

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,  
NEW DELHI BENCH  
I.A. NO. 5761 OF 2020  
IN  
COMPANY PETITION (IB) NO. ND.409 (PB) / 2017**

**IN THE MATTER OF:**

**Vikram Bajaj (Resolution Professional of Net 4 India Limited) ...Applicant**

**Versus**

**Internet Corporation for Assigned Names and Numbers & Others ...Respondents**

**IN**

**Edelweiss Asset Reconstruction Co. Ltd ... Financial Creditor**

**Versus**

**Net 4 India Limited ...Corporate Debtor**

**PRELIMINARY SUBMISSIONS OF RESPONDENT NO. 1 IN APPLICATION  
UNDER SECTION 14 READ WITH SECTIONS 20, 25, AND 60(5) OF THE  
INSOLVENCY AND BANKRUPTCY CODE, 2016**

Respondent No. 1 to the Application (i.e., Internet Corporation for Assigned Names and Numbers or ICANN) above named respectfully submits as follows:

1. These Written Submissions (**Submissions**) are being filed by ICANN pursuant to the directions passed by this Hon'ble Tribunal on 22 January 2021 in relation to IA No. 5761 of 2020 in CP (IB) NO. ND.409 (PB) of 2017 i.e., filed by the Applicant, Mr. Vikram Bajaj (**Application**), being the Resolution Professional of Net 4 India Limited (**Corporate Debtor**) under Section 14 read with Sections 20, 25, and 60(5) of the Insolvency and Bankruptcy Code, 2016.
2. At the outset, ICANN submits that these Submissions as well as its appearance before this Hon'ble Tribunal as well as any oral and written submissions are without prejudice to its objection to the jurisdiction of this Hon'ble Tribunal, as set out in greater detail below.

3. These Submissions ought to be treated as a limited, preliminary written submissions filed in the interest of assisting this Hon'ble Tribunal with regard to the breaches committed by the Corporate Debtor of the Registrar Accreditation Agreement (**RAA**) entered into between ICANN and the Corporate Debtor. It is not intended to be a comprehensive reply to the Application. The Submissions do not address all aspects raised in the Application, especially since ICANN is not privy to the facts raised therein. These Submissions also do not address any other proceedings in the underlying insolvency proceedings initiated by Edelweiss Asset Reconstruction Company Limited against the Corporate Debtor. ICANN reserves its right to file a detailed response to the Application, if required and if, so called upon by this Hon'ble Tribunal.

#### **PRELIMINARY OBJECTION AS TO JURISDICTION**

4. At the outset, ICANN clarifies that this Hon'ble Tribunal does not have jurisdiction in relation to it and/or the questions pertaining to the RAA which too, is governed by the Californian law. ICANN respectfully submits that it does not submit to the jurisdiction of Indian courts and tribunals, being a foreign entity (incorporated in and with its principal place of business in California, USA). ICANN is not registered to do business in India. It does not own any property or bank accounts within the territorial jurisdiction of this Hon'ble Tribunal or in India. ICANN does not have an agent for service of process, a mailbox or a registered address within the territorial jurisdiction of this Hon'ble Tribunal or in India. Hence, the provisions of Indian law are not applicable to ICANN and it is not subject to the jurisdiction of Indian courts or tribunals.
5. Moreover, as abovementioned, the commercial relationship between the Corporate Debtor and ICANN is governed by the RAA. The RAA contains a jurisdictional clause: Clause 5.8 of the RAA vests jurisdiction exclusively with the courts at Los Angeles, California, USA, in relation to any disputes that arise in connection with the RAA. Consequently, all issues arising under the RAA including ICANN's right to terminate the RAA may be adjudicated exclusively by the courts at Los Angeles, California, USA. It is respectfully submitted that this Hon'ble Tribunal has no jurisdiction in respect of the same.
6. It is clarified that ICANN's presence before this Hon'ble Tribunal (including these Submissions) is without prejudice to the foregoing submissions. ICANN's appearance

and these Submissions are made in good faith and with a view to assist the Hon'ble Tribunal. ICANN is not submitting to the jurisdiction of this Hon'ble Tribunal and the present proceedings cannot be considered to be binding on ICANN.

#### **DESCRIPTION OF THE KEY STAKEHOLDERS**

7. ICANN is a California-based non-profit, public benefit corporation incorporated and existing under the laws of California, USA. ICANN is engaged in the business of coordination of the global Internet systems of unique identifiers and ensuring the stability and secure operation of the Internet's unique identifier systems, including but not limited to the Domain Name System (**DNS**) and Internet Protocol (**IP**) addresses. ICANN does not offer any products or services for sale.
8. To assist in its functions, ICANN accredits and/or contracts with 'registries' and 'registrars' across the world, which are critical to a stable, secure, and unified global Internet. They key actors are as follows:
  - a. **Registries / Registry Operators:** 'Registries' are organizations that operate generic top-level domains (**gTLDs**), such as ".com" and ".org" and are responsible for managing the definitive list / database of domain names registered within the gTLDs that they operate.
  - b. **Registrars:** 'Registrars' are companies accredited by ICANN that are responsible for processing and transferring the registration of domain names. Registrars provide services allowing consumers, businesses and organizations to obtain the right to use and operate individual domain names within a particular gTLD – referred to as domain name registrations. Simply put, one of the functions of a Registrar is to facilitate the registration and use of a domain name to consumers / end users. The Corporate Debtor is a Registrar.
  - c. **Registrants:** Registrants or 'domain name registrants' or 'Registered Name Holders' are the end consumers, businesses and organizations (non-profits, educational institutions etc.) that register and operate individual domain names, with the assistance of Registrars. They are the Registrar's customers. In order to register a domain name in a gTLD (and become a registered name holder), Registrants approach an ICANN-accredited Registrar. Registrars collect

information about the Registrants (such as identifying information, billing information, server address) as a part of the registration process.

9. ICANN does not contract with Registrants in any way. ICANN contracts with Registries and Registrars and these contracts contain certain provisions aimed at ensuring that Registries and Registrars comply with a core set of standards that provide Registrants with certain levels of protection, including access to and control over their domain names and access to certain information about registered domain names. Thus, in many ways, the Corporate Debtor's compliance with the contractual terms of the RAA is a matter of public interest.
10. ICANN first entered into an RAA with the Corporate Debtor in 2006 and the latest renewal of the RAA was entered into on 14 October 2019. The RAA sets out the various obligations of both parties.

#### **OBLIGATIONS UNDER THE RAA**

11. By way of the RAA, ICANN accredited the Corporate Debtor as a Registrar. In turn, the RAA required the Corporate Debtor to discharge various obligations.
12. Illustratively, they are as follows:
  - i. Submission of Registered Name Holder data to the Registry (*Section 3.2, RAA*)
  - ii. Provision of public access to data on Registered Names, through an interactive web page and a port 43 Whois service (explained further in paragraph 16 a. below) (*Section 3.3.1, RAA*)
  - iii. Collection and retention of data in relation Registered Name Holders and Registration (*Section 3.4.3, RAA*)
  - iv. Timely respond to and address Registrants' requests to transfer or renew registrations (*Section 4.1, RAA (in relation to Transfer Policy and Expired Registration Recovery Policy)*)
  - v. Submission of electronic copy of data to a mutually acceptable escrow agent (*Section 3.6, RAA*)

- vi. Payment of accreditation fees to ICANN (*Section 3.9, RAA*)

#### **BREACHES OF THE RAA AND IMPACT**

13. The Corporate Debtor has repeatedly and persistently breached several of its obligations under the RAA since 2019. The breaches have become severe in 2020. The breaches by the Corporate Debtor have resulted in thousands of complaints being addressed to ICANN requesting ICANN to step-in and remedy the situation.
14. ICANN has communicated with the Corporate Debtor both verbally and in writing hundreds of times over one and a half years, notifying it of its instances of noncompliance with the RAA, explaining what is required to address each issue, as well as providing a deadline to do so. In many instances, the Corporate Debtor did not respond; in other instances, the Corporate Debtor's responses were incomplete and untimely and/or did not resolve the issue. Ultimately, even after extensive time and opportunity to do so, the Corporate Debtor failed to cure numerous breaches of the RAA. Therefore, ICANN was left with no choice but to issue notices to the Corporate Debtor dated 10 December 2020 and 24 December 2020, formally notifying it of its breaches (collectively, **Notices of Breach**). The same are annexed as **Annexure A** and **Annexure B** respectively. There are an additional twenty (20) noncompliance issues that the Corporate Debtor has delayed in resolving, even after multiple communications from ICANN, that are likely to soon trigger a third Notice of Breach from ICANN to the Corporate Debtor.
15. Through the two Notices of Breach (so far) and numerous prior communications between ICANN and the Corporate Debtor, ICANN notified the Corporate Debtor of its breaches, the adverse impact of the same on the public, the Corporate Debtor's customers and ICANN, and provided the Corporate Debtor with ample time to cure the breaches. ICANN informed the Corporate Debtor that it would be required to terminate the RAA if the Corporate Debtor failed to cure the breaches. The first Notice of Breach was issued on 10 December and gave the Corporate Debtor until 31 December to cure the breaches referenced therein. The second Notice of Breach was issued on 24 December 2020 and gave the Corporate Debtor until 14 January 2021 to cure the breaches referenced therein. However, ICANN has no indication that all of these breaches have been cured.
16. The Corporate Debtor's breaches of the RAA and its impact upon Registrants, ICANN, as well as the public at large are set out below:

- a. **Failure to provide interactive webpage and a port 43 Whois service**
- i. Section 3.3.1 of the RAA requires the Corporate Debtor to provide free, public query-based access to the latest data on all active Registered Names that it has registered, through an interactive webpage and a port 43 Whois portal. Essentially, the Corporate Debtor is obliged to provide up-to-date information about the domain names that are registered with the Corporate Debtor through its own Whois server (i.e. whois.net4domains.com). Since October 2020, the Corporate Debtor has failed to provide access to this data through an interactive webpage and a port 43 Whois service, thereby breaching the RAA.
  - ii. On account of this breach (and subsequent failure to remedy the breach), the Corporate Debtor has prevented Registrants, internet users in general, law enforcement authorities, intellectual property owners, and cybersecurity researchers from accessing critical information regarding domain names registered with the Corporate Debtor.
  - iii. ICANN issued notices dated 27 October 2020, 1 November 2020, 4 November 2020 and 13 November 2020 to the Corporate Debtor notifying it of this breach, illustrating it with specific examples, and requesting a resolution. On 1 November 2020, the Corporate Debtor informed ICANN that the issue would be resolved by 2 November 2020.
  - iv. On 31 December 2020, the Corporate Debtor asserted that the problem was resolved. The Corporate Debtor provided a link to its website where the option to perform the Whois search is located. However, the query-based search was not operative services on the said link. Further, as supposed evidence, the Corporate Debtor provided screenshots of the search results for a domain that is registered by another registrar - which is completely not relevant to the Corporate Debtor's continued failure to provide up-to-date information about the domain names that are registered with the Corporate Debtor.
  - v. Therefore, the fact remains that the Corporate Debtor failed to resolve this issue and cure this breach. As recent as 21 January 2021, the Whois searches of domain names registered with Net 4 India using Net 4 India's web-based Whois service yield no results and only a notation that "No Information found." A document

containing screenshots of the search results showing “No Information found.” is annexed as **Annexure C**.

**b. Failure to allow transfer of domain names and failure to renew expired registrations.**

- i. Section 3.4.3 of the RAA requires the Corporate Debtor to make registration data available for inspection and copying by ICANN, upon request. The Corporate Debtor has failed to make the registration data available to ICANN despite repeated requests for the same - breaching the RAA.
- ii. The Corporate Debtor has prevented Registrants from transferring their registered domain names from Net 4 to another registrar. It has done so by not providing the ‘AuthInfo’ Code to Registrants and has kept the status of the Registrants' domain names as ‘Client Transfer Prohibited.’ Essentially, Registrants are stuck to the Corporate Debtor against their volition - which is a violation of ICANN's Transfer Policy as well as the RAA. Thus, the Corporate Debtor is holding its customers, the Registrants, hostage and is forcing them to avail of its service. At the same time, the Corporate Debtor is not providing the services needed for Registrants to operate their domain names. ICANN has received more than eleven hundred (1100) formal complaints from Registrants in this regard, and more than six hundred (600) such complaints remain unresolved.
- iii. In some instances, the Corporate Debtor seems to have transferred Registrants to other Registrars without the Registrants’ consent (as noted in the 10 December 2020 Notice of Breach). Despite enquiries from ICANN, the Corporate Debtor has failed to show that this was done with the consent of the Registrants.
- iv. The Corporate Debtor has failed to renew expired registrations. By not effectively permitting Registrants to renew domain name registrations, the Corporate Debtor is putting Registrants at risk of losing their registered domain names upon which they may have built their businesses, non-profit institutions and/or educational websites.
- v. As on 21 January 2021, the following breaches in this regard remain:

- For the 182 domain names identified in Appendices A-B of the 10 December Notice of Breach: The Corporate Debtor has not provided evidence that the Corporate Debtor has addressed the Registrant transfer and/or renewal requests or that these domain name registrations have been transferred or renewed as requested.
- For the three domain names identified in the 10 December Notice of Breach: The Corporate Debtor has not provided records related to the transfer of the certain domain name(s) from itself to some other Registrar, which allegedly occurred without the Registrants' authorization to do so.
- For the four domain names identified in the 24 December Notice of Breach: The Corporate Debtor has not provided evidence that the Corporate Debtor has addressed the Registrant transfer and/or renewal requests or that these domain name registrations have been transferred or renewed as requested.
- And, as noted below, there are more than 450 additional Registrant complaints that the Corporate Debtor has not addressed.

**c. Failure to pay accreditation dues**

- i. As a condition of accreditation, the Corporate Debtor, as with all accredited Registrars, is required to pay accreditation fees to ICANN. These fees consist of yearly fees (US\$4,000 per year) and variable fees, which are determined by the transaction type and volume of each Registrar. The Corporate Debtor has either failed to pay or failed to timely pay every invoice issued by ICANN from April 2019 to the present. For those invoices where payment was finally made, such payments were long overdue – the delay in payments ranged from 28 days late to 412 days late.
17. For example, as of 16 January 2021, the Corporate Debtor owed ICANN US\$7,663.18 in past due fees, which included invoices dating as far back as July 2020, and US\$1,000.00 in current fees. On 20 January 2021, the Corporate Debtor paid US\$3,000.00 toward its past due fees; and on 21 January 2021, the Corporate Debtor paid US\$4,500.00 toward its past due fees, leaving US\$163.18 in overdue fees and US\$1,000 in current fees remaining. Most importantly, there is no indication that the Corporate Debtor has in place some system suggesting that it will not fall behind on future invoices if the RAA is not terminated.



18. To be clear, however, even if the Corporate Debtor was up to date on all fees, ICANN would still be seeking to terminate the RAA due to the Corporate Debtor's other, much more serious, breaches of the RAA that are harming its customers, as described above. A consolidated table detailing the Corporate Debtor's breaches of the RAA and the impact of the same is annexed as **Annexure D**.

#### **ICANN IS ENTITLED TO AND MUST BE ALLOWED TO TERMINATE THE RAA**

19. As set out above, ICANN has provided the Corporate Debtor with multiple opportunities to cure the continuing breaches of the RAA. However, several breaches still remain uncured and ICANN is still receiving daily complaints on account of the Corporate Debtor's past and ongoing breaches.
20. From the Application and the submissions before this Hon'ble Tribunal, it appears that the Corporate Debtor's breaches cannot be cured by the Resolution Professional directly. Instead, the Resolution Professional is dependent on the former promoters (in particular, Respondent No. 3 and Respondent No. 4) to cure the same. The Resolution Professional has admitted as much in the Application *inter alia* stating that "*since the entire business and revenues of the Corporate Debtor has been diverted to Net 4 Network, the Applicant is not in a position to cure such non-compliances.*" Further to the hearings on 18 January 2021, 20 January 2021 and 22 January 2021, it appears that the Resolution Professional himself is not satisfied with Respondent No. 3 and Respondent No. 4's alleged efforts to rectify the breaches - despite several months of negotiation and discussions.
21. As of today, there are several breaches of the RAA that have not been cured. Each day these breaches cause and continue to cause grave and irreparable harm to hundreds, if not thousands, of Registrants who have registered their domain names with the Corporate Debtor. As a result, and in addition to, the Corporate Debtor is also harming ICANN.
22. Since 1 September 2020 to date, ICANN has received almost 3,000 complaints from Registrants regarding the actions and breaches of the Corporate Debtor. These Registrants and authorized representatives resorted to filing complaints with ICANN after numerous unsuccessful attempts to obtain the Corporate Debtor's assistance in transferring domain names, renewing domain names, updating registration data, managing domain names, and reactivating websites and defunct email addresses, which online businesses and non-profit organizations depend upon. Unlike the Corporate

Debtor's false representations to this Hon'ble Tribunal that the volume of breaches are commonplace for all registrars, nothing can be farther from the truth. At least within the last decade, ICANN has never before received this volume of complaints about a single Registrar in such a short period of time. Moreover, this level of complaints is overwhelming ICANN's Compliance department, is creating a backlog and is detracting ICANN from the other work it must accomplish. As of 22 January 2021, ICANN's Compliance department has received more than eleven hundred (1100) formal complaints made by Registrants regarding the Corporate Debtor, and more than six hundred (600) of these complaints against the Corporate Debtor remain in process and unresolved. It should also be noted that many of the complaints involve numerous domain names, which means that the actual number of affected domain names is much higher than the number of complaints submitted.

23. Thus, thousands of domain names, many of which are registered by small business owners, educational institutes, non-profit organisations, are adversely impacted by the Corporate Debtor's breaches. The fall out is especially egregious during the pandemic, when many have shifted their businesses either partially or completely online. Illustrative extracts of complaints received by ICANN from Registrants are annexed as **Annexure E**, which demonstrate the significant harm suffered by Registrants.
24. Due to the Corporate Debtor's repeated and uncured breaches of the RAA, ICANN is unable to fully carry out its responsibility as a non-profit, public benefit corporation. It has a mandate to account for the interests of the public and is being prevented from doing so by the Corporate Debtor's continuing breaches and failure to cure the same. It is not out of place to mention that various media outlets have reported on the Corporate Debtor's breaches leading to Registrants being left with no support and have also raised questions as to ICANN's responsibility in such a situation. Some of these media reports are annexed hereto as **Annexure F** and **Annexure G**.
25. In the circumstances, ICANN has no choice but to terminate the RAA. Upon termination of the RAA, ICANN will be able to transfer the domain names registered through the Corporate Debtor to another Registrar, that will effectively and properly serve the Registrants. Termination will allow ICANN to come to the aid of hundreds, if not thousands, of Registrants and fulfil its responsibility in this regard.

26. ICANN submits that although the Insolvency and Bankruptcy Code, 2016 (**IBC**) mandates the Resolution Professional to keep the Corporate Debtor as a going concern, the same is not and cannot be at the cost of public interest (including by allowing several other businesses to seriously suffer). In any case, the IBC cannot permit a party continuously breaching a contract to insist that the contract continue for its benefit.
27. Further, the termination of the RAA will not affect all the services provided by the Corporate Debtor. Per the Corporate Debtor's own website, the Corporate Debtor provides various services which do not require it to be accredited by the RAA. These include: “*Hosting, Email, Easysite, Office 365, Cloudserver, SSL, Reseller*”; and providing registrations under country code top-level domains (ccTLDs). These additional services are not regulated by the RAA and an entity does not have to be accredited by ICANN or have an existing RAA to offer these additional services. The RAA is required only for registering domain names under gTLDs. Therefore, it cannot be said that mere termination of the RAA will result in the Corporate Debtor going out of business. In fact, because the Corporate Debtor has significantly struggled in performing its duties as a Registrar, termination of the RAA may allow the Corporate Debtor to focus its efforts on its other lines of business, rather than expending efforts and resources flailing as a Registrar and harming its own customers. A screenshot of the Corporate Debtor’s website offering the aforesaid services is annexed as **Annexure H**
28. In any case, the Corporate Debtor's insolvency resolution process started in March 2019. As on date therefore, the insolvency resolution process has continued for over 686 days, well beyond the statutorily prescribed timelines. Even now, the Corporate Debtor appears to be unable to manage compliance of its contractual obligations on its own and is heavily reliant on the former promoter. The prolonged rehabilitation efforts of the Corporate Debtor (including efforts taken by the Resolution Professional for the Corporate Debtor to fulfil its obligations) have not prevented or remedied the serious breaches of contract or the harm suffered by the public. Moreover, there is no evidence before this Hon'ble Tribunal that the breaches of contract and the harm suffered by the public will end if termination of the RAA is restrained. Therefore, in the present case, there can be no doubt that the termination of the RAA must be permitted.

## Summary and Next Steps

29. The present Application deserves to be dismissed as against ICANN on grounds that (i) the Hon'ble Tribunal has no jurisdiction over ICANN and/or (ii) there is no case made out for restraining termination of the RAA.
30. Without prejudice to the foregoing, should any order be passed regarding continuation of the RAA, it is prayed that the NCLT should also direct the Applicant to ensure the following compliances along with clarifying that in case of failure to adhere to the conditions set out below or rectify the breach, that the orders of the NCLT will no longer operate as a bar against termination:
  - i. Rectification of the Corporate Debtor's failure to provide an interactive webpage and an operable port 43 Whois service within three (3) calendar days;
  - ii. Rectification of all of the Corporate Debtor's failures to provide services that Registrants need in order to: transfer their domain name registrations; renew expired domain name registrations and ensure websites are reactivated upon renewal; and update registration data, within three (3) calendar days;
  - iii. Provide evidence to ICANN within three (3) calendar days that the domain names deesan.com, arhydraulicfittings.com, slkbima.com and arion.asia were transferred from the Corporate Debtor to Hosting Concepts B.V. d/b/a Registrar.eu, formerly known as Hosting Concepts B.V. d/b/a Openprovider (“Openprovider”), with the authorization of the Registrants and following the requirements of the Transfer Policy;
  - iv. Payment of all past and current accreditation dues within three (3) calendar days;
  - v. Within three (3) calendar days, provide the evidence to ICANN that is specifically described and required in the 10 December 2020 and 24 December 2020 Notices of Breach and related compliance notices, in order to demonstrate compliance; and
  - vi. Continued adherence to the terms of the RAA.

In light of the facts and reasons set out above, it is humbly prayed that the present Application be dismissed and that no orders be passed against ICANN.

A handwritten signature in blue ink, appearing to read "Ajith K.", is positioned above the printed name of the firm.

**TRILEGAL**

**Advocates for Respondent No. 1**