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CONFIDENTIAL

20 May 2019

The Board of Directors
DotAsia Ltd
Hong Kong

CC to Mr Joel Disini, via email to: jed@dot.ph

Dear Sirs and Madam,

Investment by DotPH in Namesphere TLDs.

Introduction

1. I have been instructed by Mr Joel Disini of DotPH, in relation to 3 investments made by DotPH in new gTLD projects managed by DotAsia Ltd. Mr Disini has have provided me (in confidence) with a substantial selection of papers including copies of emails, Skype chat transcripts, spreadsheets, accounts, transcripts of board meetings, and PowerPoint presentations dealing with those investments in two specific TLDs and in Namesphere, the holder of a portfolio of TLD investments in subsidiary companies, all managed by DotAsia. I have reviewed all of this material, and include reference to some of it below.
2. DotPH (acting through Mr Disini) invested US\$60,000 in the .Inc TLD application, US\$60,000 in the .Spa TLD application and US\$180,000 in Namesphere Ltd, all of which have been managed by DotAsia Ltd, principally through the actions of its CEO, Mr Edmon Chung.
3. Mr Disini became aware from DotAsia board materials earlier this year of substantial irregularities in the management of and dealings with the .Inc application, substantial delays in the management of Namesphere's .Box application, and a failure to properly document and protect the investments mentioned above.
4. Specifically, Mr Disini claims:
 - (1) That shares in Namesphere Ltd have not been issued to DotPH, and that these should have been issued some time ago;

- (2) That Mr Chung appears prepared to now issue shares at an undervalue to the agreed level, unless otherwise directed by the board of DotAsia;
 - (3) The delays caused by Mr Chung's management of the .Box application have resulted in litigation against DotAsia, Namesphere Holdings Ltd and Mr Chung personally, creating a real risk of substantially diminishing the value of the DotPH investment in Namesphere;
 - (4) That the delays and the conduct of Mr Chung, especially his dealings with Mr Disini, and the acrimony caused by Mr Chung's dealings with the JV partner Mr Chapnik in relation to .Box have contributed to Namesphere receiving only a small fraction of the possible gains it should have made from the sale of its .Inc application, which sold at auction for US\$16,000,000. In particular, DotPH, a major shareholder and promoter of the .Inc TLD has suffered a large financial loss as a result of Mr Chung's conduct.
 - (5) That there has been mis-management of all the Namesphere investments, and that a considerable amount of expenditure has been allocated as costs to this company in error. There has been no reporting at all on a number of Namesphere investments. (Mr Disini has called for a full accounting and formal review of all costs and expenditure allocated to Namesphere and its subsidiaries. He calls for the setting up of separate books of accounts for each of these entities, and the immediate ending of the mingling of all expenditure through the DotAsia accounts);
 - (6) That there may be continuing mis-management of the .Spa application. There have been considerable delays in getting this TLD to market, the legal position of Namesphere appears fragile, and delays may be driving the applicant to agree to a poor contract because of deadlines. The mistakes with .Box appear to be repeating with .Spa.
5. Mr Disini has requested information, complained about the irregularities and suggested various steps be taken by the board of DotAsia Ltd to remedy the deficiencies and irregularities, but has so far not received satisfaction. He has, accordingly, instructed me to write to you to put you on notice of the seriousness of the position, and to set out clearly what the Board must now do to avoid further litigation against the DotAsia board, Namesphere and Mr Chung personally over each of these various issues.
 6. I understand that Mr Christopher To, barrister of Hong Kong, has been identified as a potential mediator of this dispute. Mr Disini has elsewhere expressed his willingness to have the issues discussed below negotiated before the mediator, subject to a number of conditions further discussed below. The most important of these is that the Board understand that this is not simply between Mr Disini and Mr Chung, but deals with potential litigation between DotPH and all of the companies in the DotAsia/Namesphere group, and Mr Chung personally. DotAsia and the Namesphere companies may have separate interests from Mr. Chung, and should consider whether to appoint separate counsel, and whether or not they should have separate representation at any mediation that ensues.

Factual Background

Origins

7. In 2011, ICANN published a timetable by which applicants could file for new Top Level Domains (TLDs) with an application window that opened on January 12, 2012 and was due to close on 12 April 2012. In fact, the window closed (after being temporarily closed for a software glitch) on May 30, 2012.
8. Mr Disini had various conversations¹ during that application window with Mr. Edmon Chung, the CEO of DotAsia Organisation Ltd, (“DotAsia”) the operating company for an existing TLD (.Asia) about the aspirations of DotAsia to apply for a number of TLDs, both in its own right, and as a partner with other applicants. DotAsia had previously launched .Asia as a new TLD and was operating it successfully. Mr Chung is a long-serving member of the domain industry, and had participated as a community member in the process of developing the ICANN new TLD programme, including as an elected and appointed official. He was familiar with its requirements. The general approach was that the parties’ collective experience would make it profitable to invest in a number of selected TLDs, based on the choice of suitable TLDs and the profit from selling domain names at the second level in these TLDs.
9. Mr Chung showed Mr Disini a proposal involving an investment vehicle (“Namesphere”) and some proposed choices of TLDs. Mr Chung’s proposed strategy was to apply for names that fitted in the categories Landmark, Vertical, Brand/Geo and Niche. Mr Disini satisfied himself about a range of revenue conditions and risks and asked about the current equity in Namesphere. He was told it was wholly owned by DotAsia. He asked about options for staff and were told that none of DotAsia staff would be given options, but that new staff joining (presumably joining Namesphere) might be granted options. No other changes to the equity arrangements for Namesphere were discussed. It was always agreed that the equity in an investment vehicle would be driven entirely by the level of investment.

Investment structures

10. DotAsia set up a wholly-owned subsidiary, registered in Hong Kong (its own registered location and the site of its offices), on 21 March 2012 under the name of Namesphere Ltd. It was incorporated with a share capital of 10,000 shares at 1HK\$ each, all of which were owned by DotAsia, which was also the (sole) Corporate director.
11. There was a DotAsia board meeting on 21 March 2012, which Mr Disini attended², and at which DotPH’s intention to invest in the proposal was discussed. Mr Chung stated that DotPH was thinking of investing \$500,000. DotAsia was said to be committing \$500,000 in a first phase, to be followed up by a further \$500,000 in a later “auction/launch” phase. Mr Disini also specifically mentioned his intention to invest in an application for .Inc.
12. A second Namesphere company (Namesphere Holdings Ltd) was set up on 29 March 2012. This had a share capital on formation of 10,000 shares at 1HK\$ each. All shares were owned by Namesphere Limited, which was also the (sole) Corporate director of the company. Namesphere Holding Ltd has acted as the holding company for various subsidiary companies that are the applicants for the TLDs. Unless specified, I do not distinguish between the Namesphere companies.

¹ Unless the context requires it, I shall refer to texts and chat exchanges as conversations and talking. I shall refer to emails and other written materials as “writing”

² “Attendance” at meetings here includes electronic remote participation.

13. When the details of the TLD applications were published in June 2012, it became public knowledge that Namesphere had an interest in 28 different TLD applications, in various amounts and through various structures such as partnerships and joint ventures. Of particular relevance to this analysis are: .spa, .app, .inc, .box and .studio.

DotPH investment

14. Mr Disini confirmed DotPH's intention to invest \$300,000³ in late March 2012. He gave specific directions as to where that money was to be invested: \$60,000 was earmarked for .inc; 60,000 for .spa, and 180,000 for general investment in Namesphere.
15. On 1 April 2012 Mr Chung emailed Mr Disini to confirm receipt of DotPH's intention to invest that sum, and set out the basis on which that investment would be allocated. He was explicit about the investment in .Inc. This was proposed to be via a joint venture (details below) in which Namesphere would own 20%. The DotPH contribution of \$60,000 was understood to be 30% of the total ownership of the .Inc application.
16. He noted that \$60,000 was "dedicated to .spa" but that the percentages of that deal had not been yet finalised. The balance of \$180,000 was to go into Namesphere.
17. On April 10 2012, Mr Chung emailed Mr Disini with the details of the .Spa deal; as before, the DotPH \$60,000 would constitute 30% of the .Spa application. Namesphere would own 20%. The joint venture partner would invest and own 50%. Each of these conversations unequivocally supports Mr Disini's claim that the amount of equity in each investment was a direct function of the level of investment.
18. There was a further DotAsia board meeting on 18 April 2012. It appears from the Chronology prepared by Mr Chung, which refers to bank records and board transcripts, that DotPH funds were not received by DotAsia until 18 April 2012. If so, it would be accepted that shares to reflect the DotPH equity interest could not have been issued prior to the filing of the various TLD applications.

Non-issuing of Shares in Namesphere

19. Mr Disini was extremely surprised to find out in early 2019 that shares in Namesphere had not been allocated.
20. It seems that no shares in Namesphere have actually been issued since the date of incorporation. If that is so, then this matter can be remedied promptly by the correct issuing and allocation of shares.
21. If in fact founder shares have been issued, it seems to me that that would be unlawful under the applicable Hong Kong Companies Ordinance.
22. The Hong Kong law in question is slightly complicated in that while the Articles used for Namesphere refer to one set of provisions (called "Chapter 32"), Hong Kong company law

³ Unless otherwise indicated, all sums are in US dollars.

changed in 2012 (originally called “Chapter 28 of 2012”) coming into effect in March 2014 as “Chapter 622”.

23. The relevant provision in the Articles are 19, 20 and 22. The company may issue new shares, but is required to do so by formal resolution. There are a number of provisions applicable to resolutions (See articles 23-26) none of which has been followed. There is provision (see Article 27) for a company only having one shareholder (assuming that to be applicable to Namesphere after the investments were made) but Mr Disini tells me that the formalities required by Article 27 have not been complied with. There has been no notice to shareholders or directors of the detail of that resolution as required.
24. Having *issued* new shares (if that in fact be the case, despite the lack of evidence of proper process) it then falls to the directors to *allocate* them. Article 28 prohibits the allocation of new shares without the approval of the company in general meeting. Again, the formalities of meetings have not been followed. There has been no meeting, and no substituted meeting under the single shareholder provision. Nor, it appears, has there been a written director’s resolution by the sole director. Note that the prior approval for the director’s decision is only required when a company resolution is required by Article 57 B of the statute.
25. Article 57B is emphatic:

“Notwithstanding anything in a company’s memorandum or articles, the directors shall not without the prior approval of the company in general meeting exercise any power of the company to allot shares”
26. There follow a series of exemptions, none of which is applicable in the present case. Note in particular that there is an exemption for issuing Founders with shares they have agreed in the memorandum to take. That is not the case here – the issue is the allocation of new shares not prescribed in the founding documents, but of a number apparently constructed by Mr Chung for convenience. So, without a formal approval from the shareholder the Director may not make the allocation of the increased “Founder shares” to DotAsia.
27. The situation after March 2015 under the new Ordinance is covered by section 140 (which contains the same prohibition on directors allocating without a company resolution) and section 141 which provides exceptions that do not apply in the present case.
28. Mr Chung has been unwilling to issue shares in Namesphere, he says, for the reason that this would need to be notified to ICANN, which may cause further costs and delays. I deal with this in more detail below, as the same issue is at the heart of other complaints, including the Canadian litigation.
29. However, in relation to the DotPH investment in Namesphere Ltd, Mr Chung’s position seems inconsistent. Only shareholdings of 15% or greater need to be identified⁴, and his position appears to be that the DotPH holding was 14%. Further, this would be a change in the shareholding of the holding company, not in the shareholding of any of the subsidiary companies created to hold the individual TLD applications. Similarly, issuing shares to represent the DotPH equity at either the 14% or the 20% level claimed by DoTPH would

⁴ See page 101 of the Applicant Guidebook

- not amount to a “change of control” as that term is used in the ICANN registry contracts, so would not need to be notified to ICANN.
30. Mr Chung has recently informed Mr Disini that the DotPH investment is protected, as it is being treated as a convertible debenture. Mr Disini rejects that explanation. A debenture is a loan instrument, not applicable for an equity share. It is also entirely notional – no documentation has been created nor could it be; it would require formal board resolutions which have not occurred, and would need to address debenture requirements such as interest rates, term, conversion conditions etc. Mr Disini was not offered and would not have accepted an unsecured loan arrangement.
 31. Mr Chung has pointed to the signing by Mr Disini of acknowledgements of debt by the auditors. Those do not support the creation of a convertible debenture, stating the sum is “interest free, unsecured and no fixed term of repayment”.
 32. They were signed in 2014, before any Namesphere TLDs had been released by ICANN. Mr Disini signed those at the request of Mr Chung who said he was being “hassled by the accountants”, who needed “sign-off for tax purposes”. Nothing in those circumstances amounts to agreement to a convertible debenture.
 33. Mr Disini requires that shares be issued immediately in relation to his investment in Namesphere and also in relation to the separate investment in .Spa, discussed below.

No Justification for Dilution

Equity arrangements

34. Mr Disini recalls a presentation by Mr Chung, soon after investing, of the equity structure of Namesphere based on investment levels. However, during the board meeting of 6 June 2012, Mr Chung reported on the equity structure of Namesphere and referred to a spreadsheet. He purported in that to create a value for the company of \$1.3M, which is in excess of the investments received (\$0.9M). He characterises the difference by reference to the work and expenditure by DotAsia personnel in the pre-application phase. He appears to create a value for this previous work by DotAsia at 30% of the post -investment value but gives no real rationale for this. The sum of investments is set at 70% of the total value of the company. Mr Disini is adamant that this is in contradiction of his agreement reached with Mr Chung during negotiations that the value of investments would dictate the equity value.
35. Mr Chung’s actions, if permitted, would have the effect of reducing the value of the DotPH shareholding from 20% (the share of the total funds invested) to 14% (the share of the investment at the post-investment value Mr Chung has created).
36. Mr Chung appears to justify the amount of purported founder shares by reference to the work done by DotAsia in the period leading up to the formation of Namesphere. If it were the intention, it would have been easy to establish it as a policy, to communicate it to potential investors, and to record it by way of share allocations at, or soon after, the first investment round closed.

37. None of that was done, so there was no review of the policy, and no scrutiny at all of the basis on which it was calculated. According to Mr Disini, everyone, Mr Chung included, proceeded on the basis that all equity would be allocated on a cash investment basis, with no room for an *ex post facto* adjustment. A further clear example of this is found in the transcript of Mr Disini's chat with Mr Chung on 23 March 2012. Mr Disini said that if you "...put in .1 for ".app" and Dotasia puts in .1 for ".app"we would (create) a Newco where I am 50%". Mr Chung replies: "Possible".
38. Further, the reality of investment funding is that the promoter has to spend money to attract investment. If DotAsia had not done the preparatory work, there would have been no proposal and no investment. If there is to be a claim for this kind of expenditure, usual practice requires it to be carefully identified and on notice to investors. That was simply not done as it was not the parties' intention.
39. I have advised Mr Disini that this is at least a material misrepresentation which induced him to enter the investment contract. The consequence of that under Hong Kong law is that Mr Disini is entitled to sue for either rescission of the contract (i.e. which means DotPH get its money back and the contract is void from the beginning, or it can sue for damages.
40. I understand Mr Chung may argue some other justification for the amount, based on apparent expenditures since 2012.
41. There a number of difficulties with this approach. First, it would be in conflict with the reason stated in 2012– to compensate for previous expenditure. It would also have been impossible when the assessment was made in 2012 to have foreseen the exact amount of expenditure that would be required in future. Further, it was always clear that there would be further fund-raising rounds. It was explicit that DotAsia expected to have to contribute a further \$500k as part of the auction and implementation phases. A number of parties were expected to contribute – equity was expected to be contributed on the basis as before, i.e. pro rata according to investment-based equity. As it happened, that call was not required.
42. Finally, although a sum of \$385k further investment by DotAsia was discussed, this number was created with no basis in reality – there was no further need for DotAsia to advance any funding for Namesphere during the period in question, so there was no justification for issuing shares to fund a special drawdown of cash. Namesphere was more than paying its way from the various sources of income available to it, and did not need further injections of capital.
43. The suggestion that DotAsia could lock up 30% of Namesphere at the initial share price simply by announcing a willingness to contribute to future fundraising, and not actually contributing cash is also fundamentally unfair. The new TLD opportunities represented an historic business opportunity for the limited time the application window was open. A company like Namesphere that had set itself up and was involved with 28 new gTLDs had vastly greater enterprise value in June 2012 than it did in April 2012. There was potential for massive windfall gains from the sale of TLDs. Any call for later funding should have been offered to all investors equally, and been at an agreed (increased) price.
44. Mr Disini has at all relevant times objected to this attempt at dilution. He has challenged Mr Chung about on several occasions, including at the first face-to-face meeting after the June 2012 board meeting when it was first raised. He has, out of respect for Mr Chung's position, not made comment about it at the board level until recently. He assumed that

substantial further investment would be required for each TLD at the time of its launch, and that there would be a further comprehensive review of equity and investment levels once that position was reached, at which time he intended to make his objections known, and he expected they would then be resolved .

45. Further, no one has mistakenly relied on the assumption that Mr Disini has acquiesced to this dilution. No shares have been issued or dividends calculated on the contested cap table, so no corrections are now required to make this right.
46. There is no justification for a dilution of the DotPH investment in Namesphere from 20% to 14%. Mr Disini requires shares to be issued to DotPH for 20% of Namesphere Ltd.

The JV with Jason Chapnik

47. Namesphere entered a joint venture that linked four TLD applications (.App, Home, .Box and .Inc).
48. Each of these TLDs had been applied for by a separate company. This was a deliberate strategy proposed by Mr Chung, to allow for flexibility with subsequent dealings over the TLD, particularly M & A activity and auctions. Two of these (.Box and .Inc) were applied for by Hong Kong registered companies, wholly owned by Namesphere. The other two (.App and .Home) had been applied for by Cayman Island registered companies, effectively owned by a Mr Jason Chapnik⁵.
49. DotAsia and Namesphere (as shareholders of the two Hong Kong companies), and the two Hong Kong registry companies entered a JV with the two Cayman registry companies and the Cayman shareholder. This was designed as a risk-sharing venture, taking into account the likely event of auctions, the need for auction funding and the costs of setting up and marketing any TLDs that were awarded. All the TLD applications had been filed at the time this was signed. It's important to appreciate that this JV did not affect the ownership or the control of any of the TLD applicants as the applications were proceeding. It was an arrangement on how to deal with auctions of TLDs.
50. The terms of the JV agreement included the following:
 - (1) Marketing expenses for each TLD were to be agreed within 15 days of signing, and contributed equally. A default of \$50k was set in the absence of agreement.
 - (2) Prior agreement on a maximum bid for a TLD auction was to be reached. Agreement meant that each shareholder group (Hong Kong and Caymans) would contribute 50% of the bid, and if successful, own 50% of the TLD.

⁵ The actual partner in the JV was K2 Principal Fund LP, an Ontario company. Unless otherwise indicated reference to Mr Chapnik includes reference to his companies.

- (3) There were provisions allowing one party to participate on a “lesser bid’ basis (with lower ownership resulting), and also to withdraw from bidding altogether (with an even lower ownership share), if the bid were successful.
 - (4) In the event a bid were successful, ownership of the registry company had to be restructured to take into account the result of any changes in ownership shares resulting from the way the bidding was conducted (i.e. based on paragraphs 2 and 3 above).
 - (5) Within 60 days of winning a bid, a new Shareholder Agreement was required (after good faith negotiations).
 - (6) The shareholders were not free to assign their rights to the TLDs or the registry companies without the other’s consent, until the Shareholder Agreement was signed.
 - (7) The JV agreement was to be governed by Ontario law. Transactions dealing with the 2 Cayman companies were to be governed by Ontario law, those dealing with the Hong Kong companies by Hong Kong law.
51. It should also be noted that Mr Disini was not provided with a copy of this agreement until years after it was signed, even though it dealt with the .Inc application, in which he held a larger interest than Namesphere. The JV Agreement bears a date of 21 June 2012, and appears to have been signed as of 18 June 2012, so was well after the details of the DotPH investment were clear.

.Box

52. The application was filed in the name of a company named as NS1, a subsidiary of Namesphere Holdings Ltd. Namesphere Holdings Inc was also named as its director. Edmon Chung and Rebecca Chan were the primary and secondary contacts respectively. The email address was info@tld.asia.
53. DotAsia was said in the application to be responsible for policy oversight. Technical matters were left to ARI – the back-end provider.
54. There was a competing application for .Box filed by Amazon. In the transcript of the DotAsia board meeting of 28 May 2014, Mr Chung reported that Amazon wanted to go to a private auction for .Box. It later emerged that Amazon had offered Mr Chung \$2M to exit the .Box TLD, but that he had turned this down.
55. At that meeting also he reported that Namesphere had sold out of its interest in .Studio for \$1.5M. He said that the \$1.5M proceeds from .Studio would go towards the purchase price for .Box. This would be matched by the JV partner putting in \$1.5M also, so that the auction would be won or lost at \$3M. There was no objection to this scenario, and the funds were jointly provided to Amazon. The TLD was therefore obtained at this price- Amazon withdrew its application, and the .Box TLD proceeded to delegation.

Dispute with JV partner

56. Following the acquisition of the TLD there appears to have been considerable delay in getting .Box to market. I've reviewed Mr Chung's chronology entitled ".Box Chronology Brief". In summary, after starting negotiations to change the back end from ARI to UniRegistry, this did not proceed, and it took a considerable time to set up a company in the Caymans, to which the .Box applicant company was transferred.
57. The JV partners eventually set up Box Inc, in the Caymans. It was owned 50:50 by a further Namesphere subsidiary (Dot Box Ltd of Hong Kong) and by InterCap (a Toronto company). Box Inc then purchased all of the shares in NS1 – the original ICANN applicant for .Box.
58. There are grounds for disputing or querying some of the items in Mr Chung's chronology. For example, there is no explanation of why the UniRegistry deal is "unmaterialized" (2016-06-09). It was not an ICANN requirement that delegation be completed before a transfer to a Cayman entity was registered at ICANN, nor that PDT could only occur with the back end provider named in the application (2016-09-01).
59. This entry seems significant:

"Proposal for an allocation of revenues respectively to shareholders for .box to avoid indecisions in future, as a condition to move forward with .inc (signing rights away to Jason)"

It suggests a change from the basic 50:50 premise of the undertaking. Mr Disini formally requests any documentation on this topic in more detail below.

Litigation in Canada

60. Mr Chapnik has sued DotAsia, Namesphere and Mr Chung in Canada, for breach of the JV agreement mentioned above. The claims (paraphrased) against the defendants are:
- (1) Delay in launching the TLD, as a ploy to gain 100% control of the TLD;
 - (2) Scuttling a better back end deal (with UniRegistry) than the one with ARI;
 - (3) Keeping ARI on as back end provider as a way to maintain complete control over the TLD;
 - (4) Although the Cayman company was eventually set up, delaying the processing of documents at ICANN, holding up the start of business operations.
61. As noted above, Mr Chung did not want to make changes to the application status quo at ICANN until after delegation. This position was open to him at the time. It was prudent to give ICANN no reason to review or investigate any matters associated with the application. The 2 specific things he wanted to keep the same were the back end registry provider and the ownership details of the applicant. But these are merely decisions to avoid possible complications. They are not requirements of ICANN, as Mr Chung seems to suggest.
62. Nor does this chronology really explain the long delay between the signing of the contract with ICANN (November 2015) and the completion of PDT, or the long time taken to ready this application for market. The contention set was resolved in early 2015 but it was not till

- May 2018 that the Cayman company (Box Inc) was incorporated. There is still no published startup information available on the .box launch phases⁶ .
63. It would have been a simple matter to sign the ICANN Registry contract, then file an application for a back end change, so that a new provider took over and carried out the PDT- if that were agreed upon. Similarly, once the contract was signed, it would have been a simple matter to record the changes of control to a Cayman entity – if that was the new plan.
 64. Mr Chung says in his email to the board of 18 February 2019 that ICANN reserves the right not to approve changes to applications, and may move them to a subsequent round, and the Applicant Guide Book does do that. He says this is the basis for making no changes – but he does not report that ICANN developed a substantial process for dealing with such changes during the life of an application.⁷
 65. Changes in the applicant were a frequent case, given the resolution of contention sets by agreement and auction. ICANN created a special page dealing with “Change of control” requests.⁸
 66. A list of the many TLD applications that went through this Changes of Control process is available here: <https://www.icann.org/resources/pages/registry-agreement-assignment-direct-changes-of-control-2017-01-27-en>. It contains approximately 400 applications with changes starting in 2014.
 67. None of the corporate changes involved in the .Box scenario were of a type or scale, or out of the ordinary in any way, so as to attract adverse reactions from ICANN of the type suggested by Mr Chung.
 68. I appreciate that there may have been delays in setting up the new corporate structure because of the reasons given, but that does not explain why there was no responses on issues such as the Shareholder Agreement required within 60 days by the JV agreement.
 69. I can understand that Mr Chung preferred a company based in his own jurisdiction; the JV agreement provided that transactions relating to the 2 Hong Kong registry companies would be governed by Hong Kong law⁹, which seemed to imply that the companies would remain in Hong Kong. Further the Shareholder Agreement was required to address issues such as shareholding details, and marketing which did not per se require a change of the location of the registry company. It must be open to argue that it was Chapnik who sought to change things – from a Hong Kong company to one in a jurisdiction he was much more familiar with, and changing the back end to one he was more familiar with. If so, Mr Chung should have reported these matters to his board and sought support for maintaining his position, or instructions on how to change to the position advocated by Mr Chapnik.
 70. Mr Chapnik informed Mr Disini in early 2019 that Mr Chung’s delays over .Box caused him to view Mr Chung as a “completely dysfunctional” partner. He was explicit that he did

⁶ See <https://newgtlds.icann.org/en/program-status/sunrise-claims-periods>

⁷ See <https://newgtlds.icann.org/en/applicants/global-support/change-requests#submit-change-request> for the details of what changes could be made easily.

⁸ See <https://www.icann.org/resources/change-of-control>

⁹ See the “Governing Law” clause at page 4

not want Namesphere/Mr Chung to participate in the auction for .Inc which later eventuated, discussed below.

.Inc

71. There were originally 11 applications for .Inc. There was doubt for some time about whether the resolution of this contention set would occur by private or public auction. A private auction required all members of the contention set to agree. Eventually, after two applicants withdrew their bids, there were 9 applicants remaining as bidders. In the 14 January 2015 DotAsia board meeting, Mr Chung reported that Amazon were on board with a private auction for .Inc. It took some time for the remaining parties to all agree on a public auction.
72. On 10 May, 2017 Mr Chung approached Mr Disini to inform him that the .Inc auction was set up for 6 June, 2017, and to discuss the strategy for participating in it.
73. Namesphere did not bid in the auction. Mr Chapnik did, with a winning bid of \$16,000,000. He paid Namesphere \$185,000 or its ICANN application fee back. It's clear that the decision not to participate in the .Inc bid was very costly for Namesphere.
74. Mr Chung and Mr Disini began a conversation on the .Inc auction strategy on 10 May 2017. Mr Chung advised that the auction was to be held on 6 June 2017. In the transcript, Mr Disini and Mr Chung traverse a number of points. Mr Disini asks to delay the auction so as to raise funds. Mr Chung discourages this, pointing out that the auction will probably go for upwards of \$50M (which turned out to be incorrect), and that delaying might mean no more private auction in the future. They eventually decide not to bid, on the basis that Mr Chapnik will bid, but is likely to lose the auction.
75. Only two options are discussed; a 50:50 bid – which is rejected as too expensive, and because it would be too difficult to raise capital in the limited time available, and a non-bid. Mr Chung shows the calculations for a non-bid if Mr Chapnik were to win based on a \$30M winning bid with no cash input and shows the Namesphere residual share would be:

$$\begin{aligned} &92,500 / 30,185,000 \\ &= 0.003064 \\ &= \sim 0.3\% \end{aligned}$$

76. In a later conversation on 17 May, Mr Chung restricted the options to two - a null bid, with a “walk away” payment from Mr Chapnik (originally said to be 2x or 4x the ICANN fee) or to go to an ICANN auction and get nothing. Mr. Disini agrees to not bid, but says that the payout (in the event Chapnik won the auction) should not be at 3x-4x the ICANN fee, but significantly higher. Mr. Disini argued that the payout should be in equity in .Inc, and not in cash; and that the minimum valuation should be half the loser's proceeds from the private auction. Mr Chung discouraged this, saying that Jason was a difficult partner, and that Mr Chapnik was insisting that ICANN processes be completed (with .Box) before business decisions be undertaken (Mr. Chapnik alleges the exact opposite in his lawsuit against Mr. Chung, that it was Mr. Chung who was insisting on ICANN processes being completed before signing a Shareholder agreement and starting business operations.). Mr.

Chung went on to estimate that Mr. Chapnik only had up to \$10M for the auction, which again turned out to be wrong.

77. This was followed by a phone call from Mr Chung to Mr. Disini, where Mr Chung explains that there were only 2 options – a null bid with a “walk away” payment from Mr. Chapnik (originally said to be 3x or 4x the ICANN fee) or to go to an ICANN auction and get nothing. Mr Disini reluctantly agrees to the no-bid option, as raising funds for an ICANN auction would even be more difficult than raising funds for a private auction.
78. However, unbeknownst to Mr Disini, Mr Chung had started talks with Mr Chapnik the day before he contacted Mr Disini, and we now know that Mr Chapnik had (after the .Box experience) rejected working together on .Inc. Mr Chung did not properly report this. In that light the whole of his conversation with Mr Disini about the .Inc auction needs to be re-examined.
79. First, Mr Chung gave Mr Disini a very short time to agree to go to auction at all, and on the terms of that auction. Mr Chung required answers within a few days, or threatened that the private auction would not proceed, which meant an ICANN auction, and no distribution to losing applicants of auction proceeds. Further, he said that could prejudice them in other auctions. However, it appears the .Inc auction didn’t take place until September 2017, which would have been far more time to raise sufficient funds.
80. Next, it was only during the course of those discussions that Mr Chung revealed to Mr Disini the existence of the JV signed some 5 years earlier with Mr Chapnik, and its terms. In the time available, Mr Disini was unable to the fully appreciate the meaning and significance of the terms of that contract, let alone take legal advice.
81. Why this Agreement was not the subject of consultation with Mr Disini at the time it was negotiated and signed is not explained. Mr Disini says that as a major shareholder in the .Inc application (with a larger interest than Namesphere), this was at the very least major breach of good business conduct by Mr Chung.
82. Two aspects of the JV agreement are significant. The first is the set of provisions dealing with auctions, involving 3 aspects: a joint (50:50) bid, a lesser bid where one party bid less than the other, and a null bid where one party didn’t contribute to the bid at all. The second is the clause that prevents a party to the JV from transferring any interest in any of the identified TLDs, or transfer any shares in a Holding Company. A “Holding Company” meant the actual company holding the TLD application – in this case GTLD Ltd, a subsidiary of Namesphere Holdings Ltd). This made it impossible for Namesphere to transfer interest in the JV to Mr. Disini prior to the auction, and made it impossible for Mr. Disini to negotiate with, or even litigate against Mr Chapnik.
83. Mr Chung reported to Mr Disini in that pre-auction conversation that Mr Chapnik wished to amend the JV agreement, in that he refused to allow a joint bid, but wanted to bid himself. The terms he offered were that would only consider a null bid by Namesphere, in which case either he would win, and pay Namesphere back three of four times its ICANN application fee, or he would lose, and the auction proceeds would be distributed to the losing companies.
84. He argued that the JV didn’t apply to private auctions. That was the basis for the argument that the JV should be changed – otherwise Mr Chapnik would have insisted on going to an

ICANN auction, with no payout to losing applicants. Mr Chung advised Mr Disini that this interpretation was correct, and that Mr Chapnik could renegotiate terms.

85. Mr Disini had been a keen promoter from the outset of the .Inc application, and had earmarked a special investment in this TLD. Along with Mr Chung, he had appraised its potential worth in the \$20-30M range, and promoted this to outside potential investors. (At some stages, Mr Chung had valued the Inc TLD at \$60M). Mr Disini confirmed he had funds available of between \$1.5-2M that he wanted to invest in .Inc
86. Because Mr Chung had failed to record the general DotPH investment in Namesphere and the specific DotPH investment in the .Inc applicant company before signing the JV, Mr Disini saw that he had no bargaining position with Mr Chapnik at all.
87. Further, Mr Chung appears to go have taken some lengths to avoid informing Mr Chapnik of the identity of the investors in .Inc, or the level of their investment. Mr Chapnik was unaware of DotPH's investment and Mr Disini's role, and even if he had been, Mr Disini had no apparent legal position, except a possible claim against Mr Chung.
88. What Mr Chung should have done was to consider the best return under the JV agreement, which would have been to post a lesser bid (rather than a non-bid). The strategy with the best return appears to be the "lesser bid" formula; had Namesphere bid, say, \$2.2M, with a \$16M purchase the return would have been $\$2.2M + (\$92.5k \times 2) / \$16M = 14.9\%$ of the company.
89. Mr Disini had signaled a commitment to invest at least 1.5 M of his own funds in .Inc and it appears Namesphere could have invested up to 700k. Funds of that level (and higher) seem to have been readily available. Given that Mr Chung valued the .Inc TLD at \$60M, this represents a nearly \$9M loss to DotPH and to Namesphere. The value of the DotPH share on the basis of its individual investment (leaving aside its share in the Namesphere portion) would have been worth approximately \$6.1M
90. At the \$30M valuation level Mr Chung used (see para 74 above) the sums are still substantial.
91. Mr Chung knew the terms of the JV agreement. The absence of any discussion about the lesser bid option takes on a new meaning given Mr Chung's knowledge of Mr Chapnik's position. Mr Chung knew, but did not report to Mr Disini why Mr Chapnik had vetoed the lesser bid option – because he refused to do any further business with Mr Chung, because of the .Box experience
92. Mr Disini says that there should have been no deal with Mr Chapnik over the .Inc auction. The threat was that Mr Chapnik would not agree to a private auction if Mr Chung insisted on bidding. That in the absence of agreement from Mr Chapnik, the auction would have been an ICANN auction, with no payout to losing bidders. However, Mr Chapnik had no ability to dictate those terms. He was not a party to the .Inc bid, which was in the name of a company he had no registered interest in. His rights under the JV would have been ignored by ICANN if he had tried to interfere in the auction, as being a private contractual matter of which ICANN could take no notice. The only right Mr Chapnik had under the JV agreement at that stage was on how to agree or not on an auction bidding strategy. It gave no rights to the TLD itself.

93. Had he known of the .Box matters at the time, had he been properly advised about the terms of the JV in good time, had he been recorded as a shareholder of Namesphere and or GTLD Ltd, and had he known of the Shareholder structure of GTLD Ltd Mr Disini would have been in a position to confront Mr Chapnik, and insist on Namesphere and DotPH participating in the private auction by way of a lesser bid. In all of these matters, Mr Chung owed Mr Disini duties of candour and of disclosure, and fiduciary duties of good faith to DotPH, which appear not to have been met.
94. Further, the .Inc application was in the name of a Hong Kong company, as was .Box. Mr Chung retained control over that company and its TLD application to the same extent that he did over .Box. Mr Chapnik had no rights to bid in the auction, as he was not an applicant. The applicant was the Namesphere company GTLD Ltd. Mr Chapnik only had the contractual right to participate under the terms of the JV Agreement.
95. There seems to have been a common misunderstanding that the JV Agreement provided a 50:50 shareholding in each of the TLD registry companies. The shareholding was only 50:50 if the parties agreed on the auction bid – as happened with .Box. It was open to Namesphere to raise more money than Mr Chapnik and secure a larger proportion of the .Inc company, with him adopting the “lesser bid” proportion. Once Mr Chapnik indicated he no longer wished to work together on .Inc, Mr Chung could have treated the JV as rescinded, and participated in the auction as any other bidder.
96. The fact remains that the applicant company for . Inc, GTLD Ltd, was under Mr Chung’s direction and control at the time it raised \$16 M, which it used to purchase the right to the .Inc TLD. As the winning applicant, it would then have paid out millions to the other losing applicants.
97. Further, it appears from the Box Chronology prepared by Mr Chung that a deal was done with Mr Chapnik in favour of .Box at the possible expense of the .Inc application¹⁰. Mr Chung and DotAsia have a greater investment in .Box than they did in .Inc, but both owed DotPH a fiduciary duty to do their best for the .Inc company, in which DotPH was a substantial investor. A deal over .Box also appears only to have been necessary because of the delays and other conduct of Mr Chung in the first place.
98. Mr Disini says that Mr Chung kept secret the reason that Mr Chapnik intended departing from the terms of the JV as to joint bidding in a TLD auction, and instead of either terminating the JV and bidding, or working with Mr Chapnik on a joint bid, opted for a non-bid in the auction, with the worst possible result. That was deceptive, and possibly fraudulent. It was a breach of fiduciary duty to do best by the GTLD company and its shareholders.
99. Mr Disini had always had a special interest in .Inc, and invested specifically in that TLD. However, because shares had not been allocated, his proprietary interest was not recognised, and he was shut out of any formal position in the negotiations. While it may have been at least understandable that his interest in GTLD Ltd was not noted at the time of the JV signing in 2012, there is no excuse for not including him in the re-negotiation of

¹⁰ It reads: “Proposal for an allocation of revenues respectively to shareholders for .box to avoid indecisions in future, as a condition to move forward with .inc (signing rights away to Jason)”

that JV in April- June 2017. He was prepared to invest his own money, however because of Mr Chung's conduct he was denied that opportunity.

100. I have advised Mr Disini that DotPH has a valid claim for compensation in relation to the losses sustained on the .Inc sale.

.Spa

101. Mr Chung reports that .Spa was filed as a 50:50 deal between Namesphere and ASWPC (the Asia Spa & Wellness Promotion Council Limited). The applicant, however, is just the ASWPC so it's not clear that the Namesphere interest is properly protected.
102. The application was filed as a "community" application, and was eventually granted community priority status¹¹, beating out any other non-community applicants.
103. There have been delays in getting this TLD to market, some of which is due to ICANN processes, including GAC advice and Reconsideration. As of today, ICANN has not posted a signed contract for .Spa. Mr Disini reports that there are continuing negotiations over the terms of the Schedule to the Registry contract. These are critical to the eventual commercial success of the TLD. The applicant is up against ICANN deadlines and Mr Disini has grave concerns about the ability to meet them. Being forced to sign up to an inadequate or inappropriate Schedule will seriously damage the commercial success of .Spa
104. DotPH also has a specific investment in the .Spa TLD that exceeds the value of the Namesphere shareholding in that TLD. He is concerned that his investment is not properly recorded or protected. The long, unexplained delays in getting .Box to market appear to be being repeated with .Spa. Mr Disini proposes that the TLD application be transferred to a company owned 50:50 by AWSPC and a 60:40 JV between DotPH and Namesphere.

Spending analysis

105. Mr Disini has done an analysis of the spending by DotAsia on the Namesphere investments, and finds that much of it seems not properly attributable to Namesphere, or the TLD investments. There has been an unacceptable blurring of financial data, caused by the various Namesphere businesses being run through the DotAsia accounts. Traveling to conferences by DotAsia personnel is a DotAsia expense, for example, was being done before the Namesphere program, and has little or no bearing on the new TLDs, or creates any benefits for them. Consulting payments to Mr Matsumoto appear to be unrelated to the new TLD program.
106. Mr Disini has identified \$1,020,688 of expenditure in the spreadsheet provided ("NS cashflow breakdown") attributed to Namesphere that he questions. Those items are as follows:

¹¹ See <https://newgtlds.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>

- (1) Line 3; of the sum of \$126, 244 attributed to ‘TLD Operation’ Mr Disini questions half of this expenditure: \$63,000;
 - (2) Line 3.1; Mr Disini queries the expenditure on LOCs for .Box only and the credit for .spa; \$35,378;
 - (3) Line 5: Mr Chung has apparently paid Afiliis \$169,280 for “front end costs”. Given there are no sales of domains, it’s hard to imagine what these costs are for. The sums of \$645,586, \$22,320, and \$5,876 are all disputed, except for salaries paid to Michael Lu, who was laid off after several months due to there being “no work to do”, according to Mr. Chung.
 - (4) Lines 6.1, 6.2 and 6.3 are for “Admin expenses – Staff, Office and Travel. There has been no need to hire staff, little need for an office and no need for travel.
 - (5) The legal fees in 6.7 are due, Mr Disini assumes to the .Box litigation. Namesphere is one of 3 parties to this, so should pay no more than 1/3 of the costs. \$33,000 is questioned here.
- 107.** In relation to the income shown, Mr Disini queries:
- (1) The origin of the refunds on the .home and .app applications;
 - (2) The origin of the Afiliis payment of \$130, 027 for .web(idn) is queried and whether this has been received by Namesphere;
 - (3) No income is shown as received for .weibo, .微博 (microblog), .sina, .baidu, .新闻 (news), .广东 (canton), .taipei, .yun, .anquan, .shouji, .xihuan. What has happened to revenue from these TLDs?
- 108.** In relation to the Investment/Capital shown, Mr Disini queries why the original \$500,000 from DotAsia is not shown as invested in Namesphere. What appears to be shown is the \$180k from DotPH, plus the 200k provided by Mr Chung. \$20K seems to have been deposited in late 2018 – about 6 years too late. Mr Disini expects this amount to be refunded and not to count as equity in Namesphere.
- 109.** Mr Disini points to the \$111,000 listed at line 8.2 of the Consolidated spreadsheet: DotAsia appears to have banked \$111k of the proceeds from the auctions of home and app, although these were public auctions. If ICANN refunded this money, DotAsia should refund this. Similarly, there appears to have been a \$17,600 deposit refund from ICANN for the .Spa CPE – this also should be refunded.
- 110.** Mr Disini requires a full independent accounting of expenditure on these TLD projects with proper allocation of costs, and a refunding to Namesphere of costs found to be wrongly attributed to Namesphere, and a return of any income or benefits not so properly attributed to Namesphere.

111. Mr Disini has asked several times for complete accounting with explanations of each of the TLD contracts and a transparent allocation of costs attributed to each one. So far, he has not received that information, which is entirely within Mr Chung's control, and which needs to be now produced. It is highly irregular that a company not issue proper annual profit and loss statements nor a balance sheet for 7 years.
112. Mr Disini also required that a bank account to be set up in Namesphere's name, with proper and usual business practices applying to the management of the Namesphere businesses.
113. With respect to the work done by Mr Chung to date, Mr Disini also considers that management of Namesphere and its subsidiaries is a full-time task, distracting Mr Chung from his primary obligations as CEO of DotAsia, and recommends that the DotAsia board promptly find a replacement CEO and management team for Namesphere and its subsidiaries.

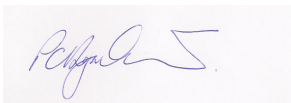
Summary

114. Mr Disini requires the DotAsia board take the following actions:
 - (1) DotPH's shares in Namesphere and any other relevant company to be promptly issued and allocated to DotPH,
 - (2) DotPH shares in Namesphere to be issued and allocated at the 20% equity level,
 - (3) Namesphere and its subsidiaries to be put on a formal business/accounting footing, with separate accounting and banking, and with full financial accounting reporting provided for each business since 2012 with supporting documentation, and a proper allocation of income and expenditure between all entities, within 60 days of receipt of this letter;
 - (4) That as a result of that analysis and reporting, any assets (including cash) found to be belonging to Namesphere to be promptly transferred to Namesphere;
 - (5) That proof be submitted of all equity payments into Namesphere and their dates, including payment by DotAsia of its 500k equity, the Chung payments of 200k, and of the payment by DotAsia of \$40k and the \$100k paid by ASWPC towards the Application fee for .SPA shortly after 1 April 2012 .
 - (6) Compensation for DotPH losses on the sale of .INC to be quantified and paid within one month of receipt of this letter, and
 - (7) .Spa to be transitioned to new corporate structure, 50% owned by ASWPC, 50% owned by a 60:40 JV between DotPH and a DotAsia entity, with its own separate accounting and banking, and a board of directors appointed reflecting the owner's equity within 30 days of receipt of this letter;
 - (8) That copies of all communications between Mr. Chung and Mr. Chapnik, and for all documents pertaining to the ongoing .BOX trial, as well as any other material affecting the

.BOX or .INC TLD be supplied to Mr Disini forthwith. Mr. Disini further requests that the lawyer handling the BOX case, Mr. Doug Smith of Borden Ladner Gervais, be instructed to copy Mr. Disini and the Board of DotAsia on all communications with regards to the .BOX trial.

115. If these requests are not met, Mr Disini will issue proceedings in Hong Kong against the DotAsia Ltd, Namesphere and Mr Chung personally, in relation to the breaches identified above.
116. Mr. Disini is prepared to negotiate these matters further through the offices of the mediator that DotAsia has identified (Mr Christopher To) , but wishes to make the following points:
 - (1) His claims are against DotAsia and Namesphere, as well as Mr Chung personally. Mr Chung's personal interests in this are not the same as, and may be in conflict on occasion with those of DotAsia and Namesphere. It is therefore not simply a matter of Mr Disini and Mr Chung discussing this matter before a mediator;
 - (2) Time is of the essence in relation to many of Mr Disini's complaints. Mediation, if it is to proceed, will have to be completed within a tight timetable, that will contain the following elements:
 - (1) Within 21 days from receipt of this letter, Mr Disini requires a detailed written response on each of the points raised herein, including any responses to the specific requests made;
 - (2) Within a further 14 days (i.e. 35 days from the date of this letter) all relevant documents requested by Mr Disini will have been made available to Mr Disini.
 - (3) Any requests by Mr Chung, DotAsia, or the Namesphere companies for documents held by Mr Disini will have been sent to him within 14 days of the date of this letter, identifying clearly what the documents consist of;
 - (4) A one-day mediation session is to be scheduled for a day more than 14 days (but not more than 28 days) after the date on which documents requested by Mr Disini have been made available to him.
117. These steps are essential in identifying what areas (if any) remain in contention, and if so, on what basis. Further matters may well require attention, but these are the pre-requisites to a successful mediation of a dispute. Mr Disini look forward to a productive mediation of these issues.

Yours sincerely,



Peter Dengate Thrush