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8 INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

9
10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12 WESTERN DIVISION

13
14 DOTCONNECTAFRICA TRUST

15 Plaintiff,

16 v.

17 INTERNET CORPORATION FOR
ASSIGNED NAMES AND
18 NUMBERS,

19 Defendant.

Case No. CV 16-00862-RGK

Assigned for all purposes to the
Honorable R. Gary Klausner

**DECLARATION OF KEVIN
ESPINOLA IN SUPPORT OF
DEFENDANT ICANN'S
OPPOSITION TO PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION**

[Opposition to Motion and
Declarations of Akram Atallah,
Jeffrey A. LeVee, Christine Willett,
and Moctar Yedaly Filed
Concurrently]

Hearing Date: April 4, 2016
Hearing Time: 9:00 a.m.
Hearing Location: Courtroom 850

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1 I, Kevin Espinola, declare the following:

2 1. I am a partner of Jones Day, counsel to defendant the Internet
3 Corporation for Assigned Names and Numbers (“ICANN”), a defendant in this
4 action. I have personal knowledge of the matters set forth herein and am competent
5 to testify as to those matters. I make this declaration in support of ICANN’s
6 Opposition to DotConnectAfrica Trust’s (“Plaintiff’s”) Motion for Preliminary
7 Injunction.

8 2. I have served as outside counsel to ICANN since May 2009. As
9 outside counsel, I assisted in the development of ICANN’s New gTLD Program.

10 3. The Generic Names Supporting Organization (“GNSO”)—one of the
11 supporting organizations that develops global Internet policy within ICANN—was
12 responsible for policy development work on the introduction of new generic top-
13 level domains (“gTLDs”) and approved a set of 19 policy recommendations. The
14 GNSO’s work involved representatives from a wide variety of stakeholder
15 groups—governments, individuals, civil society, business and intellectual property
16 constituencies, the technology community, and others—engaging in discussions on
17 policy questions regarding new gTLDs, including the application criteria and the
18 contractual conditions that should be required for new gTLD registries going
19 forward. An overview of the GNSO’s policy work and its outcomes is available at
20 <http://gns0.icann.org/issues/new-gtlds>. The culmination of the GNSO’s policy
21 development work was a June 2008 decision by the ICANN Board of Directors to
22 adopt the GNSO-developed new gTLD policy.

23 4. Following this decision, ICANN and its community began the process
24 of developing the New gTLD Applicant Guidebook (“Guidebook”), which
25 implemented the recommendations made by the GNSO and set forth the
26 requirements and the criteria by which new gTLD applications are evaluated. The
27 Guidebook was developed as part of a years-long, bottom-up multistakeholder
28 process during which numerous versions were published by ICANN for public

1 comment and revised, in part based on comments received. In total, six complete
2 versions of the Guidebook were published for public comment.¹

3 5. On December 13, 2010, as part of this process, Plaintiff submitted a
4 written public comment regarding the November 12, 2010 version of the
5 Guidebook (“November 2010 Guidebook”), noting its support for the New gTLD
6 Program and for a .AFRICA gTLD. Attached hereto as Exhibit A is a true and
7 correct copy of Plaintiff’s comment. Attached hereto as Exhibit B is a true and
8 correct copy of an excerpt of the “New gTLDs Proposed Final Applicant
9 Guidebook Public Comment Summary,” summarizing comments received
10 regarding the November 2010 Guidebook. Plaintiff’s comment is addressed on
11 page 3. I am informed and believe that Plaintiff did not submit any comments
12 regarding Section 6 of Module 6 of the Guidebook (“Covenant Not to Sue”).

13 6. In the April 15, 2011 version of the Guidebook (“April 2011
14 Guidebook”), language was added to Section 6 of Module 6 of the Guidebook
15 (“Covenant Not to Sue”) making explicit that: “[an] applicant may utilize any
16 accountability mechanism set forth in ICANN’s Bylaws for [the] purposes of
17 challenging any final decision made by ICANN with respect to the application.”
18 Attached hereto as Exhibit C is a true and correct copy of Module 6 of the April
19 2011 Guidebook, which was published with a redline, showing changes made from
20 the prior version of the Guidebook.

21 7. It is my belief that this addition was principally made in response to
22 comments from ICANN’s Governmental Advisory Committee (“GAC”) regarding
23 the Covenant Not to Sue, as reflected on page 2 of a February 21, 2011 document
24 responding to those comments. A true and correct copy of that document, “ICANN
25

26 ¹ Some modifications were made to the Guidebook requirements after the last
27 Guidebook was published. But no modifications were made to the portions of the
28 Guidebook relevant in this case—i.e., the requirement of governmental support for
gTLDs representing geographic regions and Section 6 of Module 6.

1 Board-GAC Consultation: ‘Legal Recourse’ for New gTLD Registry Applicants,”
2 is attached to this declaration as Exhibit D.

3 8. ICANN’s decision to include the Covenant Not to Sue reflected its
4 reasoned determination regarding the sort of risk, including financial, to which
5 ICANN—a non-profit public benefit corporation—should reasonably subject itself
6 as part of the New gTLD Program.

7 9. In response to public comments regarding the Covenant Not to Sue in
8 the February 18, 2009 draft of the Guidebook (“February 2009 Guidebook”),
9 ICANN explained: “Under its Bylaws ICANN’s actions are subject to numerous
10 transparency, accountability and review safeguards, and are guided by core values
11 including ‘Making decisions by applying documented policies neutrally and
12 objectively, with integrity and fairness[,]’ but it would not be feasible for ICANN
13 to subject itself to unlimited exposure to lawsuits from potential unsuccessful
14 applicants.” Attached hereto as Exhibit E is a true and correct copy of an excerpt of
15 the report of public comments to the February 2009 Guidebook. The relevant
16 language appears on p. 184.

17 10. Similarly, in responding to the GAC’s comments regarding the
18 Covenant Not to Sue, ICANN explained:

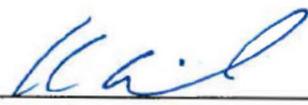
19
20 ICANN is a non-profit public benefit corporation and lacks the
21 resources to defend against potentially numerous lawsuits in
22 jurisdictions all over the world initiated by applicants that might want
23 to challenge the results of the community-designed new gTLD
24 application process. ICANN anticipates that, absent a broad waiver
25 and limitation of liability in the application terms and conditions,
26 rejected or unsuccessful applicants could initiate frivolous and costly
27 legal actions in an attempt to challenge legitimate ICANN decisions,
28 and possibly delay further the successful rollout of the new gTLD
program. Accordingly, ICANN has carefully considered how to
protect the new gTLD program from such challenges. The release
from such potential claims was deemed appropriate in light of these
considerations.

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(Exhibit D at 2.)

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

Executed on March 14, 2016, in Irvine, California.



Kevin Espinola

EXHIBIT A

Greeting Mr. Chair, Distinguished Board and participants,

also a great thank you to the local hosts and organizers of this meetings. It has gone all well.

My name is Sophia Bekele and I represent DotConnectAfrica, an organization that is applying for the .africa gTLD in the next round of application, also we have been championing the .africa TLD all over Africa.

Most of you here have **recognized our activities through our regular press releases** and distributions on facebook and twitter. (Not to advertise here of course) **but those who want to know us**, can find us there.

While I stand here in front of you, ladies & gentleman to express like most, **not to delay** the application process, **(also being careful not to ask for an expectation for Africa)**, I want to say why the Africa continent needs it most!

We have championed .africa for Africa anchored on **3 key principles**.

- 1- To brand the Continent's product and services so people will **know what Africa does and the positives** that Africa has to offer. While Africa's image has suffered thru war, famine and governance issues, **there is also another image that the world does not know about Africa**, and that can be told through its people when they engage in promoting their products & services for trade and investment in the new gTLD. **This is also quite in line with the current US administration's policy on "focus on Africa"**, to assist in increasing trade and investment. While, we all acknowledge ICANN is an international organization, it is also based in the US. **Therefore, the dotafrica TLD fulfills this US agenda and support for Africa's speedy entry in the global village.**
- 2- DotConnectAfrica has created "**generation.africa**", a theme, to empower the youth to adapt to the powers of the internet and its use, **thus enjoying a great following thus far.** ITU, a good-will partner to ICANN, and also its secretary general, Dr. Hamadoun Toure, an African as well; under his administration has championed Broadband for Africa in 2007, and since, the penetration rate has been amazing supported by African leadership. We want the same from ICANN for our generation.africa, a potential of 900billion people.
- 3- A shift in industry from US market of .com and .org to Africa empowered by the dotafrica registry to Africa, which is to be housed locally in the continent. This will mean development of new industry and market **for Africa empowering African jobs and wealth creation.** So that Africa does not have come to ICANN for financial support, like the community gTLDs. Dotafrica registry can instead fulfill that need, and this DCA has announced at the Brussels meeting.

So these **are very powerful and compelling reasons** for Africa to need this gTLD. In fact, this is our economic study for ICANN that can be used as input, we shall need no more. So ICANN should continue with its commitment with new gTLDs.

Finally, DCA has promised generation.africa to take them to this promised land, **but Africa cannot get there, without ICANN---- first taking, ALL OF US to that promised land.** Africa has already missed the boat in the last many rounds, but have seen the successes of .eu and then .asia. **and now it is time for .africa.** Thank you for listening!

EXHIBIT B

21 February 2011

NEW gTLDs PROPOSED FINAL APPLICANT GUIDEBOOK PUBLIC COMMENT SUMMARY

Sources:

Public Comment Postings (12 Nov. 2010-15 Jan. 2011). The full text of the comments may be found at <http://www.icann.org/en/topics/new-gtlds/comments-5-en.htm>.

GENERAL COMMENTS

Support for New gTLD Program

Key Points

- Supporters have argued, in general, that New gTLDs promote, competition, consumer choice, innovation and can help new businesses grow.
- Other supporters argue that while not perfect, the current proposed final AG is robust enough to support the launch of the new gTLD application process. The elements that still cause concern can be fixed within the proposed schedule.

Summary of Comments

One of ICANN's core principles is to bring competition to the registry space. New TLDs will bring innovation, consumer choice, and lower prices. Five years ago the battle was fought--the anti-TLD community lost and the vast majority of the community reached consensus that new TLDs should be introduced. The ICANN Board—with the GAC at its side—announced its approval in June 2008, which was the correct decision. The anti-TLD forces have been attempting to prevent the communities' will, consumer choice and innovation and it is no surprise that they are firing their last shots on the eve of final approval. Their efforts should be rebuffed. ICANN's implementation plan has taken into account the multitude of inputs from scores of individuals and entities. ICANN has made countless changes to the guidebook in the process and has explained its decisions along the way. Just because an input was disagreed with does not mean that it was ignored. How many economic studies are needed to show that there is demand for new TLDs? Perhaps the real life experience of a half-million .co names in three months is sufficient evidence. It is time to move on with the process--the Guidebook is ready to go and we have all waited far too long. *D. Schindler (5 Dec. 2010)*.

While not perfect, the current proposed final AG is robust enough to support the launch of the new gTLD application process. The AG will evolve as the process moves forward.

It is time to put it to the test by approving the AG so we can move forward with the proposed timeline ICANN has set for the new gTLD launch which will create more competition in the market and greater benefits to consumers. *Network Solutions (8 Dec. 2010)*. *Demand Media (8 Dec. 2010)*. *AFNIC (9 Dec. 2010)*. *AusRegistry (9 Dec. 2010)*. *Domain Dimensions (9 Dec. 2010)*.

The NCUC supports prompt commencement of the application program for new gTLDs. The elements that still cause concern (e.g. IO) can be fixed within the proposed schedule. *NCUC (10 Dec. 2010)*.

It is time to put the demand to prove the unpredictable to rest and allow innovation and progress to flourish. At ICANN meetings policy based on consensus position is developed. Yet for the last two years we have heard a few self-protectionist opponents demand study after study that will prove the consumer need for innovation. In response many analogies have been expressed. Did the Wright Brothers do market studies to get a solid number on the demand to fly from consumers? Looking back, would that study have been accurate? How about the innovations to the bicycle? The consumer “need” for the iPhone? Juan Calle, president of .co said “With the new domain extensions, creativity can live to the right of the dot. Registries will have to innovate to stay alive.” *E. Pruis (6 Dec. 2010)*.

RySG supports the introduction of new gTLDs and believes the time has come to introduce further competition into the marketplace. RySG does believe certain issues it highlights in its comments need to be resolved and hopes that ICANN provides the latitude to allow further amendment to the AG even beyond the Cartagena meeting if necessary. RySG is ready to engage with ICANN Staff to ensure resolution of these items with no impact on the projected timetable for the new gTLD round. Use of the “TDG” legal group may be the appropriate forum to resolve these issues in a timely fashion. *RySG (7 Dec. 2010)*.

New gTLDs are a platform for innovation. This change will benefit individual users and especially large brands on a scale not previously seen in the DNS. Brand owners will be the biggest beneficiaries; they will use their own top level domain to manage their Internet presence. When users grow to expect to find Internet resources at “.company” the need for brand protection and the opportunity for user confusion will be greatly diminished. We also should think in terms of how a large number of domains in the aggregate will provide competition for .com. This issue cannot be understood by studying the extremely limited TLD introductions of the past. *Tucows (8 Dec. 2010)*.

Overall, it has been established that external benefits of the gTLD program exceed its external costs. For each new gTLD individually the right thing to do is to focus preventive action on the cases where external costs will occur. It is wrong to stop the entire gTLD program because of concern about externalities from some potential gTLDs. *W. Staub (10 Dec. 2010)*. *F. Krueger (10 Dec. 2010)*.

ICANN should move ahead with the new gTLD program so that the benefits of Internet connectivity can be expanded to places such as Africa. There are powerful and compelling reasons for Africa to need the .africa gTLD and now is the time for this opportunity to happen. *DotConnectAfrica (13 Dec. 2010)*.

New gTLDs will create innovation and create a multitude and variety of jobs, all of which will create competition. New gTLDs will also bring more security to the Internet through the requirement to utilize DNSSEC. Please do not allow any further delay. Begin the communications period so people can get to work. *E. Pruis (6 Jan. 2011)*.

New gTLDs should proceed without delay, as they will bring innovation and many benefits. In particular they will bring about “cause based TLDs” –ie. those TLDs that will benefit the greater and global public good. *DotGreen (9 Jan. 2011)*.

Opposition to New gTLD Program

Key Points

- Critics have argued that the program does not serve the public interest, the risks outweigh the benefits and ICANN lacks sufficient public support. Some also oppose the introduction of an “unlimited” number of TLDs.
- Other critics express concern that the critical overarching issues, including among other things a failure to include strong trademark protections has not been fully addressed.

Summary of Comments

ICANN in pursuing the new gTLD program is acting against the broader public interest and only in the interests of itself and a small number of “insiders” who would directly profit from short term schemes that threaten the long term stability of the Internet naming system and that impose externalities on third parties (via increased confusion and defensive registration costs). “Innovation” from new gTLDs is a myth. The public has not been clamoring for new TLDs. The past new TLDs (e.g., .name, .asia, .jobs, .travel) were failures for the public. ICANN needs to go back and consider proposals such as the competitive bidding concept recommended by the DOJ (i.e., tender processes for operation of new TLDs for fixed terms at the lowest possible cost to consumers), or our suggestion of “Ascended TLDs” which uses the legal concept of easements to ensure fair allocation of new TLDs taking into full account the existing property rights of domain registrants. *G. Kirikos (13 Nov. 2010)*. *G. Kirikos (24 Nov. 2010)*. *AIPLA (6 Dec. 2010)*.

ICANN and its Board need to get things right and stop gambling with the future of the DNS. ICANN needs to stop acting like a startup trying to make commercial gains for itself, and remember that it was created to serve the public interest. There has been talk



Applicant Guidebook

April 2011 Discussion Draft Module 6

Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

15 April 2011

Module 6

Top-Level Domain Application - Terms and Conditions

By submitting this application through ICANN's online interface for a generic Top Level Domain (gTLD) (this application), applicant (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any and all others acting on its behalf) agrees to the following terms and conditions (these terms and conditions) without modification. Applicant understands and agrees that these terms and conditions are binding on applicant and are a material part of this application.

1. Applicant warrants that the statements and representations contained in the application (including any documents submitted and oral statements made and confirmed in writing in connection with the application) are true and accurate and complete in all material respects, and that ICANN may rely on those statements and representations fully in evaluating this application. Applicant acknowledges that any material misstatement or misrepresentation (or omission of material information) may cause ICANN and the evaluators to reject the application without a refund of any fees paid by Applicant. Applicant agrees to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading.
2. Applicant warrants that it has the requisite organizational power and authority to make this application on behalf of applicant, and is able to make all agreements, representations, waivers, and understandings stated in these terms and conditions and to enter into the form of registry agreement as posted with these terms and conditions.
3. 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 and consider an application to establish one or more gTLDs 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.

4. Applicant agrees to pay all fees that are associated with this application. These fees include the evaluation fee (which is to be paid in conjunction with the submission of this application), and any fees associated with the progress of the application to the extended evaluation stages of the review and consideration process with respect to the application, including any and all fees as may be required in conjunction with the dispute resolution process as set forth in the application. Applicant acknowledges that the initial fee due upon submission of the application is only to obtain consideration of an application. ICANN makes no assurances that an application will be approved or will result in the delegation of a gTLD proposed in an application. Applicant acknowledges that if it fails to pay fees within the designated time period at any stage of the application review and consideration process, applicant will forfeit any fees paid up to that point and the application will be cancelled. Except as expressly provided in this Application Guidebook, ICANN is not obligated to reimburse an applicant for or to return any fees paid to ICANN in connection with the application process.
5. Applicant shall indemnify, defend, and hold harmless ICANN (including its affiliates, subsidiaries, directors, officers, employees, consultants, evaluators, and agents, collectively the ICANN Affiliated Parties) from and against any and all third-party claims, damages, liabilities, costs, and expenses, including legal fees and expenses, arising out of or relating to: (a) ICANN's [or an ICANN Affiliated Party's](#) consideration of the application, and any approval or rejection of the application; and/or (b) ICANN's [or an ICANN Affiliated Party's](#) reliance on information provided by applicant in the application.
6. 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, 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. APPLICANT ACKNOWLEDGES AND ACCEPTS THAT APPLICANT'S NONENTITLEMENT TO PURSUE ANY RIGHTS, REMEDIES, OR LEGAL CLAIMS AGAINST ICANN OR THE ICANN AFFILIATED PARTIES IN COURT OR ANY OTHER JUDICIAL FORA WITH RESPECT TO THE APPLICATION SHALL MEAN THAT APPLICANT WILL FOREGO ANY RECOVERY OF ANY APPLICATION FEES, MONIES INVESTED IN BUSINESS INFRASTRUCTURE OR OTHER STARTUP COSTS AND ANY AND ALL PROFITS THAT APPLICANT MAY EXPECT TO REALIZE FROM THE OPERATION OF A REGISTRY FOR THE TLD-; PROVIDED, THAT APPLICANT MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN'S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION. APPLICANT ACKNOWLEDGES THAT ANY ICANN AFFILIATED PARTY IS AN EXPRESS THIRD PARTY BENEFICIARY OF THIS SECTION 6 AND MAY ENFORCE EACH PROVISION OF THIS SECTION 6 AGAINST APPLICANT.

7. Applicant hereby authorizes ICANN to publish on ICANN's website, and to disclose or publicize in any other manner, any materials submitted to, or obtained or generated by, ICANN and the ICANN Affiliated Parties in connection with the application, including evaluations, analyses and any other materials prepared in connection with the evaluation of the application; provided, however, that information will not be disclosed or published to the extent that this Applicant Guidebook expressly

states that such information will be kept confidential, except as required by law or judicial process. Except for information afforded confidential treatment, applicant understands and acknowledges that ICANN does not and will not keep the remaining portion of the application or materials submitted with the application confidential.

8. Applicant certifies that it has obtained permission for the posting of any personally identifying information included in this application or materials submitted with this application. Applicant acknowledges that the information that ICANN posts may remain in the public domain in perpetuity, at ICANN's discretion.
9. Applicant gives ICANN permission to use applicant's name in ICANN's public announcements (including informational web pages) relating to Applicant's application and any action taken by ICANN related thereto.
10. Applicant understands and agrees that it will acquire rights in connection with a gTLD only in the event that it enters into a registry agreement with ICANN, and that applicant's rights in connection with such gTLD will be limited to those expressly stated in the registry agreement. In the event ICANN agrees to recommend the approval of the application for applicant's proposed gTLD, applicant agrees to enter into the registry agreement with ICANN in the form published in connection with the application materials. (Note: ICANN reserves the right to make reasonable updates and changes to this proposed draft agreement during the course of the application process, including as the possible result of new policies that might be adopted during the course of the application process). Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application.
11. Applicant authorizes ICANN to:
 - a. Contact any person, group, or entity to request, obtain, and discuss any documentation or other information that,

- in ICANN's sole judgment, may be pertinent to the application;
- b. Consult with persons of ICANN's choosing regarding the information in the application or otherwise coming into ICANN's possession, 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.
12. For the convenience of applicants around the world, the application materials published by ICANN in the English language have been translated into certain other languages frequently used around the world. Applicant recognizes that the English language version of the application materials (of which these terms and conditions is a part) is the version that binds the parties, that such translations are non-official interpretations and may not be relied upon as accurate in all respects, and that in the event of any conflict between the translated versions of the application materials and the English language version, the English language version controls.

EXHIBIT D

ICANN Board-GAC Consultation: "Legal Recourse" for New gTLD Registry Applicants

EXPLANATION OF ISSUE/HISTORY

The following is background on the issue of "legal recourse" for new gTLD applicants, which is one of the issues identified by the GAC for the forthcoming Board-GAC consultation on new gTLDs.

The GAC's Comments on v4 of the Draft Applicant Guidebook (23 September 2010) noted, "The GAC supports a framework whereby applicants can legally challenge any decision made by ICANN with respect to the application. The GAC believes therefore that the denial of any legal recourse as stated in Module 6 of the DAG under item 6 is inappropriate. The GAC cannot accept any exclusion of ICANN's legal liability for its decisions and asks that this statement in the DAG be removed accordingly." <<http://www.icann.org/en/correspondence/dryden-to-dengate-thrush-23sep10-en.pdf>>

This appears to be a new issue that has not been raised in previous GAC communiqués, even though the legal release language is essentially the same since the first draft applicant guidebook published in 2008 <<http://www.icann.org/en/topics/new-gtlds/terms-24oct08-en.pdf>>. Two years ago (in February 2009), seven words ("IN COURT OR ANY OTHER JUDICIAL FORA") were added to make it clear that the release only applied to challenges in court <<http://www.icann.org/en/topics/new-gtlds/draft-terms-redline-18feb09-en.pdf>>. In other words, applicants would agree not to sue ICANN, but would still have access to the avenues for review built in to the new gTLD application process, as well as ICANN's existing accountability mechanisms: ombudsman, reconsideration, and independent review. Additional mechanisms may result from the consideration and implementation of the recommendations of the Accountability and Transparency Review Team.

REMAINING AREAS OF DIFFERENCE

The GAC requests that ICANN remove language for the Applicant Terms and Conditions that (paraphrasing) the Applicant agrees not to challenge in court final decisions made by ICANN with respect to the application and the Applicant waives the right to sue ICANN with respect to the application. ICANN has declined this request, stating (among other things) it would be an inappropriate risk for ICANN to undertake.

ICANN Response to GAC on "Legal Recourse" for New gTLD Registry Applicants

In the letter from Peter Dengate Thrush to Heather Dryden (23 November 2010) "Response to GAC Comments on New gTLDs and DAGv4" <<http://icann.org/en/minutes/resolutions-25sep10-en.htm> - 2.10>, the ICANN Chairman noted that:

As stated earlier in this letter, one of the guiding principles in developing the Applicant Guidebook has been to address and mitigate risks and costs to ICANN and the global Internet community.

21 February 2011

DRAFT

ICANN reaffirms its commitment to be accountable to the community for operating in a manner that is consistent with ICANN's Bylaws, including ICANN's Core Values such as "making decisions by applying documented policies neutrally and objectively, with integrity and fairness." The Board does not believe however that ICANN should expose itself to costly lawsuits any more than is appropriate.

The new gTLD process has been carefully designed over several years with multiple opportunities for public comment in order to develop a well-documented process that can be operated neutrally and objectively to the maximum extent feasible, and with integrity and fairness. Also, all of ICANN's standard accountability and review mechanisms will be available to all participants and affected parties in the new gTLD process, including ICANN's reconsideration process, independent review, and the ICANN Ombudsman.

Based on the above, in Trondheim, the Board resolved that, "The Board approves the inclusion of a broad waiver and limitation of liability in the application terms and conditions."

ICANN is a non-profit public benefit corporation and lacks the resources to defend against potentially numerous lawsuits in jurisdictions all over the world initiated by applicants that might want to challenge the results of the community-designed new gTLD application process. ICANN anticipates that, absent the broad waiver and limitation of liability in the application terms and conditions, rejected or unsuccessful applicants could initiate frivolous and costly legal actions in an attempt to challenge legitimate ICANN decisions, and possibly delay further the successful rollout of the new gTLD program. Accordingly, ICANN has carefully considered how to protect the new gTLD program from such challenges. The release from such potential claims was deemed appropriate in light of these considerations.

ICANN has surveyed multiple jurisdictions including outside the U.S., and is not aware of any law prohibiting the inclusion of such a waiver in a contract. Further, such a waiver is consistent with competition laws since it does not have the effect of excluding competition; the release simply limits the recourses available to one of the contracting parties. As noted above however, all internal ICANN accountability and review processes will remain available to applicants. ICANN will review whether further changes to the wording of the terms and conditions are necessary to clarify that internal review mechanisms will be available to applicants.

Under its Bylaws, ICANN's actions are subject to numerous transparency, accountability and review safeguards, and are guided by core values including "making decisions by applying documented policies neutrally and objectively, with integrity and fairness", but it would not be feasible for ICANN to subject itself to unlimited exposure to legal actions from potential unsuccessful applicants.

RELEVANT GUIDEBOOK SECTIONS

The following is the wording of the legal release provision in the most recent several drafts:

21 February 2011

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"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 review of this application, investigation or verification, any characterization or description of applicant or the information in 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. APPLICANT ACKNOWLEDGES AND ACCEPTS THAT APPLICANT'S NONENTITLEMENT TO PURSUE ANY RIGHTS, REMEDIES, OR LEGAL CLAIMS AGAINST ICANN OR THE ICANN AFFILIATED PARTIES IN COURT OR ANY OTHER JUDICIAL FORA WITH RESPECT TO THE APPLICATION SHALL MEAN THAT APPLICANT WILL FOREGO ANY RECOVERY OF ANY APPLICATION FEES, MONIES INVESTED IN BUSINESS INFRASTRUCTURE OR OTHER STARTUP COSTS AND ANY AND ALL PROFITS THAT APPLICANT MAY EXPECT TO REALIZE FROM THE OPERATION OF A REGISTRY FOR THE TLD."

REFERENCE DOCUMENTS: LEGAL RECOURSE FOR APPLICANTS

- **CHRONOLOGICAL LISTING OF GAC ADVICE AND COMMENTS ON NEW GTLDS AND RESPONSES PROVIDED BY ICANN AND KEY DOCUMENTS PUBLISHED ON THE TOPICS**

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GAC Advice and Comments	ICANN responses and key documents
<p>10 March 2009: Comments on V1 of Applicant Guidebook</p>	<p>24 October 2008: Applicant Guidebook Version 1 http://www.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf</p> <p>18 February 2009, version 1 Public Comments Analysis Report http://www.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf</p>
	<p>18 February 2009: Applicant Guidebook Version 2 http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-18feb09-en.pdf</p> <p>31 May 2009, Summary and analysis of public comments on version 2 http://www.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf</p>
	<p>28 May 2010: Applicant Guidebook Version 4 http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-28may10-en.pdf</p> <p>12 November 2010: Summary and analysis of comments version 4 http://www.icann.org/en/topics/new-gtlds/summary-analysis-agv4-12nov10-en.pdf</p>
<p>23 September 2010: Comments on V4 of Applicant Guidebook The GAC supports a framework whereby applicants can legally challenge any decision made by ICANN with respect to the application. The GAC believes therefore that the denial of any legal recourse as stated in Module 6 of the DAG under item 6 is inappropriate. The GAC cannot accept any exclusion of ICANN's legal liability for its decisions and asks that this statement in the DAG be removed accordingly.</p>	<p>23 November 2010: Reply from ICANN Chairman http://www.icann.org/en/correspondence/dengate-thrush-to-dryden-23nov10-en.pdf</p> <p>As stated earlier in this letter, one of the guiding principles in developing the Applicant Guidebook has been to address and mitigate risks and costs to ICANN and the global Internet community.</p> <p>ICANN reaffirms its commitment to be accountable to the community for operating in a manner that is consistent with ICANN's Bylaws, including ICANN's Core Values such as "making decisions by applying documented policies neutrally and objectively, with integrity and fairness." The Board does not believe however that ICANN should expose itself to costly lawsuits any more than is appropriate.</p>

	<p>The new gTLD process has been carefully designed over several years with multiple opportunities for public comment in order to develop a well-documented process that can be operated neutrally and objectively to the maximum extent feasible, and with integrity and fairness. Also, all of ICANN's standard accountability and review mechanisms will be available to all participants and affected parties in the new gTLD process, including ICANN's reconsideration process, independent review, and the ICANN Ombudsman.</p> <p>Based on the above, in Trondheim, the Board resolved that, "The Board approves the inclusion of a broad waiver and limitation of liability in the application terms and conditions.</p>
	<p>25 September 2010: Board meeting in Trondheim http://www.icann.org/en/minutes/resolutions-25sep10-en.htm</p> <p>Board Briefing Materials: One [PDF, 3.23 MB] Two [PDF, 2.03 MB] Three [PDF, 816 KB] Four [PDF, 240 KB] Five [PDF, 546 KB]</p> <p>"... Whereas, on 23 September 2010, the Governmental Advisory Committee (GAC) provided comments on version 4 of the draft Applicant Guidebook. Resolved (2010.09.25.__), staff is directed to determine if the directions indicated by the Board below are consistent with GAC comments, and recommend any appropriate further action in light of the GAC's comments."</p> <p><i>Role of the Board</i> The Board intends to approve a standard process for staff to proceed to contract execution and delegation on applications for new gTLDs where certain parameters are met. Examples of such parameters might include: (1) the application criteria were met, (2) no material exceptions to the form agreement terms, and (3) an independent confirmation that the process was followed. The Board reserves the right under exceptional circumstances to individually</p>

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	<p>consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community, for example, as a result of the use of an ICANN accountability mechanism. The Board approves the inclusion of a broad waiver and limitation of liability in the application terms and conditions.</p>
	<p>12 November 2010: Proposed Final Applicant Guidebook http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-12nov10-en.pdf</p>
<p>9 December 2010: Communiqué Cartagena That the GAC will provide the Board at the earliest opportunity with a list or "scorecard" of the issues which the GAC feels are still outstanding and require additional discussion between the Board and the GAC. These include:</p> <ul style="list-style-type: none"> • Legal recourse for applicants; 	<p>10 December 2010, Board meeting</p> <p>New gTLD Remaining Issues http://www.icann.org/en/minutes/resolutions-10dec10-en.htm#2</p> <p>Resolved (2010.12.10.21), the Board:</p> <ol style="list-style-type: none"> 1. Appreciates the GAC's acceptance of the Board's invitation for an inter-sessional meeting to address the GAC's outstanding concerns with the new gTLD process. The Board anticipates this meeting occurring in February 2011, and looks forward to planning for this meeting in consultation and cooperation with the GAC, and to hearing the GAC's specific views on each remaining issue. 2. Directs staff to make revisions to the guidebook as appropriate based on the comments received during the public comment period on the Proposed Final Applicant Guidebook and comments on the New gTLD Economic Study Phase II Report. 3. Invites the Recommendation 6 Community Working Group to provide final written proposals on the issues identified above by 7 January 2011, and directs staff to provide briefing materials to enable the Board to make a decision in relation to the working group's recommendations. 4. Notes the continuing work being done by the Joint Applicant Support Working Group, and reiterates the Board's 28 October 2010 resolutions of thanks and encouragement. 5. Directs staff to synthesize the results of these consultations and comments, and to prepare revisions to the guidebook to enable the Board to make a decision on the launch of the new gTLD program as soon as possible. 6. Commits to provide a thorough and reasoned explanation of ICANN

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	<p>decisions, the rationale thereof and the sources of data and information on which ICANN relied, including providing a rationale regarding the Board's decisions in relation to economic analysis.</p> <p>7. Thanks the ICANN community for the tremendous patience, dedication, and commitment to resolving these difficult and complex issues.</p>
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EXHIBIT E

Terms and Conditions (Module 6)

I. Key points

- It is unfair to applicants to allow ICANN to deny an application for any or no reason.

II. Summary of Comments

Fairness to applicants. ICANN has the option to unilaterally deny an application at any time, but it appears that if ICANN offers an applicant a Registry Agreement of ICANN's choice, the applicant must sign it and has no right to walk away for whatever reason. This seems unenforceable. *NCUC (13 April 2009)*. *S. Soboutipour (Module 6, 12 April 2009)*. *DotAfrica (Module 6, 13 April 2009)*. *L.Andreff (Module 6, 13 April 2009)*. *S. Subbiah (Module 6, 13 April 2009)*.

Specific comments on application terms and conditions. None of the matters INTA raised in Module 6 of version 1 were acted upon in version 2. INTA incorporates by reference its comments on Module 6, version 1 in their entirety and requests consideration of them by ICANN. Para. 1: oral statement must be confirmed in writing, and there should be a clear process for recording or documenting discussions outside the written application process; the phrase "reflect negatively" needs clarification/definition; Para 2: applicant must make full disclosure of all corporate relationships and any other gTLD applications, and a corporate entity should not be allowed to submit more than one application at a time for a particular gTLD; Para. 3: ICANN should be able to reject an application where the applicant intentionally submitted or provided fraudulent information, and no application refund should be issued. Para. 4: There should be notice and cure in the case where an applicant's fees are not received in a timely manner; a late fee should not be grounds for cancelling the application; Para. 6: ICANN has not justified the requirement that an applicant release ICANN from all claims and waive any rights to judicial action and review; this paragraph should be deleted and rewritten with appropriate limits on the release of ICANN from liability. Para. 7: Applicants should be notified before ICANN treats as "nonconfidential" information that the applicant submits as "confidential"; Para. 8: ICANN should require the applicant to keep its personal identifying information current and up to date, with updates required within a reasonable period of time after information has changed. Para. 9: ICANN should not have perpetual, unlimited rights to use an applicant's name and/or logo in ICANN public announcements; the right to use should be limited to announcements relating exclusively to the applicant's application. *INTA (8 April 2009)*.

Application terms and conditions suggestions. In provision 1 add the qualifier "to the best of applicant's knowledge"; and amend phrase to read "or willful omission of material information"; provision 6, release of claims against ICANN, is overreaching and inappropriate unless it is amended to include some exceptions for acts of negligence and misconduct on the

part of ICANN or its affiliated parties.; provision 11b should be amended to exclude any part of the application designated by the applicant as “confidential” without the express written permission of the applicant. *Go Daddy (13 April 2009)*.

Application procedure—limited rights. Applicants are strongly limited in their rights by agreeing with the application procedure. This is in conflict with the goal to create a clear, uncontested procedure for gTLD applications, since the final outcome of the procedure is at ICANN’s sole discretion. *SIDN (14 April 2009)*.

Applicant’s permission to ICANN (paragraph 9). This should be limited to use of the Applicant’s name in ICANN public announcements relating solely to that Applicant. ICANN must obtain specific permission from an Applicant to use its logo. *Microsoft (Guidebook, 13 April 2009)*.

Confidential information. Will ICANN treat as confidential applicant material that is clearly and separately marked as confidential (please answer Yes or No)? *NCUC (13 April 2009)*. *A. Sozonov (Module 6, 9 April 2009)*. *Association Uninet (Module 6, 11 April 2009)*. *S. Soboutipour (Module 6, 12 April 2009)*. *DotAfrica (Module 6, 12 April 2009)*. *L. Andreff (Module 6, 13 April 2009)*. *S. Subbiah (Module 6, 13 April 2009)*. Microsoft supports the version 2 position that applicant response to security and financial questions will be considered confidential and will not be posted. *Microsoft (Guidebook, 13 April 2009)*.

ICANN exclusion of liability. The exclusion of ICANN liability in clause 6 of the Terms and Conditions provides no leverage to applicants to challenge ICANN’s determinations to a recognized legal authority. If ICANN or the applicant engaged in questionable behavior then legal recourse and investigation should remain open. *NCUC (13 April 2009)*. *A. Sozonov (Module 6, 9 April 2009)*. *S. Soboutipour (Module 6, 12 April 2009)*. *Association Uninet (Module 6, 11 April 2009)*. *DotAfrica (Module 6, 12 April 2009)*. *L. Andreff (Module 6, 13 April 2009)*. *S. Subbiah (Module 6, 13 April 2009)*. *D. Allen (Module 6, 13 April 2009)*. The covenant not to challenge and waiver in Paragraph 6 is overly broad, unreasonable, and should be revised in its entirety. *Microsoft (Guidebook, 13 April 2009)*.

III. Analysis and Proposed Position

Prospective applicants cannot appropriately be offered any reassurances that ICANN will enter into a registry agreement with them, otherwise this undermines the purpose and intent of a rigorous application review. Further, ICANN must retain this right to evaluate applicants up to the point of entry into a registry agreement. Under its Bylaws ICANN's actions are subject to numerous transparency, accountability and review safeguards, and are guided by core values including "Making decisions by applying documented policies neutrally and objectively, with integrity and fairness", but it would not be feasible for ICANN to subject itself to unlimited exposure to lawsuits from potential unsuccessful applicants. The other specific comments and suggestions on the application terms and conditions will be considered by ICANN in the preparation of version 3 of the Applicant Guidebook.

EXHIBIT F

3/14/2016

Resources - ICANN

[English \(/translations\)](#) [العربية \(/ar\)](#) [Español \(/es\)](#)

[Français \(/fr\)](#) [Русский \(/ru\)](#) [中文 \(/zh\)](#)

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[COMMUNITY \(/COMMUNITY\)](#) [IANA STEWARDSHIP & ACCOUNTABILITY \(/STEWARDSHIP-ACCOUNTABILITY\)](#)

Resources

Adopted Board Resolutions

▶ [About ICANN \(Internet Corporation for Assigned Names and Numbers\) \(/resources/pages/welcome-2012-02-25-en\)](#)

25 Sep 2010
Trondheim, Norway

▶ [Board \(/resources/pages/board-of-directors-2014-03-19-en\)](#)

▶ [Accountability \(/resources/accountability\)](#)

▶ [Governance \(/resources/pages/governance-2012-02-25-en\)](#)

▶ [Groups \(/resources/pages/groups-2012-02-06-en\)](#)

[Business \(/resources/pages/business\)](#)

▶ [Contractual](#)

1. [New gTLD \(generic Top Level Domain\) Program Budget](#)
2. [New gTLDs – Directions for Next Applicant Guidebook](#)
 - 2.1. [Geographic Names](#)
 - 2.2. [New gTLD \(generic Top Level Domain\) Applicant Support](#)
 - 2.3. [Root Zone \(Root Zone\) Scaling](#)
 - 2.4. [String Similarity](#)
 - 2.5. [Variant Management](#)
 - 2.6. [Trademark Protection](#)
 - 2.7. [Role of the Board](#)
 - 2.8. [Mitigating Malicious Conduct](#)
 - 2.9. [GNSO \(Generic Names Supporting Organization\) New gTLD \(generic Top Level Domain\) Recommendation 6 Objection Process](#)
 - 2.10. [Registry Agreement](#)

<p>Compliance (/resources/pages/compliance-2012-02-25-en)</p>	<p>2.11. <u>Vertical Integration</u></p>
<p>▶ Registrars (/resources/pages/registrars-0d-2012-02-25-en)</p>	<p>3. <u>Data and Consumer Protection Working Group</u></p> <p>4. <u>Board Global Relationships Committee</u></p>
<p>▶ Registries (/resources/pages/registries-46-2012-02-25-en)</p>	<p>5. <u>Nominating Committee Chair</u></p> <p>6. <u>March 2011 International Public Meeting</u></p>
<p>Operational Metrics (/resources/pages/metrics-gdd-2015-01-30-en)</p>	<p>7. <u>Appointment of Akram Atallah as Chief Operating Officer</u></p>
<p>▶ Identifier Systems Security, Stability and Resiliency (IS-SSR) (/resources/pages/is-ssr-2014-11-24-en)</p>	<p>1. New gTLD (generic Top Level Domain) Program Budget</p> <p>Whereas, the Board Finance Committee considered the New gTLD (generic Top Level Domain) Deployment Budget at its meeting on 20 September 2010 and unanimously recommended that the Board adopt the Deployment Budget <http://www.icann.org/en/topics/new-gtlds/explanatory-memo-new-gtld-program-budget-22oct10-en.pdf (/en/topics/new-gtlds/explanatory-memo-new-gtld-program-budget-22oct10-en.pdf)>.</p>
<p>▶ ccTLDs (/resources/pages/cctlds-21-2012-02-25-en)</p>	<p>Whereas, the Board considered and discussed the New gTLD (generic Top Level Domain) Application Processing Budget at its 24-25 September 2010 retreat in Trondheim, Norway.</p>
<p>▶ Internationalized Domain Names (/resources/pages/idn-2012-02-25-en)</p>	<p>Resolved (2010.09.25.01), that the New gTLD (generic Top Level Domain) Deployment Budget and the New gTLD (generic Top Level Domain) Application Processing Budgets are approved. The Deployment Budget is to be released in order to enable the launch of the program on a timely basis upon Board approval of the Applicant Guidebook. The Application Processing budget should be released upon the approval of the final Applicant Guidebook.</p>
<p>▶ Universal Acceptance Initiative (/resources/pages/universal-acceptance-2012-02-25-en)</p>	<p>2. New gTLDs – Directions for Next Applicant Guidebook</p>
<p>▶ Policy (/resources/pages/policy-01-2012-02-25-en)</p>	<p>Whereas, ICANN (Internet Corporation for Assigned Names and Numbers)'s primary mission is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems.</p>
<p>▶ Public Comment (/public-comments)</p>	<p>Whereas, ICANN (Internet Corporation for Assigned Names and Numbers)'s Core Values include "depending on market mechanisms to promote and sustain a competitive environment" where feasible and appropriate, and "introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest."</p>
<p>▶ Technical Functions (/resources/pages/technical-functions-2015-10-15-en)</p>	<p>Whereas, in June 2008, the ICANN (Internet Corporation for Assigned Names and Numbers) Board adopted the GNSO (Generic Names Supporting Organization) policy</p>
<p>▶ Contact</p>	<p>Whereas, in June 2008, the ICANN (Internet Corporation for Assigned Names and Numbers) Board adopted the GNSO (Generic Names Supporting Organization) policy</p>

(/resources/pages/contact-2012-02-06-en)

- ▶ Help (/resources/pages/help-2012-02-03-en)

Numbers) Board adopted the GNSO (Generic Names Supporting Organization) policy recommendations for the introduction of new gTLDs <<http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>>, and directed staff to develop detailed implementation plans in communication with the community.

Whereas, one of the goals of the New gTLD (generic Top Level Domain) program is to establish a clear and predictable process.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) seeks to mitigate risks and costs to ICANN (Internet Corporation for Assigned Names and Numbers) and the broader Internet community to the extent possible.

Whereas, meeting these goals require tradeoffs and balancing of competing interests.

Whereas, in Brussels the ICANN (Internet Corporation for Assigned Names and Numbers) Board resolved <<http://www.icann.org/en/minutes/resolutions-25jun10-en.htm#11>> to dedicate its retreat scheduled for 24-25 September for the consideration of all the outstanding issues relating to the implementation of the New gTLD (generic Top Level Domain) program.

Whereas, the Board held a retreat in Trondheim, Norway on 24-25 September 2010, and talked through the outstanding issues relating to the implementation of the New gTLD (generic Top Level Domain) program in order to identify potential ways forward.

Whereas, the Board has identified certain directions to the CEO regarding items for inclusion in the forthcoming version of the Applicant Guidebook for the New gTLD (generic Top Level Domain) program.

Whereas, the forthcoming version of the Applicant Guidebook will be posted for public comment, and ICANN (Internet Corporation for Assigned Names and Numbers) will take into consideration all public comments before making final decisions on all these remaining issues by approving the final version of the Applicant Guidebook.

Whereas, on 23 September 2010, the Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) provided comments on version 4 of the draft Applicant Guidebook.

Resolved (2010.09.25.02), staff is directed to determine if the directions indicated by the Board below are consistent with GAC (Governmental Advisory Committee) comments, and recommend any appropriate further action in light of the GAC (Governmental Advisory Committee)'s comments.

Resolved (2010.09.25.03), the Board gives the CEO the following directions relating to the forthcoming version of the Applicant Guidebook for new gTLDs, which is intended

to be posted for public comment before the ICANN (Internet Corporation for Assigned Names and Numbers) meeting in Cartagena in December 2010:

2.1 Geographic Names

Sub-national place names: Geographic names protection for ISO (International Organization for Standardization) 3166-2 names should not be expanded to include translations. Translations of ISO (International Organization for Standardization) 3166-2 list entries can be protected through community objection process rather than as geographic labels appearing on an authoritative list.

Continents and UN Regions: The definition of Continent or UN Regions in the Guidebook should be expanded to include UNESCO's regional classification list which comprises: Africa, Arab States, Asia and the Pacific, Europe and North America, Latin America and the Caribbean.

Governments that file objections should be required to cover costs of the objection process just like any other objector; the objection process will be run on a cost-recovery and loser-pays basis (so the costs of objection processes in which governments prevail will be borne by applicants). Also, the Board notes that the GAC (Governmental Advisory Committee) proposal for free government objections is not specific as to particular objection grounds or particular government objectors (for example whether both national and local government objectors would be covered).

2.2 New gTLD (generic Top Level Domain) Applicant Support

Support to applicants will generally include outreach and education to encourage participation across all regions, but any direct financial support for applicant fees must come from sources outside of ICANN (Internet Corporation for Assigned Names and Numbers).

Staff will publish a list of organizations that request assistance and organizations that state an interest in assisting with additional program development, for example pro-bono consulting advice, pro-bono in-kind support, or financial assistance so that those needing assistance and those willing to provide assistance can identify each other and work together.

Owing to the level of uncertainty associated with the launch of new gTLDs, the fee levels currently in the Applicant Guidebook will be maintained for all applicants.

2.3 Root Zone (Root Zone) Scaling

Real-world experience in root zone scaling has been gained as a result of the implementation of IPv6, DNSSEC (DNS Security Extensions) and IDNs (Internationalized Domain Names) and the hard work of RSSAC (Root Server System Advisory Committee) and SSAC (Security and Stability Advisory Committee) members in tackling the underlying stability question. Staff is directed to publish its analysis of the impact of IPv6, DNSSEC (DNS Security Extensions) and IDN deployment on the root zone so far.

Staff has also developed a model and a rationale for the maximum rate of applications that can be processed over the next few years. Staff is directed to publish this model and rationale and to seek Board support for the judgments embodied in this model, thereby providing a firm basis for limiting the rate of new delegations. Based on the discussions to date, this limit is expected to be in the range of 1,000 new delegations per year, with this number to be defined precisely in the publication.

The Board notes that an initial survey of root server operators' ability to support this rate of growth has been conducted successfully, and directs staff to revisit the estimate on a regular basis and consider whether a further survey should be repeated .

Further, ICANN (Internet Corporation for Assigned Names and Numbers) will periodically consult with root zone operators regarding a procedure to define, monitor and publish data on root zone stability. As part of the regular interaction with the root server operators, ICANN (Internet Corporation for Assigned Names and Numbers) will invite inputs from the root server operators and other interested parties regarding any signs of stress in the system and advice as to what actions or changes in process might be appropriate.

Finally, in the event that the number of applications exceeds the maximum rate, an objective method for determining the order of application processing that conforms to the limited delegation rate (not relying primarily on time-stamping) will be defined in the Applicant Guidebook.

2.4 String Similarity

Similar strings should not be delegated through the New gTLD (generic Top Level Domain) Program absent an in-depth policy examination of the issues, including a clear, enforceable set of operating rules to avoid possible user confusion. Community-suggested modifications raise a complex set of policy issues and cannot be considered as a straightforward implementation matter for the first round of applications. Further policy work in this area is encouraged.

2.5 Variant Management

No changes will be made to the next version of the Applicant Guidebook with respect to the handling of gTLDs containing variant characters. I.e., no variants of gTLDs will be delegated through the New gTLD (generic Top Level Domain) Program until appropriate variant management solutions are developed.

The recent delegation of Chinese-language ccTLDs does not yet provide a generally workable approach for gTLDs; there are serious limits to extending this approach at this time. ICANN (Internet Corporation for Assigned Names and Numbers) will coordinate efforts to develop long-term policy and technical development work on these issues.

The Board notes that the following scenarios are possible while evaluating variant

The Board notes that the following scenarios are possible while evaluating variant gTLD (generic Top Level Domain) strings:

1. Applicant submits a gTLD (generic Top Level Domain) string and indicates variants to this string. The applicant, if successful, will get the primary string. The indicated variant strings are noted for future reference, and these variant strings will not be delegated to the applicant; the applicant has no rights or claim to those strings. ICANN (Internet Corporation for Assigned Names and Numbers) may independently determine which strings are variants of each other, and will not necessarily acknowledge that the applicant's list of purported variants be treated as variants under the process.
2. Multiple applicants apply for strings that are variants of each other. They will be in contention.
3. Applicant submits a request for a string and does not indicate that there are variants. ICANN (Internet Corporation for Assigned Names and Numbers) will not identify variant strings unless scenario 2 above occurs.

The CEO is directed to develop (in consultation with the board ES-WG (Working Group)) an issues report identifying what needs to be done with the evaluation, possible delegation, allocation and operation of gTLDs containing variant characters IDNs (Internationalized Domain Names) as part of the new gTLD (generic Top Level Domain) process in order to facilitate the development of workable approaches to the deployment of gTLDs containing variant characters IDNs (Internationalized Domain Names). The analysis of needed work should identify the appropriate venues (e.g., ICANN (Internet Corporation for Assigned Names and Numbers), IETF (Internet Engineering Task Force), language community, etc.) for pursuing the necessary work. The report should be published for public review.

The CEO is directed to produce for the board by the next Board meeting (28 October 2010):

1. A Work plan for developing the issues report.
2. An identification of the skills and capabilities needed by ICANN (Internet Corporation for Assigned Names and Numbers) to complete the issues report and further develop ICANN (Internet Corporation for Assigned Names and Numbers)'s organizational ability to continue the strategic rollout of IDN TLDs.

2.6 Trademark Protection

Substantive Evaluation: The Applicant Guidebook will provide a clear description of "substantive evaluation" at registration, and retain the requirement for at least substantive review of marks to warrant protection under sunrise services and utilization of the URS, both of which provide a specific benefit to trademark holders. Specifically, evaluation, whether at registration or by a validation service provider, is required on absolute grounds AND use of the mark.

Substantive evaluation upon trademark registration has essentially three requirements: (i) evaluation on absolute grounds - to ensure that the applied for mark can in fact serve as a trademark; (ii) evaluation on relative grounds - to determine if previously filed marks preclude the registration; and (iii) evaluation of use - to ensure that the applied for mark is in current use.

Substantive review by Trademark Clearinghouse validation service provider shall require: (i) evaluation on absolute grounds; and (ii) evaluation of use.

URS timing: In response to public comment, change the time to respond to a complaint from 20 days to 14 days , with one opportunity for an extension of seven days if there is a good faith basis for such an extension.

The Board notes that the suggestion for a globally-protected marks list (GPML) was not adopted by the Board (in 2009), including for the following reasons: it is difficult to develop objective global standards for determining which marks would be included on such a GPML, such a list arguably would create new rights not based in law for those trademark holders, and it would create only marginal benefits because it would apply only to a small number of names and only for identical matches of those names.

The Board recognizes that additional policy development through the GNSO (Generic Names Supporting Organization) could lead to further mechanisms for enhanced protection for trademarks.

2.7 Role of the Board

The Board intends to approve a standard process for staff to proceed to contract execution and delegation on applications for new gTLDs where certain parameters are met.

Examples of such parameters might include: (1) the application criteria were met, (2) no material exceptions to the form agreement terms, and (3) an independent confirmation that the process was followed.

The Board reserves the right under exceptional circumstances to individually consider an application for a new gTLD (generic Top Level Domain) to determine whether approval would be in the best interest of the Internet community, for example, as a result of the use of an ICANN (Internet Corporation for Assigned Names and Numbers) accountability mechanism. The Board approves the inclusion of a broad waiver and limitation of liability in the application terms and conditions.

2.8 Mitigating Malicious Conduct

While efforts to mitigate malicious conduct will continue, the implementation work completed to date by the community and staff to address the mitigation of malicious conduct issue is sufficient to proceed to launch the first New gTLD (generic Top Level

Domain) application round. The remaining issues should not delay launch with the following specific directives incorporated:

Background check: The background check should be clarified to provide detail and specificity in response to comment. The specific reference to terrorism will be removed (and the background check criteria will be revised). These clarifications regarding the background check criteria and process shall be included in the forthcoming version of the Applicant Guidebook.

Orphan glue records: Current provisions in the guidebook require each applicant to describe proposed measures for management and removal of orphan glue records for names removed from the zone. This requirement should remain in place, and will be adjusted if SSAC (Security and Stability Advisory Committee) makes a new recommendation in its report on this issue.

High Security (Security – Security, Stability and Resiliency (SSR))Zone (HSTLD) concept: The HSTLD concept is a voluntary concept being developed by a cross-stakeholder group including the financial services industry for use in TLDs wishing to provide services on a high-security basis. Thus, the development of the concept does not impact the launch of the gTLD (generic Top Level Domain) application process. Any publication of this concept will be shared freely with other organizations that might be interested in development of such a concept.

ICANN (Internet Corporation for Assigned Names and Numbers) will not be certifying or enforcing the HSTLD concept; ICANN (Internet Corporation for Assigned Names and Numbers) is supporting the development of a reference standard for industry that others may choose to use as a certification standard of their own. ICANN (Internet Corporation for Assigned Names and Numbers) will not endorse or govern the program, and does not wish to be liable for issues arising from the use or non-use of the standard.

2.9 GNSO (Generic Names Supporting Organization) New gTLD (generic Top Level Domain) Recommendation 6 Objection Process

The Board acknowledges receipt of the Rec6CWG report. This is a difficult issue, and the work of the community in developing these recommendations is appreciated. The Board has discussed this important issue for the past three years.

The Board agrees that ultimate responsibility for the new gTLD (generic Top Level Domain) program rests with the Board. The Board, however, wishes to rely on the determinations of experts regarding these issues.

The Board will accept the Rec6 CWG recommendations that are not inconsistent with the existing process, as this can be achieved before the opening of the first gTLD (generic Top Level Domain) application round, and will work to resolve any inconsistencies. Staff will consult with the Board for further guidance as required.

2.10 Registry Agreement

Required Notice and consent for increased or premium renewal prices: The current provision is necessary to protect registrants from predatory pricing upon renewals and the term should be retained.

Limitation of liability: The limitation of liability should remain as is. The remedies for registry operator are limited but appropriate given that ICANN (Internet Corporation for Assigned Names and Numbers) is a non-profit entity that cannot afford to be open to unlimited liability.

Collection of variable transaction fee from registries if registrars decline to pay ICANN (Internet Corporation for Assigned Names and Numbers) directly: The provision for the pass-through of fees is necessary to ensure that ICANN (Internet Corporation for Assigned Names and Numbers) receives adequate funding in the event that ICANN (Internet Corporation for Assigned Names and Numbers) accredited registrars (as a group) fail to approve the variable accreditation fees and should remain in the agreement.

Searchable Whois: Refer to the Board Data Consumer Protection Working Group to study issues and provide information to the Board relating to access and privacy to develop recommendations for possible inclusion in the forthcoming version of the applicant guidebook.

Indemnification of ICANN (Internet Corporation for Assigned Names and Numbers): The indemnification right should remain. ICANN (Internet Corporation for Assigned Names and Numbers) staff has invited the Registry Stakeholder Group to propose language more precisely defining the exceptions to registry operator's indemnification obligations for inclusion in the next version of the Draft Registry Agreement, and such a proposal should be considered for inclusion if received in a timely fashion.

2.11 Vertical Integration

The Board will send a letter to the GNSO (Generic Names Supporting Organization) requesting that the GNSO (Generic Names Supporting Organization) send to the Board, by no later than 8 October 2010, a letter (a) indicating that no consensus on vertical integration issues has been reached to date, or (b) indicating its documented consensus position. If no response is received by 8 October 2010, then the Board will deem lack of consensus and make determinations around these issues as necessary. At the time a policy conclusion is reached by the GNSO (Generic Names Supporting Organization), it can be included in the applicant guidebook for future application rounds.

3. Data and Consumer Protection Working Group

Whereas, the Board asked the Board Governance Committee (BGC) to make recommendations to the Board regarding establishment and membership of a working

group to address data and consumer protection issues (DCP-WG (Working Group)).

Whereas the BGC has recommended the establishment and membership of the DCP-WG (Working Group).

Resolved (2010.09.25.04), the Board hereby establishes the DCP-WG (Working Group), with its membership as follows: Harald Alvestrand, Dennis Jennings (Chair), Mike Silber, Bruce Tonkin, and Ram Mohan (non-voting member).

4. Board Global Relationships Committee

Whereas, the Board asked the Board Governance Committee (BGC) to make recommendations to the Board regarding the membership of a Board Global Relationships Committee (BGRC).

Whereas the BGC has recommend the membership of the BGRC.

Resolved (2010.09.25.05), the Board hereby sets the membership for the BGRC as follows: Peter Dengate-Thrush (chair), George Sadowsky, Jean-Jacques Subrenat, Katim Touray, Kuo-Wei Wu, Vanda Scartezini (non-voting member).

5. Nominating Committee Chair

Whereas the Board Governance Committee is tasked each year with recommending to the Board a candidate to serve as the Nominating Committee (“NomCom”) Chair.

Whereas the BGC called for expressions of interest from all who would be interested in serving as the 2010-2011 NomCom Chair.

Whereas the BGC considered and discussed all legitimate expressions of interest.

Whereas the BGC recommends that the Board appoint Adam Peake as the 2010-2011 NomCom Chair.

Resolved (2010.09.25.06), that Adam Peake is appointed as Chair of the 2010-2011 NomCom, to serve until the conclusion of the ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting in 2011, or until the Chair’s earlier resignation, removal, or other disqualification from service.

6. March 2011 International Public Meeting

Whereas, the BFC reviewed the budget for the North America ICANN (Internet Corporation for Assigned Names and Numbers) meeting, compared it to prior meeting budgets, and recommend that the Board approve the budget not to exceed \$1.941 million.

Resolved (2010.09.25.07), the Board approves San Francisco, California as the location of the ICANN (Internet Corporation for Assigned Names and Numbers) 2011

North America Meeting to be held from 13-18 March 2011, with a budget not to exceed US\$1.941M.

7. Appointment of Akram Atallah as Chief Operating Officer

Whereas, the attraction and retention of high calibre staff is essential to ICANN (Internet Corporation for Assigned Names and Numbers)'s operations and ICANN (Internet Corporation for Assigned Names and Numbers) desires to ensure competitive compensation for staff.

Whereas, Akram Atallah has been identified through a vigorous global search and senior management agrees that he is the right candidate to fill the role of Chief Operating Officer.

Whereas, independent market data provided by the outside compensation consultants indicates that the base compensation for a Chief Operating Officer would fall between [redacted] at the 50th percentile and [redacted] at the 75th percentile.

Whereas, independent market data provided by the outside compensation consultants indicates that the overall compensation for a Chief Operating Officer would fall between [redacted] at the 50th percentile and [redacted] at the 75th percentile. [redacted]

Whereas, the Compensation Committee has recommended that the Board appoint Akram Atallah as the Chief Operating Officer and approve the suggested compensation package.

Resolved (2010.09.25.08), the Board hereby appoints Akram Atallah as an Officer of the Company in the position of Chief Operating Officer effective 20 September 2010.

Resolved (2010.09.25.09), the Board authorizes a starting compensation package for Akram Atallah to consist of: (i) a base salary of \$350,000 USD per year; (ii) a bonus opportunity of 30% of base salary per year to be paid in a manner consistent with other U.S. based staff and in accordance with the company's bonus program; and (iii) the standard benefit programs made available to all other regular full time U.S. based staff.



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