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11 Attorneys for Plaintiff
12 NAME.SPACE, INC.

13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA
15 WESTERN DIVISION
16

17 NAME.SPACE, INC.,
18
19 Plaintiff,
20 v.
21 INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS,
22
23 Defendant.
24

Case No. CV 12-8676 (PA)

**DECLARATION OF PAUL
GARRIN IN SUPPORT OF
NAME.SPACE'S OPPOSITION
TO ICANN'S MOTION FOR
SUMMARY JUDGMENT**

Hearing Date: February 25, 2013
Hearing Time: 1:30 p.m.
Judge: Honorable Percy Anderson
Hearing Location: 312 N. Spring St.

1 I, Paul Garrin, pursuant to 28 U.S.C. § 1746, hereby declare:

2 1. I am the founder and Chairman of Plaintiff name.space Inc.
3 (“name.space”). I submit this declaration in support of name.space’s opposition to
4 ICANN’s motion for summary judgment. I have personal knowledge of the
5 following facts and, if called upon as a witness, could and would competently
6 testify about the matters stated herein.

7 **The 2000 Application Round**

8 2. In July 2000, the ICANN Board of Directors approved a series of
9 resolutions at its meeting in Yokohama, Japan for the creation of a process by
10 which ICANN would launch a proof-of-concept study for the process of adding
11 new top-level domains (“TLDs”) to the root.zone file (“the Root”). This process
12 ultimately became the “2000 Proof of Concept” Application process. (See
13 <http://www.icann.org/tlds/new-tld-resolutions-16jul00.htm> (as of Feb. 4, 2013).)
14 ICANN stated that this study involved limited and discrete proof-of-concept issues
15 only. For example, in a description of the 2000 Proof of Concept that ICANN
16 released in August 2000, ICANN noted that, “it is likely that only a few of these
17 will be selected by the ICANN Board for negotiations toward registry sponsor and
18 operator agreements [T]he current program [2000 Proof of Concept] is
19 intended to serve as a ‘proof of concept’ for ways in which the DNS might evolve
20 in the longer term.” (See <http://www.icann.org/tlds/tld-criteria-15aug00.htm> (as of
21 Feb. 4, 2013).) ICANN also stated that the 2000 Proof of Concept was “intended to
22 involve introduction of only a limited number of new TLDs.” (See
23 <http://archive.icann.org/en/tlds/tld-faqs.htm>, FAQ 10 (as of Feb. 4, 2013).) ICANN
24 made clear that the 2000 Proof of Concept did not involve the delegation of TLDs
25 more broadly, other than as required to accomplish the study.

26 3. Thus, ICANN’s 2000 Proof of Concept was only a limited proof-of-
27 concept process that was different and distinct from later TLD application rounds,
28 including the 2012 Application Round. The rules, fees, guidelines, goals,

1 specifications, appraisal factors and other attributes applied during the course of the
2 2000 Proof of Concept differed from those applied to later rounds.

3 4. In other public statements, ICANN also answered a question that
4 asked, “If our TLD application is not accepted, what becomes of our application? I
5 understand that the \$50,000 is non-refundable, but does the application remain
6 active for the second round of TLD applications?” ICANN responded:

7 [P]lans for any subsequent rounds of TLD introductions will not be
8 made until evaluation of the present ‘proof of concept’ round. It is
9 likely that, if there are subsequent rounds, there will be revisions in
10 the program based on experience in the first round. This will likely
11 require submission of new application materials. As to the non-
12 refundable application fee, please note that it is only an application fee
13 to obtain consideration of *this* application.

14 (See <http://archive.icann.org/en/tlds/tld-faqs.htm>, FAQ 54 (as of Feb. 4, 2013)
15 (emphasis in original).)

16 5. In connection with the 2000 Proof of Concept process, ICANN
17 published an instruction manual for participants, titled “New TLD Application
18 Instructions,” which was less than ten-pages long. (See
19 <http://archive.icann.org/en/tlds/new-tld-application-instructions-15aug00.htm> (as of
20 Feb. 4, 2013).)

21 6. name.space submitted an application in the 2000 Proof of Concept to
22 operate 118 gTLDs (name.space’s “2000 Application”) in October 2000. In
23 transmitting that application, name.space was required to include a “Transmittal
24 Form” that contained the following language: “[I]n consideration of ICANN’s
25 review of the application” the applicant releases “all claims and liabilities relating
26 in any way to (a) any action or inaction by or on behalf of ICANN in connection
27 with this application or (b) the establishment or failure to establish a new TLD.”
28 (See ICANN’s Request for Judicial Notice, ECF No. 20, Ex. C ¶ B14.2.) ICANN
included this language in a standard, ICANN-drafted transmittal form that every
applicant in the 2000 Proof of Concept was required to sign.

1 7. Both as an applicant and an advocate, I had frequent communications
2 with ICANN's leadership—including members of ICANN's Board of Directors—
3 concerning the 2000 Proof of Concept. My conversations and communications
4 with ICANN touched on all aspects of the 2000 Proof of Concept, including the
5 terms and conditions under which name.space submitted its 2000 Application to
6 ICANN.

7 8. In my communications and conversations with ICANN, members of
8 ICANN's Board of Directors and other ICANN officials never stated or otherwise
9 expressed the belief that participation in the 2000 Proof of Concept might prevent
10 name.space and/or other applicants from asserting legal claims against ICANN
11 unrelated to participation in the 2000 Proof of Concept.

12 9. Neither ICANN nor name.space ever intended the release language
13 included in the 2000 Application to relate to any future TLD application rounds or
14 to anything other than ICANN's consideration of the 2000 Application. That was
15 my understanding of the 2000 Application when I signed it. I did not intend the
16 agreement to have the meaning that ICANN now tries to attach to it, nor did
17 ICANN ever express to me any intention that the release language in the 2000
18 Application would apply to anything beyond the 2000 Application or to other future
19 conduct.

20 10. At the ICANN Board meeting on November 16, 2000, ICANN
21 adopted a resolution selecting seven of the 44 applications that had been submitted
22 as part of the 2000 Proof of Concept for further contractual negotiations to
23 participate in the proof of concept program; name.space was not one of the seven
24 applications. (*See* [http://www.icann.org/minutes/minutes-annual-meeting-16](http://www.icann.org/minutes/minutes-annual-meeting-16-nov00.htm#SelectionofNewTLDProposalsforNegotiation)
25 [nov00.htm#SelectionofNewTLDProposalsforNegotiation](http://www.icann.org/minutes/minutes-annual-meeting-16-nov00.htm#SelectionofNewTLDProposalsforNegotiation) (as of Feb. 4, 2013).)

26 11. In both my public and private communications with ICANN's
27 leadership throughout the process, I made clear that name.space reserved its
28 intellectual property rights in the catalog of TLDs that name.space originated prior

1 to ICANN's creation. ICANN never mentioned the release language in the 2000
2 Application in response to my assertion of name.space's rights, or otherwise
3 suggested that name.space had volunteered for or entered into a global surrender of
4 rights simply by applying for inclusion in the proof-of-concept study.

5 12. Similarly, in correspondence between legal counsel for the parties
6 prior to the filing of this lawsuit, ICANN's counsel never suggested that the 2000
7 release language had any bearing on name.space's legal position, or otherwise
8 suggested that the 2000 release language had or could have any relevance to the
9 2012 Application Round. In fact, counsel never mentioned the 2000 release
10 language at all. Instead, legal counsel expressly encouraged name.space to apply in
11 the 2012 Application Round, and never suggested that name.space would not be
12 treated like every other applicant during that process.

13 13. In sworn testimony before Congress following the close of the 2000
14 Proof of Concept, ICANN differentiated the 2000 Proof of Concept from potential
15 later rounds. For example, an ICANN representative testified that:

16 The goal here was not to have a contest and pick winners; it was not
17 to decide who 'deserved' to have a new TLD; it was not even to
18 attempt to predict the kind or type of TLDs that might get public
19 acceptance. The goal, articulated plainly from the beginning of the
20 process more than a year ago, was to identify from suggestions by the
21 community a limited number of diverse TLDs that could be
introduced into the namespace in a prudent and controlled manner so
that the world could test whether the addition of new global TLDs was
feasible without destabilizing the DNS or producing other bad
consequences.

22 This was not a race, with the swiftest automatically the winner. It was
23 a process that was intended to enable an experiment, a proof of
24 concept, in which private entities were invited to participate if they
25 chose to do so – and those who did choose to participate did so
voluntarily, knowing that the odds of being selected were not high,
that the criteria for being included in this experiment were in some
measure subjective, and that the goal was the production of
experimental information that could be evaluated

26 (See <http://www.icann.org/correspondence/roberts-testimony-14feb01.htm> (as of
27 Feb. 4. 2013).)

28

1 **The 2003-04 Application Round**

2 14. On or around December 15, 2003, ICANN announced a limited
3 application round for adding new sponsored top-level domains (“sTLDs”) to the
4 Root (the “2003-04 sTLD Application Round”). This 2003-04 sTLD Application
5 Round was separate and distinct from the 2000 Proof of Concept. name.space did
6 not participate in this program, because it was not seeking “sponsored” TLDs.

7 **The New gTLD Program and the 2012 Application Round**

8 15. Around 2008, ICANN discussed the possibility of accepting new
9 applications for new gTLDs, which ICANN called the “New gTLD Program.” This
10 attempt to introduce new gTLDs to the Root would ultimately become the 2012
11 Application Round that is the subject of this lawsuit.

12 16. When ICANN first began discussing the possibility of a new
13 application round in 2008, it was clear that this process was distinct from the 2000
14 Proof of Concept. Indeed, the first draft of the “New gTLD Program Applicant
15 Guidebook,” released on or around October 24, 2008, does not contain a single
16 mention of the 2000 Proof of Concept. (See [http://archive.icann.org/en/topics/new-
17 gtlds/draft-rfp-24oct08-en.pdf](http://archive.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf) (as of Feb. 4, 2013).)

18 17. Comments on the first draft of the New gTLD Applicant Guidebook
19 confirm that the 2000 Proof of Concept was a unique, one-time process “used as a
20 ‘proof of concept’” because “[a] cautious, limited expansion of the DNS was
21 warranted to better understand the impact of additions to the root zone.” (See
22 [http://archive.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-
23 18feb09-en.pdf](http://archive.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf) (as of Feb. 4, 2013).)

24 18. The New gTLD Program Applicant Guidebook first referred to the
25 2000 Proof of Concept in version two of that document, published on or around
26 February 18, 2009. A true and correct copy of relevant excerpts of a redline of the
27 Draft Applicant Guidebook, Version 2, published by ICANN, is attached hereto as
28 Exhibit 1 (*available at* [http://archive.icann.org/en/topics/new-gtlds/draft-rfp-](http://archive.icann.org/en/topics/new-gtlds/draft-rfp-ny-1076185)

1 redline-18feb09-en.pdf (as of Feb. 4, 2013)). Version two acknowledged that
2 participants in the 2000 Proof of Concept could have outstanding legal claims
3 related to their participation in the 2000 Proof of Concept. In particular, version
4 two provides that participants from the 2000 Proof of Concept seeking to re-apply
5 for gTLD strings not delegated in the 2000 Proof of Concept may receive a one-
6 time \$86,000 reduction to the \$185,000 per-TLD application fee, but only if they
7 first provided ICANN with written confirmation that “there are no existing legal
8 rights remaining from the 2000 proof-of-concept round process.” (Ex. 1 at 10-11.)

9 19. In ICANN’s May 31, 2009 analysis of public comments following the
10 release of version two of the New gTLD Program Applicant Guidebook, ICANN
11 recognized that *the New gTLD program was entirely distinct from the 2000 Proof*
12 *of Concept*. A true and correct copy of relevant excerpts of the New gTLD Draft
13 Applicant Guidebook-Version 2: Analysis of Public Comment is attached hereto as
14 Exhibit 2 (*available at* [http://archive.icann.org/en/topics/new-gtlds/agv2-analysis-](http://archive.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf)
15 [public-comments-31may09-en.pdf](http://archive.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf) (as of Feb. 4, 2013)).

16 20. ICANN’s characterization of the public comments included ICANN’s
17 apparent acknowledgment that “ICANN should explain why proof-of-concept
18 applicants from the year 2000 would be offered an \$86,000 credit *when there is no*
19 *obvious connection between the applications processes for the to-be launched*
20 *gTLDs and the 2000 gTLDs.*” (Emphasis added.) I am not aware that ICANN ever
21 provided the requested explanation or refuted that “there is no obvious connection
22 between the applications processes for the to-be launched gTLDs and the 2000
23 gTLDs.” (Ex. 2 at 13.)

24 21. In other words, when ICANN began exploring the New gTLD
25 Program in 2008, ICANN understood—as did all of the stakeholders involved—
26 that the 2000 Proof of Concept was a separate, unique process entirely unrelated to
27 the New gTLD Program. ICANN has never refuted this lack of connection
28 between the 2000 Proof of Concept and the 2012 Application Round.

1 22. ICANN published eight versions of the New gTLD Application
2 Guidebook, including the final version released on or around June 4, 2012, which is
3 338-pages long. A true and correct copy of excerpts of the final version of the New
4 gTLD Applicant Guidebook is attached hereto as Exhibit 3 (*available at*
5 <http://newgtlds.icann.org/en/applicants/agb> (as of Feb. 4, 2013)). Aside from the
6 fee reduction provision that first appeared in the second version of the guidebook,
7 no version of the guidebook, including the final version, makes even a single other
8 reference to how 2000 Proof of Concept participants will be treated in the New
9 gTLD Program. *No version of the New gTLD guidebook discusses the release*
10 *language in the 2000 Application or accompanying commentary.*

11 23. The final version of the New gTLD Applicant Guidebook provides
12 that:

13 Participants in ICANN's proof-of-concept application process in 2000
14 may be eligible for a credit toward the evaluation fee. The credit is in
15 the amount of USD 86,000 and is subject to: ***submission of***
documentary proof by the applicant . . . that the applicant has no
16 ***legal claims arising from the 2000 proof-of-concept process***
17 Each participant in the 2000 proof-of-concept application process is
18 eligible for at most one credit. A maximum of one credit may be
19 claimed for any new gTLD application submitted according to the
20 process in this guidebook. Eligibility for this credit is determined by
21 ICANN.

22 (Ex. 3 at 17-18 (emphasis added).)

23 24. In both my private conversations with ICANN's leadership and in
24 public discussions with ICANN and other stakeholders leading up to the 2012
25 Application Round, ICANN never mentioned the 2000 Application's release
26 language or otherwise stated that ICANN believed that participation in the 2000
27 Proof of Concept might bar 2000 applicants from bringing claims against ICANN
28 relating to the 2012 Application Round.

 25. The conspiracy and other conduct on which name.space bases its
Complaint relates to ICANN's conduct in connection with the New gTLD Program
that culminated in the 2012 Application Round, not the 2000 Proof of Concept. For

1 example, the conspiracy on which name.space bases its claims started in or around
2 2010—indeed, many of the co-conspirators did not even exist in 2000. In addition,
3 the unlawful and anti-competitive process about which name.space complains is
4 included in the New gTLD Application Guidebook, not the 2000 Proof of Concept
5 process, and the conduct that is infringing name.space’s intellectual property rights
6 and interfering with name.space’s contracts is likewise occurring in the 2012
7 Application Round, not the 2000 Proof of Concept.

8 26. The conflicts of interest that name.space alleges in its Complaint are
9 also related solely to the 2012 Application Round, and in fact continue to reveal
10 themselves as the 2012 Application Round unfolds. Recently, Kurt Pritz, ICANN’s
11 Chief Strategy Officer in charge of the 2012 Application Round, abruptly resigned
12 due to a conflict of interest. ICANN has refused to reveal publicly the nature of
13 Mr. Pritz’s conflict. A true and correct copy of ICANN’s announcement of Mr.
14 Pritz’s resignation is attached hereto as Exhibit 4 (*available at*
15 <http://www.icann.org/en/news/announcements/announcement-15nov12-en.htm> (as
16 of Feb. 4, 2013)).

17 I declare under penalty of perjury under the laws of the United States of
18 America that the foregoing is true and correct.

19 Executed on this 4th day of February, 2013.

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24 _____
25 Paul Garrin

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