

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Afilias Domains No. 3 Ltd.,) ICDR CASE NO. 01-18-0004-2702
)
Claimant,)
)
and)
)
INTERNET CORPORATION FOR ASSIGNED)
NAMES AND NUMBERS,)
)
Respondent.)
_____)

DECLARATION OF CHRISTINE WILLETT IN SUPPORT OF ICANN’S OPPOSITION TO AFILIAS DOMAINS NO. 3 LTD’S REQUEST FOR EMERGENCY PANELIST AND INTERIM MEASURES OF PROTECTION

I, Christine Willett, declare as follows:

1. I am the Vice President, gTLD Operations, Global Domains Division of the Internet Corporation for Assigned Names and Numbers (“ICANN”), the respondent in this Independent Review Process (“IRP”). I have personal knowledge of the matters set forth herein and am competent to testify as to those matters. I make this declaration in support of ICANN’s Opposition to Afilias Domains No. 3 Ltd.’s Request for Emergency Panelist and Interim Measures of Protection.

ICANN Background and the New gTLD Program

2. ICANN is a California non-profit public benefit corporation formed in 1998 that oversees the technical coordination of the Internet’s domain name system (“DNS”) on behalf of the Internet community, ensuring the DNS’s continued security, stability and integrity. The DNS’s essential function is to convert easily-

remembered domain names, such as “uscourts.gov” or “icann.org,” into numeric IP addresses understood by computers. The portion of a domain name to the right of the last dot (such as, “.gov” and “.org”) is known as a generic top-level domain (“gTLD”).

3. Throughout its history, ICANN has sought to expand the number of gTLDs to promote consumer choice and competition. In 2012, ICANN launched the “New gTLD Program,” in which it invited any interested party to apply for the creation of a new gTLD and for the opportunity to be designated as the registry operator of that gTLD. As the registry operator, the applicant would be responsible for managing the assignment of names within the gTLD and maintaining the gTLD’s database of names and IP addresses.

4. In connection with the New gTLD Program ICANN published an Applicant Guidebook (“Guidebook”), which prescribes the requirements for new gTLD applications to be approved, and the criteria by which they are evaluated. The Guidebook was developed in a years-long public consultation process in which numerous versions were published for public comment and revised based on comments received from the public. The operative version of the Guidebook published in June 2012 is 338 pages long and translated into six different languages.

5. In my role as Vice President, gTLD Operations, I have been responsible for overseeing the evaluation of the 1,930 new gTLD applications that ICANN received in 2012 as part of ICANN’s New gTLD Program.

The .WEB Contention Set

6. In June 2012, Afilias, Nu Dotco (“NDC”), and five other applicants applied for .WEB. Another applicant submitted two applications for .WEBS, later withdrawing one of its applications in April 2016. The seven applications for .WEB passed all applicable evaluations and were placed in a contention set,

pursuant to the procedures set forth in the Guidebook.

7. In 2013, one of the .WEB applicants filed string confusion objections against the .WEBS applications with the International Centre for Dispute Resolution (“ICDR”), which is the independent, third-party dispute resolution service provider designated to handle string confusion objections. The objection was ultimately successful and .WEBS was added into the .WEB contention set, thereby creating the .WEB/.WEBS contention set (“Contention Set”).

8. In June 2014, the .WEBS applicant (Vistaprint) filed an IRP against ICANN for accepting the ICDR’s determination following the string confusion objection proceedings. In October 2015, ICANN prevailed in the .WEBS IRP. The ICANN Board considered the .WEBS IRP Final Declaration in October 2015, December 2015, and March 2016, and resolved to “move forward with the processing of the .WEB/.WEBS contention set.”

9. Following the Guidebook’s procedures, on 27 April 2016, ICANN scheduled the auction of last resort for 27 July 2016 (“Auction”) and notified all active members of the Contention Set. ICANN also provided them with instructions and deadlines to participate in the Auction.

10. The auction rules governing indirect contention sets (“Auction Rules”) set forth a prescribed and limited period of time within which members of a contention set may request a postponement of an auction: “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.” The last day to file any such requests for this Contention Set was 12 June 2016, namely 45 days before 27 July 2016. ICANN did not receive any such request by that date. Nor did ICANN receive any notice that the members of the Contention Set had resolved the Contention Set

privately. Therefore, ICANN proceeded with plans for the 27 July 2016 auction.

11. After the postponement request deadline had passed, ICANN received requests, via email and correspondence, to postpone the Auction from three of the seven applicants for .WEB in the Contention Set (Ruby Glen, Radiz FZC, and Schlund Technologies GmbH) on 11 July 2016. This correspondence did not comply with the Auction Rules' requirements regarding postponement requests because they were sent nearly a month after the deadline to do so had passed, and requests were not submitted by all of the members of the Contention Set, which is required for ICANN to consider whether to postpone the Auction pursuant to such requests.

12. The application for new gTLDs requires applicants to provide the names and positions of "directors," "officers and partners" and "shareholders holding at least 15% of shares." This information is required so that ICANN can conduct a thorough background check into the persons or entities that, on a practical level, control or own the applicant entity. The precise title or position of each listed person or entity is not of the utmost importance, so long as the persons or entities who control or own the applicant are listed. Indeed, the terminology of the application form is tailored towards a corporation, as opposed to an LLC such as NDC. Understandably, NDC (like many other LLC applicants) sought to provide information about its management and ownership that was analogous to the corporate information requested. NDC listed its CEO, COO, and CFO by title and also as its Directors (referring to them as its "managers"). Like many other applications submitted by LLCs, this showed that those were the persons in control of the company for all practical purposes (as a director would be at a corporation).

13. As for the background check, ICANN contracts with PricewaterhouseCoopers to conduct a background check of applicants. ICANN also ensures that no person or entity that owns or controls an applicant for a new

gTLD is on the list of persons and entities with which the U.S. Office of Foreign Assets Control restricts the ability to do business absent a license. Both checks were conducted with respect to the names listed in NDC's application, as was done with the equivalent information listed in all other new gTLD applications.

14. Even if NDC had submitted a change request indicating that it had undergone a change of control and/or ownership, NDC would not have been disqualified from the auction set to take place on 27 July 2016. In fact, ICANN has received over 2,700 application change requests. Nearly 800 of those requests made changes to the responses provided to questions pertaining to ownership or control of the applicant. No application has been disqualified to date in connection with a change to responses to those questions.

15. ICANN was first notified that Ruby Glen had concerns that NDC had undergone a change of control or ownership on 23 June 2016 by way of an email from then Donuts Inc.'s co-founder and Executive Vice President of Corporate Affairs, Jon Nevett, sent to ICANN's customer portal. I am informed and believe that Donuts is the ultimate parent company of Ruby Glen. ICANN responded that it was "reviewing the information provided" and would follow up with NDC as needed. ICANN also informed Mr. Nevett that Ruby Glen should continue to follow the "standard auction process" and that ICANN would inform Mr. Nevett if any postponement of the Auction was going to take place. A true and correct copy of that email exchange is attached hereto as **Exhibit A**.

16. The only issue Mr. Nevett raised was his concern that NDC may have undergone a change in ownership or control. He did not mention that he thought Verisign might be involved with NDC's application and, in fact, did not mention Verisign at all.

17. In view of Ruby Glen's concerns, ICANN immediately investigated. Upon receipt of Mr. Nevett's 23 June 2016 email, I instructed my staff to

investigate the claims raised therein. On 27 June 2016, a member of my staff sent an email to NDC, asking it to confirm that “there have not been changes to your application or the NU DOT CO LLC organization that need to be reported to ICANN.” Mr. Jose Ignacio Rasco III, NDC’s Chief Financial Officer, responded: “I can confirm that there have been no changes to the NU DOT CO LLC organization that would need to be reported to ICANN.” A true and correct copy of this email exchange is attached hereto as **Exhibit B**.

18. One purpose of this investigation was to determine whether NDC had any previously undisclosed owners or managers that should be subject to background checks. I also instructed my staff that, if appropriate in view of the investigation, they should request that NDC update its application with respect to any change in ownership and/or control.

19. On 29 June 2016, during the ICANN56 Public Meeting in Helsinki, I met with Mr. Nevett to discuss a number of business matters, including his claims regarding NDC’s management. During that meeting, Mr. Nevett requested that the Auction be postponed because of his concerns that NDC had undergone a change in ownership or management. During this meeting, I informed Mr. Nevett that my team had already investigated the alleged management changes with NDC’s representative, and that NDC asserted that no such changes had occurred. I further informed Mr. Nevett that, based on the fact that ICANN had found no evidence of such a management change, ICANN was continuing to proceed with the Auction as scheduled. At no time did Mr. Nevett mention Verisign.

20. During my meeting with Mr. Nevett at the ICANN56 Public Meeting in Helsinki, I suggested to Mr. Nevett that if he was not satisfied with ICANN’s course of action he had the option to invoke one of ICANN’s accountability mechanisms. Mr. Nevett indicated that he intended to contact ICANN’s then Ombudsman, Mr. Chris LaHatte (“Ombudsman”) while in Helsinki. He did so,

and the Ombudsman then asked me for the contact information for NDC's application contact, Mr. Jose Ignacio Rasco III, which I provided. On 6 July 2016, the Ombudsman sent an email to NDC on which I was blind-copied, inquiring as to whether any change in ownership/control had taken place and noting that he had "opened an ombudsman complaint file about this matter." A true and correct copy of that email is attached hereto as **Exhibit C**, and a true and correct copy of the email exchange that followed between the Ombudsman and Mr. Nevett is attached hereto as **Exhibit D**.

21. On 7 July 2016, the Ombudsman sent another email to Mr. Rasco about this issue, and Mr. Rasco's response stated: "There have been no changes to the Nu Dotco, LLC application. Neither the governance, management nor the ownership in Nu Dotco has changed." A true and correct copy of that email exchange is attached hereto as **Exhibit E**. At the time, on 7 July 2016, I was not aware that Mr. Rasco had responded to the Ombudsman's email.

22. On 8 July 2016, I emailed Mr. Rasco to again inquire as to whether NDC had undergone any change in ownership or control. A true and correct copy of that email is attached hereto as **Exhibit F**. Mr. Rasco called me within a few hours, and stated that neither the managers nor the members of the NDC organization had changed since the application's submission. He further explained that his 27 June 2016 email through the applicant portal confirming the same had been rather brief because he had been under the impression that ICANN was simply conducting a routine and automatic check of all applicants within the Contention Set prior to the Auction; it was not until the Ombudsman reached out to Mr. Rasco that he realized there had been a complaint made to ICANN about a possible change in NDC's control or ownership. He also explained that his email to "a competing applicant," which ultimately gave rise to this controversy, was not intended to suggest that any change in ownership or control had taken place,

because none had.

23. On 8 July 2016 (received by the Ombudsman on 9 July 2016), I emailed the Ombudsman to again provide information as to ICANN's investigation of the matter, including a summary of my 8 July 2016 phone call with Mr. Rasco. That email stated, among other things, "As you know, my team had reached out to NU DOT CO LLC previously, and we received confirmation that NU DOT's application materials were still true and accurate. In an effort to be extremely cautious, I reached out to Mr. Jose Ignacio Rasco (the application primary contact for NU DOT's .WEB application) again today to ensure that our understanding of his previous response was accurate." A true and correct copy of that email is attached hereto as **Exhibit D**.

24. On 11 July 2016, Mr. Rasco emailed me and again confirmed that "[n]either the ownership nor the control of [Nu Dotco] has changed since we filed our application." Mr. Rasco further explained that: "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." A true and correct copy of that email is attached hereto as **Exhibit F**.

25. On 12 July 2016, the Ombudsman informed me that he had determined there was no reason to postpone the Auction because he found no evidence of a change to the ownership or control of Nu Dotco. A true and correct copy of the Ombudsman's email in this regard is attached hereto as **Exhibit G**.

26. On 13 July 2016, ICANN informed Ruby Glen and all applicants in the Contention Set that it had "investigated the matter" and "found no basis to initiate the application change request process or postpone the auction." A true and correct copy of that letter is attached to the Request by Afilias Domains No. 3 Limited For Independent Review as Exhibit C-44.

27. On 23 July 2016, the Ombudsman re-confirmed that he had concluded his investigation. A true and correct copy of the Ombudsman's email in this regard is attached hereto as **Exhibit H**.

The .WEB Auction, Subsequent Accountability Mechanisms and Litigation

28. The Auction proceeded as scheduled on 27-28 July 2016, and NDC was declared the prevailing bidder.

29. I am informed and believe that on 1 August 2016, Verisign made a public announcement that it had entered into an agreement with NDC regarding .WEB.

30. At no time before Verisign's public announcement did any applicant ever raise a concern to me that Verisign was involved with NDC's application, nor was I aware of Verisign's involvement until it publicly announced its agreement with NDC.

Registry Agreement and Delegation

31. Once a successful gTLD applicant passes initial evaluation and resolves any objections and/or contention set issues, the applicant proceeds into contracting during which it executes a Registry Agreement with ICANN. A Registry Agreement is a formal, written agreement between a gTLD registry operator and ICANN that sets forth the rights, duties, liabilities, and obligations of the registry operator. ICANN publishes a sample Registry Agreement on its website, but Registry Agreements can be negotiated and modified depending on the circumstances.


32. After execution of the Registry Agreement, ICANN takes the necessary technical steps to delegate the new gTLD into the root zone. Only after a gTLD has been fully delegated into the root zone does it become operable on the Internet.

33. Registry operators (applicants that have entered into a Registry Agreement with ICANN) have decided to use and monetize gTLDs in different ways. For example, many registry operators have followed their original business plans of operating and marketing the gTLD as described in their applications. Hundreds of other registry operators, however, have changed course and assigned or transferred their gTLDs to other entities for financial gain or other reasons. Other entities have entered the new gTLD marketplace by formally acquiring new gTLD registry operators. Some have also chosen to use the gTLDs for their own benefit, such as for branding purposes.

34. Before an applicant can assign or transfer its Registry Agreement to a third party, it must proceed through ICANN procedures and obtain ICANN's approval. ICANN's focus in evaluating a proposed gTLD transfer is whether the transferee organization has the requisite financial and technical ability to operate a gTLD.

35. Afilias is familiar with ICANN's Registry Agreement assignment process, by which a registry operator may request ICANN's approval to transfer an existing registry agreement for a TLD to another entity. I believe this to be true as Afilias Limited submitted an assignment request to gain ICANN's approval for the transfer of the .MEET Registry Agreement from Afilias Limited to Charleston Road Registry Inc. d/b/a Google Registry ("Google") in October 2014. Likewise, in 2015, the entity that entered into a Registry Agreement with ICANN to operate .PROMO requested that ICANN approve a transfer of .PROMO to Afilias plc (Afilias' parent company) prior to delegation of .PROMO. ICANN approved these transfer requests, in part, because ICANN determined that Google and Afilias plc (respectively) had the technical and financial ability to operate the noted gTLDs.

I swear under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 17th day of December, 2018 at Los Angeles, California.

By: 

Christine A. Willett