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NAME.SPACE, INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

NAME.SPACE, INC.,

Plaintiff,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Defendant.

Case No. CV12-8676-PA (PLAx)

COMPLAINT

DEMAND FOR JURY TRIAL

Plaintiff name.space, Inc. ("name.space"), by and through its undersigned counsel, brings this Complaint against Defendant Internet Corporation for Assigned Names and Numbers ("ICANN"), and alleges as follows:

INTRODUCTION

1. name.space is the originator, operator and promoter of 482 Top Level Domains ("TLDs"), which is the highest level identifier in an Internet "domain name"—such as .com or .gov.

2. ICANN controls and purports to be responsible for the entire worldwide Internet Domain Name System ("DNS"). The DNS is an essential part of the logical infrastructure that makes the Internet work by assigning unique domain names to computers running web sites and other services including e-mail and voice-over-IP, and by coordinating master computer servers which ensure that all Internet users typing a domain name into their browsers reach the same "host" computer and service. ICANN has exclusive control in determining whether to permit new TLDs into the DNS and whether to permit interconnection with TLD operators like name.space. The DNS is the critical, essential intermediary that allows Internet users to reach a website or connect to other services—whose real address is identified by a set of numbers—by typing an alphanumeric domain name in their Internet browser's address bar.

3. name.space's TLDs have been shut out of the DNS by ICANN and its predecessors, and forced to operate its own network of TLDs, thereby effectively blocking and quarantining name.space TLDs and its registrants' domains from the majority of Internet users. Instead, ICANN has given priority for any new TLDs to an exclusive group of insiders and industry incumbents who control ICANN, either directly or financially.

4. In 2000, name.space applied (the "2000 Application") for 118 of its TLDs to be delegated onto the DNS master database known as the "root.zone file," or simply "the Root." Notwithstanding ICANN's acknowledgement of name.space's qualifications and payment of the $50,000 application fee, ICANN refused to make a final determination of name.space's 2000 Application. Meanwhile, the same

handful of companies already dominating control of the Internet—many of which have close ties to ICANN's board of directors—received the only new TLDs delegated by ICANN, further entrenching their status as Internet powerhouses and consummate insiders.

5. Nevertheless, when ICANN announced it would hold another round of TLD applications in 2012, name.space relied on representations from ICANN that its 2000 Application remained pending, and had not been finally determined. At no point has name.space been informed of anything to the contrary.

6. Rather than adopting a procedure to account for the pending 2000 Application and facilitate the expansion of TLD providers in the DNS, ICANN adopted a procedure so complex and expensive that it once again effectively prohibited newcomers from competing. It instead has permitted participation solely by ICANN insiders and industry titans.

7. ICANN raised the application fee to $185,000—more than three times the previous amount. Further, unlike the 2000 round where applicants could apply for multiple TLD strings conforming to a uniform business model in a single application, this time each TLD application required its own non-refundable application fee. name.space's application for the same 118 TLDs for which it applied in 2000 would thus cost over 436 times more in 2012. In adopting this process, ICANN effectively and intentionally precluded name.space from implementing its business model of incorporating the simultaneous operation of a significant number of TLDs, which was designed to drive not only name.space's revenue stream but also its competitive appeal to other rights holders seeking to register domain names under multiple TLDs. This approach by ICANN was consciously adopted as an attack on name.space's business model and a means by which to create and maintain market power in the TLD markets.

8. Even further, not only was the 2012 process anticompetitive, but ICANN allowed applicants to apply for TLDs *that name.space had originated and was*

already operating and promoting. In other words, the 482 TLDs that name.space originated and has been using in commerce continuously since 1996 were being auctioned off by ICANN to any takers who could afford it, in total disregard to name.space's trademark rights in those TLDs.

9. Finally, through its anticompetitive, self-interested actions, ICANN has created a scenario whereby name.space will be unable to ensure that its contracts with its existing and prospective customers can be performed. Specifically, if and when ICANN delegates a TLD on the DNS that is identical with a TLD that currently resolves on the name.space network, name.space's customer's websites and other services will effectively be preempted by websites and services that resolve on ICANN's DNS and point to different hosts. Once again, this serves to benefit only ICANN and the industry insiders and power players whose interests ICANN appears to represent.

10. In fact, on June 13, 2012, ICANN published its list of TLD strings for which applications were submitted to delegate those TLDs to the DNS. Included on this list were several TLDs that already resolve on the name.space network, including .art, .blog, .book, .design, .home, .inc. and .sucks. If and when those applications are approved, however, those TLDs will become associated not only with name.space—which has been operating and promoting those TLDs in commerce for over fifteen years—but also with the prospective registers that have paid ICANN $185,000 per TLD.

11. Accordingly, name.space brings this action against ICANN, seeking damages and injunctive and declaratory relief, for violations of the Sherman Act and the Lanham Act, as well as state and common law trademark infringement, unfair competition and tortious interference claims.

JURISDICTION AND VENUE

12. This Court has original subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1338(a) and (b) over the claims in this action arising under the Sherman Act, 15 U.S.C. §§ 1 and 2, and the Lanham Act, 15 U.S.C. § 1051 *et seq*.

13. This Court also has diversity subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332 in that it is a dispute between citizens of different States where the matter in controversy exceeds the sum of $75,000, exclusive of interest and costs.

14. This Court also has supplemental jurisdiction over name.space's state law claims pursuant to 28 U.S.C. § 1367(a), because those claims are so related to name.space's federal law claims that they form part of the same case or controversy and derive from a common nucleus of operative facts.

15. This Court has personal jurisdiction over ICANN, because, on information and belief, ICANN is a California corporation with its principal place of business in this District.

16. The trade and interstate commerce relevant to this action are at least the following: (i) the international market for TLDs and markets for each individual TLD permitted by ICANN to participate in the DNS, and (ii) the markets for wholesale and retail registrations within each TLD. The activities of ICANN and its co-conspirators, as described herein, were within the flow of and had a substantial effect on interstate commerce.

17. Venue is proper in this District pursuant to 28 U.S.C. §§ 1391(b) because ICANN resides in this District and a substantial part of the events giving rise to name.space's claims occurred in this District.

PARTIES

18. Plaintiff name.space is a corporation organized under the laws of the State of Delaware, with its principal place of business at 134 West 37th Street, Suite 200, New York, New York.

19. Upon information and belief, Defendant ICANN is a non-profit corporation organized under the laws of the state of California, with its principal place of business in Marina del Rey, California. ICANN has the exclusive control over the Internet's DNS. As discussed further below, ICANN derives its authority to manage the DNS from a series of agreements with the United States government.

FACTUAL ALLEGATIONS

A. The Architecture of the Internet.

1. The DNS System.

20. At heart, the Internet is a series of interconnected servers and computers. Each computer or host server connected to the Internet can be identified by at least one unique Internet protocol ("IP") address, which consists of a string of four sets of numbers between 0 and 255, separated by periods (e.g., 170.11.225.15).

21. For ease of reference, a DNS was created to link an IP address with a unique alphanumeric "domain name," such as "nytimes.com." The DNS is a simple, efficient way for Internet users to navigate the web: remembering that "nytimes.com" is the address for The New York Times website is much easier than remembering its numeric IP address.

22. The domain name is incorporated into a Uniform Resource Locator ("URL"). When an Internet user types the URL into his or her web browser application (such as Internet Explorer or Firefox), the URL is sent to a DNS server. The DNS server looks up the IP address assigned to that domain name, and the browser then connects to the server having that IP address, which hosts the desired website.

2. Top-Level Domains.

23. The DNS uses a hierarchical structure. The alphanumeric field to the far right is known as the "Top Level Domain" ("TLD")—such as .com, .net, or .edu. The other, lower-level fields follow to the left of the TLD, separated by periods. The first field to the left of the TLD is the Second Level Domain ("SLD"), followed by the Third Level Domain, and so on. Thus, using the nytimes.com example, ".com" is the TLD, and "nytimes" is the SLD. (There is no Third Level Domain in this example.)

24. In order to link a domain name to an IP address, the DNS server must have access to the Root, which serves as the highest level of the DNS hierarchy and contains a "master list" of all the TLDs. The Root enables the connection of domain names to IP addresses by first directing an Internet user's request to the appropriate TLD, which then routes the user to the desired host computer via the second (and possibly third or fourth) level domain.

25. Currently, the number of TLDs (other than country code TLDs, discussed below) has been arbitrarily limited to twenty-two. Upon information and belief, there are no financial, technical or other constraints to adding new TLDs to the current architecture of the Internet via access to the Root.

26. A limited number of corporations and organizations operate these TLDs, and they must pay a fee to ICANN in order to do so. These organizations and corporations are "wholesale" providers of TLDs—they sell the ability to register a domain name with a particular TLD and maintain a "zone file," or registry, of all the domain names associated with that TLD. TLD wholesalers are commonly referred to as TLD "registries."

27. The "retail" sellers of domain names, called "registrars," are companies that sell the second-level domain names directly to the companies and content providers that want to create a website or provide other services. Registrars, such as "godaddy.com," must be approved by the TLD registries to sell domain names.

The "registrants"—individual companies and content producers, such as The New York Times, that purchase a domain name through the registrar—rent that domain name by paying an annual fee to the registrar.

28. The TLD market is extremely lucrative, and, at present, is controlled by a small group of industry insiders. For example, wholesale TLD registries receive approximately $5-7 per year for every domain name in that particular TLD registry. Considering that there are over a hundred million websites using the ".com" TLD, annual revenue for Verisign, Inc. ("Verisign")—the only ICANN-authorized .com TLD registry—is approximately between $500 and $700 million.

29. There are three different categories of TLDs:

(a) Fourteen of the twenty-two TLDs are "sponsored top level domains" ("sTLDs"), such as .gov and .edu, that are restricted to specific classes of users who must meet a given criterion in order to register with them (*e.g.*, be a U.S. government agency to receive a .gov domain, or be an accredited educational institution to receive a .edu domain).

(b) The other eight TLDs are "generic top level domains" ("gTLDs"), such as .com and .net, that permit anyone to register.

(c) Additionally, separate from the twenty-two TLDs controlled by corporate entities, there are unique "country-code top level domains" ("ccTLDs") that are operated by sovereign nations, or companies with the authority to operate the TLD on behalf of those countries. Each country or designated entity with the authority to operate a ccTLD may set its own registration restrictions and dictate the registration fee.

30. Despite the limited number of available TLDs, there exists competition for the most commercially "desirable" TLDs. Consumers, for example, may be more likely to trust an e-commerce site with a ".com" domain name, rather than a ".biz" domain name. The ".com" suggests a legitimacy that other TLDs may not have. On information and belief, most Internet users expect that a website will use .com

and reflexively append .com to particular content producer's trademarked brand name when seeking access to that content producer's website.

31. Additionally, there are no technological or legal reasons that might prevent a gTLD registry from offering hundreds of gTLDS; as described below, this is, in fact, name.space's business model.

B. name.space Begins Operating as a Registry.

32. In 1996, Paul Garrin, founder of name.space, established a network of servers in five countries on two continents to provide a competing registry with that of Network Solutions, Inc. ("Network Solutions"), which, in 1992, had been granted exclusive control over the Root by the National Science Foundation ("NSF"), a U.S. government agency. In 1995, Network Solutions was permitted to operate for profit as a TLD registry, and began charging fees to register domain names on the Root's limited number of TLDs.

33. In contrast to Network Solution's arbitrarily limited TLDs, name.space offered over five hundred different and "expressive" TLDs, such as .art, .food, .magic, .music, .now and .sucks. Name.space's business model offered a wide array of TLDs for content providers, allowing for increased consumer accessibility to specific Internet sites, as well as stronger expressiveness, marketability and branding. For example, at the time, name.space's domain name in the Network Solutions registry was "namespace.pgpmedia.com," while its domain name through name.space's registry was simply "name.space" (where .space, rather than .com, was the TLD).

34. Unfortunately, name.space was effectively unable to compete with Network Solutions because name.space's TLDs were not on the Root and therefore segregated from the majority of the global Internet. When an Internet user enters a URL into his or her web browser, the web browser will by default look to the Root to resolve that URL. Only by changing the DNS settings on each individual's computer with the IP addresses of name.space DNS resolvers, and bypassing the

DNS settings assigned by the user's service provider (which by default point to the Network Solutions-controlled Root), can the URL resolve domain names in service on name.space's registry. Practically speaking, for 99.9% of the world, the Root is the Internet. Domain names under name.space's TLDs were by default not universally resolvable on the Internet, thereby eliminating any chance of name.space competing with Network Solutions, and enabling Network Solutions to operate its government-granted monopoly with impunity.

C. ICANN Takes Over Management of the DNS on the Root.

35. In 1997, the U.S. government issued a report entitled "A Framework for Global Electronic Commerce," which transferred control of Internet governance from NSF to the Department of Commerce (the "DOC"). Soon after, the DOC solicited comments from stakeholders and published a "white paper" that reflected the commentators' consensus that a new, not-for-profit corporation should have the exclusive authority to manage the DNS.

36. In 1998, the DOC assigned ICANN the exclusive authority to manage the DNS system. According to the National Telecommunications and Information Administration ("NTIA")—a division of the DOC that is responsible for "promoting the stability and security" of the DNS "through its participation on behalf of the U.S. government in Internet Corporation for Assigned Names and Numbers (ICANN) activities"—ICANN "is the not-for-profit entity responsible for coordinating the technical management of the Internet's domain name system (DNS) and for ensuring its continued security, stability and integrity." In reality, ICANN has not been operating as a truly disinterested "not-for-profit entity."

37. Pursuant to its agreements with the U.S. government, ICANN has the exclusive authority to determine whether to introduce new TLDs into the Internet's current architecture. And, significantly, ICANN also has the exclusive authority to determine what companies will operate as registries for these TLDs.

38. According to the U.S. government white paper that addresses ICANN's role as the government-sanctioned gatekeeper to the Internet, "[t]he new corporation [ICANN] does not need any special grant of immunity from the antitrust laws so long as its policies and practices are reasonably based on, and no broader than necessary to promote the legitimate coordinating objectives of the new corporation."

39. Further, the white paper states that: "[a]pplicable antitrust law will provide accountability to and protection for the international Internet community. Legal challenges and lawsuits can be expected within the normal course of business for any enterprise and the new corporation [ICANN] should anticipate this reality."

40. Regarding the process by which ICANN determines what new TLDs to authorize, the white paper states that: "the decision making process would need to reflect a balance of interests and should not be dominated by any single interest category."

41. Moreover, ICANN's "activities would need to be open to all persons who are directly affected by the entity, with *no undue financial barriers to participation* or unreasonable restrictions on participation."

42. Similarly, a U.S. government "green paper" recognized that "the new corporation's [ICANN's] processes should be fair, open and pro-competitive. Its decision-making processes should be sound and transparent." The green paper also warns ICANN to guard against "capture by a self-interested faction."

43. Far from being fair and open with no undue financial barriers to participation, the process leading to the 2012 application round has been shrouded in secrecy, with significant financial and administrative barriers to entry added since the 2000 process that conflict with ICANN's mandate.

44. Upon information and belief, ICANN is controlled by a board of directors with significant conflicts of interest; the ICANN Board is comprised of industry insiders that seek to entrench their power to the detriment of the Internet

community and the general public. ICANN Board members have close business and financial connections with the existing TLD registries, as well as domain name registrants. These conflicts of interest have resulted in a commercial environment that unlawfully insulates industry insiders, stifles competition and, as discussed below, has precluded name.space from implementing its business model and competing as a domain name registry.

D. ICANN Introduces a Limited Number of New TLDs and Grants Only Industry Insiders the Authority to Operate as the New TLD Registries.

1. The 2000 Application Round Opens.

45. In 2000, ICANN sought to expand the number of available TLDs and adopted a policy for the introduction of new TLDs through an application process (the "2000 Application Round").

46. To be selected as a new TLD registry, applicants had to establish their ability to provide the technical expertise necessary to operate a TLD, as well as their financial and business management strengths. The 2000 Application Round instructions were approximately seven pages long.

47. The application fee for the 2000 Application Round was $50,000, and applicants could submit multiple TLD strings in a single application without paying any additional fees.

48. One of the stated goals of the 2000 Application Round was to "provide a vehicle for providing a diverse range of concepts for innovative uses of the DNS." ICANN emphasized that it was "seek[ing] diversity and hop[ing] to rely on the creative approach of the applications to all aspects of the introduction and operation of new TLDs." ICANN encouraged applicants to "[b]e creative."

2. name.space Applies for 118 gTLDs.

49. After four years of efforts seeking inclusion of its TLDs into the Root through administrative and legal means, name.space finally had a chance to add a

portion of its exclusive catalog of TLDs to the DNS and to begin competing with other TLD registries.

50. In 2000, as part of the 2000 Application Round, name.space submitted a complete and timely application with ICANN to operate as the registry for 118 gTLDs, and paid the $50,000 application fee. A full list of all 118 gTLDs from name.space's 2000 Application is attached as Exhibit A.

51. ICANN accepted name.space's 2000 Application, and in fact selected name.space's 2000 Application as one of the "strong candidates" and one of the top-ten applications submitted in the 2000 Application Round.

52. Moreover, a former Chairperson of ICANN's board of directors, strongly supported name.space's 2000 Application and stated that name.space represents diversity and free speech on the Internet. The former Chair also stated that name.space would likely be a successful business that would support both commerce and free speech.

53. Notwithstanding the status and credentials of name.space's 2000 Application, ICANN simply dragged its feet on making a determination. ICANN never rejected name.space's 2000 Application, but neither advanced name.space's 2000 Application for delegation nor awarded name.space the authority to operate any of name.space's TLDs over the DNS.

54. In fact, to this day, on information and belief, name.space's 2000 Application is still pending. As one ICANN committee member stated with respect to name.space's 2000 Application, "we'll wait them out."

55. Rather than delegating name.space's 118 gTLDs, ICANN ignored its own mandates of "seeking diversity" and relying on creative approaches to the introduction and operation of new TLDs, and instead approved only seven new TLDs: the gTLDs .biz and .info and the sTLDs .aero, .coop, .museum, .name and .pro.

56. As Professor Milton Mueller of Syracuse University wrote in his 2004 book, *Ruling the Root*, "[a]dding the name.space TLDs to the [] root.zone would have transformed the commercial environment of the DNS. As the only registry for hundreds of top-level domains, name.space would have been quickly elevated to the status of peer of Network Solutions ."

57. Significantly, almost no new industry players emerged from the 2000 Application Round as TLD registries. ICANN awarded the overwhelming majority—over 99%—of the "new" TLDs to existing dominant firms in the TLD and domain name registrar industries.

58. In 2000, Verisign acquired Network Solutions, including Network Solutions' control of the .com, .net and .org TLDs. Verisign's acquisition of Network Solutions added to its already significant TLD business: Verisign also has the exclusive contracts to operate the .name and .gov sTLDs and the .cc and .tv ccTLDs.

E. ICANN Launches the 2012 Application Round for New TLDs While Placing Significant Barriers to Entry.

59. Since 2000, ICANN's policies and actions regarding the TLD market have come under increasing scrutiny from the Internet community, members of Congress and international agencies.

60. ICANN has ties to and benefits from payments from the select few industry players that are able to operate domain name registries. Such conflicts of interest have been widely reported. Notably, ICANN's outgoing president and CEO has been quoted as stating: "ICANN must be able to act for the public good while placing commercial and financial interests in the appropriate context. How can it do this if all top leadership is from the very domain name industry it is supposed to coordinate independently?"

61. Upon information and belief, some of those conflicts include Chair Steve Crocker, who runs the consulting firm Shinkuro, which has a silent investment from

domain name registry provider Afilias Limited ("Afilias"), the owner of .org and .info, and Vice-chair Bruce Tonkin, a senior executive with Melbourne IT, an Australian company that has advertised its ability to help clients secure gTLD registry accreditation from ICANN. Ram Mohan, Afilias's Executive Vice President and Chief Technology Officer, also sits on the ICANN board of directors. Further, Peter Dengate Thrush, former Chairman of ICANN's board of directors, is now the Executive Chairman of Top Level Domain Holdings, Inc., which filed ninety-two applications for new gTLDs in 2012.

62. Amidst this widespread criticism, ICANN opened a new round of applications for TLD registries (the "2012 Application Round"). The application window ran from January 12, 2012 through April 12, 2012.

63. In a 2009 agreement with the DOC, ICANN emphasized that it would "ensure that as it contemplates expanding the top-level domain space, the various issues that are involved (including competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection) will be adequately addressed prior to implementation."

64. In contrast to the seven-page instruction manual from the 2000 Application Round, the rules and procedures for the 2012 Application Round were set forth in a massive 349-page guidebook.

65. ICANN purports to operate by consensus. In fact, ICANN's creation of the 2012 Application Round, its announcements regarding the 2012 Application Round and the rules that ICANN adopted were the result of an unlawful series of agreements between ICANN and its co-conspirators, some of whom had already left ICANN and some of whom were in the ICANN organization when the 2012 Application Round was decided and announced, but thereafter left ICANN.

66. Upon information and belief, ICANN and the co-conspirators entered into and furthered their conspiracy on at least the following occasions:

- March 12, 2010: the ICANN board of directors met in Nairobi, Kenya;

- September 24, 2010: a special meeting of the ICANN board of directors was held in Trondheim, Norway;
- October 28, 2010: a special meeting of the ICANN board of directors was held via teleconference;
- December 10, 2010: the ICANN board of directors met in Brussels, Belgium;
- January 25, 2011: a special meeting of the ICANN board of directors was held via teleconference;
- March 18, 2011: the ICANN board of directors met in San Francisco, California;
- October 11, 2011: a special meeting of the ICANN board of directors was held in Santa Monica, California;
- October 28, 2011: the ICANN board of directors met in Dakar, Senegal;
- December 8, 2011: a special meeting of the ICANN board of directors was held via teleconference.

67. In order to apply in the 2012 Application Round, ICANN required applicants to pay a whopping $185,000 per TLD fee—over three times more than the 2000 Application Round's $50,000 fee. More importantly, unlike the 2000 Application Round, ICANN forbid applicants from submitting multiple TLD strings in the same application.

68. Therefore, had name.space re-applied in the 2012 Application Round for delegation of the same 118 gTLDs that remain pending from name.space's 2000 Application, it would have cost name.space almost $22 million, more than 436 times the price of name.space's 2000 Application for the same 118 gTLDs.

69. Upon information and belief, the 2012 Application Round, by requiring application fees for each TLD for which an application has been submitted, was designed intentionally to preclude or at least impede name.space's business model—which incorporates the simultaneous operation of a significant number of

gTLDs. Indeed, name.space appears to be uniquely situated in this regard as its 2000 Application contains 118 gTLDs already in service that predate the ICANN application process and the formation of ICANN itself.

70. In a transparent attempt to avoid the conflict between the pending 2000 applications and the new, more expensive 2012 applications, ICANN offered a one-time $86,000 reduction in the application fee for the 2012 Application Round for those applicants that previously applied in 2000, but whose TLDs were not delegated into the Root. This fee reduction could only be used for a single TLD application. If the applicant chose to accept this one-time fee reduction, it would waive any claim it had to its 2000 application. Otherwise, the 349-page guidebook did not mention how ICANN would treat any previous applicants from the 2000 Application Round whose applications, like name.space's, are still pending.

71. In addition, in the 2012 Application Round, ICANN instituted a binding dispute resolution process to resolve any conflicts with regard to a 2012 application. Upon information and belief, ICANN is attempting to use the 2012 Application Round to force previous applicants from the 2000 Application Round to submit to this new dispute resolution process.

72. Further, ICANN did not prevent 2012 applicants from applying for delegation of TLDs that were already included in other applicants' pending 2000 applications.

73. Upon information and belief, ICANN knowingly and willingly created the application process for the 2012 Application Round without adequate safeguards in place to protect the 2000 applicants' rights in their proposed or already operating TLDs.

74. Upon information and belief, it costs as much or more to apply for one gTLD string in the 2012 Application Round than it does to launch a TLD registry in the market.