Letter to ICANN # 1

To,
Ms. Christine Willett
Vice President, New gTLD Program
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

22nd July 2013

Dear Ms. Willett,

I am writing to you on behalf of Radix Registry. As you may already be aware, Radix has applied for 29 new gTLDs, and is the largest applicant from Asia.

We would like to congratulate you and your team for the steadfast progress that you have made on the new gTLD program in the last few months. It has indeed been a pleasure to see that timelines are being met in processes like Initial Evaluations, and approval of Agreements.

That being said, we would like to draw your attention specifically to two processes related to community applications that we are deeply concerned about.

The first amongst these is the Community Objection which forms part of the Dispute Resolution process detailed in the AGB. We genuinely believe that the AGB does a remarkable job of providing clear guidance to Applicants, Objectors and Panels on the criteria that need to be met in order for an Objection to prevail. It effectively protects Applicants who have applied for generic strings from falling prey to spurious and self-serving "community objections" driven by competing applicants in their attempt at eliminating competition.

In spite of this, it has been disappointing to say the least for us and others to have received a few frivolous community objections on generic strings which we believe fall well short of meeting the AGB criteria to be qualified as a "community".

The second process that affects us and several other applicants is the Community Priority Evaluation ("CPE") process. Once again, we believe that the AGB guidance offered to the Panel to score a Community application is outstanding in that it offers simple and comprehensible definitions and guidelines.

Notwithstanding this, we believe that there are applicants who have submitted community applications for generic words, while attempting to portray themselves as representing an alleged "community".

Our primary area of concern related to both the above community processes is that while we are confident that the appointed Panel for each case will be competent, the fact that they are 3

degrees removed from ICANN is of specific concern to us. These Panels may not have any prior experience with the new gTLD program or a deep understanding of the AGB. In this situation, we would like to suggest that the ICANN staff continue to work with the DRSPs and the CPE Panels to ensure that they have adequate knowledge of the program and the specific processes.

Specifically, we would like to suggest that ICANN provide these Panels with interpretation instructions that reinforce certain aspects including, but not limited to the following:

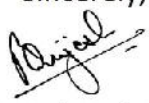
- The Panels must **strictly follow the AGB** to arrive at their Expert Determination / CPE Score. (The Panel is contractually obliged to do so.)
- Since the AGB is a long and comprehensive document, ICANN should draw the attention of the Panels to the **relevant sections** that they need to consider in their decision making.
- ICANN could possibly even issue an **additional summary or explanatory document** in order to guide the Panels further. Needless to say, nothing in such additional guidance should contradict anything in the AGB.
- Most importantly we would like to ensure that the Panels are aware about the **possible ramifications** of their decisions:
    - That if a Community Objection is allowed to prevail; it effectively enables a competing applicant to "win" the string in question without participating in an auction.
    - That if a Community applicant passes CPE, it also enables that applicant to "win" the string in question without participating in an auction.
    - In other words, both of the above processes could serve as a mechanism and **a motive for eliminating perfectly legitimate competition**.

That being said, we welcome ICANN's communication to the CTAG dated 27th June, which confirms that ICANN is coordinating with the CPE Panel to complete the evaluation procedures, and look forward to those procedures being shared with all Applicants.

Once again, we applaud ICANN's foresight while drafting the relevant sections of the AGB. The definitions in the AGB, (which we relied on to make our decision to apply as Standard applicants) were unambiguous, and were available well in advance of the application deadline. We await the Panels' decisions based on the same definitions.

We look forward to hearing from you.

Sincerely,



Brijesh Joshi
Radix Registry

cc:
Mr. Fadi Chehadé, President and CEO, ICANN
Mr. Cherine Chalaby, Board of Directors, ICANN

Letter to ICANN # 2

To,

Mr Cherine Chalaby, Board of Directors, ICANN

Mr Fadi Chehade, President and CEO, ICANN

Ms. Christine Willett, VP of New gTLD Operations, ICANN

24th September 2013

Dear Mr Chalaby, Mr Chehade, Ms. Willett,

We, the undersigned, are writing to you to express our continuing grave concerns relating to the Community Objection process. Some of our concerns in this regard have already been communicated to all of you in a letter (Annex 1) dated 22nd July 2013 sent to you by Ms. Shweta Sahjwani on behalf of Mr. Brijesh Joshi (Director, Radix Registry).

The attached letter brought to ICANN's attention the fact that Expert Panels appointed by the DRSPs for the purpose of providing an Expert Determination on each community objection are 3 degrees removed from ICANN. They do not have any prior experience with the new gTLD program or a deep understanding of the Applicant Guidebook ("AGB"). It was then explicitly suggested that these Expert Panels should be provided with interpretation instructions that reinforce certain aspects primarily the rule that the Panels must strictly follow the AGB to arrive at their Expert Determination. Needless to say, the Panels are contractually obliged to do so.

We have reason to believe that although ICANN may have spent significant amounts of time working with the personnel at the DRSPs, particularly the International Chamber of Commerce ("ICC"), to make them thorough with the AGB, **the requisite knowledge and understanding of the AGB has not percolated down to the actual Expert Panels appointed by the ICC**. This is evident from the three (3) publically available Expert Determinations (.Architect, .Fly, and .Gay), which display varying interpretations of the AGB, and in some cases a blatant disregard of the most fundamental aspects of adjudging the objections and their responses.

Our assertion that the relevant Panels either lack sufficient knowledge of the AGB or have varying interpretations of the guidelines within it is also corroborated by the inconsistent results on the same String Confusion objections. We sincerely request ICANN to take proactive steps to prevent a similar situation for Community objections, seeing as the results of the Community objections could be more grave that that of a String Confusion objections in that the former could result in an application being withdrawn entirely.

We are disappointed to say the least with the material of the Expert Determination rendered by the Expert Panel on the community objections to .Architect and .Fly. We highlight a few glaring discrepancies between the AGB and the Expert Determination below:

The Panel has ignored the clear definition of the word "community" in the AGB

As applicants who have collectively staked hundreds of thousands of dollars in this program, each of us considered the term "community" as defined by the AGB very carefully when making our decision regarding whether we should apply for specific strings as "community" applications or "standard" applications. Each of us individually came to the conclusion that the generic strings that we intended to apply for do not fulfill the criteria specified in the AGB to qualify as a "community". Additionally, we also chose to NOT game the system by projecting these generic strings to be representative of communities in order to become eligible for Community Priority Evaluation ("CPE"), and gain exclusive rights to the generic string without going to auction. We did all of this because we genuinely believed that ICANN, and its contracted parties would be responsible for upholding the AGB definitions at every stage of the program.

Unfortunately, this has not been the case. The Expert Panel in the .Architect and the .Fly cases do not even mention the definition of the term "community" as defined by the AGB, let alone evaluate whether the alleged community in question in each Objection is really a "community" as per the AGB:

"Community" - Usage of the expression "community" has evolved considerably from its Latin origin – "communitas" meaning "fellowship" – while still implying more of cohesion than a mere commonality of interest. Notably, as "community" is used throughout the application, there should be: (a) an awareness and recognition of a community among its members; (b) some understanding of the community's existence prior to September 2007 (when the new gTLD policy recommendations were completed); and (c) extended tenure or longevity—non-transience—into the future.

Shockingly, the Expert Panel in both cases has simply assumed that the alleged community is a community, without considering any of the following:

- Whether the alleged community implies or demonstrates any form of cohesion. Has the Objector fulfilled his obligation to prove that there exists more of "cohesion" than a "mere commonality of interest" amongst the alleged "community of the (structural) architects of the entire world" and "the global internet search community"?
- Whether there is an "awareness and recognition" of the community among its members. Has the objector proved that the (structural) architects and internet

searchers of the entire world (the members) are “aware” and “recognize” the alleged communities that they supposedly belong to?

- Whether the alleged “community of the (structural) architects of the entire world” and “the global internet search community” existed prior to September 2007. Has the objector proved that the “community” (and not the profession or the activity) existed prior to September 2007?
- Whether there is extended tenure or longevity – non-transience – into the future. Has the objector proved that the alleged “community of the (structural) architects of the entire world” and “the global internet search community” demonstrate extended tenure or longevity?

Had the Expert Panel evaluated these questions, and come to a reasonably justifiable affirmative answer to even a few of them, and then come to the conclusion that the “community of the (structural) architects of the entire world” or “the global internet search community” is indeed a “community” as per the AGB, that would have been acceptable.

Instead, in point 61 of the .Architect Expert Determination, the Expert unjustifiably states, “The community of (structural) architects is clearly delineated. It is the community of the (structural) architects of the entire world.” That the Expert would simply make such a statement of his own accord, without stating his reasoning behind arriving at this conclusion as per the AGB is appalling.

And in case of the .Fly Expert Determination, the Expert states in point 39, “Before assessing the institution’s relationship with the community, the Expert first considers whether the community in question can be characterized as “clearly delineated”.”

In both cases the Experts basically ignored the AGB definition of the word “community”, and directly moved on assessing “clearly delineated”. Obviously, the Experts were not trained well enough to know that proving the existence of a “community” is a pre-requisite to proving the existence of a “clearly delineated community”.

The Panel equates the “clearly delineated community” test with “standing” to object

We are aware that for the objector to have “standing” to object, one of the criteria it must satisfy is that it must have an “ongoing relationship with a clearly delineated community”. As such it is obvious that the existence of a “clearly delineated community” is a pre-requisite to proving “standing”. However, the “standing” criteria are separate from and additional to the “clearly delineated community” test.

In spite of clear language in the AGB that defines "standing" and "clearly delineated community" individually, the Expert makes this statement in Point 59 of the .Architect Expert Determination, "For the present purpose of determining whether the "community invoked" by the UIA "is a clearly delineated community", i.e. whether the UIA has standing to object, it is sufficient to note that the UIA invokes the community of the "architects" as understood by the UIA and which the applicant calls "structural architects"."

The Panel makes unsubstantiated presumptions about the likelihood of Material Detriment

Instead of attempting to stick to the AGB criteria in order to determine the likelihood of Material Detriment, the Expert in the .Architect case senselessly spends page after page quoting sentences from the GAC's Beijing Communiqué and the GAC's Early Warnings. Clearly, the Expert was unaware of the fact that the GAC's processes are independent of the Dispute Resolution process which he was appointed to resolve. Interestingly, the Expert does distance himself from other issues which are outside of the Dispute Resolution process such as the Objector's own application for .Archi through an affiliate company. Additionally, the GAC proposed safeguards that the Expert has used in order to determine that there is a likelihood of Material Detriment have not even been accepted by the New gTLD Program Committee ("NGPC"). These continue to be "in dialog" as this letter is drafted and sent. In spite of this, the Expert has used the lack of these **proposed** safeguards as a criterion in his determination. It almost appears as if the Expert had made up his mind to uphold the Objection irrespective of the facts.

To make matters worse, some of the statements made in the Material Detriment section of the .Architect Expert Determination are outrageous in that they represent nothing more than the "Expert's" personal opinion. Examples of such statements are:

- "Internet users would necessarily assume that those who use the domain name .ARCHITECT are licensed architects."
- "Opening the domain name .ARCHITECT to others than the licensed architects, including for instance "landscape architects", "naval architects", "system architects", would create an interference with the core activities of the community of architects."
- "The community of architects is clearly dependent on the DNS for its core activities, as nearly any community is nowadays."
- "…the early warnings by the Governments of Australia and France as well as the GAC Communiqué show the relevant nature and extent of concrete or economic damage to the community. They also confirm, to a relevant level of certainty, that the alleged detrimental outcomes would occur."

The last statement is particularly disturbing since the Expert used the GAC early warnings and GAC proposed safeguards as factors to conclude with a relevant level of certainty that there will be concrete or economic damage to the community. Clearly, the Expert wasn't aware and did not bother to find out that the GAC issued 242 early warnings involving 145 strings. And the GAC has proposed additional safeguards for every proposed new gTLD, and explicitly named well over 100 strings affecting 520 applications in their Beijing Communiqué. Neither of these represents remotely conclusive evidence that the affected applications create a likelihood of material detriment to the community.

Conclusion

There are several other instances in the Expert Determinations that confirm our assertion that the Expert Panels simply have not adhered to the AGB while making their decisions.

It is extremely clear that the concerned arbitrators' separation from ICANN and unfamiliarity with the AGB have resulted in grossly incorrect and unfair decisions being rendered. Furthermore, the problem at hand is bound to multiply with several more Expert Determinations in the pipeline, unless ICANN takes proactive steps to address it immediately.

In light of the above, we urge ICANN to simply ask all contracted arbitrators to temporarily suspend their decision making until ICANN can conduct a basic level of training for the actual Expert Panels on the AGB guidelines and their interpretations. Only Experts who are successfully certified by ICANN as being thorough with the AGB should be allowed to preside over objections. This kind of a training process would ensure that there will be lesser appeals to the actual Expert Determinations going forward.

Additionally, we also urge ICANN to provide parties with a more targeted appeal mechanism specifically to deal with cases in which ICANN contracted parties have not followed the AGB in spite of the requisite training processes (in addition to the 3 currently proposed broad "accountability mechanisms" that ICANN has). Ideally, there must be someone within ICANN, who knows and understands the intent of the AGB, and should preside over the appeals that are made on the grounds that the AGB was not followed.

We would like to reiterate the fact that all of us have relied on the AGB and the enforceability of the clauses within the AGB to make our decisions. It is imperative for ICANN to oversee the implementation of standards set within the AGB, especially when ICANN's failure to enforce the standards will likely result in setting a bad precedent for future rounds of applicants.

We thank you for taking the time to read this letter, and look forward to your response.

Sincerely,

Shweta Sahjwani (Radix Registry)

Jay Westerdal (Fegistry, LLC.)

Letter to ICANN # 3

To,

Mr. Cherine Chalaby, Chair, NGPC, ICANN

Mr. Fadi Chehadé, President and CEO, ICANN

Mr. Akram Atallah, President, Generic Domains Division, ICANN

Ms. Christine Willett, VP of New gTLD Operations, ICANN

CC: Ms. Špela Košak, Deputy Manager, ICC

1st November 2013

Dear Mr.Chalaby, Mr.Chehadé, Mr. Atallah, Ms. Willett,

We, the undersigned, are writing to express our ever-growing concerns relating to the Community Objection process. Some of our concerns in this regard have already been communicated to you in two letters, dated 22nd July 2013 and 24th September 2013.

Unfortunately, the issues surrounding Community Objection determinations are growing, and we are more concerned than ever that this process, and therefore the entirety of the New gTLD Program, is being corrupted by significant departures from the Applicant Guidebook (AGB). The undersigned strictly followed and relied upon the AGB throughout the application process. This included consideration about whether or not to apply for strings that may have been subject to Community Objections or contested by Community Priority Applicants. We were part of the ICANN community's discussion that set a high bar for prevailing Community Objections and resulted in the high standard that is in the AGB. The analysis we present herein related to the ICC's Expert Panels shows a disregard of the model and the standards set forth in the AGB. This is intolerable and deserves immediate mitigation.

While the decision regarding .SPORT provided by the expert can be questioned in all four criteria, the analysis is most clearly erroneous and is in clear contradiction of the AGB with regard to two specific criteria: community definition, and the likelihood of material detriment. Specifically, the record clearly demonstrates that panelists are not considering the very stringent definition of "community" set forth in the AGB. The decisions to date indicate that panelists are employing their own personal assumptions of "community" or have accepted the objectors' definition of "clearly delineated communities" without question. Additionally, panelists are ignoring the AGB requirements for a showing of material detriment. Among those requirements is the objector's burden to prove that its community is likely to be adversely affected by the delegation of the string in question.

Please note that the undersigned represent a variety of companies, including both single-string applicants and portfolio applicants, not all of which are facing community objections. We must stress that this is an issue that affects the entire New gTLD Program and ICANN community, and the support of applicants not directly affected by Community Objection proceedings speaks to our shared interest in strictly adhering to *all* AGB procedures.

To recap our prior correspondence, the first letter brought to ICANN's attention the fact that Expert Panels appointed by the DRSPs for the purpose of providing an Expert Determination on each community objection are three degrees removed from ICANN. They have neither prior experience with the new gTLD program nor a deep understanding of the AGB. It was then explicitly suggested that these Expert Panels should be provided with training or education materials that reinforce certain standards—primarily that the Panels must strictly follow the AGB to arrive at Expert Determinations. We are concerned that this process was never put into place.

The second letter pointed out specific examples of serious lapses on ICC Experts' parts in the Expert Determinations for .ARCHITECT and .FLY. The letter was a sincere attempt to inform ICANN of the fact that, although ICANN may have spent significant amounts of time working with the personnel at the DRSPs to familiarize them with the AGB, it is clear that the requisite knowledge and understanding of the AGB has not been successfully conferred to the actual Expert Panels appointed by the ICC. It was also recommended that ICANN should make appropriate appeal mechanisms available to parties who have been materially affected by decisions that departed from AGB standards. Finally, we urged ICANN to consider temporarily suspending all objection adjudications until a certain basic level of training was conducted to ensure that all concerned Experts are well versed with the AGB.

The response that was received from ICANN to this letter was disappointing, to say the least, given that ICANN's only follow-through was a simple acknowledgement of the correspondence, with no forthcoming engagement on these very serious issues.

Although the form response we received from Customer Service claimed that our comments would be "considered carefully," we believe this assurance was not genuine . We say this because the ICC recently published an Expert Determination on a community objection against an application for the .SPORT[1] generic TLD which, again, is fatally flawed. In particular, we draw ICANN's attention to at least five examples of glaring errors in this determination, which prove that at least one of ICC's Experts is not familiar with the AGB or its intent.

[1] .SPORT Expert Determination: http://www.iccwbo.org/Data/Documents/Buisness-Services/Dispute-Resolution-Services/Expertise/ICANN-New-gTLD-Dispute-Resolution/EXP_471_ICANN_88_Expert_Determination/

1. The Expert reported that,*"the concept of 'community' is not defined by the ICANN Guidebook."*[2]

   Clearly, the Expert did not know that the concept of "community" is actually explained by the ICANN Guidebook:

   > "'Community' - Usage of the expression 'community' has evolved considerably from its Latin origin – 'communitas' meaning 'fellowship' –while still implying more of cohesion than a mere commonality of interest. Notably, as "community" is used throughout the application, there should be: (a) an awareness and recognition of a community among its members; (b) some understanding of the community's existence prior to September 2007 (when the new gTLD policy recommendations were completed); and (c) extended tenure or longevity—non-transience—into the future."[3]

   We reiterate that the above definition of the term "community" was relied upon by *all* applicants whilst making their decisions to stake hundreds of thousands of dollars applying as standard applicants for generic strings in the new gTLD Program. It is absolutely unfair and unacceptable for an application to be rejected under the premise that the concept of "community" is not defined in the AGB. This is blatantly untrue and to disregard this is to compromise the integrity of the AGB, the New gTLD Program, and ICANN**.**

   We understand that the above description of "community" is referenced with regard to community applications; however, the context is relevant to "community" objections as well. This is because, like a community application, a community objection that is upheld directly eliminates the bona fide standard application against which it is filed. Consequently, it is the Expert's duty to thoroughly test the existence of a "clearly delineated community" as per AGB descriptions before eliminating the standard application from the program altogether.

2. While the Expert is clearly aware that the objector needs to prove that "the application creates a likelihood of material detriment…", none of the factors that were considered included anything about the application**.** The Expert did not identify a single objectionable or lacking aspect in the application that creates a likelihood of material detriment.

3. The Expert states:

[2] Page 18 of the .SPORTExpert Determination
[3] §4-11 of AGB

"In other words, the standard of a "likelihood of material detriment" is, in the Appointed Expert's opinion, equivalent to future "possible" damage."[4]

In this case, the Expert opines that "likelihood" is equivalent to "future possible." It almost appears as if the criteria have been deliberately weakened in order to allow the objector to prevail. In fact, the Expert even made this statement:

"…Expert agrees with Applicant that many detriments alleged by Objector are purely hypothetical…"

In spite of this, the Expert ruled in favor of the Objector. If the Expert's current logic is followed, every application, including the Objector's own application, creates "possible" damage. In this case, an allegation of material detriment against any application would be upheld because there is future "possible" damage. How can any applicant guarantee that it is "not possible," in all conceived hypotheticals, for any future damage to occur?

The .SPORT ruling leaves no doubt the panelist replaced the word "likelihood" with the word "possibility" thus materially altering AGB fourth test to read as follows:

"The application creates a ~~*likelihood*~~ *possibility* of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted."[5]

Procedurally, the guidebook explicitly does not provide the panelist with discretion to change the burden of proof the objector bears. If this is not true, then ICANN did not notify applicants and other interested parties of such discretion provided to the panelist. Either way a procedural error has occurred. In the spirit of fairness and due process, we call upon ICANN to incorporate an appeals process for exactly such procedural errors in the community objection proceedings.

4. The Expert has erroneously considered the "economic damage" that the *objector* "may suffer."[6] Instead, he was supposed to consider the "nature and extent of damage to the reputation of the *community* represented by the objector…". It appears that the Expert misread the AGB or inappropriately assumed that the Objector IS the "sports community."

5. The decision provides no evidence that the Expert even considered the "level of certainty that alleged detrimental outcomes would occur." As noted above, in point 3,

[4] Page 27 of the .SPORT Expert Determination
[5] §3-24 of AGB
[6] Page 28 of the .SPORT Expert Determination

unlikely and hypothetical situations have been given credence over any level of certainty.

To evidence that unbiased industry insiders share our viewpoint on this subject, please take note of two recently published relevant articles, both by reputed journalists who are not participants in the new gTLD program:

1) http://www.thedomains.com/2013/10/29/wow-icc-upholds-objection-of-sportsaccord-to-famous-fours-app-for-new-gtld-sport-giving-sportaccord-the-extension/. In this case, the title itself expresses shock over this Expert Determination.
2) http://domainnamewire.com/2013/10/29/breatheaccord-wins-community-objection-against-breathe-top-level-domain-name/. This article is a satirical response to the above news that the .sport objection was upheld. It shows the extent to which the journalist found the .sport decision to be unmerited.

We also bring to ICANN's attention the fact that objectors on other unrelated cases are citing these decisions in their Supplemental Submissions in order to influence Experts to weaken the objection criteria and rule in their favor. If these are considered to be precedents for other Experts, we can assure you that most community objectors will unfairly prevail over applicants who applied as standard applicants in good faith.

Not only does this situation cause immense commercial damage to the affected applicants, but also sets a precedent for future application rounds where applicants cannot rely on the application documents and ICANN can expect absolutely any applicant to use (or rather, abuse) the community objection process as its first attempt at contention resolution. These current decisions by ICC Experts will probably be used as grounds for rejecting future applications on the most generic words.

ICANN should *immediately* rectify this obvious deficiency. We sincerely request ICANN to take a more active role in the Dispute Resolution Process altogether. This includes impressing upon the ICC that its Experts need appropriate training before additional decisions are published to avoid any further inadequate decision making, by ensuring that the AGB is followed for future cases, and by putting in place an appeals mechanism so that procedural errors such as those in the .sport decision can be rectified. As applicants in the program, we are confident that ICANN will do the right thing, and ensure that its contracted parties uphold the AGB at any cost.

We thank you for taking the time to read this letter, and look forward to a positive and constructive response from you.

Sincerely,

Shweta Sahjwani, Radix FZC

United TLD Holdco Ltd.

DotClub Domains, LLC

Top Level Design, LLC

Donuts Inc.

Top Level Domain Holdings Ltd

Priver Nivel S.A.

Fegistry, LLC

Employ Media, LLC

Famous Four Media Limited

Merchant Law Group, LLP

DOTSTRATEGY CO.