

**HCA 1767/2020**

DotPH Domains Inc & NSPH Limited

v

Asia Spa and Wellness Promotion Council

DotAsia Organisation Limited

Namesphere Limited

Edmon Chung

& Others

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**Skeleton Argument for DotAsia, Namesphere & Edmon**

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**Locus of DotAsia, Namesphere & Edmon**

1. Ps' Summons seeks orders (a) restraining ASWPC from proceeding with launch of the TLD except insofar as the intended terms of launch agreements for "premium" and "non-premium" sub-domains and "sunrise" applications are approved by DotPH, also (b) restraining ASWPC from entering into launch agreements with any of the Defendants or entities with which the Defendants are associated.
2. Ps' Summons also seeks orders (c) requiring ASWPC to pay 50% of revenues received into an escrow account with DotPH's solicitors, (d) to provide Ps with an account of launch agreements, revenues received and backend registry data and (e) to provide full details of intended launch schedule, contracts entered into with service providers and confirmation that no other Defendants are providing services to ASWPC for the TLD for gain or advantage.
3. Each of (a), (b) and (c) is of indirect concern to DotAsia and Namesphere, without whose efforts the TLD would not have been secured in the first place. Insofar as (e) enjoins ASWPC from engaging Namesphere from providing services on its usual terms it is of direct concern to Namesphere.

4. The Summons is of direct concern to Edmon, against whom Disini's Affidavit makes several and serious allegations. Edmon, along with Disini, holds office as director of DotAsia. Edmon is also director of Namesphere, originally formed as DotAsia's wholly-owned subsidiary and in which Edmon and Disini are now also beneficially interested.
5. It is inappropriate to expect the court to give proper consideration to the Summons and Disini's evidence in support in the absence of evidence from Edmon. Any directions to file evidence, *either in opposition or otherwise* should extend to DotAsia, Namesphere and Edmon.

### **Ps' Interest in the TLD**

6. Disini's assertions<sup>1</sup> that that Ps have a 50% interest in the TLD alongside ASWPC's 50% interest therein and are entitled to equal participation in the TLD launch are unsupported by the facts -

6.1 DotAsia's board of directors considered a business plan<sup>2</sup> in January 2012 pursuant to which DotAsia caused the formation of Namesphere in March 2012 and sought investor interest in Namesphere;

6.2 Disini's interest in investing in Namesphere was initially expressed at US\$500,000 and in April 2012 confirmed at US\$300,000 of which US\$60,000 was to be dedicated towards an undetermined share of Namesphere's intended joint venture with William Ng to bid for the TLD;<sup>3</sup>

6.3 At no point prior to discussions between Disini, William Ng and Edmon 6 years later in August 2018 was Disini's intended interest expressed to be in the nature of a *direct interest* in the TLD: Disini was at all times an investor in Namesphere to the extent of US\$300,000 of which US\$60,000 was to be dedicated to the TLD initiative and that much is plain from the face of the April 2012 email exchange.

7. Over the course of the next 6 years Namesphere furnished staff resources and expertise, along with financial contribution, towards the intended bid for the TLD. At no point did

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<sup>1</sup> Disini, at §3(a) & §3(e)(vii).

<sup>2</sup> Exhibit JEMD-2.

<sup>3</sup> Exhibit JEMD-5.

Disini contribute anything further to Namesphere in relation to the TLD beyond the US\$60,000 of his US\$300,000 investment in Namesphere.

8. Until August 2018 when Namesphere began to enter into more detailed discussions with William Ng as to how and in whose name the application for the TLD would best be presented, Disini presented himself to Namesphere (and was at all times regarded by Namesphere) as an investor whose interest was limited to financial return and not as active participant in the management of the TLD application.
9. From August 2018 onwards and in particular during face-to-face meetings among Disini, William Ng and Edmon in December 2018 it became clear that Disini's agenda and interests differed markedly from those reflected in the intended TLD application.
10. The prospect of how best to reflect and record the respective interests of Disini, William Ng and Namesphere through prospective entities such as a "DotSpa Limited" and a "NSPH Limited" was floated for discussion by Disini but no preliminary shareholder agreement,<sup>4</sup> let alone any detailed agreement, was ever reached - facts averred in DotAsia's and Namesphere's pleadings.
11. Indeed, by August 2019 and following Disini's repeated failure to agree and execute draft agreements intended to reflect December 2018 discussions among DotPH, ASWPC and Namesphere, it was evident that Disini's rationale for investing was totally at odds with the rationale DotAsia had pursued since the very beginning and in order to avoid frustrating the TLD application and to meet successive ICANN deadline extensions the DotAsia board resolved to review its working relationship with (but not its financial interest in) ASWPC.
12. DotAsia and Namesphere have averred in their Defences in these proceedings that whatever agreement was reflected in email exchanges of April 2012 between Edmon (for Namesphere) and Disini (for DotPH) lacked contractual force on account of being so vague and uncertain that no definite meaning could be given to it without the addition and imposition of further terms. Rather than achieve agreement to further terms, discussions among Disini, William Ng and Edmon from August 2018 to August 2019 saw increasing distrust and at no point did DotPH, ASWPC and Namesphere manage to reach any of the agreements Ps have pleaded were made and later breached.

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<sup>4</sup> Exhibit JEMD-22.

## Special Asset

13. The court should be slow to accept that the TLD at issue here is in the nature of the original “.com” top level domain in respect of which premium prices can be brokered for particular names. Of the 219 names listed at Exhibit JEMD-28 only 43 are listed at US\$10,000 or more and all but 17 names derive from the original “.com” domain. There is no evidence to suggest, let alone support any contention, that new “.spa” domain names will be anything like as desirable or valuable as “.com” domain names featuring in resellers’ listings.
14. In any event, application for the TLD was at all times intended, constructed and presented as a *community application* to serve the spa and wellness sector. Instead of being directed at naked commercial criteria otherwise applicable to business sectors such as “.biz”, “.shop” or “.tech” the application was made in the name of ASWPC, a not-for-profit entity representative of the spa and wellness sector in Asia, and Namesphere helped craft it to meet ICANN’s community priority application criteria.
15. Disini’s suggestion<sup>5</sup> that the decision to present the TLD application to meet CPE represented a change in approach is disingenuous: ICANN policies require any election to pursue CPE to be made when an application is first presented and that was the case with the TLD application from the very start.<sup>6</sup> Item 19 of the 13 June 2012 application is titled “*Is the application for a community-based TLD?*” to which the response is a plain and simple “**Yes**”.
16. Disini was a member of the DotAsia board in June 2012 when the TLD application was made and for almost 8 years thereafter.
17. Disini’s contention “*ASWPC’s CPE application was based on its representations of the spa and wellness community. I was skeptical of this approach given my interest in exploiting the Italian SpA market, but by the time Edmon made this known to me, the CPE application was already well underway*” is thus a late invention and distortion of the truth. Indeed, the narrative in ASWPC’s 13 June 2012 application for the TLD<sup>7</sup> is firmly focused on and replete with references to the spa and wellness community.
18. It will be important for the court to hear from Edmon whether, had Disini expressed to Edmon the desire that the TLD exploit commercial opportunities in respect of the Italian

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<sup>5</sup> Disini, at §14(d).

<sup>6</sup> Exhibit JEMD-08.

<sup>7</sup> Exhibit JEMD-8.

corporate market, Edmon would have been duty-bound to inform him that his offer to dedicate US\$60,000 of his Namesphere towards the TLD would not have been acceptable on account of such intention and purpose squarely conflicting with DotAsia's purpose in promoting community applications in general and the goal of promoting the spa and wellness sector in particular.

19. Indeed, the June 2012 application regarded the prospect of exploiting the Italian SpA market as an *abuse*, as paragraph 20(d) of the application states

*The use of "S.p.A" as a short form for the Italian form of stock corporation "Società per Azioni" is also relatively much less prevalent than the word as intended for the spa community. Furthermore, a more proper and popular way of denoting the form of corporation is "S.p.A" with the periods included. While this is an important usage of the string "SpA", the Registry believes that it should not take away from the significant meaning of the word "spa" in its intended use for the spa community as a TLD. Furthermore, additional preventive measures can be put in place to mitigate against the concerns for abusive utilization of the TLD in this manner. (emphasis added)*

20. Disini's fears<sup>8</sup> of the impending launch of the TLD now risking losses (to be suffered by each of ASWPC, DotPH and Namesphere) of hundreds of thousands of dollars by reason of failing fully to exploit opportunity to extract high prices from the release of domain names such as "*Ferrari.spa*" and "*Armani.spa*" are therefore misplaced, misleading and a total distortion of the facts: the TLD has never been contemplated by Namesphere or ASWPC (or, indeed by ICANN itself) as serving and exploiting the narrower commercial interests of major, public companies registered as Società per Azioni. Nor, even if that were the case, is there any evidence that such high prices are in fact achievable.

21. Namesphere has not been involved in drafting ASWPC's "Sunrise Policy"<sup>9</sup> but it is evident from that policy that ASWPC intends to abide by ICANN's community registration policies and accommodate domain name applications in order of

- (a) Trademark holders meeting TMCH criteria;
- (b) Community Landrush;

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<sup>8</sup> Disini, at §3(d).

<sup>9</sup> Exhibit JEMD-37.

(c) General Availability.

22. Such Policy intends to allocate first priority consideration to organisations in the spa and wellness sector able to demonstrate by credentials membership of an appropriate spa or wellness industry association and declaration that the domain name will be used to promote the spa and wellness community.
23. The Sunrise Policy then addresses second priority consideration to “related coincidental communities” such as businesses located in the town of Spa in Belgium and businesses registered with the Italian Chamber of Commerce and such applicants are required to demonstrate appropriate credentials.
24. Once Sunrise Registration ends ASWPC will permit General Availability registration.

**Disposition**

25. Terms of the Summons appear to permit ASWPC to proceed with launch of the TLD but on restrictive terms acceptable to DotPH. This appears to be not only a disingenuous means of enabling Disini to exercise the kind of management and financial control in respect of the TLD that neither William Ng nor Namesphere were willing to agree and which led to the breakdown in trust of which Disini has complained,<sup>10</sup> but given Disini’s evident fears of missing out on premium domain names in respect of Italian businesses (which in many cases have already secured “prime internet real estate” in the form of “*Ferrari.com*” and “*Armani.com*”, would amount to fundamental breach of the representations made to ICANN in support of CPE for the application in the first place.
26. While DotAsia, Namesphere and Edmon take no position in regard to the relief sought it should be apparent that any proper consideration of the Summons and Disini’s evidence in support cannot be given in the absence of evidence from DotAsia, Namesphere and Edmon, of whom Disini makes at least 59 mentions and several serious allegations.

John Brewer

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31 March 2021

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<sup>10</sup> Disini, at §30.