Declaration of Russ Weinstein in Support of Defendant ICANN's Opposition to Plaintiff's Ex Parte Application for Temporary Restraining Order
DECLARATION OF RUSS WEINSTEIN

I, Russ Weinstein, declare as follows:

1. I am the Director of Global Domains Division Operations for the Internet Corporation for Assigned Names and Numbers (“ICANN”), the defendant in this action. I have personal knowledge of the matters set forth herein and am competent to testify as to those matters. I make this declaration in support of ICANN’s Opposition to Plaintiff Ruby Glen LLC’s (“Ruby Glen’s”) Ex Parte Application For A Temporary Restraining Order.

2. Donuts Inc. (“Donuts”), the ultimate parent of Ruby Glen (see ECF 4), submitted 307 applications for new gTLDs through various subsidiary companies just like Ruby Glen. Donuts’ subsidiaries have thus far participated in eight ICANN auctions for the contractual right to operate the respective new gTLDs, and has prevailed in one of those auctions, for the new gTLD .SALON. The winning price for .SALON was in the amount of $5.1 million.¹

3. The rules governing ICANN’s auction process were developed in two parts, a baseline set of rules to resolve the simpler “direct contention sets,” then a set of rules to resolve the more complex “indirect contention sets.” Both sets of rules were based on the New gTLD Applicant Guidebook (“Guidebook”) and developed through ICANN’s multistakeholder process including an opportunity for public comment. The auction that will take place on July 27, 2016 is to resolve the .WEB/.WEBS contention set (“Contention Set”), which is classified as an “indirect contention set.” Here, there are seven applicants for .WEB and one applicant for .WEBS in the Contention Set. Through the course of other ICANN procedures and mechanisms, the applicant seeking to operate .WEBS was included in this Contention Set, thereby classifying it as an “indirect” contention set and making it

¹ See https://gtldresult.icann.org/application-result/applicationstatus/auctionresults:downloadauctionreport/SALON.
subject to the auction rules that pertain to indirect contention sets.

4. The rules governing ICANN new gTLD auctions were developed over multiple years and through public comment. In 2013, ICANN launched webinars regarding those auction rules, explaining their function and drafting process. In December of 2013 through January of 2014, ICANN solicited public comments regarding the auction rules governing direct contention sets. Donuts submitted a comment on the draft version of the auction rules for direct contention sets, and a true and correct copy of that comment is attached hereto as Exhibit A. That comment notes that “applicants . . . have sought throughout the New TLD program[] an acceptable level of certainty and predictability at each stage of the process.” Donuts also recommended limiting applicants’ ability to postpone auctions. Id. The auction rules for direct contention sets were published in February of 2014. After further discussion between ICANN and the ICANN community, the auction rules for direct contention sets (and a Bidder’s Agreement to which each bidder must agree) were updated again in April 2014.

5. After the rules for the direct contention sets were completed and validated through use, the auction rules governing the more complex indirect contention sets were developed. Similar to the development of direct contention auction rules, ICANN conducted webinars regarding the draft auction rules for indirect contention sets, explaining their function and drafting process and published the draft for public comment in November 2014 through January 2015. Donuts submitted two comments on the draft version of the auction rules for indirect contention sets. In February 2015, the final version of the auction rules for indirect contention sets (“Auction Rules”) was published, and a true and correct

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copy is attached to the Zecchini Declaration as Exhibit J. Those rules will govern the July 27, 2016 auction (“Auction”).

6. In order to participate in an ICANN new gTLD auction, each bidder must sign a standardized Bidder Agreement. Ruby Glen signed a Bidder Agreement, which contains the following provision:

Section 1.4 The Auction. The Bidder shall participate in the Auction(s) for the relevant Contention Sets on the terms set forth herein and under the Auction Rules. The Auction(s) shall be conducted in accordance with the procedure set out in the Auction Rules. The Bidder acknowledges that it has reviewed the Auction Rules that will govern the participation of the Bidder in the Auction(s) and that the Auction(s) will be administered by the Auction Manager. By this Agreement, the Bidder agrees to be bound by the Auction Rules as published on ICANN’s website.

True and correct copies of the fully executed version of Ruby Glen’s Bidder Agreement, and a supplement thereto, are attached hereto as Exhibits B-C.

7. Many facets of the Auction process for the Contention Set are already underway. For instance, by July 20, 2016, the Auction participants transferred their Auction deposits into escrow accounts overseen by the Auction provider, which may amount to as much as $16 million in total. Likewise, on July 20, 2016, the “blackout period” began, which is a period of time called for in the Auction Rules during which auction participants are prohibited from communicating, or cooperating, with one another in terms of the auction. Tomorrow, on July 26, 2016, around 6:00 am Pacific time, the Auction provider will conduct a “mock auction” in order to allow participants to test connectivity and familiarize themselves with the system, if they are not already familiar with it. About an hour or so later on that same morning, the Auction provider will open “early-bidding,” which allows participants to submit their first round bids into the system in preparation for the start of the Auction. These early-bids, however, will not be accepted until after the
Auction bidding officially begins at 6:00 am Pacific time on July 27, 2016.

8. After an auction concludes, a relatively complex and lengthy process begins in order for ICANN to contract with the winning applicant to operate the new gTLD, and culminates with the delegation of the gTLD into the root zone. The shortest amount of time that has ever elapsed between the close of an ICANN auction in the New gTLD Program and the delegation of a new gTLD into the root zone is approximately four months. Usually, after an auction, there is a period of processing time of between four months and 15 months before the new gTLD is delegated into the root zone. This delay is due to a number of steps that must occur after the auction concludes and prior to delegation, which include the following steps.

9. Once bidding has concluded and a winner has been declared, the winner has 20 business days to pay the balance of the winning price (all participants submit deposits in advance of the auction, with the deposits made for the auction at issue here being up to $2 million for each application). During the 20 business day payment period, the winner is sent an invitation to fill out a form that will be used to help generate the Registry Agreement, which is the contract between the auction winner and ICANN. An auction winner is expected to execute the Registry Agreement within 90 days of the invitation to contracting (Guidebook 4.3.2).

10. After the Registry Agreement is executed, the registry operator will undergo Pre-Delegation Testing, and complete Registry Onboarding (providing ICANN with contact information for various roles at the registry operator and providing some technical information to enable ICANN and registry operator system integration) to request delegation of the gTLD into the root zone. The registry operator has one year after the activation of the Registry Agreement to request delegation of the gTLD, but could conceivably complete these activities in about 45 days.

11. The Registry Agreement, which all auction winners must sign before a
gTLD is delegated into the root zone, includes an affirmation that all of the
information in the winning bidder's application for the new gTLD remains
accurate. If ICANN had any question as to the accuracy of the information in a
winning bidder's application, ICANN would not enter into a Registry Agreement
before ensuring that such concerns have been addressed.

12. If for whatever reason the winner of an auction for a new gTLD is
ineligible to enter into a Registry Agreement with ICANN, the second-highest
bidder will have that option at the price at which it had last bid. (Zecchini Decl. Ex.
J [Auction Rules at pp. 12-13].) Such a scenario has never occurred. If the second-
highest bidder chose to not move forward in place of the highest-bidder, or
otherwise became ineligible to do so, the third-highest bidder will have the option
at the price at which it had last bid. (Zecchini Decl., Ex. J [Auction Rules at at pp.
12-13].) Such a scenario has never occurred.

13. Any financial proceeds of new gTLD auctions initially flow to
ICANN. However, these auction proceeds have been fully segregated in separate
bank and investment accounts, and earmarked until the community develops and
the ICANN Board authorizes a plan for the appropriate use of the funds.4 The
ICANN community has indicated that it will create a Cross-Community Working
Group to develop a proposal for eventual consideration by the ICANN Board on the
manner in which the new gTLD auction proceeds should be allocated. During the
ICANN56 Public Meeting in Helsinki, a meeting took place on June 28, 2016 to
discuss the formation of that working group.5

14. Should the Auction at issue in this case be cancelled or terminated,

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5 See https://icann562016.sched.org/event/7NE0/cross-community-session-charter-for-the-ccwg-on-auction-proceeds?iframe=no&w=i:100; &sidebar=yes&bg=no.
ICANN would suffer a monetary loss of at least $10,000, in the form of a fee the Auction provider would charge. There may be additional fees associated with the escrow accounts used to facilitate the bidder’s payments.

15. There is no technological barrier that would prevent the transfer of the Registry Agreement for a gTLD from one registry operator to another after the gTLD is contracted or even delegated into the root zone and in operation. In fact, Section 7.5 of the Registry Agreement defines the rules and regulations regarding the process for transferring a gTLD from one registry operator to another. ICANN has a website dedicated to assisting registry operators through such a process. For instance, Donuts has transferred more than 20 gTLDs to another party after executing a Registry Agreement with ICANN, and Donuts has acquired several gTLDs this way as well.

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6 See https://www.icann.org/resources/change-of-control.
I swear under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 25th day of July, 2016 at Los Angeles, California.

By: Russ Weinstein