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9 September 2016

Via E-Mail

Mr Akram Attallah
President, Global Domains Division
Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: .WEB auction

Dear Mr. Atallah:

On behalf of Afilias Domains No. 3 Limited (“Afilias”), a wholly-owned subsidiary of Afilias plc, I write with reference to our letter of 8 August 2016, in which we requested that ICANN disqualify and reject Nu Dot Co LLC’s (“NDC”) application for .WEB.

Specifically, NDC entered into an agreement to transfer any rights it acquired in connection with its application for .WEB to VeriSign, Inc. (“VeriSign”), which it did not disclose prior to the .WEB auction. The evidence strongly suggests that NDC acted as a front for and participated in the .WEB auction (the “Auction”) for and on behalf of Verisign. Given ICANN’s failure to respond to our prior letter, we request that ICANN promptly, and by no later than 16 September, 2016, (1) disclose the steps (if any) that it has taken to disqualify NDC’s bid on the basis that NDC violated the rules applicable to its application; and (2) provide an undertaking that it has not, and will not, enter into a registry agreement for .WEB with NDC until (a) the Ombudsman has completed his investigation; (b) ICANN’s Board has reviewed NDC’s conduct and determined whether or not to disqualify NDC’s bid and reject its application; and, (c) to the extent Afilias seeks review of any decision of ICANN relating to .WEB through ICANN’s accountability mechanisms, such mechanisms are completed. We nonetheless emphasize that Afilias reserves all of its rights to pursue any and all rights or remedies available to it in any forum against ICANN, NDC or VeriSign in connection with the delegation of the .WEB gTLD.

We take the opportunity of this letter to further explain the reasons why ICANN must disqualify NDC’s application for .WEB and proceed to contract for .WEB with Afilias, the next highest bidder in the Auction, in compliance with its obligations under ICANN’s Articles of Incorporation and Bylaws (as well as principles of international law and California law), as set forth below.



NDC violated the New gTLD Applicant Guidebook and the Auction Rules for New gTLDs

First, NDC violated Paragraph 10 of the Terms and Conditions in Module 6 of the New gTLD Applicant Guidebook (the "Guidebook"), which expressly prohibits any applicant for a gTLD to *"resell, assign or transfer any of applicant's rights or obligations in connection with the application"*. As we explained in our letter of August 8, 2016, Verisign publicly disclosed that it *"provided funds"* for NDC's bid for .WEB and that NDC would *"seek to assign the Registry Agreement to VeriSign."* Although the specific terms of the agreement between VeriSign and NDC have not been disclosed, it is clear from Verisign's own press release and its disclosure in its Form 10-Q filed with the U.S. Securities and Exchange Commission for the quarter ended June 30, 2016, that both companies entered into an arrangement well in advance of the Auction to transfer NDC's rights and obligations regarding its .WEB application to VeriSign.

Second, NDC violated Section 1.2.7 of the Guidebook, which requires applicants to *"promptly notify ICANN via submission of the appropriate forms"* *"if at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate,"* including *"changes in financial position and changes in ownership or control of the applicant"*. In this regard, we find remarkable that the Form 10-Q VeriSign filed with the U.S. Securities and Exchange Commission on 28 July, 2016—the day after the Auction—contained the following statement: *"Subsequent to June 30, 2016, the Company incurred a commitment to pay approximately \$130.0 million for the future assignment of contractual rights, which are subject to third-party consent. The payment is expected to occur during the third quarter of 2016."* When rumors surfaced that another company was behind NDC's application for .WEB, NDC sent a note to ICANN's Ombudsman on 8 July 2016, stating merely that *"neither the governance, management nor the ownership in NuDotcoco [sic] has changed."* Clearly, by then, relevant changes concerning NDC's financial position had, at a minimum, been agreed to and should have been reported to ICANN, namely, that the VeriSign had agreed to fund NDC's bid for .WEB.

Third, NDC violated the Auction Rules for New gTLDs ("Auction Rules"). Rule 12 provides that *"participation in an Auction is limited to Bidders, which is defined by the Auction Rules as a "Qualified Applicant" or a "party designated by a Qualified Applicant to bid on its behalf"*. This rule prohibits bids placed on behalf of a third-party that is not a *"Qualified Applicant"*, defined by the Auction Rules as *"an entity that has submitted an Application for a new gTLD, has received all necessary approvals from ICANN, and which is included within a Contention Set to be resolved by an Auction."* Accordingly, Rule 40(b) provides that *"in order to be valid" "a Bid must be placed by a Bidder for its Application in an Open Contention Set."*



ICANN has the duty to deny NDC's application, disqualify its bid and proceed to contract with the next highest bidder in the Auction

ICANN's governing documents clearly dictate the appropriate response ICANN should take in connection with NDC's improper conduct:

- ICANN is required to *"...operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets."* [Articles of Incorporation, Art.4]
- ICANN is required to *"mak[e] decisions by applying documented policies neutrally and objectively, with integrity and fairness"* [Bylaws, Art.I § 2 (8)]
- ICANN is required to *"not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition."* [Bylaws, Art. II3]
- ICANN is required to *"Act[] with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected."* [Bylaws, Art. I§ 2 (9)]
- ICANN is directed to *"operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness"* [Bylaws, Art. III § 1].
- ICANN is required to *"promot[e] competition in the registration of domain names where practicable and beneficial in the public interest"* [Bylaws, Art. I. § 2 (6)]
- ICANN is required to *"Remain[] accountable to the Internet community through mechanisms that enhance ICANN's effectiveness."* [Bylaws, Art. I. § 2 (10)]

VeriSign chose not to apply for .WEB, as it could have done. Instead, VeriSign improperly and surreptitiously funded NDC's application. NDC's and VeriSign's attempt to game the system and obtain control over .WEB for VeriSign (which already controls.COM), must be sanctioned by ICANN by disqualifying NDC's bid and rejecting its application.

In these circumstances, we submit that ICANN should disqualify NDC's bid and offer to accept the application of Afilias, which placed the second highest exit bid. Consistent with Auction Rules No. 46 and No. 47, the winning price should be deemed to be the second-highest remaining exit bid after disqualifying NDC and striking its exit bid as invalid.

This course of action is consistent not only with ICANN's Guidebook and Auction Rules, but also with the principles of due process and fairness that ICANN is obligated to observe pursuant to its governing documents. In this regard, we note that NDC's violations must not affect the rights of other applicants that participated in the Auction in full compliance with the applicable rules, and that a new auction would be improper since the bidders have already



seen the outcome of the first Auction. Thus, ICANN must protect the integrity of the gTLD auction and delegation process from being tainted by the actions of one bidder. The only way to do this is to disqualify NDC and proceed as we have outlined above.

Finally, we remind ICANN that "ICANN's Board of Directors has ultimate responsibility for the New gTLD Program" (Bylaws, Art. II, § 1; Guidebook, Section 5.1), and that "material changes in circumstances" require "additional Board review" before "formal approval" of a registry agreement for the delegation of a gTLD. We therefore request that ICANN provide us with an undertaking that it has not, and will not, enter into a registry agreement for .WEB with NDC until ICANN's Board has reviewed NDC's conduct and reached a considered decision on whether or not to disqualify NDC's bid and reject its application; the Ombudsman has completed his investigation and the Board has considered and reached a decision on his report; and, to the extent Afilias seeks review of any decision of ICANN relating to .WEB through ICANN's accountability mechanisms, Afilias has exhausted such mechanisms.

Conclusion

For the reasons set out above, ICANN's Board and officers are obligated under the Articles of Incorporation, Bylaws and the Guidebook (as well as international law and California law) to disqualify NDC's bid immediately and proceed with the contracting of a registry agreement with Afilias, the second highest bidder. We look forward to receiving a response from ICANN by no later than 16 September 2016.

Afilias reserves all of its rights at law and in equity, including, without limitation, relating to the issues raised in this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Scott Hemphill", with a long, sweeping horizontal line extending to the right.

M. Scott Hemphill
Vice President & General Counsel

cc: Steve Crocker, Chairman of the ICANN Board
Göran Marby, President and Chief Executive Officer
Arif Hyder Ali, Dechert LLP