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

Hearing Date: February 25, 2013
Hearing Time: 1:30 p.m.
Judge: Honorable Percy Anderson
Hearing Location: 312 N. Spring St.
I, Paul Garrin, pursuant to 28 U.S.C. § 1746, hereby declare:

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

The 2000 Application Round

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

3. Thus, ICANN’s 2000 Proof of Concept was only a limited proof-of-concept process that was different and distinct from later TLD application rounds, including the 2012 Application Round. The rules, fees, guidelines, goals,
specifications, appraisal factors and other attributes applied during the course of the 2000 Proof of Concept differed from those applied to later rounds.

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

[Plans for any subsequent rounds of TLD introductions will not be made until evaluation of the present ‘proof of concept’ round. It is likely that, if there are subsequent rounds, there will be revisions in the program based on experience in the first round. This will likely require submission of new application materials. As to the non-refundable application fee, please note that it is only an application fee to obtain consideration of this application.](http://archive.icann.org/en/tlds/tld-faqs.htm, FAQ 54 (as of Feb. 4, 2013))

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

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

6. name.space submitted an application in the 2000 Proof of Concept to operate 118 gTLDs (name.space’s “2000 Application”) in October 2000. In transmitting that application, name.space was required to include a “Transmittal Form” that contained the following language: “[I]n consideration of ICANN’s review of the application” the applicant releases “all claims and liabilities relating in any way to (a) any action or inaction by or on behalf of ICANN in connection with this application or (b) the establishment or failure to establish a new TLD.” (See ICANN’s Request for Judicial Notice, ECF No. 20, Ex. C ¶ B14.2.) ICANN included this language in a standard, ICANN-drafted transmittal form that every applicant in the 2000 Proof of Concept was required to sign.
7. Both as an applicant and an advocate, I had frequent communications with ICANN’s leadership—including members of ICANN’s Board of Directors—concerning the 2000 Proof of Concept. My conversations and communications with ICANN touched on all aspects of the 2000 Proof of Concept, including the terms and conditions under which name.space submitted its 2000 Application to ICANN.

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

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

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

11. In both my public and private communications with ICANN’s leadership throughout the process, I made clear that name.space reserved its intellectual property rights in the catalog of TLDs that name.space originated prior
to ICANN’s creation. ICANN never mentioned the release language in the 2000 Application in response to my assertion of name.space’s rights, or otherwise suggested that name.space had volunteered for or entered into a global surrender of rights simply by applying for inclusion in the proof-of-concept study.

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

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

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

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

(See http://www.icann.org/correspondence/roberts-testimony-14feb01.htm (as of Feb. 4. 2013).)
The 2003-04 Application Round

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

The New gTLD Program and the 2012 Application Round

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

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

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

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

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

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

21. In other words, when ICANN began exploring the New gTLD Program in 2008, ICANN understood—as did all of the stakeholders involved—that the 2000 Proof of Concept was a separate, unique process entirely unrelated to the New gTLD Program. ICANN has never refuted this lack of connection between the 2000 Proof of Concept and the 2012 Application Round.
22. ICANN published eight versions of the New gTLD Application Guidebook, including the final version released on or around June 4, 2012, which is 338-pages long. A true and correct copy of excerpts of the final version of the New gTLD Applicant Guidebook is attached hereto as Exhibit 3 (available at http://newgtlds.icann.org/en/applicants/agb (as of Feb. 4, 2013)). Aside from the fee reduction provision that first appeared in the second version of the guidebook, no version of the guidebook, including the final version, makes even a single other reference to how 2000 Proof of Concept participants will be treated in the New gTLD Program. **No version of the New gTLD guidebook discusses the release language in the 2000 Application or accompanying commentary.**

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

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

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

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

25. The conspiracy and other conduct on which name.space bases its Complaint relates to ICANN’s conduct in connection with the New gTLD Program that culminated in the 2012 Application Round, not the 2000 Proof of Concept. For
example, the conspiracy on which name.space bases its claims started in or around 2010—indeed, many of the co-conspirators did not even exist in 2000. In addition, the unlawful and anti-competitive process about which name.space complains is included in the New gTLD Application Guidebook, not the 2000 Proof of Concept process, and the conduct that is infringing name.space’s intellectual property rights and interfering with name.space’s contracts is likewise occurring in the 2012 Application Round, not the 2000 Proof of Concept.

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

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

Executed on this 4th day of February, 2013.

Paul Garrin