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10   UNITED STATES DISTRICT COURT

11   CENTRAL DISTRICT OF CALIFORNIA

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13   RUBY GLEN, LLC,   Case No. 2:16-cv-5505 PA (ASx)

14   Plaintiff,   Assigned for all purposes to the
                                             Honorable Percy Anderson
15   v.
                                             DECLARATION OF RUSS
16   INTERNET CORPORATION FOR   **WEINSTEIN IN SUPPORT OF**
     ASSIGNED NAMES AND   **DEFENDANT ICANN'S**
17   NUMBERS,   **OPPOSITION TO PLAINTIFF'S**
                                             ***EX PARTE* APPLICATION FOR**
18   Defendant.   **TEMPORARY RESTRAINING**
                                             ORDER
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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

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[1] *See* https://gtldresult.icann.org/application-result/applicationstatus/auctionresults:downloadauctionreport/SALON.

1 | subject to the auction rules that pertain to indirect contention sets.

2 | 4.   The rules governing ICANN new gTLD auctions were developed over

3 | multiple years and through public comment. In 2013, ICANN launched webinars

4 | regarding those auction rules, explaining their function and drafting process. In

5 | December of 2013 through January of 2014, ICANN solicited public comments

6 | regarding the auction rules governing direct contention sets.[2] Donuts submitted a

7 | comment on the draft version of the auction rules for direct contention sets, and a

8 | true and correct copy of that comment is attached hereto as **Exhibit A**. That

9 | comment notes that "applicants . . . have sought throughout the New TLD

10 | program[] an acceptable level of certainty and predictability at each stage of the

11 | process." Donuts also recommended limiting applicants' ability to postpone

12 | auctions. *Id.* The auction rules for direct contention sets were published in

13 | February of 2014. After further discussion between ICANN and the ICANN

14 | community, the auction rules for direct contention sets (and a Bidder's Agreement

15 | to which each bidder must agree) were updated again in April 2014.

16 | 5.   After the rules for the direct contention sets were completed and

17 | validated through use, the auction rules governing the more complex indirect

18 | contention sets were developed. Similar to the development of direct contention

19 | auction rules, ICANN conducted webinars regarding the draft auction rules for

20 | indirect contention sets, explaining their function and drafting process and

21 | published the draft for public comment in November 2014 through January 2015.

22 | Donuts submitted two comments on the draft version of the auction rules for

23 | indirect contention sets.[3] In February 2015, the final version of the auction rules for

24 | indirect contention sets ("Auction Rules") was published, and a true and correct

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26 | [2] *See* https://www.icann.org/public-comments/new-gtld-auction-rules-2013-12-17-en.

27 | [3] *See* https://forum.icann.org/lists/comments-new-gtld-auctions-indirect-contention-14nov14/msg00002.html; https://forum.icann.org/lists/comments-new-gtld-auctions-indirect-contention-14nov14/msg00005.html.

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WEINSTEIN DECL. ISO OPP. TO TRO
2:16-cv-5505 PA (ASx)

- 2 -

1   copy is attached to the Zecchini Declaration as Exhibit J. Those rules will govern

2   the July 27, 2016 auction ("Auction").

3   6.   In order to participate in an ICANN new gTLD auction, each bidder

4   must sign a standardized Bidder Agreement. Ruby Glen signed a Bidder

5   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.**

13   True and correct copies of the fully executed version of Ruby Glen's

14   Bidder Agreement, and a supplement thereto, are attached hereto as

15   **Exhibits B-C**.

16   7.   Many facets of the Auction process for the Contention Set are already

17   underway. For instance, by July 20, 2016, the Auction participants transferred their

18   Auction deposits into escrow accounts overseen by the Auction provider, which

19   may amount to as much as $16 million in total. Likewise, on July 20, 2016, the

20   "blackout period" began, which is a period of time called for in the Auction Rules

21   during which auction participants are prohibited from communicating, or

22   cooperating, with one another in terms of the auction. Tomorrow, on July 26, 2016,

23   around 6:00 am Pacific time, the Auction provider will conduct a "mock auction" in

24   order to allow participants to test connectivity and familiarize themselves with the

25   system, if they are not already familiar with it. About an hour or so later on that

26   same morning, the Auction provider will open "early-bidding," which allows

27   participants to submit their first round bids into the system in preparation for the

28   start of the Auction. These early-bids, however, will not be accepted until after the

1   Auction bidding officially begins at 6:00 am Pacific time on July 27, 2016.

2   8.   After an auction concludes, a relatively complex and lengthy process

3   begins in order for ICANN to contract with the winning applicant to operate the

4   new gTLD, and culminates with the delegation of the gTLD into the root zone. The

5   shortest amount of time that has ever elapsed between the close of an ICANN

6   auction in the New gTLD Program and the delegation of a new gTLD into the root

7   zone is approximately four months. Usually, after an auction, there is a period of

8   processing time of between four months and 15 months before the new gTLD is

9   delegated into the root zone. This delay is due to a number of steps that must occur

10 after the auction concludes and prior to delegation, which include the following

11 steps.

12   9.   Once bidding has concluded and a winner has been declared, the

13 winner has 20 business days to pay the balance of the winning price (all participants

14 submit deposits in advance of the auction, with the deposits made for the auction at

15 issue here being up to $2 million for each application). During the 20 business day

16 payment period, the winner is sent an invitation to fill out a form that will be used

17 to help generate the Registry Agreement, which is the contract between the auction

18 winner and ICANN. An auction winner is expected to execute the Registry

19 Agreement within 90 days of the invitation to contracting (Guidebook 4.3.2).

20   10.   After the Registry Agreement is executed, the registry operator will

21 undergo Pre-Delegation Testing, and complete Registry Onboarding (providing

22 ICANN with contact information for various roles at the registry operator and

23 providing some technical information to enable ICANN and registry operator

24 system integration) to request delegation of the gTLD into the root zone. The

25 registry operator has one year after the activation of the Registry Agreement to

26 request delegation of the gTLD, but could conceivably complete these activities in

27 about 45 days.

28   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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[4] *See* https://newgtlds.icann.org/en/applicants/auctions/proceeds; *see also* https://community.icann.org/display/NGAPDT/Draft+Documents?preview=/59644 825/59648456/CCWG%20Auction%20Proceeds%20-%20Draft%20Charter%20- %20upd%2023%20June%202016.docx.

[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.

1 ICANN would suffer a monetary loss of at least $10,000, in the form of a fee the

2 Auction provider would charge. There may be additional fees associated with the

3 escrow accounts used to facilitate the bidder's payments.

4   15. There is no technological barrier that would prevent the transfer of the

5 Registry Agreement for a gTLD from one registry operator to another after the

6 gTLD is contracted or even delegated into the root zone and in operation. In fact,

7 Section 7.5 of the Registry Agreement defines the rules and regulations regarding

8 the process for transferring a gTLD from one registry operator to another. ICANN

9 has a website dedicated to assisting registry operators through such a process.[6] For

10 instance, Donuts has transferred more than 20 gTLDs to another party after

11 executing a Registry Agreement with ICANN, and Donuts has acquired several

12 gTLDs this way as well.

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[6] *See* https://www.icann.org/resources/change-of-control.

1   I swear under penalty of perjury under the laws of the United States that the

2   foregoing is true and correct. Executed this 25th day of July, 2016 at Los Angeles,

3   California.

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5   By: _____
             Russ Weinstein

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