joshi of Radix to Akram Attallah, Christine Willett and John Jeffrey of ICANN).

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management.¹³ NDC and Verisign understand that ICANN’s Ombudsman similarly determined that there were no grounds for a delay of the auction.

On 17 July 2016, Donuts and Radix jointly submitted a reconsideration request to ICANN, again seeking a delay of the public auction based on the same misrepresentations. ICANN properly rejected this request on 21 July 2016.¹⁴

Afilias repeated these false accusations regarding NDC in its IRP, alleging that ICANN violated its Bylaws by not properly investigating and deciding the claims. Contrary to Afilias’ claims, in its Final Decision, following a full hearing, the Panel found no fault with ICANN’s pre-auction investigation, and “reject[ed] the Claimant’s [Afilias] contention that the Respondent violated its Bylaws by the manner in which it investigated and resolved the pre-auction allegations of change of control within NDC.” (Final Decision, 20 May 2021, ¶ 295).

C. *The Spurious Court Action to Stop the Public Auction -- Rejected by Both the District Court and Court of Appeals*

After the false claims of material changes in NDC’s ownership and/or control were rejected by ICANN three times, on 22 July 2016, Ruby Glen filed a civil action against ICANN in the United States District Court for the Central District of California (Case No. 16-5505) seeking a temporary restraining order (“TRO”) postponing the public auction. The civil action was based on the same meritless accusations that ICANN had repeatedly rejected.

The district court denied Ruby Glen’s TRO on 26 July 2016. In its Order, the court specifically noted “the weakness of Plaintiff’s efforts to enforce vague terms contained in the ICANN bylaws and Applicant Guidebook” and concluded that Ruby Glen had failed to “establish that it is likely to succeed on the merits” and failed to demonstrate that its allegations “raise[d] serious issues.”¹⁵ Ruby Glen’s action subsequently was dismissed with prejudice, and its appeal of that dismissal was rejected by the Ninth Circuit Court of Appeals.¹⁶ Nonetheless, Afilias repeated these false claims in the IRP. As explained above, Afilias’ claims were rejected by the Panel in its Final Decision.

¹³ See Ex. I (13 July 2016 Letter from Christine A. Willett, Vice President, GDD Operations of ICANN, to the .WEB contention set).

¹⁴ Ex. J (21 July 2016 Determination of the Board Governance Committee (“BGC”) Reconsideration Request 16-9).

¹⁵ See Ex. K (*Ruby Glen, LLC v. Internet Corporation for Assigned Names and Numbers*, United States District Court for the Central District of California, Case No. 2:16-cv-05505-PA-AS (“*Ruby Glen Action*”), Dkt. No. 21 (Order denying Ruby Glen’s Application for Temporary Restraining Order)).

¹⁶ See Ex. L (*Ruby Glen Action*, Dkt. No. 53 (Order from the Court of Appeals for the Ninth Circuit affirming dismissal of Ruby Glen’s complaint)).

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D. *The Schlund Private Auction Proposal*

Alongside the other efforts to interfere with the public auction, on 5 July 2016, Oliver Mauss of Schlund emailed NDC pushing a proposal for an “alternative private auction,” claiming its numerous advantages over a public auction. The so-called “benefits” of this alternative form of private auction, according to Mr. Mauss, included that the *winning participant would pay less for the gTLD* than it would in a competitive public auction. The agreement would include the following “principles”: “It divides the participants into groups of strong and weak”; “the weak *players are meant to lose and are compensated for this with a pre-defined sum*”; “the strong players bid for the asset”; “the losing strong players receive a higher return than in the Applicant Auction”; and “the losing weak players receive a lower return than in the Applicant Auction.”¹⁷ (emphasis added). Through his proposal, Mr. Mauss contended, the “winning party” would pay “less for the asset in comparison to both” a public auction organized by ICANN and a private auction organized by the applicants themselves. *Id.* NDC did not respond to Mr. Mauss’ email. An agreement to the terms of the Schlund proposal, like the proposals made directly by Afiliast to “guarantee” NDC a specific amount to lose a private auction, could have involved NDC in a collusive scheme that may have raised issues under the antitrust laws.

E. *Afiliast’s Reiteration of the Settlement Proposals During the Blackout Period in Order to Resolve .WEB*

Once the deposit deadline for an ICANN administered auction passes, both the Bidder Agreement and the Auction Rules for new gTLD auctions explicitly prohibit all applicants within a contention set from “cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other’s, or any other competing applicants’ bids or bidding strategies or discussing or negotiating settlement agreements...” until the auction has completed and full payment has been received from the winner. (Bidder Agreement, § 2.6; Auction Rules, Clause 68). Violation of this “Blackout Period” is a “serious violation” of ICANN’s rules under the Bidder Agreement and Auction Rules—so much so that applicants are expressly warned in writing that such violations may result in forfeiture of the violator’s application. (Bidder Agreement, § 2.10; Auction Rules, Clause 61).

Afiliast’s continuation of negotiations to resolve the contention set during the Blackout Period represents a clear and intentional violation of the Blackout Rules. Afiliast is a sophisticated applicant with full knowledge and awareness of the rules, including those pertaining to the Blackout Period. Moreover, Larry Ausubel of Power Auctions LLC (the administrator appointed by ICANN to conduct the Auction) sent every member of the .WEB contention set an email on 20

¹⁷ See Ex. M (5 July 2016 email from Oliver Mauss of Schlund to Juan Calle of NDC with attachment proposing an “Alternative Private Auction”).

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July 2016, expressly reminding them that “the Deposit Deadline for .WEB/.WEBS has passed and we are now in the Blackout Period.”¹⁸

Nonetheless, on 22 July 2016, five days before the Auction’s 27 July 2016 commencement date and after the deposit deadline for the auction had passed—plainly within the Blackout Period—Afilias continued to seek a settlement of .WEB in accordance with its earlier offers, thereby engaging in a discussion regarding bids, bidding strategies and settlement contrary to the Blackout Rules. Specifically, Afilias sent the following text message to NDC with reference to its earlier proposals seeking a settlement of the auction: “If ICANN delays the auction next week would you again consider a private auction? Y-N.”¹⁹ This proposal to continue settlement discussions was an indisputable violation of the Blackout Rules. NDC did not respond to Afilias’ proposal.

The direct communication from Afilias to NDC on 22 July 2016 was in furtherance of Afilias’ earlier offers to settle the .WEB contention set by paying the proceeds of a private auction to the losing bidders in exchange for their losing the auction. Indeed, Afilias already had guaranteed NDC a payment of \$17.2 million for settling the contention set on Afilias’ terms.

NDC told Afilias and others on multiple occasions before the Blackout Period started that NDC was not interested in participating in a private settlement of the contention set. Despite these repeated rejections, Afilias chose to make a last ditch effort during the Blackout Period to salvage the potential windfall it and other members of the contention set sought to secure for themselves via the private settlement they were pushing.

Afilias’ plain violation of the Blackout Rules should result in its disqualification from the auction and all proceedings related to .WEB. The Blackout Period rules are specific and clear, and Afilias’ violation of the rules is express and in writing.

Further, Afilias’ Blackout Period violation is directly relevant to ICANN’s consideration of Afilias’ claims against ICANN, NDC and Verisign. By reason of its violations, Afilias should be disqualified and therefore lacks standing to pursue its objections against NDC’s application. In addition, based on its disqualification (among other reasons addressed in this IRP), Afilias cannot be awarded the .WEB gTLD, the relief it seeks on its claims against ICANN for alleged violations of the ICANN Bylaws.

Afilias has delayed the delegation of .WEB for 5 years, at a cost of tens of millions of dollars to the affected parties, based on convoluted and false claims of technical violations of the

¹⁸ See Ex. N (20 July 2016 email from Larry Ausubel of Power Auctions LLC to Jose Rasco of NDC regarding the commencement of the Blackout Period).

¹⁹ See Ex. O (22 July 2016 Text messages from Jonathan Kane of Afilias to Jose Rasco of NDC).

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New gTLD Program Rules.²⁰ By contrast, Afilias' undeniable violation of the Program rules is clear and far more culpable than its manufactured claims of violations against NDC and Verisign.

During the IRP proceedings, Afilias offered no meaningful response to the evidence of its Blackout Period violation. On the contrary, during the IRP, Afilias actively took steps to prevent its witnesses from being questioned regarding the Blackout Period violation (among other issues). For example, Mr. Kane's written message to Mr. Rasco on 22 July 2016 was a violation of the Blackout Rules. Rather than ask Mr. Kane to testify to respond to the serious questions raised by his message, Afilias chose not to call him as a witness and, in fact, withdrew his witness statement so that others could not cross-examine him during the hearings. By contrast, Afilias offered only the baseless views of its counsel regarding Mr. Kane's conduct and intentions.²¹ *See Graves v. United States*, 150 U.S. 118, 121 (1893) (“[I]f a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.”).

During the IRP, Afilias *admitted* that the Blackout Period was designed to prevent bid rigging. (Afilias' Response to the *Amicus Curiae* Briefs, ¶¶ 179–84). Yet that is precisely what Afilias attempted. Its Blackout Period conduct *was* an attempt at bid rigging. Under the auction format and explicit terms proposed by Afilias, Schlund and other members of the contention set, *see* Ex. M, the winner would be able to obtain .WEB for a lower price than in a public auction administered by ICANN by paying pre-determined amounts to its competitors in exchange for their losing the auction. Such a collusive auction is the type of agreement that the Blackout Period is designed to prevent. Furthermore, bid rigging and other forms of collusive price fixing are considered “*per se*” illegal. *See United States v. Joyce*, 895 F.3d 673, 679 (9th Cir. 2018) (holding bid rigging is a “*per se*” antitrust violation); Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 2005(b) (4th ed. 2013-2018) (“Bid-rigging schemes are commonly thought to be more harmful than ordinary price fixing because bid-rigging is much easier for cartel members to enforce...For this reason, bid-rigging has been treated with greater hostility than price fixing generally.”).

Afilias' conduct deserves the most serious sanctions, including a disqualification from all proceedings regarding .WEB. The sanctions should set an example of enforcement of the Program rules, and against gaming the system, for future gTLD rounds. As the ICANN Board has

²⁰ All of Afilias' claims are contrary to the clear testimony of ICANN witnesses during the IRP that NDC's and Verisign's conduct was consistent with ICANN and industry practices. *See, e.g.*, Ms. Willett, Head of the New gTLD Program, IRP Transcript at 707:16–708:3 (“my general understanding based on Verisign's press release is that they had some future intention... to operate the TLD if ICANN approved of a TLD assignment. I also understood from the press release that they had committed funds that were put forward towards the auction. So to me that was akin to and consistent with the auction rules...”)

²¹ *See* Afilias' Response to the *Amicus Curiae* Briefs, ¶¶ 179–84. *Amici* could not compel Mr. Kane's testimony.

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recognized, it is important to prevent gaming of the Program rules in future new gTLD rounds. (Fn. 6, *supra.*) That is especially true where the form of gaming ICANN's system may also be a violation of the antitrust laws, casting doubt on the fairness and legality of DNS activities.

Here, Afilias sought to game the Program rules through collusive activity. Its conduct went far beyond proposing a fair private auction of the kind that ICANN supports. Instead, the express terms of the proposals by Afilias and other contention set members were intended to limit competitive bidding in exchange for pre-auction guarantees of payments by competitors and potential pre-selection of winning and losing participants. Further, the effect of these proposals would be to deprive the Internet community of funds that otherwise could be invested in DNS security and reliability, instead diverting those funds to be split among the losing competitors solely for their own private benefit.

NDC and Verisign request that ICANN confirm that it will consider and reach a determination regarding Afilias' Blackout Period violation as part of its post-IRP process for .WEB. If ICANN would like this request to be endorsed in any other form, please advise us.

Respectfully submitted,

/s/ Steven A. Marenberg

Steven A. Marenberg
PAUL HASTINGS LLP

cc: John Jeffrey, Esq.
Jose I. Rasco
Thomas Indelicarto, Esq.
Ronald L. Johnston, Esq.

Exhibit A

26 September, 2018

RE: New gTLD Subsequent Procedures PDP WG Initial Report

Cheryl Langdon-Orr, Co-Chair
Jeff Neuman, Co-Chair
GNSO New gTLD Subsequent Procedures PDP Working Group

Dear Ms. Langdon-Orr and Mr. Neuman,

I am writing in response to the request in your 10 July 2018 [letter](#) for the Board to provide feedback on the New gTLD Subsequent Procedures Policy Development Process (PDP) Working Group's Initial Report. The Board is impressed by the level of detail that the Working Group has gone to in analyzing the results of the current new gTLD round and the serious effort that is being made to reach consensus on the policies related to each of the issues. We understand that the policy recommendation for the Generic Names Supporting Organization (GNSO) will be built upon existing policies and the Application Guidebook (AGB) instructions unless, and except, for where they have been modified based on Subsequent Procedures PDP consensus. The Board also appreciates the efforts the GNSO and the PDP leadership have taken to include other stakeholders in the discussions on the various issues in the PDP working group and subgroups. Since there are a number of areas the PDP Working Group is still considering, the Board may have comments in the future as discussions advance.

There were a few issues that the Board would like to comment on:

- In regard to Global Public Interest, section 2.3.2, with the growing reliance on PICs as a method of resolving public interest issues within an application, the Board remains concerned with the lack of definition of the global public interest in the context of Public Interest Commitments (PIC) and the Public Interest Commitments Dispute Resolution Procedure (PICDRP). As discussed further below, the Board would like to see additional work fleshing out what is meant by the public interest in this context and additional recommendations concerning PIC enforceability.
- The Board appreciates the approach being taken to deal with the serious issue of Closed Generics, especially with the complex issues related to the public interest and public interest goals in the use or restriction of generic terms in any language. We are aware of the continuing conflicts among competing aspects of the public interest in this area and are concerned about the scalability of any proposed solution. This issue has been pending for some time. In 2015, the Board enacted a resolution on closed generics that provided as follows:

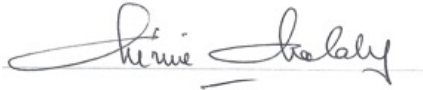
“The NGPC is also requesting that the GNSO specifically include the issue of exclusive registry access for generic strings serving a public interest goal as part of the policy work it is planning to initiate on subsequent rounds of the New gTLD Program, and inform the Board on a regular basis with regards to the progress on the issue.”

Because these difficult questions on how to define the public interest and public interest goals have been pending for several years, the Board re-emphasizes that it remains critical for the Subsequent Procedure group to further flesh out these concepts in all proposed options for addressing closed generics.

- Regarding question 2.7.4.e.2 on “gaming” or abuse of private auction, the Board believes that applications should not be submitted as a means to engage in private auctions, including for the purpose of using private auctions as a method of financing their other applications. This not only increases the workload on processing but puts undue financial pressure on other applicants who have business plans and financing based on their intention to execute the plan described in the application. In particular, we are concerned about how gaming for the purpose of financing other applications, or with no intent to operate the gTLD as stated in the application, can be reconciled with ICANN's Commitments and Core Values.
- Regarding Applicant reviews, section 2.7.7, the Board is interested in recommendations for a mechanism that can be used when there are issues that block an application moving forward.
- The Board is concerned about unanticipated issues that might arise and what mechanism should be used in such cases. The Board understands that the PDP Working Group is discussing a Predictability Framework that could potentially be used to address these types of issues. The Board looks forward to the outcomes of these discussions.
- Regarding timelines for future rounds, the Board requests that the PDP Working Group consider the issue of round closure and what criteria or mechanism could be used to close a round.
- The Board looks forward to further discussions in the PDP on Name Collisions, Applicant Support and the Predictability Framework as each of these may have significant operational impact. On Name Collisions there may be an opportunity to combine work being done by SSAC on the collision risk with the work being done in the PDP to achieve a consensus solution to this issue.

Again, the Board appreciates the efforts and time being devoted by the Subsequent Procedure Working Group and its leadership. We are available to respond to any specific questions the PDP WG might have for the Board.

Best regards,



Cherine Chalaby
Chair, ICANN Board of Directors

Exhibit B

30 September 2020

RE: New gTLD Subsequent Procedures PDP WG Draft Final Report

Cheryl Langdon-Orr, Co-Chair
Jeff Neuman, Co-Chair
GNSO New gTLD Subsequent Procedures PDP Working Group

Dear Ms. Langdon-Orr and Mr. Neuman,

I am writing in response to your [letter](#) from 20 August 2020, in which you informed the Board of the new gTLD Subsequent Procedures PDP Working Group's (PDP WG) publication of the draft Final Report for public comment. The Board recognizes the PDP WG's dedication and hard work, including the PDP WG's alignment of GNSO Policy with existing advice, such as on Reserved Names (Topic 21) and Name Collisions (Topic 29). The Board appreciates the PDP WG's affirmation of the importance of Universal Acceptance, as well as its encouragement of the ongoing efforts taking place through the Universal Acceptance Initiative and the Universal Acceptance Steering Group. The Board also appreciates the organization of the draft Final Report, in which the PDP WG recognizes existing policy and affirms the existing Applicant Guidebook (AGB) and New gTLD Program Committee (NGPC) implementation practices in absence of new consensus policy modifying or clarifying existing policy recommendations. Overall, the Board is impressed with the progress that has been made since the publication of the Initial Report. On behalf of my fellow Board members, I would like to congratulate you and the members of the PDP WG on achieving this important milestone.

In your letter you encouraged the Board to review the draft Final Report and provide feedback on the draft recommendations and implementation guidance. In addition, you sought input from the Board specifically on the topics of private resolution of contention sets and closed generics. We hope that our input on these and other topics will provide you with helpful feedback, contributing to the successful conclusion of the PDP WG. In this context, the Board notes that our comments provided in this letter do not preclude us from providing additional comment or input at a later stage.

Topic 2: Predictability (Pg. 15-19)

- A. The Board welcomes recommendations to support predictability in future new generic top-level domains (gTLDs), and is encouraged by the thoughtful discussion that has taken place on this subject within the PDP WG.
- B. The Board encourages the PDP WG to provide as much detail as possible to ensure clarity around the roles and responsibilities of the GNSO Council, ICANN org, applicants, objectors, other SO/ACs as well as the Board vis-a-vis the predictability framework. To inform implementation, the PDP WG may find it useful to provide case studies to illustrate roles and responsibilities of these different actors if and when changes to future application round processes are proposed and/or required.

- C. With regard to the proposed Standing Predictability Implementation Review Team (SPIRT), the Board encourages the PDP WG to consider whether there are established processes within the GNSO (or within ICANN's multistakeholder model) that might serve the intended role(s) of the SPIRT, rather than creating new ones.
- D. The Board encourages the PDP WG to consider whether recommendations are needed to avoid any unintended impact of the predictability framework on the necessary effectiveness and flexibility of ICANN org when implementing future new gTLD rounds. In this context, the Board notes Annex E that states "The SPIRT shall strive towards achieving Consensus on all advice and/or recommendations from the SPIRT. Even if consensus is not reached, the SPIRT can provide input on any particular issue received, as long as the level of consensus/support within the SPIRT is reported using the standard decision making methodology outlined in section 3.6 of the GNSO WG Guidelines." The Board believes it might be helpful to recommend a timeframe by which the SPIRT needs to reach a decision. (Pg. 16)
- E. It may also be useful for the PDP WG to consider the role of precedent in the Predictability Framework, e.g., can SPIRT recommendations form a body of decisions to guide handling of issues and increase efficiencies? (Pg. 16)
- F. The Board notes that the Predictability Framework cannot replace the ICANN Board or org's need to act in emergency situations, including taking actions in line with the Board or officers' fiduciary responsibilities.

Topic 6: Registry Service Provider Pre-Evaluation (Pg. 28-33)

The Board notes the affirmation of the revenue-neutral approach for future new gTLDs. (Pg. 31)

Topic 9: Registry Voluntary Commitments/Public Interest Commitments (PICs) (Pg. 36-48)

- A. The Board notes that as part of the restatement of ICANN's mission as reflected in the post-IANA Stewardship Transition Bylaws, the current form of the Registry Agreements were explicitly excluded from challenge on grounds that they exceeded ICANN's mission. See Bylaws, Section 1.1(d)(ii)(A)(1) and (2). This exclusion was brought about in large part by concerns from some in the community that some of the PICs within the Registry Agreements were outside of ICANN's technical mission. The community did not wish to invalidate those contracts through the revised mission statement. The language of the Bylaws, however, could preclude ICANN from entering into future registry agreements (that materially differ in form from the 2012 round version currently in force) that include PICs that reach outside of ICANN's technical mission as stated in the Bylaws. The language of the Bylaws specifically limits ICANN's negotiating and contracting power to PICs that are "in service of its Mission." The Board is concerned, therefore, that the current Bylaws language would create issues for ICANN to enter and enforce any content-related issue regarding PICs or Registry Voluntary Commitments (RVCs). Has the PDP WG considered this specific language in ICANN's Bylaws as part of its recommendations or implementation guidance on the continued use of PICs or the

future use of RVCs? Can the PDP WG provide guidance on how to utilize PICs and RVCs without the need for ICANN to assess and pass judgment on content?

- B. In its comment on the Initial Report, the Board asked the PDP WG to give more clarity on how to frame “public interest” in the context of a PIC and the PIC Dispute Resolution Procedure (PICDRP). We note that this has not yet been developed. We would like to reiterate our view that clear guidance on this issue will be valuable, and we encourage the PDP WG to work to that end. Specifically, we ask that the PDP WG provide clear and consistent implementation guidance on “public interest” in this context, to ensure that objective enforceability lies within ICANN’s mission. (See also our comment on Topic 24 below.)

Topic 15: Application Fees (Pg. 62-66)

The Board notes the PDP’s Recommendation 15.7: *“In managing funds for the New gTLD Program, ICANN must have a plan in place for managing any excess fees collected or budget shortfalls experienced. The plan for the management and disbursement of excess fees, if applicable, must be communicated in advance of accepting applications and collecting fees for subsequent procedures.”* The Board asks the PDP to more carefully examine the concept of “excess” or shortage of fees, especially in the light of the likely need for ICANN org, a not-for-profit organization, to increase resources for the application process and the continued support of the new gTLD program. The proposed principle of cost recovery of the next round, as for the 2012 round is understood as a clear mechanism to state to the public that the fee to be paid by applicants is designed to only cover for the cost of the program and not to support non-program operations of ICANN org. The proposed principle does not require a dollar-to-dollar return of any potential excess. The lack of a clear definition of “closure” and “round” for any new gTLD subsequent procedures future ‘round’ is also problematic in this context and the Board encourages the PDP WG to contemplate including such definition in its Final Report. (Pg. 63)

Topic 17: Applicant Support (Pg. 67-79)

- A. The Board notes that *“The Working Group recommends expanding the scope of financial support provided to Applicant Support Program beneficiaries beyond the application fee to also cover costs such as application writing fees and attorney fees related to the application process”* (Recommendation 17.2). The expansion of applicant support to affirmative payments of costs beyond application fees could raise fiduciary concerns for the Board. We encourage the PDP WG to ensure that applicant support is well scoped by preventing, to the extent possible, the possibility of inappropriate use of resources, e.g. inflated expenses, private benefit concerns, and other legal or regulatory concerns. (Pg. 68)
- B. Implementation Guidance 17.14 states that “ICANN org should seek funding partners to help financially support the Applicant Support Program, as appropriate.” The ICANN Board notes that this would change the role of ICANN, as ICANN is not a grant-seeking organization. Alternatively, ICANN org – through the Pro Bono Assistance Program –

could act as a facilitator in the introduction of industry players or potential funding partners to the prospective entrants.

Topic 18: Terms and Conditions

- A. The Board notes that the PDP WG recommends “[u]nless required by specific laws, ICANN Board members’ fiduciary duties, or the ICANN Bylaws, ICANN must only reject an application if done so in accordance with the provisions of the Applicant Guidebook. In the event an application is rejected, ICANN org must cite with specificity the reason in accordance with the Applicant Guidebook, or if applicable, the specific law and/or ICANN Bylaws for not allowing an application to proceed. This recommendation constitutes a revision to Section 3 of the Terms and Conditions from the 2012 round.” (Recommendation 18.1). The Board is concerned that this recommendation may limit the Board’s authority to act as needed. The Board would like to understand what problems the PDP WG identified with regard to Section 3 of the Terms and Conditions in the 2012 Application Guidebook “*Applicant acknowledges and agrees that ICANN has the right to determine not to proceed with any and all applications for new gTLDs, and that there is no assurance that any additional gTLDs will be created. The decision to review, consider and approve an application to establish one or more gTLDs and to delegate new gTLDs after such approval is entirely at ICANN’s discretion. ICANN reserves the right to reject any application that ICANN is prohibited from considering under applicable law or policy, in which case any fees submitted in connection with such application will be returned to the applicant.*” The revision, as proposed by the PDP WG in Recommendation 18, may bind the Board unless one of the specific conditions is met. Such limitations could lead to unforeseen challenges, and so we encourage the PDP WG to provide details on how the proposed text in Recommendation 18.1 addresses any identified problems in Section 3 and also provide guidance on how to avoid limitations on the Board’s authority to act in unanticipated circumstances. (Pg. 79)
- B. The Board notes Recommendation 18.3: “*In subsequent rounds, the Terms of Use must only contain a covenant not to sue if, and only if, the appeals/challenge mechanisms set forth under Topic 32 of this report are introduced into the program (in addition to the accountability mechanisms set forth in the current ICANN Bylaws).*” The Board understands the intent behind this recommendation, but is concerned that dissatisfied applicants or objectors might argue based on this policy recommendation that the covenant not to sue is not valid because they did not like the way the appeals/challenge mechanism was built or operated. Accordingly the Board asks the PDP WG to review this recommendation, as anything that could weaken the covenant not to sue might preclude the ability to offer the program due to an unreasonable risk of lawsuits. The Board also asks the PDP WG to provide guidance on who would make the determination that the conditions set forth in Recommendation 18.3 are met and how.

Topic 20: Application Change Request

The Board notes Recommendation 20.6: “The Working Group recommends allowing application changes to support the settling of contention sets through business combinations or other forms

of joint ventures. In the event of such a combination or joint venture, ICANN org may require that re-evaluation is needed to ensure that the new combined venture or entity still meets the requirements of the program. The applicant must be responsible for additional, material costs incurred by ICANN due to re-evaluation and the application could be subject to delays.” Also Recommendation 20.8: *“The Working Group recommends allowing .Brand TLDs to change the applied-for string as a result of a contention set where (a) the change adds descriptive word to the string, (b) the descriptive word is in the description of goods and services of the Trademark Registration, (c) such a change does not create a new contention set or expand an existing contention set, (d) the change triggers a new public comment period and opportunity for objection and, (e) the new string complies with all New gTLD Program requirements.”* The Board acknowledges that recommendations 20.6 and 20.8 may lead to more flexibility, permitting applicant changes while also increasing the complexity of future new gTLD procedures. We note that this increase in flexibility and complexity is likely to lead to higher costs beyond applicant fees and result in possible delays, thereby making subsequent rounds potentially less predictable.

Topic 22: Registrant Protections

The Board notes the PDP WG’s recommendation that *“TLDs that have exemptions from the Code of Conduct (Specification 9), including .Brand TLDs qualified for Specification 13, must also receive an exemption from Continued Operations Instrument (COI) requirements or requirements for the successor to the COI.”* In the rationale provided for Recommendation 22.7, the PDP WG also states that an Emergency Back-end Registry Operator (EBERO) event would not be necessary because *“there are no registrants in need of such protections in the event of a TLD failure.”* The Board encourages the PDP WG to provide more details in its rationale and to ensure there are no hypothetical cases in which an EBERO might be appropriate. In addition, the Board encourages the PDP WG to consider the potential impact on end users and consumers in the event of a short-term or long-term technical or business failure of a .BRAND TLD.

Topic 23: Closed Generics (also known as Exclusive Generics) (Pg. 96-102)

- A. As previously [noted](#) by the Board, we believe that *“[closed generics] require input from the GNSO through the bottom-up policy development process”* and we continue to appreciate the PDP WG’s work on this topic. As noted in our 2018 [letter](#), the questions on how to evaluate the public interest and public interest goals of an application have been pending for several years, and we continue to encourage the PDP WG to reach consensus¹ on one or more recommendations concerning closed generics, taking into account relevant public comment and advice from ICANN’s Advisory Committees.
- B. You quoted the language of a [2015 Board letter](#) in your communication that is based on a [2015 resolution](#) of the New gTLD Program Committee (NGPC), stating: *“Resolved (2015.06.21.NG02), to address the GAC’s Category 2.2 Safeguard Advice, the NGPC requests that the GNSO specifically include the issue of exclusive registry access for*

¹ Consensus here is referred to as defined in the [GNSO Working Group Guidelines](#).

generic strings serving a public interest goal as part of the policy work it is planning to initiate on subsequent rounds of the New gTLD Program, and inform the Board on a regular basis with regards to the progress on the issue.” You asked “whether this [resolution] meant that the ICANN Board resolved that all future closed generics must serve a public interest goal if they were to be allowed, or whether it was just attempting to understand the GNSO’s thoughts on closed generics in general.” While the NGPC requested a discussion on the issue of closed generics that serve a public goal, requesting a specific outcome of such a discussion lies outside the Board’s purview. Pursuant to the Bylaws, we will consider any consensus-based recommendation that is adopted by the GNSO Council and put before us and base our decision on whether we reasonably believe that the policy proposal is or is not in the best interests of the ICANN community and ICANN (Bylaws Annex A, Section 9 (a)).

- C. The PDP WG also enquired about the [three recent proposals](#) on the future treatment of Closed Generics and “whether any of these proposals at a high level are heading in a direction in line with the Board’s views.” The Board read all three proposals with great interest. As stated above, the Board is not in a position to request policy outcomes. It is therefore not in the Board’s purview to indicate a preference. As stated above, we will base our decision on whether we reasonably believe that the policy proposal is or is not in the best interests of the ICANN community or ICANN (Bylaws Annex A, Section 9 (a)), if and when such a policy is recommended by the GNSO Council and put before us.

Topic 24: String Similarity Evaluations (Pg. 102-109)

- A. The Board notes the PDP WG’s strong reliance on the intended use of applied-for strings when it comes to similarity evaluations in Recommendation 24.3: “*Applications will not automatically be placed in the same contention set because they appear visually to be a single and plural of one another but have different intended uses.*” The Board asks the PDP WG to include recommendations and implementation guidance for objective evaluation criteria to determine “different intended uses” because we believe this will be invaluable to ensure consistent and transparent processes regarding this element in string similarity evaluations. (Pg. 103)
- B. The Board notes Recommendation 24.5: “*If two applications are submitted during the same application window for strings that create the probability of a user assuming that they are single and plural versions of the same word, but the applicants intend to use the strings in connection with two different meanings, the applications will only be able to proceed if the applicants agree to the inclusion of a mandatory Public Interest Commitment (PIC) in their Registry Agreement. The mandatory PIC must include a commitment by the registry to use the TLD in line with the intended use presented in the application, and must also include a commitment by the registry that it will require registrants to use domains under the TLD in line with the intended use stated in the application.*” As noted in our comment on Topic 9, the Board is concerned that the proposed reliance on PICs to restrict the use and potentially the content of names registered in delegated TLDs raises questions about compliance with ICANN’s Bylaws,

which state that ICANN will not restrict “services that use the Internet’s unique identifiers or the content that such services carry or provide [...]”.

Topic 25: Internationalized Domain Names (IDNs) (Pg. 109-113)

- A. The Board sees IDNs as a critical part of ICANN’s mission to support global access to the domain name system, and therefore appreciates the affirmation that IDNs are “*an integral part of the New gTLD Program.*”
- B. The Board appreciates that Root Zone Label Generation Rules (RZ-LGR), which have been developed by the efforts of the various script communities, have been integrated into the program to validate and determine the variant labels of the applied-for strings and that many of the [Recommendations for Implementing Variant TLDs \[icann.org\]](#) (Variant TLD Recommendations) have also been incorporated. (Pg. 109-110)
- C. The Board suggests that any applied-for string in a script not integrated in the RZ-LGR should not be processed until its validity and variant labels can be determined by RZ-LGR, following the [Recommendation 5 \[icann.org\]](#) of the RZ-LGR Study Group. (Pg. 110)
- D. The Board also suggests that [Recommendations 5 and 6 \[icann.org\]](#) of Variant TLDs Recommendations also be considered by the PDP WG for implementing variant TLDs.
- E. The Board notes that using RZ-LGR and adopting the Variant TLD Recommendations may have impact on other processes, including string similarity reviews, managing reserved labels, changes of control, and more, as also [analyzed \[icann.org\]](#) in the Variant TLD Recommendations, which are not currently addressed in the draft Final Report. (Pg. 110)
- F. In the context of the point above, the Board is concerned that additional recommendations (and implementation guidance) are needed for effectively processing gTLD applications along with their variant labels. Therefore, the Board asks that impact on these processes be assessed and finalized either by the PDP WG or by the GNSO’s further follow-up work in time for planning and implementation of the next gTLD application round.
- G. The Board notes that ICANN org is finding that some IDN tables previously approved for gTLD registries may have security or stability issues, based on more recent work by the technical and script-based communities. Taking such findings into consideration, the Board asks the PDP WG to clarify which IDN tables “pre-vetted by the community” could still be used to remove IDN table testing for the new gTLDs. The Board suggests that the PDP WG considers Reference IDN tables being published by ICANN org as the candidate pre-vetted IDN tables. (Pg. 178)

Topic 29: Name Collisions (Pg. 128-133)

The Board encourages the PDP WG to provide details on how future NCAP study results should be dealt with in future rounds. Would these need to initiate new policy processes and how would such processes affect ongoing rounds?

Topic 30: GAC Consensus Advice and GAC Early Warning (Pg. 133-139)

The Board is committed to working closely with the GAC to encourage the issuing of advice prior to the finalization of the Applicant Guidebook (AGB), with the goal of reducing, if not eliminating, the need for wide-ranging GAC advice.

Topic 31: Objections

The Board notes that the PDP WG affirms *“that the role of the Independent Objector (IO) should exist in subsequent procedures”* (Affirmation 31.8). As the PDP WG seems to be affirming the role and use of the IO (which was not part of the earlier policy recommendations). The Board encourages the PDP WG to identify the purpose of continuing the use of the IO role and the problems that the continued use of the IO is expected to solve. The Board also encourages the PDP WG to consider how the IO role was exercised in the 2012 round to help illustrate this work. (Pg. 142)

Topic 33: Dispute Resolution Procedure After Delegation (Pg. 156-157).

The Board notes Recommendation 33.2 that states: *“For the Public Interest Commitment Dispute Resolution Procedure (PICDRP) and the Registration Restrictions Dispute Resolution Procedure (RRDRP), clearer, more detailed, and better-defined guidance on the scope of the procedure, the role of all parties, and the adjudication process must be publicly available.”* The Board encourages the PDP WG to provide clear problem statements detailing any concrete deficiencies with the PICDRP and the Registration Restrictions Dispute Resolution Policy (RRDRP). Such statements may help the PDP WG provide details on what aspects of the guidance concerning the scope of the procedure, the role of all parties, and the adjudication process should be clearer, more detailed, and better-defined.

Topic 34: Community Applications (Pg. 157-162)

- A. The Board notes that the PDP WG recommended very few substantive changes related to the community application process, and more specifically to the Community Priority Evaluation (CPE) process. The PDP WG simply recommends that the *“Community Priority Evaluation (CPE) process must be efficient, transparent and predictable”* (Recommendation 34.2) and that *“ICANN org should examine ways to make the CPE process more efficient in terms of costs and timing”* (Recommendation 34.4). The Board is concerned that these are not sufficiently detailed recommendations to address the issues that arose during the 2012 round. The Board asks the PDP WG to raise specific concerns that the PDP WG sees with the CPE process, considering the fact that many of the CPE determinations were challenged in the 2012 round. The Board believes these clarifications are required in order for the Board to assess whether it is in the best interests of ICANN and the ICANN community to proceed with CPEs in the next round.
- B. In this context the Board also encourages the PDP WG to consider the mission-limitation that derives from the Bylaws, which state that ICANN will not restrict “services that use the Internet’s unique identifiers or the content that such services carry or provide”

(Section 1.1 (c)). The PDP WG may want to review the impact this provision might have on ICANN's ability to enforce the content of community TLDs post delegation.

Topic 35: Auctions: Mechanisms of Last Resort/Private Resolution of Contention Sets
(Pg. 163-172)

- A. The Board notes Recommendation 35.2, which states “[...] *the Applicant Guidebook (AGB) must reflect that applicants will be permitted to creatively resolve contention sets in a multitude of manners, including but not limited to business combinations or other forms of joint ventures and private resolutions (including private auctions).*” The Board encourages the PDP WG to provide a rationale why the resolution of contention sets should not be conducted in a way such that any net proceeds would benefit the global Internet community rather than other competing applicants.
- B. The Board notes that if “private” resolutions will be allowed or encouraged in subsequent procedures, the PDP WG is requested to provide a rationale for why these private processes should only partially be brought into the program rather than be kept outside of the program or be brought into the program. The Board also encourages the PDP WG to provide guidance on the kinds of transparency requirements that it would like to see applied in practice around private resolutions of contention sets.
- C. Recommendation 35.3 states that “*Applications must be submitted with a bona fide (good faith) intention to operate the gTLD. Applicants must affirmatively attest to a bona fide intention to operate the gTLD clause for all applications that they submit.*” The Board is supportive of applications needing to be submitted with “bona fide” intentions to operate the gTLD. However, it is unclear from Recommendation 35.3 whether these are specific and enforceable promises or statements of current intent that can be changed at a later time.
- D. The Board acknowledges the “*potential non-exhaustive list of ‘factors’ that ICANN may consider in determining whether an application was submitted with a bona fide (good faith) intention to operate the gTLD.*” We note that this non-exhaustive list of “factors” may put ICANN org or the ICANN Board into the position of subjectively trying to determine the state of mind of applicants, and take decisions that are subject to possible challenges. The Board asks the PDP WG to consider providing a clear problem statement of what types of behavior or abuse the requirement of bona fide applications is meant to address. PDP WG members could then use such a statement to provide objective criteria for assessing the bona fide nature of an application. (Pg. 164)
- E. The Board notes that a statement of “bona fide” intentions would be expected for all applications, not only those involved in auctions, particularly since when an application is submitted the applicant likely will not know if it will be in contention. (Pg. 164)
- F. In this context, the Board suggests that the PDP WG consider the hypothetical scenario of an applicant intending to operate up to five gTLDs. To avoid contention sets the applicant might apply for 20 strings, with the expectation to drop 15 applications based on contention and their own preference. Would those 15 applications not be considered “bona fide,” and what would be the consequence for such an applicant? Similarly, a large number of applications could be submitted by separate corporations; would ICANN org be required to establish each applicant’s investor(s) and other controlling parties in

order to affirm bona fide intent? The Board believes it would be helpful for the PDP WG to address these questions and provide guidance on making objectively enforceable rules to establish what constitutes a bona fide intention to run a gTLD. (Pg. 164)

Topic 41: Contractual Compliance (Pg. 181-183)

- A. The Board is aware of the need for increased resources to ensure the enforcement of compliance on a significantly larger number of TLDs.
- B. The Board notes that much of the data reporting that is being recommended by the PDP WG is already being published, see [ICANN Contractual Compliance Dashboard](#). (Pg.182)

Again, the Board would like to thank the Subsequent Procedure PDP Working Group, its leadership, and the support team for its dedication and hard work. The Board remains available to respond to any specific questions or comments the PDP WG might have.

Best regards,



Maarten Botterman
Chair, ICANN Board of Directors

Exhibit C

Begin forwarded message:

From: Jon Nevett Contact Information Redacted
Subject: Re: .web
Date: June 8, 2016 at 12:33:31 PM EDT
To: "Jose I. Rasco" Contact Information Redacted
Cc: Juan Diego Calle Contact Information Redacted

Thanks Jose. Would this be the same decision for .inc and .llc?

Contact Information Redacted

On Jun 7, 2016, at 11:32 AM, Jose Ignacio Rasco wrote:

Jon,
Thanks for the message, sorry for the delay. The three of us are still technically the managers of the LLC, but the decision goes beyond just us. 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. Based on your request, I went back to check with all the powers that be and there was no change in the response and will not be seeking an extension. It pains me personally to stroke a check to ICANN like this, but that's what we're going to have to do just like others did on .app and .shop.
Best,
Jose

On Jun 6, 2016, at 1:08 PM, Jon Nevett Contact Information Redacted wrote:

Hi guys. Jose and I corresponded last week, but I wanted to take another run at the three of you. Not sure if you three are still the Board members of your applicant, but I wanted to reach out to discuss a couple of ideas. Until Monday, I believe that we have a right to ask for a 2 month delay of the ICANN auction with the agreement of all applicants. Would you be ok with an extension while we try to work this out cooperatively?

Please let me know.

Thanks.

jon

Jonathon Nevett
Co-Founder & EVP, Donuts Inc.

Contact Information Redacted

Exhibit D

From: Juan Diego Calle Contact Information Redacted
Subject: Thread
Date: June 7, 2016 at 4:36:40 PM EDT
To: "Jose I. Rasco" Contact Information Redacted

Attached.

••• AT&T

4:35 PM



Messages (119)

Steve

Details

Wednesday 7:32 PM

Amigo...how's life?
Got time to chat today?

Yesterday 12:53 PM

Hey bro, not sure if you got my message last week. Would appreciate a few mins today if you're free, thanks

Steve! Hope you are well. Sorry I was out last week with kids.

Ahhhhh I see. You free to talk sometime today or tomorrow?

I think I know why you're reaching out. Unfortunately all I can say is that we have to go to ICANN auction.

I understand...you gotta do what is best for you. still like to talk if you're amicable.



Take a picture

Send

Can't give up...how about I guarantee you score at least 16 mil if you go into the private auction and lose? \$\$\$

Today 2:52 PM

No. [Redacted]

Ok how about...17.02m?

No. ;)

Ok..np. I think Kane just got the deal with Jose anyway 😊

[Redacted]

Today 4:22 PM

In all seriousness if it helps to delay the private auction a few days to get you back in, it's possible. Just throwing that out if it helps



Text Message

Send

Sent from my iPhone

Exhibit E

Messages

Details

[Redacted]


[Redacted]

[Redacted]

Thursday 6:34 PM

Can you talk?

Today 2:48 PM

Heard Heflin offered Juan \$17M;
I'll give you \$17.01M. 

Steve offered him \$16M. Are
you guys bidding each other

Exhibit F

Case Detail

[Edit](#) [Clone](#) [SPAM](#)

▼ Case Information

Case Number	00225003 [View Hierarchy]	Internal Status	● Closed
Account Name	Ruby Glen, LLC	Status	Closed
Contact Name	Daniel Schindler	Case Close Reason	Response Provided
Contact Type		Urgency	Moderate
Application ID	1-1527-54849	Severity	Sev 3
Registry		Case Record Type	General Case [Change]
Case Origin	Web	Category	Application Processing
Multiple Contacts Found	<input type="checkbox"/>	Sub Category	Initial Evaluation Process
Visible in Self-Service Portal	<input checked="" type="checkbox"/>	Case Owner	Jared Erwin [Change]
Suppress Notification	<input type="checkbox"/>	Assigned to	Jared Erwin
Updates On Case	<input type="checkbox"/>	Parent Case	
SLA Resolution status	SLA Exceeded		
Phone			

▼ Additional Information

Subject	.WEB Auction Postponement – Required Applicant Update
Description	<p>ICANN,</p> <p>It has come to our attention that one of the applicants for .WEB has failed to properly update its application. Upon information and belief, there have been changes to the Board of Directors and potential control of Nu Dot Co LLC ("NDC") that has materially changed its application. To our knowledge, however, NDC has not filed the required application change request.</p> <p>As you know, Section 1.2.7 of the Applicant Guidebook specifically states, "[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 via submission of the appropriate forms. This includes applicant-specific information such as changes in the financial position and changes in ownership or control of the applicant... Failure to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading may result in denial of the application." As you also know, ICANN has been clear that such requirements are in full force and effect until the registry agreement is executed with the successful applicant.</p> <p>Failure by No Dot Co LLC to maintain the accuracy of its application is detrimental to the other competing applicants, especially in light of the pending ICANN auction, creating an unfair competitive advantage for NDC.</p> <p>We request that ICANN investigate the change in NDC's Board and potential control and that the ICANN auction scheduled for July 27 be immediately postponed. The auction should be rescheduled after the final investigation is complete and NDC's requisite change request is resolved.</p> <p>We do not make this request lightly and haven't done so in well over 100 other scheduled ICANN auctions.</p> <p>Thank you and best regards, Jonathon Nevett</p>

Case Comments

[New](#)

[Case Comments Help](#) [?](#)

Action	Public	Comment
		<p>Created By: Jared Erwin (6/27/2016 3:42 PM) Dear Daniel Schindler,</p> <p>Thank you for bringing this to our attention. We are reviewing the information provided, and we will work with the applicant directly should action be required. We note your request to postpone the auction for the .WEB/.WEBS contention set currently scheduled for 27 July 2016. Please continue to follow the standard auction process and monitor the Customer Portal for updates. If there are any changes to the auction date, we will notify you and all auction participants.</p>
Make Private	<input checked="" type="checkbox"/>	<p>Thank you for your attention. I will now resolve this case, but please do not hesitate to reopen it should you have any questions.</p> <p>Best regards,</p> <p>Jared Erwin New gTLD Operations</p>
		<p>Created By: Susan Yao (6/23/2016 10:17 AM) Dear Daniel Schindler,</p> <p>Thank you for your contacting ICANN Global Support on your request.</p>
Make Private	<input checked="" type="checkbox"/>	<p>Your request has been forwarded to our gTLD Team for processing. Someone from the team will be contacting you.</p> <p>Please do not hesitate to contact us if you have any other questions or concerns.</p> <p>Best regards, Susan Yao Global Support Analyst II ICANN Global Support</p>

Exhibit G



JUL 11 2016

Schlund Technologies GmbH | Maximilianstr. 6 | 93047 Regensburg | Germany

Schlund Technologies GmbH
Maximilianstr. 6
93047 Regensburg
Germany

Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536
USA

Handelsregister B
Regensburg 9620

Geschäftsführer/CEO
RA Thomas Moerz

USt-IdNr. DE814286643

Commerzbank AG
Konto-Nr. 589279900
BLZ 60040000

IBAN-Nr.:
DE54600400000589279900

SWIFT-Code:
COBADEFFXXX

To: Akram Atallah, Christine Willett, John Jeffrey
Via e-mail and fax

July 11, 2016

RE: Postponement of ICANN Auction .WEB/.WEBS

Dear Mr. Atallah, Ms. Willett, and Mr. Jeffrey,

Schlund Technologies GmbH is one of the applicants for .WEB with a scheduled ICANN Auction on July 27, 2016.

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.

Sincerely,

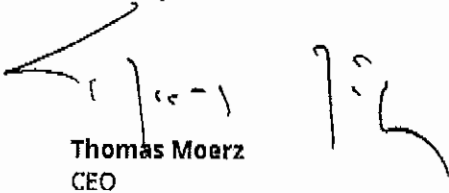

Thomas Moerz
CEO

Exhibit H

From: Brijesh Joshi [REDACTED]
Date: Monday, July 11, 2016 at 12:07 AM
To: Akram Atallah [REDACTED], Christine Willett [REDACTED],
John Jeffrey [REDACTED], [REDACTED]
Cc: Sandeep Ramchandani [REDACTED]
Subject: Postponement of the .WEB auction

Hi,

We support 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 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.

Brijesh Joshi
Director,
Radix FZC, Dot Web, Inc.

Exhibit I



The Internet Corporation for Assigned Names and Numbers

13 July 2016

Mr. Jose Ignacio Rasco, NU DOT CO LLC
Ms. Sarah Falvey, Charleston Road Registry Inc.
Mr. Robert Wiegand, Web.com Group, Inc
Mr. Brijesh Joshi, DotWeb Inc.
Mr. Daniel Schindler, Ruby Glen, LLC
Mr. John Kane, Afilias Domains No. 3 Limited
Mr. David Barron, Vistaprint Ltd
Mr. Thomas Moerz, Schlund Technologies GmbH
Mr. Jonathon Nevett, Ruby Glen, LLC

Re: .WEB/.WEBS Auction on 27 July 2016

Dear Members of the .WEB/.WEBS Contention Set,

We are writing in regards to inquiries we have received concerning potential changes of control of NU DOT CO LLC, an applicant in the .WEB/.WEBS contention set, and requests to postpone the auction to investigate the matter. We would like to provide some clarification regarding this issue and how it may or may not impact the .WEB/.WEBS auction scheduled for 27 July 2016.

Firstly, as a reminder, in regards to a request for postponement, Rule 10 of the Auction Rules for Indirect Contention states:

“...Postponement requests must be submitted by all members of the Contention Set by the due date specified within the ICANN Customer Portal, generally twenty eight (28) days after receipt of Intent to Auction notice from ICANN. If a postponement request is not submitted by the due date specified within the ICANN Customer Portal or is not accommodated by ICANN, an applicant may request an advancement/postponement request via submission of the Auction Date Advancement/Postponement Request Form. The form must be submitted at least 45 days prior to the scheduled Auction Date and ICANN must receive a request from each member of the contention set...” (<https://newgtlds.icann.org/en/applicants/auctions/rules-indirect-contention-24feb15-en.pdf>)

The date to submit the postponement form passed on 12 June 2016, and we did not receive consensus from the contention set. As such, no postponement was granted.

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.



The Internet Corporation for Assigned Names and Numbers

Finally, as you are aware, ICANN provided confirmation to all members of the .WEB/.WEBS contention set on 6 July 2016 that the auction will be proceeding as scheduled on 27 July 2016. Please follow all instructions provided to you by Power Auctions, the Auction Manager, regarding next steps, including mini and mock auctions as well as the deposit deadline.

Regarding the deposit deadline, Rule 28 of the Auction Rules for Indirect Contention states:

“All wires and all instructions associated with Deposits, including instructions regarding the allocation of funds among Contention Sets from wires and funds rolled over from previous Auctions, must be received no later than 16:00 UTC on the day that is seven (7) calendar days prior to the Commencement Date of the relevant Auction (the “Deposit Deadline”), unless this deadline is waived, at the Auction Manager’s sole discretion.”

As per Rule 28, the Deposit Deadline for the upcoming auction is 16:00 UTC on 20 July 2016.

While the auction is currently set to proceed as scheduled, applicants may continue to work toward self-resolution of the contention set. Applicants may withdraw their application up until the Deposit Deadline noted above. Once the Deposit Deadline is reached, there is a quiet period in which applicants are no longer allowed to withdraw their application until after conclusion of the auction.

I hope this information has been helpful to you. Please do not hesitate to respond with any additional questions or concerns. Should you have specific questions regarding next steps for the auction, you may submit a case to globalsupport@icann.org, and someone from my team will contact you promptly.

Sincerely,

Christine A. Willett
Vice President, GDD Operations
ICANN

Exhibit J

**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 K

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
Title	Ruby Glen, LLC v. Internet Corp. for Assigned Names & Numbers		

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.

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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 . . .

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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

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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 L

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, Presiding

Argued 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 M

From: Oliver Mauss .Contact Information Redacted

Date: July 5, 2016 at 9:27:07 AM EDT

To: Contact Information Redacted

Subject: proposal

Juan,

it has been a while since we last spoke, I hope things are well on your side.

I understand that you have decided against joining the Applicant Auction for .web. I have no insight into your motivation for this decision, but perhaps you might be interested in a different approach to resolving the string contention.

We have designed an Alternative Private Auction that comes with some advantages against the Application Auction and also the ICANN auction. Here are the basic principles:

- It divides the participants into groups of strong and weak
- the weak players are meant to lose and are compensated for this with a pre-defined sum
- the strong players bid for the asset
- the highest bid wins, but the winner pays a price lower than the 2nd highest bid

In result, there are a number of advantages versus both ICANN and Applicant Auction:

- the winning party pays less for the asset in comparison to both ICANN and Applicant Auction
- the losing strong players receive a higher return than in the Applicant Auction
- the losing weak players receive a lower return than in the Applicant Auction

So essentially, the benefit for the strong bidders comes from a lower share of proceeds for the weak bidders than in the Applicant Auction.

I have attached a deck that describes the principles in detail and also gives some examples. It has been developed by Takon, a consultancy specialized in auctions.

I have already discussed this with other parties in the contention set and have received only positive feedback so far. I would appreciate if you could review as well and give me your view. Perhaps this approach achieves a better fit with your goals than the Applicant Auction.

I look forward to hearing from you.

Best

Oliver

Oliver Mauss
CEO

United Internet Ventures AG | Ernst-Frey-Strasse 9 | 76135 Karlsruhe | Germany

Phone: +49 721 91374-3400

E-Mail: Contact Information Redacted | Web: www.united-internet.de

Surplus Sharing Negotiation (SSN)

Ex ante agreement process for TLD *.web*
instead of the ICANN Last Resort Auction (IA)

June 2016

Surplus Sharing Negotiation (SSN)

Procedure and main advantages

- The SSN is a procedure to resolve the contention between the applicants for a TLD and is conducted instead of the ICANN Last Resort Auction (IA).
- The SSN generates higher surpluses for all applicants than the ICANN Auction (IA) in the case that the SSN-Auction (SSNA) is conducted.

SSN Procedure

How does the SSN work?

- The SSN consist of two stages:
 - (1) Participation Decision (SSNP)
 - (2) Auction (SSNA)
- In the SSNP, the applicants decide on their participation in the SSNA.
- If not more than three applicants decide to participate in the SSNA, the SSNA is conducted, otherwise, the SSN is terminated and instead the IA will take place.

SSN Procedure

How does the SSN-Participation-Decision (SSNP) work?

- The applicants simultaneously decide whether they want to participate in the SSN-Auction (SSNA) or not.
- If only one applicant decide to participate in the SSNA, this applicant immediately wins the TLD at price p (see below).
- If two or three applicants decide to participate in the SSNA, the SSNA will be conducted.
- If more than three applicants decide to participate, the SSN is terminated and the IA will take place.

SSN Procedure

How does the SSN-Auction (SSNA) work?

- Two or three SSNA-participants simultaneously submit their bid (one-shot sealed-bid mechanism).
- The SSNA-participants with the highest bid (SSNA-winner) wins the TLD.
- The group of the applicants that do not participate in the SSNA receives a predetermined payment p .
- The SSNA-losers receive from the SSNA-winner a compensation payment, which depends on the bids in the SSNA and the payment p .

Note: The SSNA makes only sense for two or three participants.



Rules and Properties of the Surplus Sharing Negotiation Auction (SSNA)

Surplus Sharing Negotiation Auction (SSNA)

Variables and notation

SSN	Surplus Sharing Negotiation Process
SSNA	Surplus Sharing Negotiation Auction
IA	ICANN Last Resort Auction
n	Number of applicants for <i>.web</i>
v_i	Applicant <i>i</i> 's value (willingness to pay) for <i>.web</i> , $i = 1, \dots, n$
π_i	Applicant <i>i</i> 's surplus (profit), $i = 1, \dots, n$
p	Payment for the non-participating applicants
$\varphi(b_1, b_2, p)$	Compensation payment for the SSNA-losers

Properties of the SSNA

The SSNA is a simple and an incentive compatible mechanism

- **One-shot sealed-bid auction:** Two or three strong applicants participate in the SSNA where they simultaneously submit their bids.
- **No sophisticated bidding strategy required:** The SSNA is designed that if the SSNA-participants consider themselves equally strong (i.e. equally likely to be weaker or stronger than each of the other SA-participants,
 - they have an incentive to bid their willingness to pay for the TLD in the SSNA (i.e. truthful bidding),
 - their optimal bid does not depend on the payments to the other applicants that do not participate in the SSNA.
- **Truthful bidding:** optimal bidding strategy in the SSNA.
- **Efficient outcome:** SSNA-participant with the highest valuation for the TLD wins the SSNA and thus the TLD.

SSNA Concept

Rules

- The two (three) applicants 1, 2 (and 3), that participate in the SSNA, simultaneously submit their b_1, b_2 (and b_3), we assume $b_1 > b_2 (> b_3)$
- The reservation price is determined by the compensation payment to the other applicants p , i.e. $b_1, b_2, b_3 \geq p$
- The SSNA-participant 1 with b_1 (highest bid) is called the SSNA-winner and the SSNA-participants 2 (and 3) are called SSNA-losers.
- The SSNA-winner wins the TLD.
- The group of non-participating applicants receives from the SSNA-winner the predetermined compensation payment p .
- Each of the SSNA-losers receives from the SSNA-winner the compensation payment $\varphi(b_1, b_2, p)$.

SSNA with two bidders

Compensation payments

The group of non-participating applicants receive from the SSN-winner the predetermined payment p .

The SSNA-loser receives from the SSNA-winner the payment $\varphi(b_1, b_2, p)$:

$$(1) \quad \varphi(b_1, b_2, p) = \frac{\frac{b_1+b_2}{2} - p}{2} = \frac{b_1+b_2-2p}{4} \quad \text{if } b_2 > \frac{b_1+2p}{3} \Leftrightarrow b_1 - b_2 < 2(b_2 - p)$$

The SSNA-loser receives half of the difference $\frac{b_1+b_2}{2} - p$ from the SSNA-winner if the difference between b_1 and b_2 is smaller than twice the difference between the SSNA-loser's bid b_2 and the compensation payment p to the other bidders.

This is considered to be the very probable case!

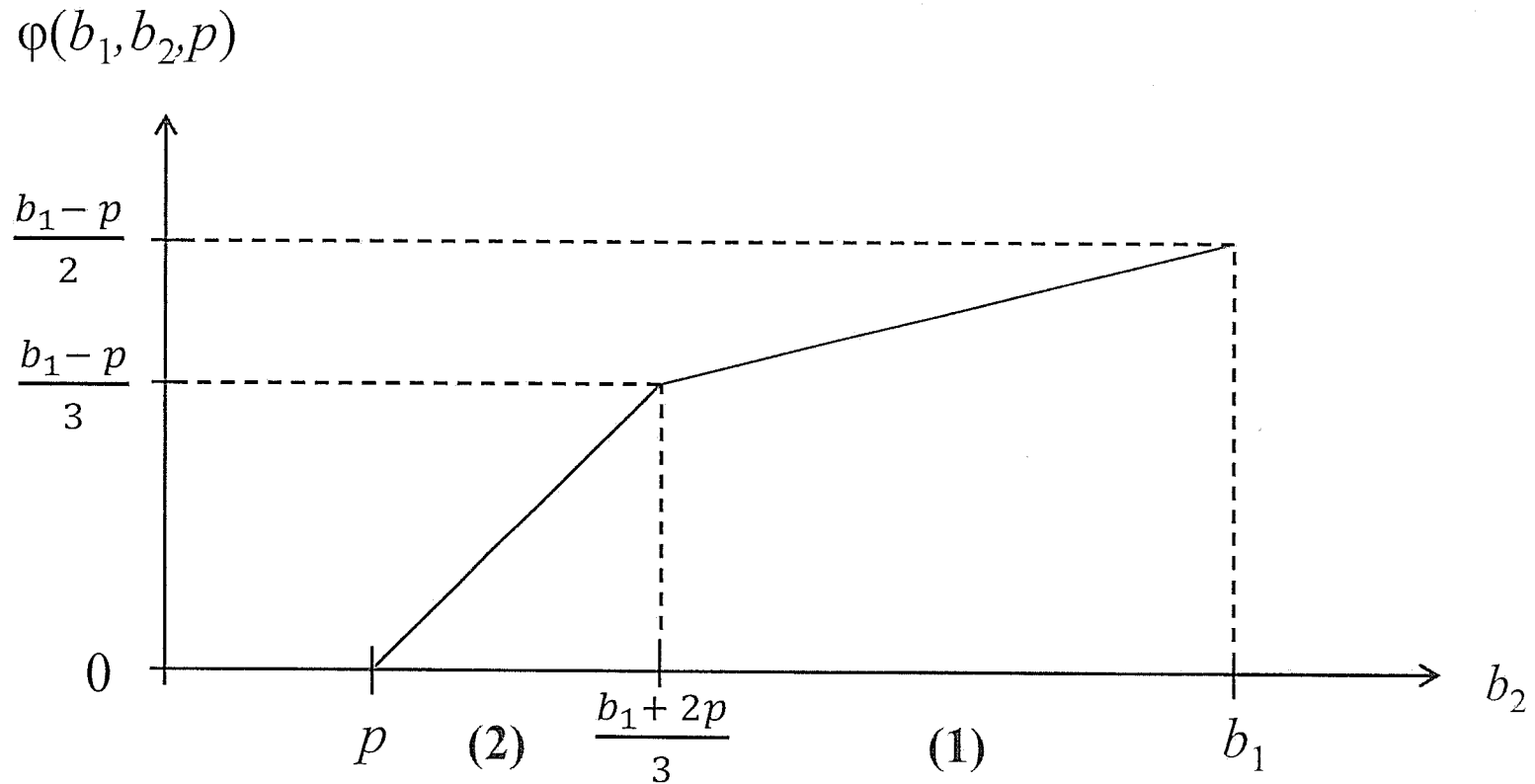
$$(2) \quad \varphi(b_1, b_2, p) = b_2 - p \quad \text{if } p < b_2 \leq \frac{b_1+2p}{3} \Rightarrow b_1 - b_2 \geq 2(b_2 - p)$$

The SSNA-loser receives the difference between its SSNA-bid b_2 and p if the difference between b_1 and b_2 is larger than twice the difference between b_2 and p .

This rule assures that the SSNA-winner is not worse off than in the IA.

SSNA with two bidders

Compensation payment for the SSNA-loser (illustration)



SSNA with two bidders

SSNA-participants' surpluses π_1 and π_2

➤ SNNA-winner

$$(1) \quad \pi_1 = v_1 - p - \frac{b_1 + b_2 - 2p}{4} \quad \text{if} \quad b_2 > \frac{b_1 + 2p}{3}$$

$$(2) \quad \pi_1 = v_1 - b_2 \quad \text{if} \quad p < b_2 \leq \frac{b_1 + 2p}{3}$$

➤ SNNA-loser

$$(1) \quad \pi_2 = \frac{b_1 + b_2 - 2p}{4} \quad \text{if} \quad b_2 > \frac{b_1 + 2p}{3}$$

$$(2) \quad \pi_2 = b_2 - p \quad \text{if} \quad p < b_2 \leq \frac{b_1 + 2p}{3}$$

v_1 and v_2 denote the two strong applicants' values (willingness to pay) for the nTLD *.web* and π_1 and π_2 denote their surpluses.

Example 1.1 (two SSNA-bidders)

Case (1): $v_2 > (v_1 + p)/3$

- $v_1 = 100, v_2 = 80, p = 20$
- Truthful bidding: $b_1 = v_1 = 100, b_2 = v_2 = 80$
- SSN
 - Applicant 1 wins the SSNA and thus the TLD
 - Applicant 1 pays $\varphi(b_1, b_2, p) = \frac{b_1 + b_2 - 2p}{4} = 35$ to Applicant 2 and $p = 20$ to the others
 - Applicant 1's surplus: $\pi_1(\text{SSN}) = v_1 - p - \varphi(b_1, b_2, p) = 100 - 35 - 20 = 45$
 - Applicant 2's surplus: $\pi_2(\text{SSN}) = \varphi(b_1, b_2, p) = 35$
 - Surplus of each of the $n - 2$ other applicants : $\pi_j(\text{SSN}) = 20/(n - 2)$
- ICANN Auction (IA)
 - Applicant 1 wins the IA at $b_2 = 80$
 - Applicant 1's surplus: $\pi_1(\text{IA}) = v_1 - b_2 = 100 - 80 = 20$
 - Applicant 2's surplus: $\pi_2(\text{IA}) = 0$
 - Surplus of each of the $n - 2$ other applicants : $\pi_j(\text{IA}) = 0$

Example 1.2 (two SSNA-bidders)

Case (2): $v_2 \leq (v_1 + 2p)/3$

- $v_1 = 100, v_2 = 40, p = 20$
- Truthful bidding: $b_1 = v_1 = 100, b_2 = v_2 = 40$
- SSN
 - Applicant 1 wins the SSNA and thus the TLD
 - Applicant 1 pays $\varphi(b_1, b_2, p) = b_2 - p = 20$ to Applicant 2 and $p = 20$ to the others
 - Applicant 1's surplus: $\pi_1(\text{SSN}) = v_1 - p - \varphi(b_1, b_2, p) = 100 - 20 - 20 = 60$
 - Applicant 2's surplus: $\pi_2(\text{SSN}) = \varphi(b_1, b_2, p) = 20$
 - Surplus of each of the $n - 2$ other applicants : $\pi_j(\text{SSN}) = 20/(n - 2)$
- ICANN Auction (IA)
 - Applicant 1 wins the IA at $b_2 = 40$
 - Applicant 1's surplus: $\pi_1(\text{IA}) = v_1 - b_2 = 100 - 40 = 60$
 - Applicant 2's surplus: $\pi_2(\text{IA}) = 0$
 - Surplus of each of the $n - 2$ other applicants : $\pi_j(\text{IA}) = 0$

Examples 1 (two SSNA-bidders)

Comparison

Case	$b_1 = v_1$	$b_2 = v_2$	p	$\varphi(b_1, b_2, p)$	$\pi_1(\text{SSN})$	$\pi_2(\text{SSN})$	$\pi_1(\text{IA})$	$\pi_2(\text{IA})$
(1)	100	80	20	35	45	35	20	0
(2)	100	40	20	20	60	10	60	0

For both SSNA-participants 1 and 2, the SSN is never worse than the IA.
For Applicant 1 the SSN is better in Case (1) and for Applicant 2 the SSN is better in Case (1) and Case (2).

For all other applicants that do participate in the SSNA, the SSN is better than the ICANN Auction (IA).

SSNA with three bidders

Compensation payments

The group of non-participating applicants receive from the SSNA-winner the predetermined payment p .

Each of the two SSNA-losers receives from the SSNA-winner the same compensation payment $\varphi(b_1, b_2, p)$:

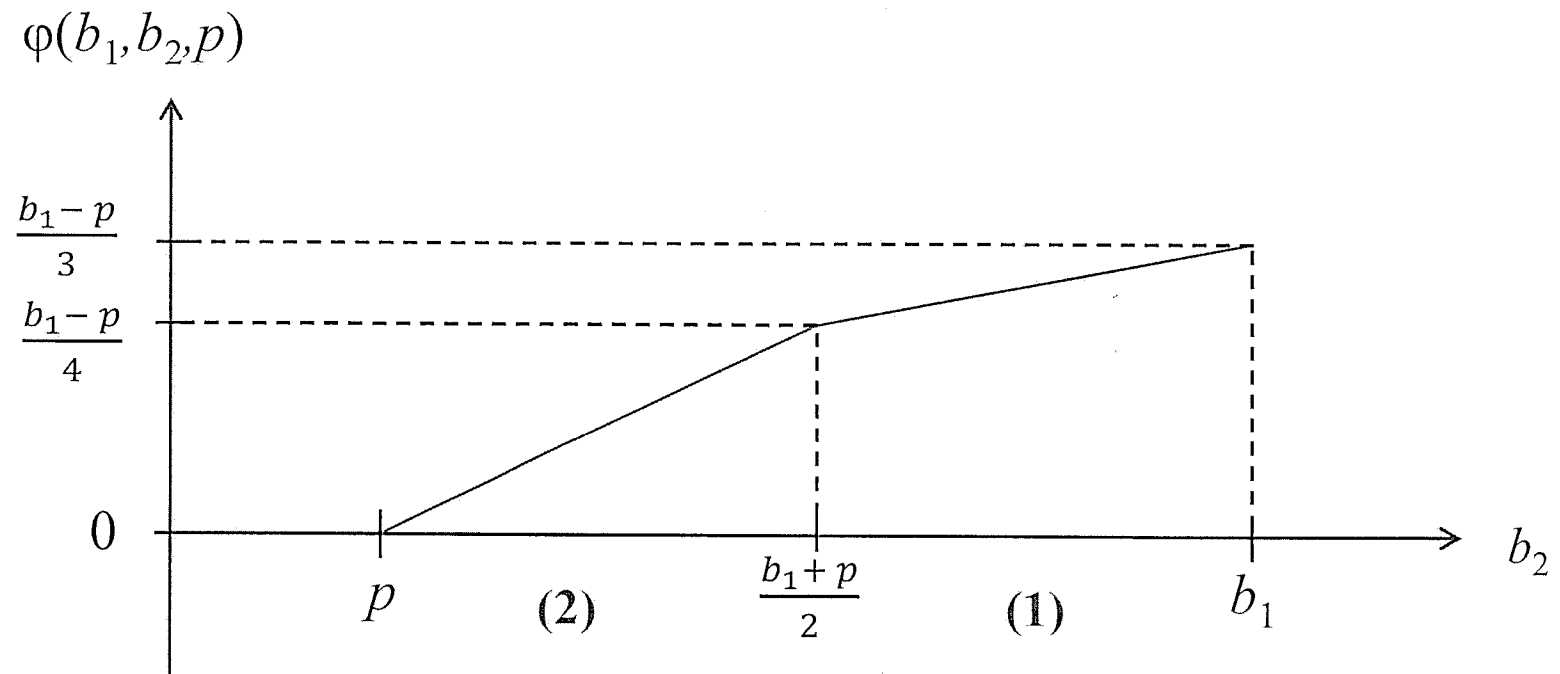
$$(1) \varphi(b_1, b_2, p) = \frac{\frac{b_1 + b_2}{2} - p}{3} = \frac{b_1 + b_2 - 2p}{6} \quad \text{if } b_2 > \frac{b_1 + p}{2}$$

This is considered to be the very probable case!

$$(2) \varphi(b_1, b_2, p) = \frac{b_2 - p}{2} \quad \text{if } p < b_2 \leq \frac{b_1 + p}{2}$$

SSNA with three bidders

Compensation payment for the SSNA-losers (illustration)



SSNA with three bidders

SSNA-participants' surpluses π_1 , π_2 , and π_3

➤ Applicant 1 (SNNA-winner)

$$(1) \quad \pi_1 = v_1 - p - \frac{b_1 + b_2 - 2p}{3} = v_1 - \frac{b_1 + b_2 + p}{3} \quad \text{if} \quad b_2 > \frac{b_1 + p}{2}$$

$$(2) \quad \pi_1 = v_1 - b_2 \quad \text{if} \quad p < b_2 \leq \frac{b_1 + p}{2}$$

➤ Applicant 2/3 (SNNA-losers)

$$(1) \quad \pi_{2/3} = \frac{b_1 + b_2 - 2p}{6} \quad \text{if} \quad b_2 > \frac{b_1 + p}{2}$$

$$(2) \quad \pi_{2/3} = \frac{b_2 - p}{2} \quad \text{if} \quad p < b_2 \leq \frac{b_1 + p}{2}$$

v_1 and v_2 denote the two strong applicants' values (willingness to pay) for the nTLD *.web* and π_1 the surplus on the winner and $\pi_{2/3}$ the surplus of each loser.

Example 2.1 (three SSNA-bidders)

Case (1): $v_2 > (v_1 + p)/2$

- $v_1 = 100, v_2 = 84, v_3 = 70, p = 20$
- Truthful bidding: $b_1 = v_1 = 100, b_2 = v_2 = 84, b_3 = v_3 = 70$
- SSN
 - Applicant 1 wins the SSN and thus the TLD
 - Applicant 1 pays $\varphi_{2/3}(b_1, b_2, p) = \frac{b_1 + b_2 - 2p}{6} = 24$ to Applicant 2 and 3 and $p = 16$ to the others
 - Applicant 1's surplus: $\pi_1(\text{SSN}) = v_1 - p - 2 \cdot \varphi_{2/3}(b_1, b_2, p) = 100 - 48 - 20 = 32$
 - Applicant 2's surplus: $\pi_2(\text{SSN}) = \varphi_2(b_1, b_2, p) = 24$
 - Applicant 3's surplus: $\pi_3(\text{SSN}) = \varphi_3(b_1, b_2, p) = 24$
 - Surplus of each of the $n - 3$ other applicants : $\pi_j(\text{SSN}) = 20/(n - 3)$
- ICANN Auction (IA)
 - Applicant 1 wins the IA at $p = b_2 = 80$
 - Applicant 1's surplus: $\pi_1(\text{IA}) = v_1 - p = 100 - 84 = 16$
 - Applicant 2's surplus: $\pi_2(\text{IA}) = 0$
 - Applicant 3's surplus: $\pi_3(\text{IA}) = 0$
 - Surplus of each of the $n - 3$ other applicants : $\pi_j(\text{SSN}) = 0$

Example 2.2 (three SSNA-bidders)

Case (2): $v_2 \leq (v_1 + p)/2$

- $v_1 = 100, v_2 = 40, v_3 = 30, p = 20$
- Truthful bidding: $b_1 = v_1 = 100, b_2 = v_2 = 40, b_3 = v_3 = 30$
- SSN
 - Applicant 1 wins the SSNA and thus the TLD
 - Applicant 1 pays $\varphi(b_1, b_2, p) = \frac{b_2 - p}{2} = 10$ to Applicant 2 and 3 and $p = 20$ to the others
 - Applicant 1's surplus: $\pi_1(\text{SSN}) = v_1 - p - 2 \cdot \varphi(b_1, b_2, p) = 100 - 20 - 20 = 60$
 - Applicant 2's surplus: $\pi_2(\text{SSN}) = \varphi(b_1, b_2, p) = 10$
 - Applicant 3's surplus: $\pi_3(\text{SSN}) = \varphi(b_1, b_2, p) = 10$
 - Surplus of each of the $n - 3$ other applicants : $\pi_j(\text{SSN}) = 20/(n - 3)$
- ICANN Auction (IA)
 - Applicant 1 wins the IA at $b_2 = 60$
 - Applicant 1's surplus: $\pi_1(\text{IA}) = v_1 - p = 100 - 40 = 60$
 - Applicant 2's surplus: $\pi_2(\text{IA}) = 0$
 - Applicant 3's surplus: $\pi_3(\text{IA}) = 0$
 - Surplus of each of the $n - 3$ other applicants : $\pi_j(\text{SSN}) = 0$

Examples (three SSNA-bidders)

Comparison

Case	$b_1 = v_1$	$b_2 = v_2$	p	$\Phi_{2/3}(b_1, b_2, p)$	$\pi_1(\text{SSN})$	$\Pi_{2/3}(\text{SSN})$	$\pi_1(\text{IA})$	$\pi_{2/3}(\text{IA})$
(1)	100	82	16	25	34	25	18	0
(2)	100	40	16	12	60	12	60	0

For the three SSNA-participants 1, 2, and 3, the SSN is never worse than the IA. For Applicant 1 the SSN is better in Case (1) and for Applicant 2 and 3 it is better in Case (1) and Case (2).

For all other applicants that do participate in the SSNA, the SSN is better than the ICANN Auction (IA).

Exhibit N

From: Ausubel, Lawrence M. Contact Information Redacted
Sent: Wednesday, July 20, 2016 10:59 AM
To: Contact Information Redacted
Cc: Contact Information Redacted
Subject: Reminders

Dear Jose Ignacio Rasco,

You are reminded that the Deposit Deadline for .WEB/.WEBS has passed and we are now in the Blackout Period. During the Blackout Period, all applicants for Contention Strings in the Auction are prohibited from cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other's, or any other competing applicants' bids or bidding strategies, or discussing or negotiating settlement agreements or post-Auction ownership transfer arrangements, with respect to any Contention Strings in the Auction.

You are also reminded of the following upcoming events in relation to the Auction:

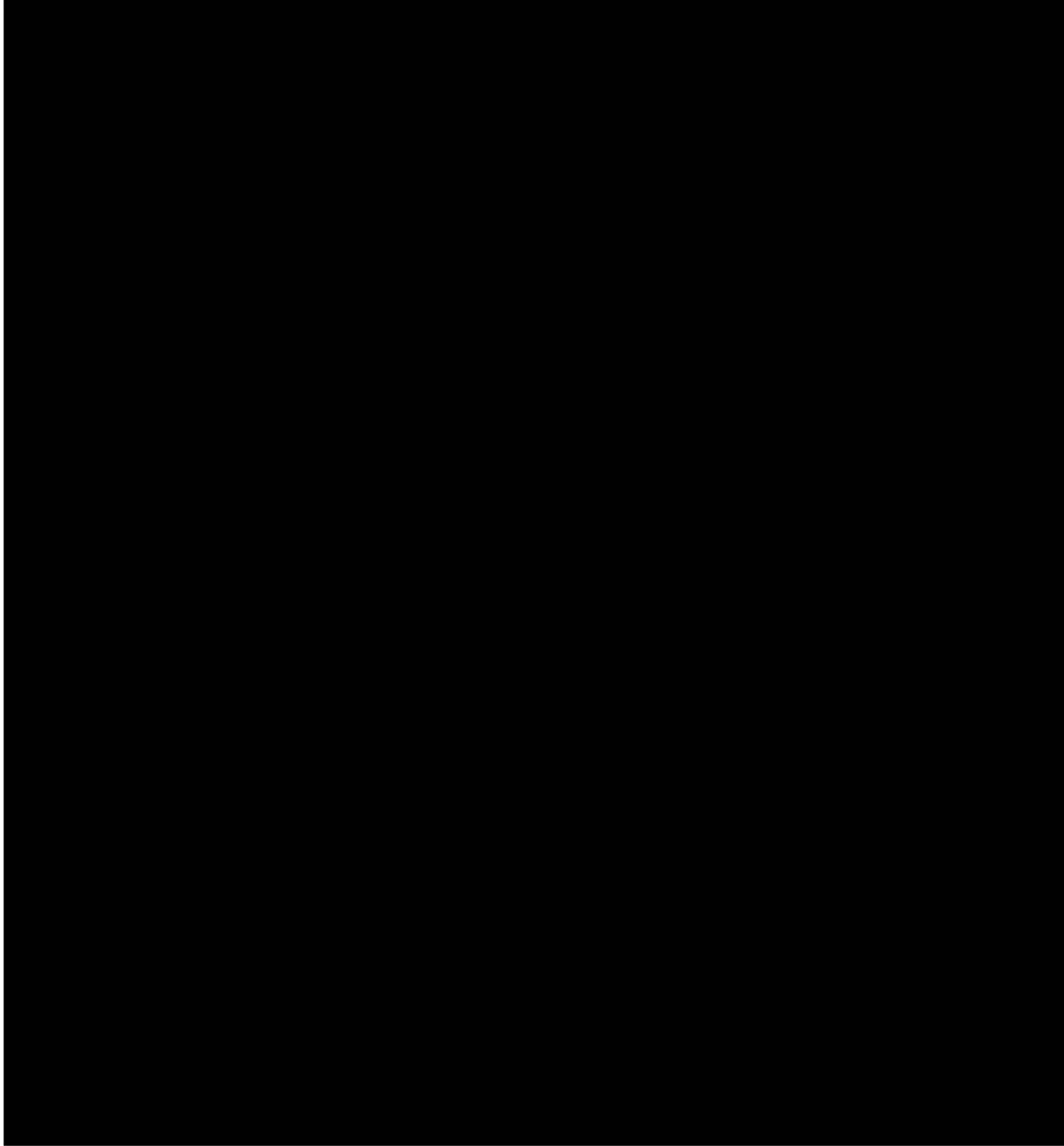
- Connectivity Test: 21 July 2016 at 13:00 UTC (9:00 am New York time).
- Mock Auction: 26 July 2016 at 13:00 UTC (9:00 am New York time).
- Auction: 27 July 2016 at 13:00 UTC (9:00 am New York time).

Please feel free to contact us if you have any questions.

Kind regards,

Larry Ausubel
Power Auctions LLC

Exhibit O



Yesterday 1:54 PM

Talk?

Today 10:24 AM

IF ICANN delays the auction
next week would you again
consider a private auction? Y-N



iMessage

