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RE: Reply Comments in Support of Public Comments Made on Necessary Changes to the Revised Registry Agreement

Dear Mr. Halloran:

Thank you for this opportunity to provide reply comments on the new gTLD Registry Agreement. We respectfully submit the following public comments on behalf of several of our first-time new gTLD applicant clients ("Applicants") in response to the ICANN Staff's proposed revision to the New gTLD Registry Agreement (RA) posted on April 29, 2013. Specifically, we write to reply to and voice strong support for the public comments submitted by Richemont DNS Inc. and Valideus Ltd. on May 20, 2013 that specify specific changes that need to be made for the Registry Agreement to be more in line with commercial contracting best practices, and particularly those that will be operating .BRAND registries.[1] We incorporate by reference our comments on the RA that we submitted on February 26, 2013 in connection with the February 5, 2013 revision of the RA.[2]

Applicants approve of many of the changes in the most recent revisions to the RA, but are still concerned with the way many of terms in the RA are currently drafted. Applicants consist of large corporations that negotiate a wide range of contracts with governments and vendors on a daily basis, many of which are highly-regulated. We are writing to inform ICANN that

[1] Richemont DNS Inc., New gTLD Registry Agreement Public Comments, available at http://forum.icann.org/lists/comments-base-agreement-29apr13/pdfuhx2V2kEn3.pdf (last visited June 10, 2013); Valideus Ltd., New gTLD Registry Agreement Public Comments, available at http://forum.icann.org/lists/comments-base-agreement-29apr13/pdfcqp84LjOd4.pdf (last visited June 10, 2013).

[2] Steptoe & Johnson LLP, New gTLD Registry Agreement Public Comments, available at http://forum.icann.org/lists/comments-base-agreement-05feb13/msg00042.html (last visited June 11, 2013).

Applicants are of the opinion that many of the terms in the RA still do not meet commercially reasonable standards and need to be revised before the RA can be executed.

Applicants are first-time gTLD applicants and are thus relative newcomers to the ICANN community. As a result, Applicants were not engaged during the drafting and revising of the Applicant Guidebook and the RA, and decided to become applicants well after the Applicant Guidebook was nearing its final form. In light of the large number of such first-time corporate applicants participating in the new gTLD program, the concerns and reasonable commercial expectations of corporate applicants need to be heard and acted upon in order for the New gTLD Program to be a success. Otherwise, the Program may stall when it comes time to execute the RA.

Accordingly, in addition to those provisions identified in our February 26, 2013 public comments, we strongly urge ICANN to consider making the following revisions:

Section 1.3(a)(i) – Representations and Warranties. It is standard in modern contracts to not limit the representations and warranties regarding the truthfulness and correctness of statements made during the negotiation of the Registry Agreement to statements "made in writing", as negotiation statements are made by various means these days. Instead, the final agreement should be fully inclusive of all promises, statements, and other agreements between the parties that might have been made during the negotiation. Accordingly, this clause should be eliminated.

Section 2.18 – Personal Data. Like many of the other provisions of the Registry Agreement that deal with personal data, it is standard for confidentiality obligations such as these to be subject to applicable law(s).

Section 4.2(i)-(ii) – Renewal. We think that the Renewal and Termination provisions could be made much more clear and streamlined. For example, the non-renewal provisions in Sections 4.2(i)-(ii) are redundant of the Termination provisions in Section 4.3 and could be removed, and merely be revised to state that the Agreement shall renew unless "the Agreement has been terminated pursuant to either Section 4.3 and 4.4."

Section 4.3 – Termination. If Section 4.2 is revised as above, it is recommended that Section 4.3 be revised accordingly:

- (a)(i)(B) – notice of breach should come from ICANN;
- (a)(ii) – Registry Operator should have "on at least three (3) separate occasions to have been" been in fundamental and material breach for this to apply;
- (a)(iii) – should have at least a 30-day cure period for the Registry Operator;
- (b) – should have at least a 30-day cure period for the Registry Operator;
- (c)(i) – should have at least a 30-day cure period for the Registry Operator;
- (c)(ii) – should be limited to breaches of Section 2.12;
- (c)(iii) – should have at least a 30-day cure period for the Registry Operator;

Section 4.3(f) – Termination. Also, like with personal data, heavily-regulated companies are subject to strict employment laws and contracts. Under these contracts and laws, for example, it is not also possible to immediately terminate officers or employees for many kinds of felonies, such as disorderly conduct, DUIs, minor drug possession, and others that many consider unrelated to job performance and are not crimes of trust. Terminating an officer or director for committing one of these felonies could thus unnecessarily subject the registry operator to liability for wrongful termination, breach of contract, and other violations. Accordingly, the termination provisions of Section 4.3(f) should be conditioned upon a statement such as "provided, that termination of such officer [or director] is not otherwise prohibited by applicable law and doing so would subject Registry Operator to a potential wrongful termination claim or other claim(s) by such officer or [director]."

Section 4.4 – Breach. The Registry Operator's ability to terminate the Registry Agreement based on ICANN's fundamental and material breaches should not be limited to those relating to Article 3. Rather, under standard contracting principles, Registry Operator should be able to terminate with 30-days' notice based on ICANN's fundamental and material breach of <u>any</u> part of the Registry Agreement.

Section 4.5 – Transition of Registry upon Termination of Agreement. If the 4.2 and 4.3 provisions are revised, for consistency purposes, we recommend that this provision be revised to reflect that Sections 4.2, 4.3, and 4.4 are termination provisions and not expiration provisions. Also, Registry Operator should only have to provide data upon termination that is "reasonably required" for operation of the registry for the TLD "only to the extent" necessary to maintain operations and registry functions. Other data may be confidential and not necessary to operate the registry upon termination.

Section 5.3 – Limitations of Liability. It is a standard contracting principle that the limitations of liability should not apply to damages: (i) resulting from the gross negligence, intentional breach, bad faith or willful misconduct of a party or its personnel, (ii) stemming from personal injury, death, or property damage caused by a party or its personnel, (iii) arising from claims for which either party has agreed to indemnify the other party pursuant to the provisions of this agreement, or (iv) arising from any breach by a party of its confidentiality obligations. Accordingly, this language should be entered here.

Also, it is not usual contracting drafting to disclaim only warranties "with respect to the services rendered by itself, its servants or agents, or the results obtained from their work". It is thus recommended that this be revised to merely state that each party disclaims all other representations and warranties to protect both parties.

Section 5.4 – Specific Performance. <u>Applicants are of the opinion that</u> this provision is overly broad, as it is Applicants' understanding that injunctive relief is usually limited to breach of confidentiality provision or breach of performance obligations that are critical with respect to the services and products to be provided. We recommend that this provision be

revised accordingly. Also, specific performance should be limited to non-performance by the other party.

Section 7.2 – Indemnification. Applicants are concerned that the indemnification procedures will not provide Registry Operators enough time to respond to indemnification notices. Accordingly, we request that all indemnification notice "ensure that Registry Operator has sufficient time to investigate and respond to such claim." Also, as with other provisions, ICANN's consent regarding a remedy affecting ICANN should be qualified that it "shall not be unreasonably withheld."

Section 7.15 – Confidentiality. Confidentiality is obviously crucial to highly-regulated corporations. It is thus not standard to limit any confidentiality obligations for only two years; rather it should be extended "so long as such information is treated as confidential by the disclosing party."

Specification 8 – Continued Operations Instrument. Corporations are understandably concerned about being bound by "best efforts" language due to the varying and often unduly strict standards applied by courts, which can include obligations that are unduly burdensome. Indeed, it has been said that "'Best efforts' is the most stringent standard". *See* Charles M. Fox, Working with Contracts 88 (2002). Accordingly, large, multi-national corporations do not generally agree to "best efforts" clauses, but can agree to "commercially reasonable" efforts language.

Our applicant clients hope that ICANN takes the steps necessary to revise the draft Registry Agreement and ameliorate the significant issues identified above for the benefit of all applicants. This will reduce the need for applicants to engage in the extended negotiation of the Registry Agreement, which would ultimately delay the implementation of many TLDs.

In addition, ICANN should consider creating a separate BRAND Registry Agreement specifically designed for .BRAND TLDs as suggested in comments filed by the Brand Registry Group and others during this and the previous public comment round. Such an agreement can be better tailored to that subsection of TLDs so that those registry operators understand better their rights and obligations under the Registry Agreement.

We thank you for your consideration of these reply comments.

Respectfully submitted,

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