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11 Attorneys for Plaintiff
NAME.SPACE, INC.

12
13 UNITED STATES DISTRICT COURT
14 CENTRAL DISTRICT OF CALIFORNIA
15 WESTERN DIVISION
16

17 NAME.SPACE, INC.,
18

19 Plaintiff,

20 v.

21 INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS,
22

23 Defendant.
24

Case No. CV 12-8676 (PA)

**DECLARATION OF MICHAEL
MILLER 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.

1 I, Michael B. Miller, pursuant to 28 U.S.C. § 1746, hereby declare:

2 1. I am a member of the bar of the State of New York and have been
3 admitted *pro hac vice* before this Court. I am a partner in the law firm Morrison &
4 Foerster LLP, attorneys for Plaintiff name.space, Inc. (“name.space”) in this action.
5 I have personal knowledge of the facts stated below and with the proceedings in
6 this case.

7 2. I submit this declaration in support of name.space’s opposition to
8 ICANN’s motion for summary judgment. As set forth in name.space’s opposition,
9 name.space respectfully requests that the Court deny ICANN’s motion for
10 summary judgment. Absent denying the motion, however, name.space respectfully
11 requests the Court defer consideration of the motion pursuant to Federal Rule of
12 Civil Procedure 56(d) to allow name.space a reasonable opportunity to take
13 discovery and present facts essential to justify its opposition to ICANN’s summary
14 judgment motion.

15 **Background**

16 3. name.space filed its Complaint in this action on October 10, 2012. On
17 November 30, 2012, ICANN moved to dismiss name.space’s Complaint pursuant
18 to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). In support of its motion,
19 ICANN introduced and sought judicial notice of three documents: (1) ICANN’s
20 Articles of Incorporation (the “Articles”); (2) ICANN’s Bylaws (the “Bylaws”);
21 and (3) the “Unsponsored TLD Application Transmittal Form” (“2000
22 Application”).

23 4. On January 4, 2013, name.space filed its opposition to ICANN’s
24 motion to dismiss, as well as an opposition to ICANN’s request for judicial notice.

25 5. On January 14, 2013, ICANN filed its reply in support of its motion to
26 dismiss and its reply in support of its request for judicial notice.

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1 6. On January 15, 2013, the Court issued an order converting ICANN’s
2 motion to dismiss into a motion for summary judgment pursuant to Federal Rule of
3 Civil Procedure 12(d) in order to consider the 2000 Application.

4 7. To date, there has been no discovery in this case.

5 8. This declaration sets forth facts that name.space would seek to obtain
6 through discovery regarding the parties’ interpretation of the 2000 Application.
7 name.space believes that it has provided sufficient facts to preclude the entry of
8 summary judgment for ICANN. name.space nevertheless believes discovery is
9 highly likely to produce additional facts that would preclude the entry of summary
10 judgment for ICANN because they would provide further support for name.space’s
11 position that the 2000 Application does not release any of name.space’s claims.

12 9. In addition, this declaration also sets forth facts that name.space would
13 seek to obtain through discovery regarding the Articles and Bylaws. name.space
14 believes that it has provided sufficient facts to preclude the entry of summary
15 judgment for ICANN. name.space nevertheless believes discovery is highly likely
16 to produce additional facts that would preclude the entry of summary judgment for
17 ICANN because they would provide further support for name.space’s position that
18 the Articles and Bylaws do not entitle ICANN to summary judgment.

19 10. Discovery is particularly appropriate in this case, where ICANN did
20 not clearly set forth in connection with its motion for summary judgment precisely
21 what facts are contended to not be subject to genuine dispute, or to identify clearly
22 the allegations of name.space’s Complaint that ICANN contends are barred by the
23 release language in the 2000 Application.

24 **Facts Presently Unavailable to name.space**

25 **A. The 2000 Application.**

26 11. name.space has not had the opportunity to conduct any discovery
27 regarding the parties’ interpretation of the 2000 Application. Publicly available
28 evidence supports name.space’s argument that the parties to the 2000 Application

1 did not intend it to apply to the claims at issue in this case. To justify further
2 name.space's opposition to ICANN's argument that the 2000 Application releases
3 name.space's claims in this action, name.space must obtain through interrogatories
4 the identity of the individuals responsible for drafting and including the release
5 language in the 2000 Application on behalf of ICANN.

6 12. In addition, name.space requires document discovery regarding
7 internal memoranda and communications within or involving ICANN concerning
8 the 2000 Application, and the rationale for including the release language in
9 particular.

10 13. name.space also requires document discovery regarding ICANN's
11 internal memoranda and communications following the 2000 Proof of Concept,
12 including ICANN's failure to mention or otherwise refer to the release language in
13 situations in which it would be reasonably expected to do so.

14 14. Following receipt of the documents and information identified above,
15 name.space must depose the relevant individuals, including the individuals
16 responsible for drafting the 2000 Application and including the release language at
17 issue, as well as the individuals involved in subsequent communications who would
18 provide further evidence of ICANN's true intent with regard to the 2000
19 Application and 2000 Proof of Concept.

20 15. To the extent that ICANN is arguing that name.space's claims relate in
21 some way to conduct barred by the 2000 Application, name.space requires
22 substantive discovery in connection with its claims, which will demonstrate that the
23 conduct at issue in this case does not fall within the ambit of the release language of
24 the 2000 Application.

25 **B. The Articles and Bylaws.**

26 16. name.space has not had the opportunity to conduct any discovery
27 regarding the Articles or Bylaws. In its opposition brief, name.space argues that the
28 Articles and Bylaws do not entitle ICANN to judgment as a matter of law and,

1 regardless, that the existence of the Articles and Bylaws by themselves does not
2 create a necessary inference that ICANN followed the requirements in the Articles
3 and Bylaws. Put most simply, the mere fact that the Articles and Bylaws say that
4 something is true, or characterize market conduct in a particular way, does not
5 mean that ICANN has complied with its Articles and Bylaws or that ICANN's
6 characterization is economically and legally accurate.

7 17. To justify further name.space's opposition, name.space must obtain
8 through interrogatories the identity of the ICANN officials responsible for
9 structuring and implementing the 2012 Application Round, and the various
10 affiliations of those individuals. name.space must then take the deposition of those
11 individuals to demonstrate that any relevant requirements of ICANN's Articles and
12 Bylaws were not followed in structuring and implementing the 2012 Application
13 Round. name.space also requires discovery from ICANN's co-conspirators.
14 name.space further anticipates that expert testimony on these issues may be
15 required in order to properly characterizes ICANN's market conduct.

16 18. In addition, name.space must seek discovery concerning
17 communications among ICANN officials and industry insiders both during and
18 outside of board meetings to support further name.space's arguments that ICANN
19 was competing in the relevant market and engaged in a conspiracy in violation of
20 antitrust laws.

21 19. Discovery, including depositions and document requests, is also
22 necessary to examine the scope and extent of ICANN's conflicts of interest and to
23 demonstrate how they influenced ICANN's board to act contrary to any relevant
24 requirements in ICANN's Articles and Bylaws.

25 Exhibits

26 20. Attached as Exhibit 1 hereto is a true and correct copy of the
27 "Chronological History of ICM's Involvement with ICANN" *available at*
28 www.icann.org/en/.../icm-v-icann/icm-icann-history-21feb10-en.pdf (as of Feb. 4,

1 2013).

2 21. Based on counsel's review of the documents published on the ICANN
3 website concerning the dispute between ICM Registry, LLC ("ICM") and ICANN,
4 *available at* <http://www.icann.org/en/news/irp/icm-v-icann> (as of Feb. 4, 2013), it
5 does not appear that there are any references by ICANN concerning the 2000
6 Application's release language. Further, the International Centre for Dispute
7 Resolution's February 19, 2012 Declaration regarding the ICM/ICANN dispute,
8 *available at* <http://www.icann.org/en/news/irp/icm-v-icann> (as of Feb. 4, 2013),
9 does not appear to refer to the 2000 Application's release language or otherwise
10 indicate that ICANN presented any argument based on the 2000 Application's
11 release language in connection with that dispute.

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

14 Executed on this 4th day of February, 2013.

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17 Michael B. Miller

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