

**AMERICAN ARBITRATION ASSOCIATION
INTERNATIONAL COMMERCIAL ARBITRATION**

OPENTLD B.V.,

Claimant,

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Case No. 01-15-0004-1379

V.

**INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS,**

[Assigned to: Peter Michaelson]

Respondent.

**COMPLAINANT, OPENTLD B.V.'S REPLY BRIEF IN SUPPORT OF REQUEST
FOR A STAY OF SUSPENSION**

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I. INTRODUCTION

Complainant OpenTLD BV (“OpenTLD”) hereby submits its reply brief in support of its request for stay of suspension. Respondent The Internet Corporation for Assigned Names and Numbers (“ICANN”) has opposed OpenTLD’s stay request by undertaking to paint OpenTLD in an unfairly negative light through a selective and misleading recitation of the facts and, separately, a selective reading of its own policies, which it disregarded in ordering the suspension. Yet consideration of the true facts demonstrates that OpenTLD’s continued operations as a registrar pending resolution of this arbitration will **not** harm consumers or the public interest in any way. Accordingly OpenTLD is entitled to a mandatory stay pursuant to RAA 5.8.

Moreover, contrary to the narrow reading urged by ICANN, there is nothing in Section 5.8 that limits the Emergency Arbitrator’s authority to consider the potential harm to the public interest that would likely result if the suspension were allowed to take effect in rendering its decision on OpenTLD’s stay request. Indeed, balancing the likely potential harm to the public posed by allowing the suspension to take effect against any remote risk of harm posed by staying the suspension, the scales weigh heavily in favor of granting the requested stay, particularly in light of the lack of any prejudice to ICANN presented by a stay. Accordingly, OpenTLD urges the Emergency Arbitrator to exercise his discretion to consider the likely negative impact on consumers and harm to the public interest presented by the suspension, and resolve any doubt in favor of the public’s superior interest in granting the stay.

II. LEGAL ANALYSIS

A. OpenTLD's Continued Operation As A Registrar Poses No Risk To Consumers Or The Public Interest

Notwithstanding the misimpression created by ICANN's opposition brief, OpenTLD takes its obligations as a registrar very seriously and strives to ensure its compliance with the RAA and applicable law. OpenTLD flatly denies that it engages in abusive-registration practices, and likewise rejects the remainder of ICANN's factual allegations and legal arguments presented in opposition to this request for stay. OpenTLD has strong anti-abuse measures in place, and has a demonstrated history of honoring WIPO decisions and promptly responding to abusive registration claims. Supplemental Declaration of Joost Zuurbier ("Zuurbier Supp. Dec."), ¶¶ 5, 6. Moreover, OpenTLD has cured all previously noticed breaches to ICANN's satisfaction in the past; either has cured or is in the process of curing each of the breaches identified in the June 23, 2015 Suspension Notice by the designated deadline of September 15, 2015, which is more than a month away; and is eager to demonstrate its full compliance with the RAA to ICANN and this panel alike. *Id.* at ¶¶ 3-12. Accordingly, OpenTLD's continued operations pending a determination in this arbitration will **not** harm consumers or the public interest.

1. OpenTLD Has A Strong Program In Place To Combat Abusive Registrations

As discussed in OpenTLD's opening papers, OpenTLD offers **free** country code top-level domain ("ccTLD") registration services to consumers in conjunction with its generic top-level domain ("gTLD") registration services. Zuurbier Supp. Dec., ¶¶ 5, 6, 10, 13. Under this free domain structure, when a third party registers a country code domain, **the domain is registered in OpenTLD's name** on behalf of the actual registrant, who nonetheless remains the licensee and user of the domain. *Id.* Unfortunately, in addition to helping promote access to the Internet in developing

countries in West Africa and the South Pacific, such **free** ccTLD registration services also prove appealing to unscrupulous third parties engaged in abusive registration practices. *Id.*

To combat that risk, OpenTLD developed and implemented a special policy and Application Programming Interface (“API”) against abusive registrations allowing trusted third parties to immediately suspend domains involved in abuse, such as, *inter alia*, fraud or infringement of intellectual property rights. *Id.* For the purposes of contributing to the use of its API, OpenTLD maintains a list of trusted third parties which includes, among over fifty other organizations, Facebook, Twitter, Kaspersky Labs, and the Anti-Phishing Alliance of China. *Id.* Under this API, abusive domains are subject to immediate enforcement takedown whereby they are permanently suspended and removed from the market of available domains. *Id.* Again, OpenTLD specifically developed this policy to manage the special risk associated with its free country code registration services. *Id.* Many large Internet service corporations employ a substantially similar abuse mitigation approach to combat potential user abuse, and OpenTLD has consistently endeavored to ensure that its abuse prevention measures meet commercially reasonable industry standards. *Id.*

2. OpenTLD Also Performs Payment Information Monitoring To Prevent Abusive Paid Registrations

OpenTLD also has additional anti-fraud measures in place to protect against abuse in connection with its paid registration services. Zuurbier Supp. Dec., ¶ 6.

First, OpenTLD’s finance team monitors paid registrations on a daily basis to screen for fraudulent registrations that may lead to payment fraud. *Id.* OpenTLD uses automated systems, such as “iovation,” to alert OpenTLD’s staff about any possible fraudulent paid registration. OpenTLD’s staff manually verifies the complete registration information (registrant name, address, country, payment information, registration history, payment history, payment declined history) for each registration flagged as “doubtful” by

that screening process. *Id.* If the registration information is incomplete in any way, OpenTLD contacts the registrant to address the omissions. *Id.* In clear instances of fraud, OpenTLD refunds payment and reports the fraud to the payment processor. *Id.* OpenTLD then promptly deletes the domain and closes the account. *Id.*

Second, OpenTLD crosschecks new registrant information against previously closed accounts, including email addresses, PayPal email account, and previously registered domain names, to identify suspicious accounts. *Id.* Upon determination that a given account presents unacceptable risk, OpenTLD promptly deletes the domain, refunds payment, and closes the account. *Id.*

Third, OpenTLD's finance and risk management team also download the payment activity from the payment providers – including email addresses, IP addresses, payment details, and transaction details – and analyze this information for red flags of fraudulent registration. *Id.* Again, where the account presents an unacceptable risk of fraud, OpenTLD promptly deletes the domain, refunds payment and closes the account. *Id.*

Finally, OpenTLD honors the DMCA and UDRP claims processes, and earnestly endeavors to respond promptly and appropriately to all lawful takedown and transfer orders pursuant to its obligations under the RAA and applicable law. *Id.* While ICANN mischaracterizes OpenTLD as engaging in abusive registration practices based on a selective recitation of facts extracted from a total of two WIPO cases, two letters from other registrars, and its identification of infringing domains registered by third party registrants who happened to abuse OpenTLD's anonymous registration services, upon closer review, each of these examples instead demonstrates OpenTLD's commitment to identifying and combatting abusive domain registrations. *Id.* at ¶¶ 8-12.

3. OpenTLD Complied With The Transfer Orders In The WIPO Cases

ICANN depends heavily on the findings of two WIPO cases to assert that OpenTLD has engaged in abusive practices with respect to “seven domains.” Neither

ICANN nor OpenTLD participated in those proceedings, however, and the WIPO findings do not carry the weight ICANN affords them. Contrary to the assertion in ICANN's Opposition, OpenTLD most certainly did not engage in "cyber-flight" but instead made prompt efforts to comply with the WIPO decisions by ensuring the transfer of the challenged domains to the complainant in both cases. Declaration of Owen Smigelski (Smigelski Dec.), Exhs. 1, 2. While OpenTLD concedes that it deleted the challenged domains, those deletions were inadvertent, and OpenTLD undertook prompt efforts to correct that mistake and comply with the WIPO decisions by contacting the complainants to ensure timely transfer of the domains.¹ *Id.* Moreover, OpenTLD has **not** deleted any domain name since its inadvertent deletion of <netearth.biz> in connection with the second of the two WIPO decisions referenced by ICANN. Accordingly, the WIPO decisions simply do not suggest that OpenTLD's continued operations pose any risk of harm to consumers or the public interest.

Because OpenTLD had no personal stake in the outcome of the WIPO proceedings, it did not file responsive briefs or otherwise challenge the inaccurate assertions of facts by the complainants. Zurbier Supp. Dec., ¶¶ 5, 10, 11 The findings made by WIPO in those two proceedings which did not involve ICANN should not be accorded any weight in these entirely unrelated proceeding. Stated another way, the default finds in the WIPO matters are not *res judicata* on any issue whatsoever in this arbitration.

¹ It bears mention that the registry agreements for the ccTLDs prescribe different rapid takedown enforcement procedures than the RAA. For example, the .CF Registry Procedure and Registration Agreements, which encompass the UDRP, give broad authority to the Registry to take action and suspend domain names in response to a valid complaint of abuse, and expressly recognize suspension or deletion of a domain as an appropriate enforcement action. Zurbier Supp. Dec., ¶ 10, 11. Moreover, in the past, WIPO has specifically condoned these rapid takedown practices in light of OpenTLD's unique service offering of free domain registrations, such as with the domain <goyard.tk>. *Id.* at Exh. C. Accordingly, OpenTLD's deletion of the challenged domains simply does not amount to "cyber-flight."

4. OpenTLD Responded Appropriately To Informal Complaints By GoDaddy And Tucows By Promptly Taking Down The Challenged Domains

ICANN also cites to two letters it obtained from two of OpenTLD's competitors, registrars GoDaddy and Tucows, as purported evidence of abusive practices by OpenTLD. Zuurbier Supp. Dec., ¶¶ 8, 9, Exh. C. Yet these informal complaints were resolved privately through the parties, and do not tend to prove abusive registration practices by OpenTLD. *Id.*

GoDaddy complained that OpenTLD had been using its marks in connection with several domains names allegedly registered by OpenTLD: <godaddy.cf>, <godaddy.ml>, <domainsbyproxy.tk> and <domainsbyproxy.ga> (collectively referred to as the "GoDaddy Domains"). *Id.* As previously explained, however, when a third party registers a country code domain using OpenTLD's free registration services, **the domain is registered in OpenTLD's name** on behalf of the actual registrant, who nonetheless remains the licensee and user of the domain. *Id.* at ¶¶ 5, 6, 8, 10, Exh. B. Thus, OpenTLD merely acted as the registrar for the unaffiliated third parties who happened to use OpenTLD's registrar services to register the GoDaddy Domains. *Id.* Therefore, any impropriety associated with the registration and use of the GoDaddy Domains is properly attributable to the true third party registrants of the GoDaddy Domains rather than OpenTLD.

Further, OpenTLD promptly responded to GoDaddy's letter by deleting <godaddy.cf> the next day on February 20, 2015.² *Id.* In regard to the other GoDaddy Domains: <Domainsbyproxy.ga> was registered in January 2015 by a third party registrant and will naturally expire on January 15, 2016; <Domainsbyproxy.tk> was

² The .CF Registry Procedure and Services Agreement expressly permits deletion as an appropriate enforcement action, and ICANN's suggestion that this deletion was somehow improper is simply without merit. Zuurbier Supp. Dec., ¶ 10.

registered in April 2014 by a third party registrant and naturally expired on April 23, 2015. *Id.* It is currently registered by Godaddy.com at Key-Systems GmbH, an accredited Registrar of OpenTLD. *Id.* Finally, <Godaddy.ml> was never registered and has always been available for registration. *Id.* Thus, there is no evidence of a violation of policy which had the effect of preventing the mark-owner from registering the domains in question in its own name.

OpenTLD also took timely action in response to a letter from Tucows by promptly deactivating a single third level domain name identified by Tucows as infringing its trademark. *Id.* at ¶ 9. OpenTLD also performed a full audit of its sub-domains in response to the Tucows letter to ensure no other abusive third level domains are maintained within the zones of OpenTLD or any of its affiliates. *Id.* It also bears emphasis that neither GoDaddy nor Tucows bothered to take any formal action, such as initiating a UDRP proceeding in connection with the disputed domain name, presumably because OpenTLD acted in a responsive manner to address the matter promptly upon notice in both cases. *Id.* at ¶¶ 9-10.

It is hardly appropriate to accord these informal communications, which, again, did not involve ICANN, any evidentiary weight in the determination of whether there was a RAA violation subject of this arbitration.

Thus, rather than in any way tending to prove bad practices, OpenTLD's response to the GoDaddy and Tucows letters instead tends to show OpenTLD's responsiveness to domain complaints and affirmative efforts to combat abusive registrations. Also, such private letters plainly do not amount to any sort of notice from ICANN, and therefore do not constitute an appropriate predicate for suspension. Accordingly, these letters do not suggest any risk to consumers or the public interest associated with OpenTLD's continued operations as a registrar pending a final determination on the merits herein.

5. ICANN’s Attempt To Attribute Proxy Registered Domains To Abuse By OpenTLD Is Disingenuous And Without Merit

ICANN also takes the disingenuous position that OpenTLD is the actual registrant behind its private or “proxy” domain registration service, Stichting OpenTLD WHOIS Proxy. This stance is impossible to reconcile with ICANN’s own “Specification on Privacy and Proxy Registrations,” which inherently assumes the legitimacy of the widespread offering of WHOIS privacy or proxy services by domain name registrars. Supplemental Declaration of Jerl B. Leutz (“Leutz Supp. Dec.”), ¶ 3. To this extent, OpenTLD is no different from other registrars offering this same type of Whois proxy service. *Id.*

Specifically, ICANN identifies several domains registered by third parties under OpenTLD’s proxy or privacy service, i.e., Stichting OpenTLD WHOIS Proxy, as purported evidence of abusive domain trafficking practices by OpenTLD. Such domains include: <barnesandnoble.link>, <sephora.bargains>, <at-facebook.com>, <ebaybh.com>, <googlefreeporn.com>, <global-paypal.com>, <hotmailtechnicalsupport.com>, and <secure-apple.com>. Zuurbier Supp. Dec., ¶ 12, Exh. D. Yet OpenTLD did **not** register or use any of these domains, but merely acted as the anonymous proxy service provider to the true third party registrants. *Id.*

Moreover, OpenTLD promptly identified and deleted several of these domains on its own initiative in the normal course of administering its routine monitoring procedures against abusive registrations by third party users of its services. *Id.* In regard to the remaining domains, OpenTLD did not receive any complaint from the respective rights-holders, and did not identify their infringing nature prior to its receipt of its Opposition in this matter. *Id.* Thus, the fact that unscrupulous third parties happened to have used OpenTLD’s proxy services to register abusive domains simply does not tend to suggest any wrongdoing by OpenTLD.

Indeed, one need only consider the plethora of WIPO arbitrations initiated by complainants against GoDaddy's Domains By Proxy privacy service, and the lack of any adverse action by ICANN in response, to appreciate the hollowness of this argument. Leutz Supp. Dec., ¶ 4, Exh. A. Abusive registration by third party users of registrar and privacy services is a problem that each and every registrar must face. Zuurbier Supp. Decl. ¶ 5. The bottom line is OpenTLD employs commercially reasonable measures to combat such abusive registrations. Accordingly, OpenTLD's continued operations present no risk of harm to consumers or the public interest.

6. OpenTLD's Compliance History And Affirmative Steps To Cure And Ensure Continuing Compliance

Again, OpenTLD has previously cured all past noticed breaches to ICANN's satisfaction. Zuurbier Dec. (submitted in support of Opening Brief Requesting Stay), ¶¶ 7-12. OpenTLD disputes that it received the June 2, 2015 inquiry email described by ICANN in its opposition – the fact that the email was electronically accepted by OpenTLD's mail server does not mean the email necessarily reached or was ever reviewed by the intended recipient. Zuurbier Dec. (Op. Br.), ¶¶ 12, 16, 20; Zuurbier Supp. Dec., ¶ 7. Regardless, ICANN does not dispute that it did not issue any notice of breach, and made no steps to follow up on that single email, before issuing its June 23, 2015 Notice of Suspension. Indeed, the June 23, 2015 Notice states on its last page that the alleged June 2 email Inquiry was ICANN's only attempt to communicate, and that it was the "1st" compliance email. Zuurbier Dec. (Op. Br.), Exh. C. p. 5. No "2nd" or "3rd" attempts were made. *Id.*

As of the date of this brief, OpenTLD has taken affirmative steps toward completing ICANN's compliance demands. Zuurbier Supp. Dec. ¶ 3, Exh. A; Leutz Supp. Dec., ¶ 5. To date, OpenTLD has delivered to ICANN a list of domains registered by OpenTLD and its affiliates, a list of its resellers, affirmations of compliance, and milestones for completion of the more resource intensive undertakings, such as updates to

OpenTLD's policies, procedures and preventative measures. *Id.* Moreover, the June 23, 2015 Suspension Notice requires OpenTLD to “**demonstrate compliance on or before September 15, 2015.**” Zuurbier Dec. (Op. Br.), Exh. C. (Emphasis added). That deadline has not accrued. Thus, ICANN's argument that OpenTLD failed to meet its burden to justify the imposition of a stay because OpenTLD has not yet fully complied with ICANN's demands is a nonstarter. Indeed, this is yet another example of ICANN placing arbitrary and disparate demands upon OpenTLD. As a result, ICANN's claim that OpenTLD has failed to meet its compliance obligations is simply without merit. Again, OpenTLD remains committed to satisfying ICANN's compliance demands and ensuring its complete and continuous compliance with the RAA. Zuurbier Supp. Dec. ¶ 3, Exh. A; Leutz Supp. Dec., ¶ 5.

Accordingly, OpenTLD's past compliance history and current compliance efforts demonstrate that its continued operations pose no harm to consumers or the public.

B. ICANN's Failure To Follow Its Own Procedures And Singling Out Of OpenTLD For Disparate Treatment By Issuing The Suspension Without Any Prior Notice Or Opportunity To Cure Weighs In Favor Of A Stay

ICANN must govern in a fair, reliable, and consistent manner that includes attempts at informal resolution of compliance issues with registrars like OpenTLD that escalate along a predictable course as set forth in ICANN's published compliance approaches. Leutz Dec. (Op. Br.), ¶¶ 6, 7, and 8, Exhs. C, D, and E. Published ICANN policy indicates that ICANN will first attempt “informal resolution” by sending (3) three inquiry notices before escalating to suspension, termination or non-renewal of a registrar. *Id.* at ¶ 6, Exh. C. ICANN represents that it will escalate only when there is “no response” or an “insufficient response” from the registrar. *Id.* at p. 2, § 1; also see *Id.* at ¶¶ 7, 9, Exhs. D, and E.

ICANN also represents that its “processes ensure consistency for all parties

involved.” Leutz Dec. (Op. Br.), ¶ 9, Exh. F, § 31. “ICANN attempts to resolve contractual compliance matters informally before pursuing formal remedies available under the agreements.” *Id.* at § 32. If a registrar “must resolve a critical issue immediately, an escalated notice is sent. Failure to adequately respond to an escalated notice may result in a breach notice.” *Id.* ICANN only resorts to the “Formal Resolution” or “Enforcement” processes when the offending registrar fails to “sufficiently collaborate during the Informal Resolution process” or where it “otherwise continue[s] to be non-compliant after attempts at informal resolution have been unsuccessful.” *Id.*

ICANN claims that its suspension of OpenTLD after sending a single email inquiry – **not** a Notice of Breach – is **not** unprecedented. Response, ¶ 5. Yet ICANN fails to provide a single example where it has taken such action in the past, or explain how this conduct is not in violation of its own guidelines. That is because ICANN’s suspension of OpenTLD without prior notice is, in fact, unprecedented, and violates Section 2.3.3 of the RAA, which prohibits ICANN from “singling out” a registrar for “disparate treatment” unless there is a “substantial or reasonable cause” for disregarding its posted guidelines. RAA, § 2.3.3. ICANN’s suspension of OpenTLD without prior notice also violates Sections 2.3.1 and 2.3.2 of the RAA, which require ICANN to comply with the RAA in an “open and transparent manner” and to “not unreasonably restrain competition.” Neither the June 23 Suspension Notice or ICANN’s Opposition brief demonstrates any such substantial or reasonable cause for abandoning these requirements.

Thus, to impose the suspension when it is apparent that ICANN has not followed its own protocol would serve a much greater harm to the community. Specifically, to order rather than stay the suspension would signal to the entire domain community that ICANN is not bound by its own policies and procedures while expecting all parties (i.e. registrars, registries, resellers and privacy services) to

operate in conformity with its stated policies. Moreover, to allow the suspension to proceed would eviscerate any expectation in the community that ICANN will enforce its rules evenhandedly and in accordance with the very policy it has designed and set forth as its rules binding upon the community.

Accordingly, the public interest in ensuring transparency and consistency in ICANN's administration of its own enforcement guidelines weighs heavily in favor of staying the suspension.

C. ICANN's Unwarranted And Unprecedented Suspension Of OpenTLD's Registrar Abilities Would Devastate Its Business

Finally, while ICANN suggests that suspension of OpenTLD's registrar services will not impact OpenTLD's ability to register new country code domains, or significantly impact OpenTLD's business, that suggestion is baseless and without merit. Again, OpenTLD offers a unique domain registration service wherein certain ccTLD domains are offered free of charge in connection with other gTLD offerings. *Zurbier Supp. Dec.* ¶¶ 5, 6, 13. These two domain registration services are deeply intertwined, and separation of the gTLD option from the free ccTLD offering will impair OpenTLD's ability to do business. *Id.* Quite simply, the suspension of OpenTLD's ability to offer gTLD registrations and inbound transfers would decimate its unique business model. *Id.*

Furthermore, the consequences of a premature suspension are beyond being purely monetary. *Id.* Suspension will damage the ongoing development of relationships between OpenTLD and its partners in the African domain space. *Id.* Among other projects, OpenTLD and its partners have been working toward building a robust offering of free domain registrations to registrants located in their respective African nations. *Id.* If a suspension were to issue at this juncture, the damage to those growing relationships will be done, regardless of whether OpenTLD is ultimately successful in the conclusion of this arbitration. *Id.*

Accordingly, consideration of the public interest in continued free access to country code registrations, as well as the unwarranted risk of irreparable harm to OpenTLD's business, weigh heavily in favor of a stay, particularly given ICANN's failure to follow its own policies.

D. Postponing the Proposed Suspension Would Not Harm the Community Because It Is Purely Punitive

Finally, the proposed suspension is a temporary one. Thus, it is tantamount to a fine or a penalty. It was therefore contemplated by ICANN that OpenTLD would, after the expiration of this suspension, resume operations. Therefore, the date of the imposition of this penalty – in the event that the arbitrator ultimately find the penalty to be appropriate – is not significant. This is particularly so where OpenTLD has met its compliance obligations set forth in the Notice a month earlier than the date of compliance. Resultantly, there is no threat to the public interest in staying the suspension until the time of trial when, after full presentation of evidence and arguments, the arbitrator can take up the issue upon a fully developed record. If he still finds it appropriate, the suspension can be ordered then. However, at present it does nothing to preserve the public interest but, rather, injures it for the reasons addressed above.

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III. CONCLUSION

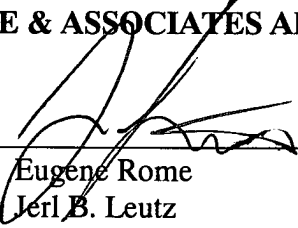
For all the foregoing reasons, OpenTLD requests an order staying the suspension of OpenTLD's registrar abilities pending a final determination on the merits herein. OpenTLD has met its burden of demonstrating that its continued operations will not harm consumers or the public interest. As a result, OpenTLD is entitled to a mandatory stay. Moreover, the public interest in ensuring transparency and consistency in ICANN's administration of its own enforcement guidelines, along with considerations of fundamental fairness, also weigh heavily in favor of staying the suspension.

Dated: August 10, 2015

Respectfully submitted,

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BY: _____


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