

## Board Briefing Materials – 10 March 2022 Regular Board Meeting

The originally published version of this document contained information that was withheld from publication in accordance with the [ICANN Publication Practices](#). The updated information can be found at ICANN BOARD SUBMISSION NO. 2022.03.10.2c (pages 19-21). To view a redacted or previously withheld version, please see <https://www.icann.org/en/board-activities-and-meetings/board-materials-redaction-archive-register>.

24 February 2022

### ICANN BOARD PAPER NO. 2022.03.10.1a

**TITLE:** Appointment of Independent Audit Firms for FY22

**PROPOSED ACTION:** For Board Consideration and Approval

**EXECUTIVE SUMMARY:**

Section 22.2 of the ICANN Bylaws (<http://www.icann.org/general/bylaws.htm>) requires that after the end of the fiscal year, the books of ICANN must be audited by certified public accountants, which shall be appointed by the Board.

The Audit Committee has reviewed and discussed the opportunity to rotate audit firms, considering that our most recent audit firm has performed the independent financial audits for the past eight years. ICANN org has carried out a request for proposal (RFP) and has identified Confidential Negotiation Information , from the five applicants. The Audit Committee has reviewed the evaluation performed by org and has recommended that the Board approve Confidential Negotiation Information as the independent audit firms for the fiscal year ending 30 June 2022 for any annual ICANN independent audit requirements. The Board is now being asked to approve the Audit Committee’s recommendation.

**AUDIT COMMITTEE RECOMMENDATION (*Subject to Board Audit Committee Approval*):**

The Audit Committee has recommended that the Board authorize the President and CEO, or his designee(s), to take all steps necessary to engage Confidential Negotiation Information as ICANN’s annual independent audit firms for the fiscal year ending 30 June 2022 for any annual independent audit requirements in any jurisdiction.

**PROPOSED RESOLUTION:**

Section 22.2 of the ICANN Bylaws (<http://www.icann.org/general/bylaws.htm>) requires that after the end of the fiscal year, the books of ICANN must be audited by certified public accountants, which shall be appointed by the Board.

Whereas, ICANN org has carried out a request for proposal for independent audit services, which has resulted in identifying <sup>Confidential Negotiation Information</sup> as the most suitable for ICANN at this time.

Whereas, the Board Audit Committee has discussed the recommendation from ICANN org and has recommended that the Board authorize the President and CEO, or his designee(s), to take all steps necessary to engage <sup>Confidential Negotiation Information</sup> to carry out the independent audit for the fiscal year ending 30 June 2022.

Resolved (2021.03.10.XX), the Board authorizes the President and CEO, or his designee(s), to take all steps necessary to engage <sup>Confidential Negotiation Information</sup> as the audit firm(s) for the financial statements for the fiscal year ending 30 June 2022.

**RATIONALE FOR RESOLUTION:**

ICANN has engaged the same independent audit firm since the audit of fiscal year 2014.

In 2021, the BAC recommended that ICANN perform a Request for Proposal (RFP) for the selection of the audit firm for FY22. ICANN issued the direct RFP to numerous audit firms and received five expressions of interest. After evaluating a completed 75-part questionnaire received from each of the five firms, ICANN organization invited all five firms to make an oral presentation.

ICANN org evaluated the interested firms on the following attributes: overall capabilities of the Firm, professional team assigned, understanding the assignment, financial value/pricing, and proposed methodology/audit approach,

ICANN org evaluated <sup>Confidential Negotiation Information</sup> most suitable for ICANN based on the firm's strong partner tenure, team experience in the Not-for-Profit and Technology sectors, and value for completing much of the transaction testing before the year-end audit begins.  
<sup>Confidential Negotiation Information</sup>

Taking this decision is both consistent with ICANN's Mission and in the public interest as the engagement of an independent audit firm is in fulfilment of ICANN's obligations

to undertake an audit of ICANN's financial statements and helps serve ICANN's stakeholders in a more accountable manner.

This decision will have a fiscal impact on ICANN, which is accounted for in the FY22 ICANN Operating Plan and Budget. This decision should not have any direct impact on the security, stability and resiliency of the domain name system.

This is an Organizational Administrative Function not requiring public comment.

Submitted by:	Xavier Calvez
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[DRAFT] ICANN BOARD PAPER NO. 2022.03.10.2a

**TITLE:** **Deferral of the Third Review of Security, Stability and Resiliency of the DNS**

**PROPOSED ACTION:** **For Board Consideration and Approval**

**EXECUTIVE SUMMARY:**

The Board is being asked to defer the Third Review of the Security, Stability and Resiliency of the Domain Name System (SSR3). This review is scheduled to start in March 2022, based on the current timing defined by the ICANN [Bylaws](#). Considering recent developments with Specific Reviews outlined below, it is neither prudent nor feasible to initiate SSR3 at this time. Board [action](#) on the recommendation issued by the [Third Accountability and Transparency Review \(ATRT3\)](#) pertaining to the future SSR Reviews impacts the timing of SSR3.

Specifically, the ATRT3 recommended that the next review of the SSR be suspended until the next ATRT. The Board approved the ATRT3 recommendations, subject to prioritization, recognizing that the ICANN community and organization will need time to plan for, and execute those recommendations once prioritized for implementation. Additionally, the Second Review of the Security, Stability, and Resiliency of the Domain Name System (SSR2) completed its work and delivered its [Final Report](#) to the Board on 25 January 2021, with the Board [taking action on the 63 recommendations](#) on 22 July 2021. The implementation preparations are underway for recommendations approved by the Board, and work is progressing to inform Board action on the 34 recommendations placed into “pending” status. However, the current timing for SSR3 would not provide sufficient time to complete implementation of SSR2 recommendations, before starting the next review cycle, thus impacting the feasibility of timing.

**[Proposed] ORGANIZATIONAL EFFECTIVENESS COMMITTEE**

**RECOMMENDATION:**

With the above issues, the Organizational Effectiveness Committee (OEC) recommends that the Board defer the SSR3, acknowledging that although the Bylaws state that the SSR Review

should be conducted every five years, pursuant to the ATRT3 recommendations, the prudent way forward is to proceed with the community's recommendation to defer the SSR3 Review. The OEC recommends that it would be neither prudent nor feasible to begin this review now, given the ATRT3 recommendation to suspend and before the implementation of SSR2 recommendations has been completed. The OEC discussed this issue in depth at its 20 January 2022 meeting.

**PROPOSED RESOLUTION:**

Whereas, [Section 4.6 \(c\) of the ICANN Bylaws](#) stipulates that the Board shall cause a periodic review of ICANN's execution of its commitment to enhance the operational stability, reliability, resiliency, security, and global interoperability of the systems and processes, both internal and external, that directly affect and/or are affected by the Internet's system of unique identifiers that ICANN coordinates. The Stability, Security and Resiliency Review shall be conducted no less frequently than every five years, measured from the date the previous SSR Review Team was convened; the Second Review of the Stability, Security and Resiliency of the Domain Name System (SSR2) was convened in March 2017.

Whereas, on 30 November 2020 the Board approved recommendations from the Third Accountability and Transparency Review pertaining to reviews, subject to prioritization and community agreement on the Bylaws change. Recommendation 3.3 states that Security, Stability and Resiliency Reviews shall be suspended until the next Accountability and Transparency Review Team shall decide if these reviews should be terminated, amended or kept as is.

Whereas, the SSR2 completed its work and delivered its [Final Report](#) to the Board on 25 January 2021, with the Board [taking action on the 63 recommendations](#) on 22 July 2021. The implementation preparations are underway for recommendations approved by the Board, and work is progressing to inform Board action on the 34 recommendations placed into "pending" status.

Whereas, the ICANN Board’s Organizational Effectiveness Committee (OEC) recommends the Board to defer the Third Review of the Security, Stability and Resiliency of the Domain Name System (SSR3), determining that it would be neither prudent nor feasible to begin this review now, given the ATRT3 recommendation to suspend and before the implementation of SSR2 recommendations has been completed.

Resolved (2022.03.10

.xx), the ICANN Board defers the SSR3 to allow the ICANN community and organization sufficient time to plan for, and implement pertinent ATRT3 recommendations once prioritized for implementation. The Board acknowledges that the Bylaws state that the SSR Review should be conducted every five years. The Board also acknowledges the ATRT3 recommendation, to suspend the SSR3 Review until the next ATRT makes a further recommendation on timing. The Board will oversee the implementation of ATRT3 recommendations and determine whether the timing of SSR3 should be re-examined based on the changing environment, including various dependencies.

**PROPOSED RATIONALE:**

The Board action today is an essential step in its oversight responsibility over Specific Reviews, including the review of the Security, Stability and Resiliency of the Domain Name System (SSR). The Board recognizes that the current timing specified in the Bylaws to commence SSR3 in March 2022 is not prudent in light of recently issued and approved community recommendations, nor feasible given insufficient time to implement SSR2 recommendations nor determine their effectiveness, prior to starting the next review. By deferring the start of SSR3, the Board is acting in line with the ATRT3 recommendations as also supported by the ICANN community. The Board expects that once ATRT3 recommendations are prioritized, the implementation work will result in a package of proposed amendments to the ICANN Bylaws, some of which would address the timing of future reviews, including SSR3.

The ATRT3 Recommendation 3.3 states that: “Given SSR2 will not be finalized prior to ATRT3 completing its work, ATRT3 recommends that SSR Reviews shall be suspended until the next

ATRT Review (or any type of review that include current ATRT duties) which shall decide if these should be terminated, amended or kept as is. This review could be re-activated at any time by the ICANN Board should there be a need for this.” The Board approved this recommendation in November 2020, subject to community agreement on a Bylaws change, stating that “When deemed appropriate through the prioritization process, the Board directs ICANN org to begin the process to make the appropriate Bylaw amendments, but if the Empowered Community rejects the Bylaws changes, further ICANN community discussion would be required before implementation.”

Today’s action supports the Board’s continued commitment to proactively implement community-issued recommendations and to evolve Specific Reviews in collaboration with the ICANN community, to produce impactful outcomes that serve the public interest. Continuously improving delivery of Specific Reviews is a cornerstone of ICANN’s commitment to accountability and transparency. It is in the public interest in that it will continue to support and improve the reviews of ICANN’s responsibility for the security, stability and resiliency of the DNS toward improved outcomes.

Public comment proceeding is not considered necessary, since the ATRT3 recommendation to suspend SSR3 until the next ATRT was the subject of two public comment proceedings – on the [Draft](#) and [Final](#) SSR2 Reports.

This action is expected to result in positive impact to the security, stability or resiliency of the Internet’s DNS, by allowing sufficient time to implement SSR2 recommendations and assess their impact as well as by enabling a community-based evaluation of the future of this review. This action is anticipated to result in positive budgetary or financial implications in the near term, in that the expenditure for the next review of the SSR will be deferred. It is also anticipated to have a positive impact on community and ICANN org resources.

**Signature Block:**

Submitted by: Theresa Swinehart, Senior Vice President

Date: 16 February 2022

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**ICANN BOARD PAPER NO. 2022.03.10.2b**

**TITLE:** **GNSO Council Policy Recommendations on EPDP  
Phase 2A**

**PROPOSED ACTION:** **For Board Consideration and Approval**

**EXECUTIVE SUMMARY:**

The Board is being asked to approve the policy recommendations from the Expedited Policy Development Process (“EPDP”) Team’s Phase 2A Final Report. The four Phase 2A recommendations relate to the topics of 1) the differentiation of legal vs. natural persons' registration data and 2) the feasibility of unique contacts to have a uniform anonymized email address. In short, the four recommendations recommend that:

1. A field or fields **MUST** be created to facilitate differentiation between legal and natural person registration data and/or if that registration data<sup>1</sup> contains personal or non-personal data. This field or fields **MAY** be used by those Contracted Parties that differentiate.
2. Contracted Parties who choose to differentiate based on person type **SHOULD** follow the guidance included in the Final Report.
3. If a GDPR Code of Conduct is developed within ICANN by the relevant controllers and processors, the guidance to facilitate differentiation between legal and natural person data **SHOULD** be considered within ICANN by the relevant controllers and processors.
4. Contracted Parties who choose to publish a registrant-based or registration-based email address in the publicly accessible RDDS **SHOULD** evaluate the legal guidance obtained by the EPDP Team on this topic.

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<sup>1</sup> Registration data includes both domain data and contact data. The EPDP Team did not directly specify whether the new field(s) would be considered a domain object or a contact object. The Team’s discussions, however, seem to imply that this field would be contact-related data. ICANN org will work with the dedicated Implementation Review Team to further clarify the technical details regarding the implementation of this recommendation.

The recommendations were adopted by the GNSO Council with the required GNSO Supermajority Support.

**STAFF RECOMMENDATION:**

The purpose of this paper is to recommend Board approval of the EPDP Phase 2A recommendations. Approval of these recommendations can be considered complementary to the EPDP Phase 1 (and 2) recommendations<sup>2</sup>. All necessary steps of the process to this point have been satisfied, and ICANN org recommends Board approval of the Phase 2A recommendations.

**PROPOSED RESOLUTION:**

Whereas, on 17 May 2018, the ICANN Board adopted the Temporary Specification for gTLD Registration Data (Temporary Specification) pursuant to the procedures in the Registry Agreement and Registrar Accreditation Agreement concerning the establishment of temporary policies;

Whereas, following the adoption of the Temporary Specification, and per the procedure for Temporary Policies as outlined in the Registry Agreement and Registrar Accreditation Agreement, a Consensus Policy development process as set forth in ICANN's Bylaws must be initiated immediately and completed within a one-year time period from the implementation effective date (25 May 2018) of the Temporary Specification;

Whereas, the GNSO Council approved the EPDP Initiation Request (<https://gns0.icann.org/sites/default/files/file/field-file-attach/temp-spec-gtld-rd-epdp-initiation-request-19jul18-en.pdf>) and the EPDP Team Charter (<https://gns0.icann.org/sites/default/files/file/field-file-attach/temp-spec-gtld-rd-epdp-19jul18-en.pdf>) on 19 July 2018;

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<sup>2</sup> Note that the implementation of the Phase 2A recommendations is not expected to impact the implementation timeline of the Phase 1 recommendations (nor Phase 2 if/when these are adopted by the ICANN Board).

Whereas, the EPDP Team divided the work into two phases; Phase 1 completed with the adoption of the EPDP Phase 1 Final Report on 4 March 2019, at which point the GNSO Council indicated its non-objection, as required per the EPDP Team Charter, for the EPDP Team to commence work on a System for Standardized Access/Disclosure to Non-Public Registration Data (“SSAD”) as well as other topics identified in Phase 2 of the Charter and/or carried over from Phase 1 (priority 2 items);

Whereas, the Phase 2 Final Report noted that “As a result of external dependencies and time constraints, this Final Report does not address all priority 2 items”. It furthermore noted that the EPDP Team would “consult with the GNSO Council on how to address the remaining priority 2 items”;

Whereas, following these consultations, the GNSO Council adopted on 21 October 2020 [instructions](#) for the EPDP Phase 2A to address the remaining priority 2 items, namely 1) differentiation between legal and natural person registration data, and 2) feasibility of unique contacts to have a uniform anonymized email address;

Whereas, the EPDP Team commenced its deliberations on Phase 2A on 17 December 2020 (see <https://community.icann.org/x/VojzC>);

Whereas, the EPDP has followed the prescribed EPDP steps as stated in the Bylaws, including the publication of an Initial Report for public comment (see <https://www.icann.org/public-comments/epdp-phase-2a-initial-report-2021-06-03-en>) on 3 June 2021, resulting in a Final Report delivered on 3 September 2021 with an updated version containing all minority statements submitted on 13 September 2021;

Whereas, all recommendations received the consensus support of the EPDP Phase 2A Team but the Chair’s statement indicated that “it’s important to note that some groups felt that the work did not go as far as needed, or did not include sufficient detail, while other groups felt that certain recommendations were not appropriate or necessary”;

Whereas, the GNSO Council reviewed and discussed the recommendations of the

EPDP Team and approved all Phase 2A on 27 October 2021 by a GNSO Supermajority vote (see <https://gns0.icann.org/en/council/resolutions/2020-current#20211027-2>);

Whereas, after the GNSO Council vote, [a public comment period](#) was held on the approved Recommendations, and the comments received ([see summary report](#)) are similar to comments provided by the EPDP Phase 2A Team members during its deliberations, the comments received in response to the EPDP Phase 2A Team’s Initial Report, and the positions demonstrated in the minority statements to the Final Report, represent a clear divergence of views as also reflected in the Chair’s statement referenced above;

Whereas, the Governmental Advisory Committee (GAC) was requested to raise any public policy concerns that might occur if the proposed policy is adopted by the Board (<https://www.icann.org/en/system/files/correspondence/botterman-to-ismail-09dec21-en.pdf>);

Whereas, the GAC responded to the Board’s notice, and provided [its response](#) on 9 February 2022 requesting that the ICANN Board consider “the GAC Minority Statement in its entirety, as well as available options to address the outstanding public policy concerns expressed therein”;

Whereas, ICANN org reviewed the Recommendations as well as the Minority Statements, and, based on current information and subject to further inputs from Data Protection Authorities and legal analysis, believes the EPDP Phase 2A recommendations do not appear to be in conflict with (a) the GDPR, (b) existing requirements for gTLD registry operators and registrars, or (c) ICANN's mandate to ensure the stability, security, and resiliency of the Internet's DNS;

Resolved (2022.03.10.xx) the Board adopts the GNSO Council EPDP Phase 2A Policy Recommendations as set forth in section 3 of the Final Report.

Resolved ((2022.03.10.xx), the Board directs the President and CEO, or his designee(s), to develop and execute an implementation plan for the adopted Recommendations that

is consistent with the guidance provided by the GNSO Council and to continue communication with the community on such work.

## **PROPOSED RATIONALE:**

### **Why is the Board addressing this issue now?**

The GNSO Council approved all of the final recommendations from the EPDP Working Group's [Final Report](#) dated 13 September 2021 at its meeting on [27 October 2021](#), and [a Recommendations Report](#) from the Council to the Board on the topic on [16 December 2021](#). In accordance with the ICANN Bylaws, a [public comment forum](#) was opened to facilitate public input on the adoption of the Phase 2A Recommendations. The public comment period closed on 13 January 2022. As outlined in Annex A of the ICANN Bylaws, the EPDP recommendations are now being forwarded to the Board for its review and action.

### **What are the proposals being considered?**

The four Phase 2A recommendations relate to the topics of 1) the differentiation of legal vs. natural persons' registration data and 2) the feasibility of unique contacts to have a uniform anonymized email address. In short, the four recommendations recommend that:

1. A field or fields **MUST** be created to facilitate differentiation between legal and natural person registration data and/or if that registration data<sup>3</sup> contains personal or non-personal data. This field or fields **MAY** be used by those Contracted Parties that differentiate.
2. Contracted Parties who choose to differentiate based on person type **SHOULD** follow the guidance included in the Final Report.
3. If a GDPR Code of Conduct is developed within ICANN by the relevant controllers and processors, the guidance to facilitate differentiation between legal and natural person data **SHOULD** be considered within ICANN by the relevant controllers and processors.

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<sup>3</sup> Registration data includes both domain data and contact data. The EPDP Team did not directly specify whether the new field(s) would be considered a domain object or a contact object. The Team's discussions, however, seem to imply that this field would be contact-related data. ICANN org will work with the dedicated Implementation Review Team to further clarify the technical details regarding the implementation of this recommendation.

4. Contracted Parties who choose to publish a registrant-based or registration-based email address in the publicly accessible RDDS SHOULD evaluate the legal guidance obtained by the EPDP Team on this topic.

The full list and scope of the final recommendations can be found in Annex B of the GNSO Council's Recommendations Report to the Board (see <https://gns0.icann.org/sites/default/files/file/field-file-attach/draft-epdp-phase-2a-report-06dec21-en.pdf>).

### **What significant materials did the Board review?**

In taking this action, the Board considered:

- The [EPDP Team's Phase 2A Final Report](#), dated 13 September 2021, including minority statements;
- The [GNSO Council's Recommendations Report to the Board](#), dated 6 December 2021;
- The [comments](#) and the [summary of public comments](#) received in response to the public comment period that was opened following the GNSO Council's adoption of the recommendations contained in the Final Report, and GAC advice received on the topic;
- The [letter](#) from the GAC to the Board, dated 9 February 2022.

### **What factors did the Board find to be significant?**

The EPDP Team's Phase 2A recommendations were developed following the GNSO Expedited Policy Development Process as set out in Annex A of the ICANN Bylaws and have received the support of the GNSO Council. As outlined in the ICANN Bylaws, the Council's Supermajority support obligates the Board to adopt the recommendations unless, by a vote of more than two-thirds, the Board determines that the recommended policy is not in the best interests of the ICANN community or ICANN. The Bylaws also allow input from the GAC in relation to public policy concerns that might be raised if a proposed policy is adopted by the Board. The GAC responded by requesting the ICANN Board to consider the GAC Minority Statement in its entirety, as well as available options to address the outstanding public policy

concerns expressed therein. The Board has taken note of the comments received during the public comment period which seem to echo the sentiments of the minority statements, in which some are of the view that some of the recommendations do not go far enough while others question whether these are even necessary. The Board observes that these positions were also known to the EPDP Phase 2A Working Group as well as the GNSO Council who adopted the recommendations with the required GNSO Supermajority support.

**Are there positive or negative community impacts?**

Although the recommendations do not create new obligations for Contracted Parties, the recommendations are intended to facilitate differentiation between legal and natural person registration data as well as personal and non-personal data for those Contracted Parties that choose to differentiate, in line with the EPDP Phase 1 recommendations. In addition, Contracted Parties who choose to publish a registrant-based or registration-based email address may benefit from the guidance provided. Promotion of this guidance may furthermore help standardize the way in which Contracted Parties who choose to differentiate implement this in practice.

**Are there fiscal impacts or ramifications on ICANN (strategic plan, operating plan, budget); the community; and/or the public?**

There may be fiscal impacts on ICANN associated with the implementation of policy recommendations. These would be related to the use of ICANN org resources to implement the recommendations.

**Implementation Considerations considered**

The creation of a field or fields would require coordination and work through the Internet Engineering Task Force (IETF). ICANN org participates voluntarily and org staff act in their individual capacity in the IETF. Therefore, ICANN org staff can coordinate with the technical community/RDAP WG to put forward relevant proposals in IETF Working Groups to develop the necessary standards; however, it is ultimately up to the IETF to make the changes.

ICANN org estimates that implementing Recommendation 1 would require coordination through the IETF for (1) EPP extension and (2) support in RDAP (i.e., jCard and JSContact). ICANN org estimates that the EPP extension could take between 12-24 months, depending on the milestones and priorities of the IETF Registration Protocols Extensions (REGEXT) Working Group. The IETF REGEXT WG is the home of the coordination effort for standards track extensions. In the case of RDAP, (i) adding support in jCard may require adding properties or values (e.g., KIND). ICANN org estimates that this should take between 6 – 12 months. (ii) Adding support in JSContact could take between 12 – 24 months depending on whether the change could make it into the current internet draft of JSContact or require an extension. The three lines of work: (a) EPP, (b) jCard, and (c) JSContact; could be done in parallel.

In relation to recommendation #2, ICANN org has reiterated its previous feedback<sup>4</sup> to the EPDP Phase 2A WG with regards to guidance for Contracted Parties. ICANN Contractual Compliance enforces requirements placed on contracted parties via the RA, RAA, and ICANN Consensus Policies, in furtherance of ICANN's mission, as recognized in the ICANN Bylaws. Guidance and best practices would exist outside these agreements and are not contractual requirements; thus, ICANN Contractual Compliance would not have contractual authority to take enforcement action against a contracted party related to its implementation of best practices or guidance, even if those best practices or guidance is developed through the EPDP Process.

**Are there any Security, Stability or Resiliency issues relating to the DNS?**

There are no security, stability, or resiliency issues relating to the DNS that can be directly attributable to the implementation of the EPDP recommendations.

**Is this decision in the public interest and within ICANN's mission?**

Consideration of community-developed policy recommendations is within ICANN's mission as defined at Article 1, section 1.1(i) of the ICANN Bylaws. This action serves the public interest, as ICANN has a core role as the "guardian" of the Domain Name System.

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<sup>4</sup> Please note that the ICANN org liaisons provided the EPDP Team with the following feedback on how this guidance would be implemented once adopted: <https://mm.icann.org/pipermail/gnso-epdp-team/2021-May/003904.html>

**Is this either a defined policy process within ICANN's Supporting Organizations or ICANN's Organizational Administrative Function decision requiring public comment or not requiring public comment?**

Public comment has taken place as required by the ICANN Bylaws and GNSO Operating Procedures in relation to GNSO policy development.

**Signature Block:**

Submitted by: David Olive

Position: SVP Policy Development  
Support

Date Noted: 23 February 2022

Email: david.olive@icann.org

## ICANN BOARD SUBMISSION NO. 2022.03.10.2c

**TITLE:** Consideration of the Afilias Domains No. 3 Ltd. v. ICANN (.WEB) Independent Review Process Final Declaration

**PROPOSED ACTION:** For Board Consideration and Approval

### EXECUTIVE SUMMARY:

Afilias Domains No. 3 Ltd. (Afilias),<sup>1</sup> one of the applicants for .WEB, initiated an Independent Review Process (IRP), challenging the validity of another applicant's .WEB application and the auction of last resort that resolved the .WEB contention set (.WEB IRP). The Final Declaration issued by the IRP Panel became "final" on 21 December 2021. Per the Bylaws, the Board initially considered the Final Declaration at its next scheduled meeting, on 16 January 2022, and asked the BAMC to take the following next steps:

- "[F]urther consideration is needed regarding the IRP Panel's non-binding recommendation that ICANN 'stay any and all action or decision that would further the delegation of the .WEB gTLD until such time as the [ICANN] Board has considered the opinion of the Panel in this Final Decision, and, in particular (a) considered and pronounced upon the question of whether the DAA complied with the New gTLD Program Rules following [Afilias'] complaints that it violated the Guidebook and Auction Rules and, as the case may be, (b) determined whether by reason of any violation of the Guidebook and Auction Rules, NDC's application for .WEB should be rejected and its bids at the auction disqualified.'"
- "[T]he Board asks the Board Accountability Mechanisms Committee (BAMC) to review, consider, and evaluate the IRP Panel's Final Declaration and recommendation, and to provide the Board with its findings to consider and act upon before the organization takes any further action toward the processing of the .WEB application(s)."<sup>2</sup>

The BAMC has reviewed and considered the IRP Panel's Final Declaration and recommendation, considered relevant correspondence from Nu Dotco LLC (NDC) and Verisign, Inc. and from Afilias submitted after the issuance of the IRP Final Declaration, and other relevant materials related to the .WEB IRP (see accompanying Reference Materials). In the

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<sup>1</sup> Afilias Domains No. 3 Ltd. is now known as Altanovo Domains Limited. For consistency and ease of reference, we will continue to use "Afilias" to refer to the Claimant in this IRP.

<sup>2</sup> Board Resolutions 2022.01.16.14 – 2022.01.16.15, <https://www.icann.org/resources/board-material/resolutions-2022-01-16-en#2.b>.

course of the .WEB IRP and since, Afilias has made numerous claims regarding the agreement between NDC and Verisign regarding .WEB (the Domain Acquisition Agreement (DAA)), and requested that ICANN disqualify NDC's .WEB application, reject its winning bid, and recognize Afilias as the winning bidder (which had the second highest bid in the auction). In particular, Afilias claims that, as a result of the DAA, NDC violated the Guidebook and Auction Rules by: (a) undermining the fairness, transparency and non-discrimination aspects of the new gTLD applications process; (b) "omitting material information from and failing to correct material misleading information in its .WEB application"; (c) "assigning [NDC's] rights and obligations in its .WEB application to VeriSign"; and (d) "agreeing to submit bids on VeriSign's behalf at the .WEB Auction."

In addition, NDC and Verisign have made numerous claims throughout the .WEB IRP and since that Afilias violated the Auction Blackout Period, and requested that ICANN disqualify Afilias' .WEB application. In particular, NDC and Verisign claim that Afilias violated the Auction Rules by contacting NDC during the .WEB Auction Blackout Period, which is a period of time before the auction begins when auction participants are prohibited from "cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other's, or any other competing applicants' bids or bidding strategies, or discussing or negotiating settlement agreements or post-Auction ownership transfer arrangements..."

After conducting its initial review, the BAMC has recommended that the Board take the following next steps relating to the .WEB applications and .WEB IRP: (a) ask the BAMC to review, consider and evaluate the claims relating to the DAA between NDC and Verisign relating to .WEB, and the claims relating to Afilias' conduct during the Auction Blackout Period; (b) ask the BAMC to provide the Board with its findings and recommendations as to whether the alleged actions of NDC and/or Afilias warrant disqualification or other consequences, if any, related to any relevant .WEB application; and (c) direct ICANN to continue refraining from contracting for or delegation of .WEB until the Board has made its determination regarding the .WEB application(s).<sup>3</sup>

In light of the Panel's determination in the Final Declaration that ICANN violated its Articles of Incorporation (Articles) and Bylaws by not previously deciding whether the DAA between NDC

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<sup>3</sup> Board Resolutions 2022.01.16.12 – 2022.01.16.15, <https://www.icann.org/resources/board-material/resolutions-2022-01-16-en#2.b>

and Verisign relating to .WEB violated the Guidebook and/or Auction Rules and moving forward toward contracting with NDC in June 2018 without first having made that decision,<sup>4</sup> it seems appropriate and prudent for ICANN to undertake an analysis of the allegations regarding the DAA as well as the allegations regarding the Auction Blackout Period in order to determine if any consequences are warranted with respect to any of the .WEB applications before moving forward with .WEB.

Per the Board resolution below, the Board would be acknowledging the Panel's recommendation and conveying to the community the next steps ICANN will take in its review of the allegations raised by Afilias with regard to the DAA, and raised by NDC and Verisign with regard to the Auction Blackout Period. This also provides an opportunity for ICANN organization and the BAMC to further analyze the allegations and actions, and provide the Board with its findings and recommendations before the organization takes any further action toward the processing of the .WEB application(s).

**BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC) RECOMMENDATION:**

The BAMC recommends that the Board take the following next steps relating to the .WEB applications: (a) ask the BAMC to review, consider and evaluate the claims relating to the Domain Acquisition Agreement (DAA) between Nu Dotco LLC (NDC) and Verisign, Inc. and the claims relating to Afilias' conduct during the Auction Blackout Period; (b) ask the BAMC to provide the Board with its findings and recommendations as to whether the alleged actions of NDC and/or Afilias warrant disqualification or other consequences, if any, related to any relevant .WEB application; and (c) direct ICANN to continue refraining from contracting for or delegation of .WEB until ICANN has made its determination regarding the .WEB application(s).

**PROPOSED RESOLUTION:**

Whereas, the Final Declaration in the Afilias Domains No. 3 Ltd. (Afilias)<sup>5</sup> v. ICANN Independent Review Process regarding .WEB (.WEB IRP) was deemed "final" as of 21 December 2021 when the Panel denied Afilias' subsequent challenge.

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<sup>4</sup> Further background information is provided in the Rationale below.

<sup>5</sup> Afilias Domains No. 3 Ltd. is now known as Altanovo Domains Limited. For consistency and ease of reference, we will continue to use "Afilias" to refer to the Claimant in this IRP.

Whereas, on 16 January 2022, the Board considered the Final Declaration and, in part, resolved that further consideration is needed regarding the IRP Panel's non-binding recommendation that ICANN "stay any and all action or decision that would further the delegation of the .WEB gTLD until such time as the [ICANN] Board has considered the opinion of the Panel in this Final Decision, and, in particular (a) considered and pronounced upon the question of whether the DAA complied with the New gTLD Program Rules following [Afilias'] complaints that it violated the Guidebook and Auction Rules and, as the case may be, (b) determined whether by reason of any violation of the Guidebook and Auction Rules, NDC's application for .WEB should be rejected and its bids at the auction disqualified."

Whereas, pursuant to its 16 January 2022 resolution, the Board asked the Board Accountability Mechanisms Committee (BAMC) to review, consider, and evaluate the IRP Panel's Final Declaration and recommendation, and to provide the Board with its findings to consider and act upon before the organization takes any further action toward contracting for or delegation of .WEB.

Whereas, the BAMC has reviewed, considered, and evaluated the IRP Panel's Final Declaration and recommendation, as well as other relevant material, and as a result the BAMC has recommended that the Board take the following next steps relating to .WEB: (a) ask the BAMC to review, consider and evaluate the claims relating to the Domain Acquisition Agreement (DAA) between Nu Dotco LLC (NDC) and Verisign, Inc. and the claims relating to Afilias' conduct during the Auction Blackout Period; (b) ask the BAMC to provide the Board with its findings and recommendations as to whether the alleged actions of NDC and/or Afilias warrant disqualification or other consequences, if any, related to any relevant .WEB application; and (c) direct ICANN to continue refraining from contracting for or delegation of .WEB until ICANN has made its determination regarding the .WEB application(s).

Resolved (2022.03.10.xx), the Board hereby: (a) asks the BAMC to review, consider and evaluate the allegations relating to the Domain Acquisition Agreement (DAA) between NDC and Verisign and the allegations relating to Afilias' conduct during the Auction Blackout Period; (b) asks the BAMC to provide the Board with its findings and recommendations as to whether the alleged actions of NDC and/or Afilias warrant disqualification or other consequences, if any, related to any relevant .WEB application; and (c) directs ICANN organization to continue refraining from contracting for or delegation of the .WEB gTLD until ICANN has made its determination regarding the .WEB application(s).

## PROPOSED RATIONALE:

Seven applicants submitted applications for the right to operate .WEB, including Afiliias Domains No. 3 Ltd. (Afiliias)<sup>6</sup> and Nu Dotco LLC (NDC), and, as the members of the .WEB contention set did not privately resolve contention, the applicants went to an ICANN auction of last resort. An auction was held on 27-28 July 2016, which concluded with NDC prevailing with a bid of US\$135 million. Shortly thereafter, Verisign Inc. (Verisign) publicly disclosed that, pursuant to an agreement it had entered with NDC, Verisign provided the funds for NDC's bid in exchange for, among other things, NDC's future assignment of the .WEB registry agreement to Verisign, subject to ICANN's consent.

Afiliias initiated an Independent Review Process regarding .WEB (.WEB IRP) in November 2018, alleging that NDC had violated the Guidebook and/or Auction Rules as a result of its arrangement with Verisign and that ICANN had violated the Bylaws by failing to disqualify NDC. NDC and Verisign asked to participate as *amici curiae* in the IRP, which the Panel granted. The merits hearing took place on 3-11 August 2020, and the IRP Panel issued its Final Declaration on 20 May 2021, which the Panel later corrected for certain typographical errors, effective 15 July 2021.

In the Final Declaration, the IRP Panel, among other things, specifically denied Afiliias' requests for: (a) a binding declaration that ICANN must disqualify NDC's bid for .WEB for violating the Guidebook and Auction Rules; and (b) an order directing ICANN to proceed with contracting for .WEB with Afiliias. The Panel noted that: "it is for [ICANN], that has the requisite knowledge, expertise, and experience, to pronounce in the first instance on the propriety of the [Domain Acquisition Agreement (DAA)] under the New gTLD Program Rules, and on the question of whether NDC's application should be rejected and its bids at the auction disqualified by reason of its alleged violations of the Guidebook and Auction Rules."

The Panel further declared, among other things, that ICANN had violated its Articles of Incorporation (Articles) and Bylaws by not applying documented policies objectively and fairly in that: (a) ICANN staff did not decide whether the DAA between NDC and Verisign relating to .WEB violated the Guidebook and Auction Rules, and moved forward toward contracting with NDC in June 2018 without first having made that decision; and (b) the ICANN Board did not

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<sup>6</sup> Afiliias Domains No. 3 Ltd. is now known as Altanovo Domains Limited. For consistency and ease of reference, we will continue to use "Afiliias" to refer to the Claimant in this IRP.

prevent staff from moving toward contracting in June 2018 or decide whether the DAA violated the Guidebook and Auction Rules once accountability mechanisms had been resolved.

In addition, the Panel issued a non-binding recommendation that ICANN “stay any and all action or decision that would further the delegation of the .WEB gTLD until such time as the [ICANN] Board has considered the opinion of the Panel in this Final Decision, and, in particular (a) considered and pronounced upon the question of whether the DAA complied with the New gTLD Program Rules following [Afilias’] complaints that it violated the Guidebook and Auction Rules and, as the case may be, (b) determined whether by reason of any violation of the Guidebook and Auction Rules, NDC’s application for .WEB should be rejected and its bids at the auction disqualified.”

Once the Final Declaration became “final,” after resolution of Afilias’ request for “interpretation and correction” (which the Panel determined was a “frivolous” request) on 21 December 2021, the Board considered the Final Declaration at its 16 January 2022 meeting and adopted the following resolutions:

- “[T]he Board acknowledges that the Panel declared the following: (i) Afilias is the prevailing party in the Afilias Domains No. 3 Ltd. v. ICANN Independent Review Process; (ii) ICANN violated its Articles of Incorporation and Bylaws in the manner set forth in the Final Declaration; and (iii) ICANN shall reimburse Afilias the sum of US\$450,000 for its legal costs relating to the Emergency Interim Relief proceedings; and (iv) ICANN shall reimburse Afilias the sum of US\$479,458.27 for its share of the IRP costs.”
- “[T]he Board directs the President and CEO, or his designee(s), to take all steps necessary to reimburse Afilias in the amount of US\$450,000 in legal fees and US\$479,458.27 for its share of the IRP costs in furtherance of the Panel’s Final Declaration.”
- “[F]urther consideration is needed regarding the IRP Panel’s non-binding recommendation that ICANN ‘stay any and all action or decision that would further the delegation of the .WEB gTLD until such time as the [ICANN] Board has considered the opinion of the Panel in this Final Decision, and, in particular (a) considered and pronounced upon the question of whether the DAA complied with the New gTLD Program Rules following [Afilias’] complaints that it violated the Guidebook and Auction

Rules and, as the case may be, (b) determined whether by reason of any violation of the Guidebook and Auction Rules, NDC's application for .WEB should be rejected and its bids at the auction disqualified.”

- “[T]he Board asks the Board Accountability Mechanisms Committee (BAMC) to review, consider, and evaluate the IRP Panel's Final Declaration and recommendation, and to provide the Board with its findings to consider and act upon before the organization takes any further action toward the processing of the .WEB application(s).”

In accordance with the Board's resolution, the BAMC reviewed and considered the IRP Panel's Final Declaration and recommendation, as well as correspondence to the ICANN Board from NDC and Verisign and from Altanovo Domains Limited (formerly Afilias) submitted since the Final Declaration was issued and other relevant materials. The Board also reviewed and considered these materials including further correspondence from Altanovo and from NDC and Verisign, as identified in the accompanying Reference Materials.

In the course of the .WEB IRP and through additional correspondence, Afilias has made numerous allegations regarding the DAA between NDC and Verisign, and requested that ICANN disqualify NDC's .WEB application, reject its winning bid, and then recognize Afilias as the winning bidder (which had the second highest bid in the auction). In addition, NDC and Verisign have made numerous allegations through the .WEB IRP and additional correspondence that Afilias violated the Auction Blackout Period, and requested that ICANN therefore disqualify Afilias' .WEB application.

After reviewing the various allegations, IRP materials, and correspondence, the BAMC recommended that the Board take the following next steps relating to the .WEB applications: (a) ask the BAMC to review, consider and evaluate the claims relating to the DAA between NDC and Verisign and the claims relating to Afilias' conduct during the Auction Blackout Period; (b) ask the BAMC to provide the Board with its findings and recommendations as to whether the alleged actions of NDC and/or Afilias warrant disqualification or other consequences, if any, related to any relevant .WEB application; and (c) direct ICANN to continue refraining from contracting for or delegation of .WEB until ICANN has made its determination regarding the .WEB application(s).

The Board agrees with the BAMC's recommendation and notes that, in light of certain of the Panel's determinations, it is appropriate and prudent for ICANN to undertake an analysis of the allegations regarding the DAA as well as the allegations regarding the Auction Blackout Period in order to determine if any consequences are warranted with respect to any of the .WEB applications before moving forward with processing NDC's .WEB application, as the prevailing bidder at the auction.

The Board recognizes the importance of this decision and wants to make clear that it takes the results of all ICANN accountability mechanisms very seriously, which is why the BAMC and the Board are carefully considering and formulating the various next steps with regard to the .WEB applications. It is important that ICANN take sufficient time to consider all factors before taking any further action regarding .WEB.

This action is within ICANN's Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures. This accountability includes having a process in place by which a person or entity materially and adversely affected by a Board or organization action or inaction may challenge that action or inaction.

Taking this decision is not expected to have a direct financial impact on ICANN. Further review and analysis of the allegations regarding NDC's and Afiliias' actions will not have any direct impact on the security, stability or resiliency of the domain name system.

This is an Organizational Administrative function that does not require public comment.

Submitted By: Amy A. Stathos, Deputy General Counsel  
Date Noted: 1 March 2022  
Email: amy.stathos@icann.org

Privileged and Confidential

## REFERENCE MATERIALS – ICANN BOARD SUBMISSION NO. 2022.03.10.2c

**TITLE:           Consideration of the Afilias Domains No. 3 Ltd. v. ICANN (.WEB) Independent Review Process Final Declaration**

**Attachments:**

The following attachments are relevant to the Board’s further consideration of the IRP Panel’s Final Declaration in the Afilias Domains No. 3 Ltd. v. ICANN Independent Review Process regarding .WEB (.WEB IRP):

- Attachment A is the operative Final Declaration in the .WEB IRP – initially issued on 20 May 2021, corrected version issued by the IRP Panel on 15 July 2021, deemed “final” on 21 December 2021 when the Panel denied Afilias’ subsequent challenge.
- Attachment B is the Panel’s ruling on 21 December 2021 denying Afilias’ request for “interpretation and correction” of the Final Declaration.

**Other Relevant Materials:**

The documents, briefs, background facts, arguments, supporting declarations, and Panel rulings submitted during the course of the .WEB IRP are available at:

<https://www.icann.org/resources/pages/irp-afili-as-v-icann-2018-11-30-en>.

Board Resolution and Rationale regarding the .WEB IRP Final Declaration, dated 16 January 2022, is available at: <https://www.icann.org/resources/board-material/resolutions-2022-01-16-en#2.b>.

Nu Dotco LLC (NDC) and Verisign, Inc.’s (Verisign) 23 July 2021 letter to the ICANN Board is attached here as Attachment C.

Altanovo Domains Limited’s (formerly Afilias Domains No. 3 Ltd.) 3 November 2021 letter to the ICANN Board is attached here as Attachment D.

Altanovo Domains Limited’s (formerly Afilias Domains No. 3 Ltd.) 11 February 2022 letter (corrected on 13 February 2022) to the ICANN Board is attached here as Attachment E.

Altanovo Domains Limited’s (formerly Afilias Domains No. 3 Ltd.) 18 February 2022 letter to the ICANN Board is attached here as Attachment F.

Altanovo Domains Limited’s (formerly Afilias Domains No. 3 Ltd.) 23 February 2022 letter to ICANN’s outside counsel is attached here as Attachment G.

NDC and Verisign's 23 February 2022 letter to ICANN's outside counsel is attached here as Attachment H.

Submitted By: Amy A. Stathos, Deputy General Counsel  
Date Noted: 1 March 2022  
Email: amy.stathos@icann.org

## Attachment A to Board Reference Materials

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS  
BEFORE THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

**ICDR Case No. 01-18-0004-2702**

**AFILIAS DOMAINS NO. 3 LIMITED,**  
*Claimant*

**v.**

**INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,**  
*Respondent*

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**FINAL DECISION**

**Corrected version dated 15 July 2021**

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20 May 2021

Members of the IRP Panel

Catherine Kessedjian  
Richard Chernick  
Pierre Bienvenu Ad. E., Chair

Administrative Secretary to the IRP Panel

Virginie Blanchette-Séguin

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## GLOSSARY OF DEFINED TERMS

Afilias	Claimant Afilias Domains No. 3 Limited.
Afilias' First DIDP Request	Documentary Information Disclosure Policy request submitted by Afilias to ICANN on 23 February 2018.
Afilias' Response to the <i>Amici's</i> Brief	Afilias' Response to the <i>Amici Curiae</i> Briefs dated 24 July 2020.
Amended Request for IRP	Afilias's Amended Request for Independent Review dated 21 March 2019.
<i>Amici</i>	Collectively, Verisign, Inc. and Nu DotCo, LLC.
<i>Amici's</i> PHB	Verisign, Inc. and Nu DotCo, LLC's post-hearing brief dated 12 October 2020.
Articles	<i>Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers</i> , as approved by the Board on 9 August 2016, and filed on 3 October 2016, Ex. C-2.
Auction Rules	Power Auctions LLC's Auction Rules for New gTLDs: Indirect Contentions Edition, Ex. C-4.
Board	ICANN's board of directors.
Blackout Period	Period associated with an ICANN auction extending from the deposit deadline until full payment has been received from the prevailing bidder, and during which discussions among members of a contention set are prohibited.
Bylaws	Bylaws for Internet Corporation for Assigned Names and Numbers, as amended 18 June 2018, Ex. C-1.
CCWG	The Cross-Community Working Group for Accountability created by ICANN's supporting organizations and advisory committees to review and advise on ICANN's accountability mechanisms.
CEP	ICANN's Cooperative Engagement Process, as described in Article 4, Section 4.3(e) of the Bylaws, intended to help parties to a potential IRP resolve or narrow the issues that might need to be addressed in the IRP.

CEP Rules	Rules applicable to a Cooperative Engagement Process described in an ICANN document dated 11 April 2013, Ex. C-121.
Claimant	Afilias Domains No. 3 Limited.
Claimant’s PHB	Afilias’ post-hearing brief dated 12 October 2020.
Claimant’s Reply	Afilias’ Reply Memorial in Support of Amended Request by Afilias Domains No. 3 Limited for Independent Review dated 4 May 2020.
Claimant’s Reply Submission on Costs	Afilias’ reply dated 23 October 2020 to the Respondent’s submissions on costs.
Covered Actions	As defined at Section 4.3(b)(ii) of the Bylaws : “any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute”.
DAA, or Domain Acquisition Agreement	Domain Acquisition Agreement between Verisign, Inc. and Nu DotCo, LLC dated 25 August 2015, Ex. C-69.
Decision on Phase I	Panel’s decision on Phase I dated 12 February 2020.
DIDP	ICANN’s Documentary Information Disclosure Policy.
DNS	Domain Name System.
DOJ	United States Department of Justice.
Donuts	Donuts, Inc., the parent company of .WEB applicant Ruby Glen, LLC.
Donuts CEP	Cooperative Engagement Process invoked by Donuts on 2 August 2016 in regard to .WEB.
First Procedural Order	Panel’s first procedural order for Phase II, dated 5 March 2020.
gTLD	Generic top-level domain.
Guidebook	ICANN’s New gTLD Applicant Guidebook, Ex. C-3.
ICANN, or Respondent	Respondent Internet Corporation for Assigned Names and Numbers.
ICANN’s Response to the <i>Amici’s</i> Briefs	ICANN’s response dated 24 July 2020 to the <i>amici curiae</i> briefs.

ICDR	International Centre for Dispute Resolution.
ICDR Rules	International Arbitration Rules of the ICDR.
Interim Procedures	Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers' Independent Review Process, Ex. C-59.
IOT	Independent Review Process Implementation Oversight Team.
IRP	Independent Review Process provided for under ICANN's Bylaws.
Joint Chronology	Chronology of relevant facts dated 23 October 2020, agreed to by the Parties and the <i>Amici</i> pursuant to the Panel's communication dated 16 October 2020.
NDC	<i>Amicus Curiae</i> Nu DotCo, LLC.
NDC's Brief	Nu DotCo, LLC's <i>amicus curiae</i> brief dated 26 June 2020.
New gTLD Program Rules	Collectively, ICANN's New gTLD Applicant Guidebook, Ex. C-3, and the Power Auctions LLC's Auction Rules for New gTLDs: Indirect Contentions Edition, Ex. C-4.
November 2016 Workshop	Workshop held by the Board on 3 November 2016 during which a briefing was presented by in-house counsel regarding the .WEB contention set.
Ombudsman	ICANN's Ombudsman.
Panel	The Panel appointed to resolve Claimant's IRP in the present case.
Phase I	First phase of this Independent Review Process which concluded with the Panel's Decision on Phase I dated 12 February 2020.
Procedural Order No. 2	Panel's second procedural order for Phase II dated 27 March 2020.
Procedural Order No. 3	Panel's third procedural order for Phase II dated 27 March 2020.
Procedural Order No. 4	Panel's fourth procedural order for Phase II dated 12 June 2020.
Procedural Order No. 5	Panel's fifth procedural order for Phase II dated 14 July 2020.
Procedural Order No. 6	Panel's sixth procedural order for Phase II dated 27 July 2020.

Procedural Timetable	Procedural timetable for Phase II attached to the First Procedural Order dated 5 March 2020.
Questionnaire	Questionnaire issued by ICANN on 16 September 2016.
Radix	Radix FZC.
Reconsideration Request 18-7	Reconsideration request submitted by Afilias challenging ICANN's response to its First Documentary Information Disclosure Policy Request.
Reconsideration Request 18-8	Reconsideration request submitted by Afilias challenging ICANN's response to its Second Documentary Information Disclosure Policy Request.
Request for Emergency Interim Relief	Afilias' Request for Emergency Panelist and Interim Measures of Protection, dated 27 November 2018.
Respondent, or ICANN	Respondent Internet Corporation for Assigned Names and Numbers.
Respondent's Answer	ICANN's Answer to the Amended Request for IRP dated 31 March 2019.
Respondent's PHB	ICANN's post-hearing brief dated 12 October 2020.
Respondent's Rejoinder	ICANN's Rejoinder Memorial in Response to Amended Request by Afilias Domains No. 3 Limited for Independent Review dated 1 June 2020.
Respondent's Response Submission on Costs	ICANN's response dated 23 October 2020 to the Claimant's submissions on costs.
Revised Procedural Timetable	Revised procedural timetable for Phase II attached to the Procedural Order No. 3 dated 13 March 2020.
Ruby Glen	Ruby Glen, LLC.
Ruby Glen Litigation	Ruby Glen, LLC's complaint against ICANN filed in the US District Court of the Central District of California and application seeking to halt the .WEB auction.
Rule 7 Claim	Afilias' claim that ICANN violated its Bylaws in adopting the <i>amicus curiae</i> provisions set out in Rule 7 of the Interim Procedures.

Second DIDP Request	Documentary Information Disclosure Policy request submitted by Afilias to ICANN on 23 April 2018.
Staff	ICANN's Staff.
Supplemental Submission	Afilias' supplemental submission dated 29 April 2020 adding an additional argument in favour of a broader document production by ICANN.
Verisign	<i>Amicus Curiae</i> Verisign, Inc.
Verisign's Brief	Verisign, Inc.'s <i>amicus curiae</i> brief dated 26 June 2020.
10 June Application	Afilias' application dated 10 June 2020 regarding the status of the evidence originating from the <i>Amici</i> which had been filed with the Respondent's Rejoinder.
29 April 2020 Application	Afilias' application seeking assistance from the Panel regarding ICANN's document production and privilege log.

## I. INTRODUCTION

### A. Overview

1. The Claimant is one of seven (7) entities that submitted an application to the Respondent for the right to operate the registry of the .WEB generic Top-Level Domain (**gTLD**), pursuant to the rules and procedures set out in the Respondent's New gTLD Applicant Guidebook (**Guidebook**) and the Auction Rules for New gTLDs (**Auction Rules**) (collectively, **New gTLD Program Rules**).
2. gTLDs are one category of top-level domains used in the domain name system (**DNS**) of the Internet, to the right of the final dot, such as ".COM" or ".ORG". Under the Guidebook and Auction Rules, in the event of multiple applicants for the same gTLD, the applicants are placed in a "contention set" for resolution privately or, if this first option fails, through an auction administered by the Respondent.
3. On 27 and 28 July 2016, the Respondent conducted an auction among the seven (7) applicants for the .WEB gTLD. Nu DotCo, LLC (**NDC**) won the auction while the Claimant was the second-highest bidder. Shortly after the .WEB auction, it was revealed that NDC and Verisign, Inc. (**Verisign**) had entered into an agreement (**Domain Acquisition Agreement** or **DAA**) under which Verisign undertook to provide funds for NDC's bid for the .WEB gTLD, while NDC undertook, if its application proved to be successful, to transfer and assign its registry operating rights in respect of .WEB to Verisign upon receipt from the Respondent of its actual or deemed consent to this assignment.<sup>1</sup>
4. The Claimant initiated the present Independent Review Process (**IRP**) on 14 November 2018, seeking, among others, binding declarations that the Respondent must disqualify NDC's bid for .WEB and, in exchange for a bid price to be specified by the Panel, proceed with contracting the registry agreement for .WEB with the Claimant.
5. At the outset of these proceedings, on 30 August 2019, the Parties agreed that there should

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<sup>1</sup> Domain Acquisition Agreement entered into by NDC and Verisign on 25 August 2015, Ex. C-218, as amended and supplemented by the "Confirmation of Understanding" executed by these same parties on 26 July 2016, Ex. H to Mr. Livesay's witness statement. See below, paras. 39, 84 and 101.

be a bifurcated Phase I in this IRP to address two questions. The first was the Claimant's claim that the Respondent violated its *Bylaws for Internet Corporation for Assigned Names and Numbers*, as amended on 18 June 2018 (**Bylaws**), in adopting the *amicus curiae* provisions set out in Rule 7 of the *Interim Procedures for Internet Corporation for Assigned Names and Numbers' Independent Review Process*, adopted by the Respondent's board of directors (**Board**) on 25 October 2018 (**Interim Procedures**), and that Verisign and NDC should be prohibited from participating in the IRP on that basis. This question has been referred to in these proceedings as the Claimant's **Rule 7 Claim**. The second question to be addressed in Phase I was the extent to which, in the event the Rule 7 Claim failed, NDC and Verisign should be permitted to participate in the IRP as *amici*.

6. In its Decision on Phase I dated 12 February 2020 (**Decision on Phase I**), which concluded the first phase of the IRP, this IRP Panel (**Panel**) unanimously decided to grant the requests respectively submitted by Verisign and NDC (collectively, the *Amici*) to participate as *amici curiae* in the present IRP, on the terms and subject to the conditions set out in that decision. On the basis of the Claimant's alternative request for relief in Phase I,<sup>2</sup> the Panel decided to join to the Claimant's other claims in Phase II those aspects of Afiliias' Rule 7 Claim over which the Panel determined that it had jurisdiction<sup>3</sup> – to the extent the Claimant were to choose to maintain them.
7. On 4 March 2020, the Panel held a case management conference in relation to Phase II of the IRP. On that occasion, the Claimant informed the Panel that it intended to maintain its Rule 7 Claim in order to illustrate what it described as the “unseemly relationship between the regulator and the monopolist”<sup>4</sup> (*i.e.*, in this case, respectively, the Respondent and Verisign). For reasons set out later in this Final Decision, the Panel has determined that the outstanding aspects of the Rule 7 Claim that were joined to the Claimant's other claims in Phase II have become moot by the participation of the *Amici* in this IRP in accordance with the Panel's Decision on Phase I. Accordingly, the Panel has concluded that no useful

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<sup>2</sup> See Decision on Phase I, para. 183.

<sup>3</sup> In its decision on Phase I, the Panel found that it has jurisdiction over any actions or failures to act alleged to violate the Articles or Bylaws: (a) committed by the Board; or (b) committed by Staff members of ICANN, but not over actions or failures to act committed by the IRP Implementation Oversight Team as such. See Decision on Phase I, para. 133.

<sup>4</sup> Transcript of the preparatory conference of 4 March 2020, p. 11.

purpose would be served by the Rule 7 Claim being addressed beyond the findings and observations contained in the Panel's Decision of Phase I, which the Respondent's Board has no doubt reviewed and can act upon, as deemed appropriate. In this Final Decision, the Panel disposes of the Claimant's other substantive claims in this IRP, as well as its cost claims in connection with the IRP, including in relation to Phase I.

8. After careful consideration of the facts, the applicable law and the submissions made by the Parties and the *Amici*, the Panel finds that the Respondent has violated its *Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers*, as approved by the Board on 9 August 2016, and filed on 3 October 2016 (**Articles**) and its Bylaws by (a) its staff (**Staff**) failing to pronounce on the question of whether the Domain Acquisition Agreement complied with the New gTLD Program Rules following the Claimant's complaints that it violated the Guidebook and Auction Rules, and, while these complaints remained unaddressed, by nevertheless moving to delegate .WEB to NDC in June 2018, upon the .WEB contention set being taken "off hold"; and (b) its Board, having deferred consideration of the Claimant's complaints about the propriety of the DAA while accountability mechanisms in connection with .WEB remained pending, nevertheless (i) failing to prevent the Staff, in June 2018, from moving to delegate .WEB to NDC, and (ii) failing itself to pronounce on these complaints while taking the position in this IRP, an accountability mechanism in which these complaints were squarely raised, that the Panel should not pronounce on them out of respect for, and in order to give priority to the Board's expertise and the discretion afforded to it in the management of the New gTLD Program. In the opinion of the Panel, the Respondent in so doing violated its commitment to make decisions by applying documented policies objectively and fairly. The Panel also finds that in preparing and issuing its questionnaire of 16 September 2016 (**Questionnaire**), and in failing to communicate to the Claimant the decision made by the Board on 3 November 2016, the Respondent has violated its commitment to operate in an open and transparent manner and consistent with procedures to ensure fairness.
9. The Panel is also of the view that it is for the Respondent, that has the requisite knowledge, expertise, and experience, to pronounce in the first instance on the propriety of the DAA under the New gTLD Program Rules, and on the question of whether NDC's application

should be rejected and its bids at the auction disqualified by reason of its alleged violations of the Guidebook and Auction Rules. The Panel therefore denies the Claimant's requests for (a) a binding declaration that the Respondent must disqualify NDC's bid for .WEB for violating the Guidebook and Auction Rules, and (b) an order directing the Respondent to proceed with contracting the Registry Agreement for .WEB with the Claimant, in exchange for a price to be specified by the Panel and paid by the Claimant.

## **B. The Parties**

10. The Claimant in the IRP is Afilias Domains No. 3 Limited (**Afilias** or **Claimant**), a legal entity organised under the laws of the Republic of Ireland with its principal place of business in Dublin, Ireland. Afilias provides technical and management support to registry operators and operates several generic gTLD registries.
11. The Claimant's parent company, Afilias, Inc., was, until 29 December 2020, a United States corporation that was the world's second-largest Internet domain name registry. As noted below in paragraphs 244 to 249, in post-hearing submissions made in December 2020, the Panel was informed that pursuant to a Merger Agreement signed on 19 November 2020 between Afilias, Inc. and Donuts, Inc. (**Donuts**), these two (2) companies have merged as of 29 December 2020. The Claimant has explained, however, that this transaction does not include the transfer of the Claimant's .WEB application, as both the Claimant as an entity and its .WEB application have been carved out of the transaction.
12. The Claimant is represented in the IRP by Mr. Arif Hyder Ali, Mr. Alexandre de Gramont, Ms. Rose Marie Wong, Mr. David Attanasio, Mr. Michael A. Losco and Ms. Tamar Sarjveladze of Dechert LLP, and by Mr. Ethan Litwin of Constantine Cannon LLP.
13. The Respondent is the Internet Corporation for Assigned Names and Numbers (**ICANN** or **Respondent**), a not-for-profit corporation organised under the laws of the State of California, United States. ICANN oversees the technical coordination of the Internet's DNS on behalf of the Internet community. The essential function of the DNS is to convert

domain names that are easily remembered by humans – such as “icann.org” – into numeric IP addresses understood by computers.

14. ICANN’s core mission, as described in its Bylaws, is to ensure the stable and secure operation of the Internet’s unique identifier system. To that end, ICANN contracts with, among others, entities that operate gTLDs. The Bylaws provide that in performing its mission, ICANN will act in a manner that complies with and reflects ICANN’s commitments and respects ICANN’s core values, as described in the Bylaws.
15. ICANN is represented in the IRP by Mr. Jeffrey A. LeVee, Mr. Steven L. Smith, Mr. David L. Wallach, Mr. Eric P. Enson and Ms. Kelly M. Ozurovich, of Jones Day LLP.

### **C. The IRP Panel**

16. On 26 November 2018, the Claimant nominated Professor Catherine Kessedjian as a panelist for the IRP. On 13 December 2018, the International Centre for Dispute Resolution (**ICDR**) appointed Prof. Kessedjian on the IRP Panel and her appointment was reaffirmed by the ICDR on 4 January 2019.
17. On 18 January 2019, the Respondent nominated Mr. Richard Chernick as a panelist for the IRP and he was appointed to that position by the ICDR on 19 February 2019.
18. On 17 July 2019, the Parties nominated Mr. Pierre Bienvenu, Ad. E., to serve as the IRP Panel Chair. Mr. Bienvenu accepted the nomination on 23 July 2019 and he was appointed by the ICDR on 9 August 2019.
19. In September 2019, with the consent of the Parties, Ms. Virginie Blanchette-Séguin was appointed as Administrative Secretary to the IRP Panel.

### **D. The Amici**

20. Verisign is a publicly traded company organised under the laws of the State of Delaware. Verisign is a global provider of domain name registry services and Internet infrastructure that operates, among others, the registries for the .COM, .NET and .NAME gTLDs. Verisign is represented in this IRP by Mr. Ronald L. Johnston, Mr. James S. Blackburn,

Ms. Maria Chedid, Mr. Oscar Ramallo and Mr. John Muse-Fisher, of Arnold & Porter Kaye Scholer LLP.

21. NDC is a limited liability company organised under the laws of the State of Delaware. NDC was established as a special purpose vehicle to participate in ICANN's New gTLD Program. NDC was initially represented in this IRP by Mr. Charles Elder and Mr. Steven Marenberg, of Irell & Manella LLP, and from 1 March 2020 onward by Mr. Steven Marenberg, Mr. Josh B. Gordon and Ms. April Hua, of Paul Hastings LLP.

**E. Place (Legal Seat) of the IRP**

22. The Claimant has proposed that the seat of the IRP be London, England, without prejudice to the location of where hearings are held. In its letter dated 30 August 2019, the Respondent has confirmed its agreement with this proposal.

**F. Language of the Proceedings**

23. In accordance with Section 4.3(I) of the Bylaws, the language of the proceedings of this IRP is English.

**G. Jurisdiction of the Panel**

24. The Claimant's Request for IRP is submitted pursuant to Article 4, Section 4.3 of the Bylaws, the International Arbitration Rules of the ICDR (**ICDR Rules**), and the Interim Procedures. Section 4.3 of the Bylaws provides for an independent review process to hear and resolve, among others, claims that actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers or Staff members constituted an action or inaction that violated the Articles or the Bylaws.
25. In its Decision on Phase I, the Panel concluded, in respect of Afilias' Rule 7 Claim, that it has jurisdiction over any actions or failures to act alleged to violate the Articles or Bylaws:
  - (a) committed by the Board; or
  - (b) committed by Staff members;

but not over actions or failures to act allegedly committed by the IRP Implementation Oversight Team (**IOT**), on the ground that the latter does not fall within the enumeration “Board, individual Directors, Officers or Staff members” in the definition of **Covered Actions** at Section 4.3(b)(ii) of the Bylaws.

26. In relation to Phase II issues, the Parties and *Amici* have characterized a number of issues as “jurisdictional”, such as the scope of the dispute described in the Amended Request for IRP, the timeliness of the claims, the applicable standard of review, and the relief that the Panel is empowered to grant. Those issues are addressed in the relevant sections of this Final Decision. However, and subject to the foregoing, the jurisdiction of the Panel to hear the Claimant’s core claims against the Respondent in relation to .WEB is not contested.

#### **H. Applicable Law**

27. The rules applicable to the present IRP are, in the main, those set out in the Bylaws and the Interim Procedures.
28. Section 1.2(a) of the Bylaws provides that “[i]n performing its Mission, ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law [...]”. The Panel notes that Article III of the Articles is to the same effect as Section 1.2(a) of the Bylaws.
29. At the hearing on Phase I, counsel for the Respondent, in response to a question from the Panel, submitted that in case of ambiguity the Interim Procedures, as well as the Articles and other “quasi-contractual” documents of ICANN, are to be interpreted in accordance with California law, since ICANN is a California not-for-profit corporation. The Claimant did not express disagreement with ICANN’s position in this respect.
30. As noted later in these reasons, the issues of privilege that arose in the document production phase of this IRP were resolved applying California law, as supplemented by US federal law.

## **I. Burden and Standard of Proof**

31. It is a well-known and accepted principle in international arbitration that the party advancing a claim or defence carries the burden of proving its case on that claim or defence.
32. As regards the standard (or degree) of proof to which a party will be held in determining whether it has successfully carried its burden, it is generally accepted in practice in international arbitration that it is normally that of the balance of probabilities, that is, “more likely than not”. That said, it is also generally accepted that allegations of dishonesty or fraud will attract very close scrutiny of the evidence in order to ensure that the standard is met. To quote from a leading textbook, “[t]he more startling the proposition that a party seeks to prove, the more rigorous the arbitral tribunal will be in requiring that proposition to be fully established.”<sup>5</sup>
33. These principles were applied by the Panel in considering the issues in dispute in Phase II of this IRP.

## **J. Rules of Procedure**

34. The ICDR is the IRP Provider responsible for administering IRP proceedings.<sup>6</sup> The Interim Procedures, according to their preamble and the contextual note at footnote 1 thereof, are intended to supplement the ICDR Rules in effect at the time the relevant request for independent review is submitted. In the event of an inconsistency between the Interim Procedures and the ICDR Rules, the Interim Procedures govern.<sup>7</sup>

## **II. HISTORY OF THE PROCEEDINGS**

### **A. Phase I**

35. The history of these proceedings up to 12 February 2020, the date of the Panel’s Decision on Phase I, is set out at paragraphs 33 to 67 of the Panel’s Phase I decision, which are

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<sup>5</sup> See, generally, Nigel Blackaby, Constantine Partasides QC, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration*, 6<sup>th</sup> ed., Oxford, Oxford University Press, 2015, para. 6.87.

<sup>6</sup> See Bylaws, Ex. C-1, Section 4.3 (m).

<sup>7</sup> See Interim Procedures, Ex. C-59, Rule 2.

incorporated by reference in this Final Decision.

36. In order to provide context for the present decision, the Panel recalls that on 18 June 2018, Afiliias invoked ICANN's Cooperative Engagement Process (**CEP**) after learning that ICANN had removed the .WEB gTLD contention set's "on-hold" status. A CEP is intended to help parties to a potential IRP resolve or narrow the issues that might need to be addressed in an IRP. The Parties participated in the CEP process until 13 November 2018.
37. On 14 November 2018, Afiliias filed its request for IRP with the ICDR. On the same day, ICANN informed Afiliias that it would only keep the .WEB gTLD contention set "on-hold" until 27 November 2018, so as to allow Afiliias time to file a request for emergency interim relief, barring which ICANN would take the .WEB gTLD contention set off of its "on hold" status. Afiliias filed a Request for Emergency Panelist and Interim Measures of Protection with the ICDR on 27 November 2018 (**Request for Emergency Interim Relief**), seeking to stay all ICANN actions that would further the delegation of the .WEB gTLD.
38. From November 2018 to March 2019, the Parties focused on the Claimant's Request for Emergency Interim Relief and, pursuant to Requests to Participate as *Amicus* in the IRP filed by the *Amici* on 11 December 2018, on the possible participation of the *Amici* in the proceedings.
39. The Emergency Panelist presided over a focused document production process during which, on 18 December 2018, ICANN produced the Domain Acquisition Agreement entered into between Verisign and NDC in connection with .WEB. The Claimant then took the position that the documents produced to it by the Respondent warranted the amendment of its Request for IRP. Accordingly, on 29 January 2019, the Parties agreed to postpone the deadline for the submission of the Respondent's Answer until after the Claimant filed its Amended Request for IRP. In the event, the Claimant filed its Amended Request for IRP with the ICDR on 21 March 2019 (**Amended Request for IRP**), and the Respondent submitted its Answer to the Amended Request for IRP on 31 May 2019 (**Respondent's Answer**).
40. In January 2019, the Parties asked the Emergency Panelist to postpone further activity

pending resolution of the *Amici*'s requests to participate in the IRP. After the appointment of this Panel to determine the IRP, the Parties expressed their understanding that it would be for this Panel to resolve the Emergency Interim Relief Request. In the meantime, the Respondent agreed that the .WEB gTLD contention set would remain on hold until the conclusion of this IRP.<sup>8</sup>

41. As for the *Amici*'s requests to participate in the IRP, they were first the subject of proceedings before a Procedures Officer appointed by the ICDR on 21 December 2018. In its final Declaration, dated 28 February 2019, the Procedures Officer found that "the issues raised [...] are of such importance to the global Internet community and Claimants [sic] that they should not be decided by a "Procedures Officer", and therefore the issues raised are hereby referred to [...] the IRP Panel for determination".<sup>9</sup> The *Amici*'s requests to participate in the IRP were referred to the Panel and, by agreement of the Parties, were resolved in Phase I of this IRP by the Panel's Decision on Phase I dated 12 February 2020.

## **B. Phase II**

42. On 4 March 2020, the Panel presided over a case management conference to discuss the issues to be decided in Phase II and the Parties' respective proposed procedural timetables for the Phase II proceedings. The Parties differed as to the timing of document production and the briefing schedule for Phase II. The Claimant favoured document production taking place after the filing of Afilias' Reply, ICANN's Rejoinder and the *Amici*'s Briefs, such production to be followed by the simultaneous filing of Responses from the Parties. The Respondent, for its part, proposed a document production stage at the outset of Phase II, to be followed by a briefing schedule for the filing of the Parties' additional submissions and the *Amici*'s Briefs.
43. In its First Procedural Order for Phase II, dated of 5 March 2020 (**First Procedural Order**), the Panel decided that the document production phase in relation to Phase II would take place at the outset of Phase II, as proposed by the Respondent, so as to give the Parties

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<sup>8</sup> See ICANN's Response to Afilias' Costs Submission, dated 23 October 2020, at para. 23.

<sup>9</sup> Declaration of the Procedures Officer dated 28 February 2019, p. 38.

the benefit of the documents produced during this process in their additional submissions in relation to Phase II. With respect to the other elements of the Procedural Timetable, the Panel adopted the Claimant’s proposed briefing sequence, which provided for the filing of the Claimant’s Reply, the Respondent’s Rejoinder, the *Amici*’s Briefs, and an opportunity for the Claimant and the Respondent subsequently to respond simultaneously to the *Amici*’s Briefs. The Panel attached to the First Procedural Order the following procedural timetable for Phase II, reflecting these decisions (**Procedural Timetable**):

No.	Action	Party	Date
1.	Simultaneous requests to produce (via Redfern Schedules)	Afilias and ICANN	6 March 2020
2.	Simultaneous responses/objections (via Redfern Schedules)	Afilias and ICANN	13 March 2020
3.	List of agreed issues to be decided in Phase II and, as the case may be, list(s) of additional issues to be decided in Phase II	Afilias and ICANN	13 March 2020
4.	Simultaneous replies to responses/objections (via Redfern Schedules)	Afilias and ICANN	20 March 2020
5.	Hyperlinked list of constituent elements (as of that date) of the Phase II record	Afilias and ICANN	20 March 2020
6.	Panel ruling on outstanding objections	N/A	27 March 2020
7.	Production of documents	Afilias and ICANN	17 April 2020
8.	Submissions on questions as to which the <i>Amici</i> will be permitted to submit briefings to the Panel, as well as page limits and other modalities	Afilias, ICANN, Verisign and NDC	24 April 2020
9.	Reply (along with all supporting exhibits, witness statements, expert reports and legal authorities)	Afilias	1 May 2020
10.	Rejoinder (along with all supporting exhibits, witness statements, expert reports and legal authorities)	Afilias	29 May 2020
11.	<i>Amici</i> ’s Briefs (along with all supporting exhibits, if any, and legal authorities)	Verisign and NDC	26 June 2020
12.	Simultaneous Responses to the <i>Amici</i> ’s Briefs	Afilias and ICANN	15 July 2020
13.	Parties to identify witnesses called for cross-examination at the hearing	Afilias and ICANN	24 July 2020
14.	Final status and pre-hearing conference	Afilias, ICANN, Verisign and NDC	29 July 2020
15.	Hearing	Afilias, ICANN, Verisign and NDC	3-7 August 2020

No.	Action	Party	Date
16.	Post-hearing submissions	Afilias, ICANN, Verisign and NDC	TBD

44. As reflected in the Procedural Timetable, in its First Procedural Order the Panel also asked the Parties to develop a joint list of issues to be decided in Phase II, and laid out a process for the determination, in consultation with the Parties and as contemplated in the Panel’s Decision on Phase I, of the questions as to which the *Amici* would be permitted to submit briefings to the Panel. The Panel also accepted the Parties’ proposal that the hearing, scheduled on 3-7 August 2020, be held in Chicago, IL.
45. In accordance with the Procedural Timetable, on or about 6 March 2020, the Parties exchanged document production requests in the form of Redfern Schedules. The Claimant addressed twenty-one (21) requests to produce documents to the Respondent, while the Respondent addressed two (2) requests to produce to the Claimant. Responses or objections to those requests were exchanged on or about 13 March 2020. The Claimant objected to both of the Respondent’s requests. The Respondent objected to many, but not all, of the Claimant’s requests, having agreed to search for some categories of documents requested by the Claimant.
46. Also on 6 March 2020, the Claimant sought clarification of the First Procedural Order as regards the question of whether the *Amici* would be permitted, in their briefs, to add new documents to the record as exhibits. The Claimant argued that any documents to be submitted by the *Amici* would inevitably be “cherry picked” and supportive of their submissions. The Claimant thus took the position that if the *Amici* were allowed to refer to documents that are not already in the record, the principles of fundamental fairness and due process required that it be granted an opportunity to request documents from the *Amici*. On 11 March 2020, the Respondent submitted in response that pursuant to the Decision on Phase I, the *Amici* are entitled to submit “briefings and supporting exhibits” and that the provisions of the Interim Procedures relating to the exchange of information do not apply to the *Amici*. On the same date, the *Amici* contended, for their part, that the First Procedural Order clearly states that they may submit exhibits, without specifying that such exhibits are limited to those already in the record. The *Amici* stressed that material evidence may

be in their possession and not in possession of the Parties. They further contended that the Panel had already ruled that they may not propound discovery nor be the recipient of information requests. In its reply dated 12 March 2020, the Claimant reiterated its fairness concerns and stated that the First Procedural Order did not address the question of whether the *Amici*'s exhibits were to be limited to those on record.

47. By email dated 13 March 2020, the Parties informed the Panel that they had attempted – for a second time and still without success – to agree on a joint list of issues to be decided in Phase II. While unable to agree on the joint issues list requested by the Panel, the Parties proposed an agreed procedure for the Panel ultimately to determine the questions on which the *Amici* would be invited to submit briefs. In the event, the Panel accepted the Parties' suggestion in Procedural Order No. 3, and issued a revised procedural timetable reflecting the changes proposed by the Parties (**Revised Procedural Timetable**).
48. In Procedural Order No. 2 dated 27 March 2020 (**Procedural Order No. 2**), the Panel ruled on the outstanding objections to the Parties' respective requests to produce, granting twelve (12) of the Claimant's fourteen (14) outstanding requests and one (1) of the two (2) requests presented by the Respondent. In the same order, the Panel directed each of the Parties to provide to the other a privilege log listing each document over which a privilege is asserted, on the ground that such logs might prove useful to the Parties and the Panel in addressing issues arising from refusals to produce based on privilege.
49. In Procedural Order No. 3, also dated 27 March 2020 (**Procedural Order No. 3**), the Panel ruled on the Claimant's clarification request in regard to the possibility for the *Amici*, as part of their briefs, to add to the evidentiary record of the IRP. It is useful to cite in full the Panel's ruling on that question:

In its Decision on Phase I, the Panel made clear that, under the Interim Procedures, the *Amici* are non-disputing parties whose participation in the IRP is through the submission of "written briefings", possibly supplemented by oral submissions at the merits hearing. The Panel also rejected the notion that, under the Interim Procedures, the *Amici* can enjoy the same participation rights as the disputing parties. It follows that it is for the Parties, who bear the burden of proving their case, to build the evidentiary record of the IRP, and it is based on that record that the *Amici* "may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP Panel may request briefing" (see Rule 7 of the Interim Procedures).

The Panel expects the Parties, in accordance with the Procedural Timetable, to file the entirety of the remainder of their case as part of the second round of submissions contemplated by the timetable, that is to say, with the Claimant's Reply and the Respondent's Rejoinder. As evoked in the Panel's Decision on Phase I (*see* par. 201), if there is evidence in the possession of the *Amici* that the Respondent considers relevant to, and that it wishes to adduce in support of its case, be it witness or documentary evidence, that evidence is required to be filed as part of the Respondent's Rejoinder, and not with the *Amici*'s Briefs.

The Panel did not preclude the possibility in its Phase I Decision (and the Procedural Timetable) that the *Amici* might wish to file documents in support of the submissions to be made in their Briefs. By referring to such documents as "exhibits", however, as other arbitral tribunals have in referring to materials to be filed with the submissions of *amicus* participants, the Panel did not mean to suggest that these "exhibits" (which the Panel would expect to be few in number, and to be directed to supporting the *Amici*'s submissions, not the Respondent's case) would become part of the record and acquire the same status as the documentary evidence filed by the Parties.

Should a Party be of the view that documents submitted in support of the *Amici*'s Briefs are incomplete or somehow misleading, it will be open to that Party to advance the argument in response to the *Amici*'s submissions and to seek whatever relief it considers appropriate from the Panel.<sup>10</sup>

50. As regards the Claimant's request to be granted an opportunity to request documents from the *Amici*, the Panel referred to its Decision on Phase I, in which it was noted that the provisions of the Interim Procedures relating to Exchange of Information (Rule 8) apply to *Parties*, not to persons, groups or entities that are granted permission to participate in an IRP with the status of an *amicus curiae*.<sup>11</sup>
51. On 17 April 2020, the Respondent produced to the Claimant its document production pursuant to the Procedural Order No. 2. On 24 April 2020, the Respondent transmitted to the Claimant a privilege log identifying documents withheld from production based on the attorney-client privilege or the attorney work product doctrine.
52. On 29 April 2020, the Claimant filed an application seeking assistance from the Panel regarding what the Claimant described as the Respondent's "grossly deficient document production and insufficiently detailed Privilege Log" (**29 April 2020 Application**). By way of relief, the Claimant requested in this application that the Panel order the Respondent to "(i) supplement and remedy its production by producing those documents that are subject to the Tribunal's production order or ICANN's production agreement; (ii) produce those

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<sup>10</sup> Procedural Order No. 3, pp. 2-3.

<sup>11</sup> See Decision on Phase I, para. 195.

documents listed on ICANN's Privilege Log that are not privileged; (iii) produce those documents that contain privileged and non-privileged information with appropriate redactions covering only the privileged information; and (iii) (*sic*) for the remaining documents, remedy its Privilege Log so that the Panel and Afilias can properly assess the validity of the privilege that ICANN has invoked."<sup>12</sup> The Claimant also reserved "its right to request the Panel to conduct an in camera review of documents that ICANN has asserted are covered by privilege".<sup>13</sup>

53. As directed by the Panel, the Respondent responded to the 29 April 2020 Application on 6 May 2020, rejecting the Claimant's complaints and asserting that the Respondent had in all respects complied with the Procedural Order No. 2. The Respondent argued that it searched and produced all non-privileged documents responsive to the Claimant's requests to which the Respondent agreed or was directed by the Panel to respond, and that it properly withheld only those documents protected by attorney-client privilege or the work product doctrine. The Respondent added that it served a privilege log providing, in respect of each withheld document, all of the information necessary to establish privilege.
54. On 11 May 2020, the Panel, as suggested by the Claimant, held a telephonic hearing in connection with the 29 April 2020 Application. On that occasion, both Parties had the opportunity to amplify their written submissions orally and to present arguments in reply. Consistent with the Panel's Decision on Phase I, the *Amici* were permitted to attend this procedural hearing as observers, which they did. In the course of its counsel's reply submissions at the hearing, the Claimant articulated a new waiver argument, namely that by arguing that the Board reasonably decided, in November 2016, not to make any determination regarding NDC's conduct until after the conclusion of the IRP, as alleged in the Respondent's Rejoinder, the Respondent had in effect affirmatively put the reasonableness and good faith of that Board's decision at issue in the case.
55. In accordance with the Revised Procedural Timetable (as modified by the Panel's correspondence of 1 May 2020), on 4 May 2020, the Claimant filed its Reply Memorial in

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<sup>12</sup> 29 April 2020 Application, p. 11.

<sup>13</sup> *Ibid*, fn 29.

Support of Amended Request by Afilias Domains No. 3 Limited for Independent Review (**Claimant's Reply**) and, on 1 June 2020, the Respondent filed its Rejoinder Memorial in Response to Amended Request by Afilias Domains No. 3 Limited for Independent Review (**Respondent's Rejoinder**).

56. On 10 June 2020, while the Claimant's 29 April 2020 Application regarding document production remained under advisement, the Claimant filed a supplemental submission to add an additional argument in favour of a broader document production by the Respondent, which echoed the new argument put forward in the course of its counsel's reply at the hearing of 11 May 2020 (**Supplemental Submission**). In that supplemental submission, the Claimant argued that the Respondent had waived potentially applicable privilege with the filing of its Rejoinder Memorial where it allegedly put certain documents for which it claimed privilege "at issue" in this IRP.
57. By emails dated 11 June 2020 (corrected the following day), the Panel established a briefing schedule in relation to the Claimant's Supplemental Submission. In accordance with this schedule, the Respondent set out its position in relation to the Supplemental Submission in a response dated 17 June 2020 and a sur-reply dated 26 June 2020, inviting the Panel to find that the Respondent did not waive privilege and, therefore, that the relief sought by the Supplemental Submission should be denied. As for the Claimant, its position in relation to the Supplemental Submission was amplified in a reply dated 19 June 2020. The relief sought by the Claimant's Supplemental Submission as set out in the Claimant's 19 June 2020 reply is that the Panel order the Respondent to produce all documents that formed the basis of its Board's alleged determination, in November 2016, to defer any decision on the .WEB contention set, as well as all documents reflecting any determination by the Board to continue or terminate such deferral, including all such documents for which the Respondent claimed privilege, on the ground that the Respondent has waived any applicable privilege by putting such documents at issue.
58. The Claimant filed another application on 10 June 2020, this one regarding the status of the evidence originating from the *Amici* which had been filed with the Respondent's Rejoinder with the caveat that "ICANN did so without endorsing those statements or

agreeing with them in full”<sup>14</sup> (**10 June Application**). The Claimant argued that ICANN was not permitted, pursuant to Procedural Order No. 3, to submit materials from the *Amici* unless it considered them relevant and wished to adduce them in support of its case. By way of relief, the Claimant requested that the Respondent be directed to resubmit the evidence filed with its Rejoinder that originated from the *Amici*, with a clear indication of the portions thereof with which the Respondent did not agree or which it did not endorse. Should the Respondent fail to do so, the Claimant invited the Panel to hold that all of the evidence submitted by the Respondent should be taken to have been submitted by and on behalf of the Respondent. On 15 June 2020, the Respondent responded to the 10 June Application, arguing that the submission of evidence on behalf of the *Amici* with the Respondent’s Rejoinder complied with Procedural Order No. 3. The Claimant replied on 17 June 2020, contending that the Panel could not allow Respondent to hide the basis for its actions and non-actions by letting the *Amici* defend it in the abstract and without affirming that it agrees with the *Amici*’s evidence.

59. In Procedural Order No. 4 dated 12 June 2020 (**Procedural Order No. 4**), the Panel denied the Claimant’s 29 April 2020 Application while reserving the question raised in the Supplemental Submission. The Panel decided that the Respondent had no obligation to ask the *Amici* to search for documents responsive to the Claimant’s requests to produce, and consequently rejected the Claimant’s claim that the Respondent ought to have produced responsive documents in the possession of the *Amici*. In that same order, a majority of the Panel concluded, applying California law as supplemented by US federal law, that the description used by the Respondent in its privilege log was sufficient to validly assert privilege and, therefore, that the Claimant had failed to justify its request that the Respondent be required to revise its privilege log. One member of the Panel, however, would have required disclosure of more detailed information from the Respondent in order to support the latter’s claims of privilege. Finally, the Panel rejected the remaining allegations of the Claimant regarding the alleged insufficiency of the Respondent’s production. Specifically, the Panel held that it would violate the attorney-client privilege and work product protection to call upon the Respondent, as requested by the Claimant, to

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<sup>14</sup> Respondent’s Rejoinder, fn 6.

redact privileged communications or work product documents so as to reveal “facts or information” contained in those protected documents.

60. On 26 June 2020, NDC and Verisign respectively filed the *Amicus Curiae* Brief of Nu DotCo, LLC (**NDC’s Brief**) and Verisign, Inc.’s Pre-Hearing Brief (Phase II) (**Verisign’s Brief**). In accordance with the Revised Procedural Timetable, the Claimant and the Respondent both responded to the *Amici*’s briefs on 24 July 2020, respectively in Afilias Domains No. 3 Limited’s Response to the *Amicus Curiae* Briefs (**Afilias’ Response to the Amici’s Briefs**) and ICANN’s Response to the Briefs of *Amicus Curiae* (**ICANN’s Response to the Amici’s Briefs**).
61. On 14 July 2020, the Panel issued its fifth procedural order (**Procedural Order No. 5**). In relation to the 10 June Application, the Panel found that the Respondent had allowed its Rejoinder to serve as a vehicle for the filing of what the Respondent itself described as the “*Amici*’s evidence”, the “*Amici*’s expert reports and witness statements”. In the Panel’s view, the Respondent had thus sought to do indirectly what the Panel had decided in Phase I could not be done directly under the Interim Procedures. By way of relief, the Panel directed the Respondent to clearly identify, in a communication to be addressed to the Claimant and the *Amici* and filed with the Panel, those aspects (if any) of the *Amici*’s facts and expert evidence which the Respondent formally refused to endorse, or with which it disagrees, and to provide an explanation for this non-endorsement or disagreement.<sup>15</sup> The Respondent complied with the Panel’s direction by letters dated 17-18 July 2020.
62. The Panel considers it useful to cite the reasons supporting this ruling as they laid the foundations to the Panel’s approach to the issues in dispute in this IRP:

17. The Respondent has filed a Rejoinder seeking to draw a distinction between the Respondent’s evidence, filed without reservation in support of the Respondent’s primary case, and the “*Amici*’s evidence”, which the Respondent states it is filing “on behalf of the *Amici*” “to help ensure that the factual record in this IRP is complete”. However, the Respondent files this *Amici* evidence with the caveat that it is neither endorsing it, nor agreeing with it in full, as set out in the above quoted footnote 6 of the Rejoinder.

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<sup>15</sup> Procedural Order No. 5, para. 24.

18. In the Panel's view, the Respondent is thus seeking to do indirectly what the Panel decided in Phase I could not be done directly under the terms of the Interim Procedures. Instead of the *Amici* filing their own evidence with their Briefs, the Respondent has allowed the Rejoinder to serve as a vehicle for the filing of the "*Amici's* evidence", the "*Amici* expert reports and witness statements". This is indeed how the Respondent describes that evidence in its 15 June 2020 correspondence. The fact that the Rejoinder serves as a vehicle for the filing of what is, in effect, the *Amici's* evidence is consistent with the Respondent's proposal, in its submissions of 22 June 2020 relating to the modalities of the merits hearing (discussed below), that "the *Amici* be permitted to [...] introduced and conduct redirect examination of their own witnesses" (Respondent's letter of 22 June 2020, p. 2, para. 3 [emphasis added in PO5]).

19. The Respondent explains, in its 15 June response, that the purpose of the so-called "*Amici* evidence" is to address the Claimant's challenge of the *Amici's* conduct. The Respondent goes on to explain [emphasis added in PO5]:

Given that ICANN has not fully evaluated the competing contentions of Afilias and the *Amici*, for reasons ICANN explains at length in its Rejoinder, ICANN is not in a position to identify the portions of the *Amici* witness statements with which it "agrees or disagrees." But ICANN views it as essential that this evidence be of record, and that the Panel consider it, if the Panel decides to address the competing positions of Afilias and Amici regarding the latter's conduct.

20. The Panel understands the resulting procedural posture to be as follows. The Respondent has adduced evidence in support of its primary case that the ICANN Board, in the exercise of its fiduciary duties, made a decision that is both consistent with ICANN's Articles and Bylaws and within the realm of reasonable business judgment when, in November 2016, it decided not to address the issues surrounding .WEB while an Accountability Mechanism regarding .WEB was pending. That, according to the Respondent, should define the proper scope of the present IRP.

21. However, recognizing that the Claimant's case against the Respondent includes allegations concerning the *Amici's* conduct (specifically, NDC's alleged non-compliance with the Guidebook and Auction Rules), the Respondent files the "*Amici* evidence" on the ground that the record should include not only Afilias' allegations against Verisign and NDC, "but also Verisign's and NDC's responses." The difficulty is that this evidence is propounded not as the Respondent's defense to Afilias' claims against it, but rather (on the ground that the Respondent has not fully evaluated the competing contentions of Afilias and the *Amici*) as the *Amici's* response to Afilias' allegations that NDC violated the Guidebook and Auction Rules.

22. The Panel recalls that this IRP is an ICANN Accountability Mechanism, the parties to which are the Claimant and the Respondent. As such, it is not the proper forum for the resolution of potential disputes between Afilias and two non-parties that are participating in these proceedings as *amici curiae*. While it is open to the Respondent to choose how to respond to the Claimant's allegations concerning NDC's conduct, and to evaluate the consequences of its choice in this IRP, the Panel is of the view that the Respondent may not at the same time as it elects not to provide a direct response, adduce responsive evidence on that issue on behalf of the *Amici* and, in relation to that evidence, reserve its position as to which portions thereof the Respondent endorses or agrees with. In the opinion of the Panel, this leaves the Claimant uncertain as to the case it has to meet, which the Panel considers unfair, and it has the potential to disrupt the proceedings if the Respondent were later to take a position, for example in its post-hearing brief, which the Claimant would not have had the opportunity to address prior to, or at the merits hearing.

23. The Panel has taken due note of the Respondent's evidence and associated contentions concerning its Board's decision of November 2016. Nevertheless, the Guidebook and Auction Rules originate from ICANN. That being so, in this ICANN Accountability Mechanism in which the Respondent's conduct in relation to the application of the Guidebook and Auction Rules is being impugned, the Respondent should be able to say whether or not the position being defended by the *Amici* in relation to these ICANN instruments is one that ICANN is prepared to endorse and, if not, to state the reasons why.

63. In Procedural Order No. 5, the Panel also ruled on the Claimant's Supplemental Submission by rejecting the Claimant's contention that the Respondent's Rejoinder had itself put in issue in the IRP documents over which the Respondent had claimed privilege, and that the Respondent had thus waived attorney-client privilege. Having quoted the leading case on implied waiver of attorney-client privilege under California law,<sup>16</sup> the Panel wrote:

37. In the Panel's opinion, the Supreme Court's reasoning directly applies, and defeats the Claimant's claim of implied waiver. While the Respondent has disclosed the fact that its Board received legal advice before deciding to defer acting upon Afilias' complaints, the Respondent did not disclose the content of counsel's advice. Nor is the Respondent asserting that the Board's decision was consistent with counsel's advice, or that the Board's decision was reasonable because it followed counsel's advice. Disclosure of the *fact* that the Board solicited and received legal advice does not entail waiver of privilege as to the *content* of that advice. If that were so, the Respondent's compliance with the Panel's directions concerning the contents of the privilege log to be filed in support of its claims of privilege would, in of itself, waive the privilege that the privilege log serves to protect.

[emphasis in the original]

64. On 26 July 2020, the *Amici* filed a request for "urgent clarification from the Panel regarding the status of the evidence from *Amici* that ICANN has not endorsed in response to Procedural Order No. 5". The *Amici* stressed that, while ICANN endorsed almost all of the statements of the *Amici*'s expert witnesses, ICANN declined to endorse almost all of the *Amici*'s fact witnesses. In its order dated 27 July 2020 (**Procedural Order No. 6**), the Panel ruled that, notwithstanding ICANN's decision not to endorse them, the witness statements of Messrs. Paul Livesay and Jose I. Rasco III remained part of the record of this IRP, and that the Panel would consider the evidence of these witnesses, as well as the rest of the evidence filed in the IRP.
65. On 29 July 2020, the Panel held a telephonic pre-hearing conference, which was attended

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<sup>16</sup> *Southern Cal. Gas Co. v. Public Utilities Com.*, 50 Cal. 3d 31 (1990).

by the Parties and *Amici*, to discuss various points of order in advance of the merits hearing.

66. The evidentiary hearing in relation to the merits of the IRP was held from 3 to 11 August 2020 inclusive. Because of the ongoing COVID-19 pandemic and the associated air travel restrictions, the hearing was conducted remotely using a videoconference platform selected by the Parties. Since the participants were located in multiple time zones, hearing days had to be shortened. To compensate, three (3) additional days to the five (5) days initially scheduled for the hearing were held in reserve. In the end, fewer witnesses than had been anticipated were heard and the hearing was completed in seven (7) days. A transcript of the hearing was prepared by Ms. Balinda Dunlap.
67. The Claimant had filed with its original Request for IRP witness statements from three (3) fact witnesses, Messrs. John L. Kane, Cedarampattu “Ram” Mohan and Jonathan M. Robinson, as well as one expert report by Mr. Jonathan Zittrain. Upon the filing of its Amended Request for IRP, on 21 March 2019, the Claimant filed one expert report, by Dr. George Sadowsky, and withdrew the witness statements of its three (3) fact witnesses “[i]n light of ICANN’s disclosure of the August 2015 Domain Acquisition Agreement between VeriSign and NDC”.<sup>17</sup>
68. For its part, the Respondents filed, on its own behalf, witness statements from five (5) fact witnesses, Ms. J. Beckwith Burr, Mr. Todd Strubbe, Ms. Christine A. Willett, Mr. Christopher Disspain and Ms. Samantha S. Eisner, and one (1) expert report by Dr. Dennis W. Carlton. In addition, the Respondent filed, on behalf of the *Amici*, witness statements from three (3) fact witnesses, Mr. Rasco, of NDC, and Messrs. David McAuley and Paul Livesay, of Verisign, and two (2) expert reports, one (1) by the Hon. John Kneuer, the other by Dr. Kevin M. Murphy. In its letter of 18 July 2020, the Respondent withdrew the witness statement of Mr. Strubbe, a Verisign employee whose evidence had been offered in support of the Respondent’s opposition to the Request for Emergency Interim Relief sought by the Claimant at the outset of the proceedings. The Respondent explained that Mr. Strubbe’s evidence related to the question of whether Verisign would be irreparably injured by a delay in the delegation of .WEB, an issue that had become moot

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<sup>17</sup> See Amended Request for IRP, fn 14, at p. ii.

by the time of the hearing.

69. The seven (7) fact witnesses whose witness statements remained in evidence, as well as the three (3) expert witnesses appointed by the Parties, were all initially called to appear at the hearing for questioning.<sup>18</sup> In the course of the hearing, the Claimant informed the Panel of its decision not to cross-examine the Respondent's expert witness, which prompted the Respondent to decide not to cross-examine the Claimant's experts.
70. The evidentiary hearing was thus devoted to hearing the Parties' and *Amici*'s opening statements, and to the questioning of the remaining seven (7) fact witnesses called by the Respondent, on its behalf or on behalf of the *Amici*, namely Ms. Burr, Ms. Willett, Mr. Disspain, Ms. Eisner, Mr. McAuley, Mr. Rasco and Mr. Livesay.
71. At the end of the hearing, it was decided that the Parties and *Amici* would be permitted to file post-hearing briefs on 8 October 2020. The Panel indicated, referring back to a question that had been discussed at the pre-hearing conference, that it would inform the Parties and *Amici* of a date – to be held in reserve – on which the Panel would make itself available to hear oral closing submissions from the Parties and *Amici* should the Panel feel the need to do so after perusing the post-hearing submissions. The date was later set to 20 November 2020.
72. On 23 August 2020, the Panel forwarded to the Parties and *Amici* a list of questions that the Panel invited them to address in their respective post-hearing submissions.
73. Pursuant to a short extension of time granted by the Panel on 6 October 2020, on 12 October 2020, the Parties filed their post-hearing briefs (respectively, **Claimant's PHB** and **Respondent's PHB**), submissions on costs, and updated lists of Phase II issues, along with a factual chronology agreed to by both of them.
74. Also on 12 October 2020, the *Amici* filed a joint post-hearing brief (***Amici's PHB***). In their cover email, as well as in footnote 2 to their PHB, the *Amici* noted that the Parties had not consulted with them in the preparation of their respective issues lists, nor in the preparation

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<sup>18</sup> The Claimant did not request the presence of the *Amici*'s expert witnesses at the hearing.

of their joint chronology. The *Amici* therefore objected to the Parties' Phase II issues lists "to the extent that they omit or misrepresent the issues before this Panel", and they objected also to the Parties' joint chronology, which they asserted was incomplete.

75. On 16 October 2020, the Panel noted the *Amici*'s conditional objection to the Parties' respective issues lists. As regards the Parties' joint chronology, the *Amici* were given until 23 October 2020 to file, after consultations with the Parties, an amended version of the joint chronology with marked-up additions showing the items that they consider should be added to the joint chronology for it to be complete.
76. Also on 16 October 2020, the Claimant sought leave to respond to a number of "new non-record documents" cited in the *Amici*'s PHB. Having considered the Respondent's and *Amici*'s comments on this request, on 22 October 2020 the Panel granted the Claimant's request and a response to the impugned non-record documents was filed by the Claimant on 26 October 2020.
77. On 23 October 2020, the Parties filed their respective replies to the cost submissions of the other party (respectively, **Claimant's Reply Submission on Costs** and **Respondent's Response Submission on Costs**). On that date, the Claimant also provided the Panel with a joint chronology which had been agreed by the Parties and the *Amici* pursuant to the Panel's communication dated 16 October 2020 (**Joint Chronology**). The 23 October 2020 Joint Chronology is the chronology referred to in this Final Decision, and it is the one that the Panel has used in its deliberations
78. On 3 November 2020, having had the opportunity carefully to review the Parties' and *Amici*'s comprehensive post-hearing submissions, the Panel informed them of its decision not to avail itself of the possibility to hear additional oral closing submissions. The date reserved for that purpose was therefore released.
79. In a series of letters beginning with counsel for Verisign's letter of 9 December 2020, sent on behalf of both *Amici*, the Panel was informed of an impending, and later consummated merger of the Claimant's parent company, Afilias, Inc., and its competitor Donuts, Inc. This was described by Verisign as "new facts arising subsequent to the merits hearing, as

well as related newly discovered evidence, that contradict critical representations made by Afiliias Domains No. 3 Limited (“Afiliias”) in the pre-hearing pleadings and at the merits hearing [...]”. The *Amici* requested that the Panel consider these new developments in resolving the Claimant’s claims in this IRP. The submissions of the Parties and *Amici* concerning these post-hearing developments are summarized in the next section of this Final Decision.

80. On 7 April 2021, the Panel, being satisfied that the record of the IRP was complete and that the Parties and *Amici* had no further submissions to make in relation to the issues in dispute, formally declared the arbitral hearing closed in accordance with Article 27 of the ICDR Rules.
81. The Panel concludes this history of the proceedings by expressing its gratitude to Counsel for the Parties and *Amici* for their assistance in the resolution of this dispute and the exemplary professional courtesy each and everyone of them displayed throughout these proceedings.

### **III. FACTUAL BACKGROUND**

82. The essential facts of this case have been conveniently laid out in the Joint Chronology dated 23 October 2020 agreed to by the Parties and *Amici*. In order to provide some background for the Panel’s analysis below, the most salient facts of this case are summarized in this section.
83. The deadline for the submission of applications for new gTLDs under the Respondent’s New gTLD Program was 30 May 2012. As mentioned in the overview, the Claimant is one of seven (7) entities that submitted an application to the Respondent for the right to operate the registry of the .WEB gTLD pursuant to the rules and procedures set out in the Respondent’s Guidebook and the Auction Rules for New gTLDs.
84. Because there were multiple applicants for .WEB, the applicants were placed in a “contention set” for resolution either privately or through an auction of last resort administered by the Respondent.
85. Towards the end of 2014, at a time when the .WEB contention set was still on hold, and

had thus not been resolved, Redacted - Third Party Designated Confidential Information

.<sup>19</sup> Apart from filing applications for new gTLDs that were variants of the company's name, for example ".Verisign", or internationalized versions of Verisign's existing TLDs, Verisign had not otherwise sought to acquire rights to new gTLDs as part of ICANN's New gTLD Program. Redacted - Third Party Designated Confidential Information

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86. Verisign identified .WEB as one business opportunity in the New gTLD Program. Redacted - Third Party Designated Confidential Information

. In May 2015, Mr. Livesay contacted Mr. Rasco, NDC's CFO and manager, and expressed interest in working with NDC to acquire the rights to .WEB.<sup>21</sup>

87. On 25 August 2015, Verisign and NDC executed the DAA under which Verisign undertook to provide, Redacted - Third Party Designated Confidential Information, funds for NDC's bid for the .WEB gTLD while NDC undertook, if it prevailed at the auction and entered into a registry agreement with ICANN, to transfer and assign its .WEB registry agreement to Verisign upon receipt of ICANN's actual or deemed consent to the assignment.

88. On 27 April 2016, ICANN scheduled the .WEB auction of last resort for 27 July 2016.

89. Early in June 2016, it became known among members of the .WEB contention set that NDC did not intend to participate in a private auction in order to privately resolve the contention set. It is common ground that the Respondent, as a rule, favours the private resolution of contention sets. On 7 June 2016, in answer to a request to postpone the

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<sup>19</sup> Merits hearing transcript, 11 August 2020, pp. 1125:17-1126:15 (Mr. Livesay).

<sup>20</sup> Mr. Livesay's witness statement, 1 June 2020, para. 4.

<sup>21</sup> Merits hearing transcript, 7 August 2020, p. 806:12-18 (Mr. Rasco).

ICANN auction in order for members of the contention set to “try to work this out cooperatively”, Mr. Rasco stated in an email: “I went back to check with the powers that be and there was no change in the response and will not be seeking an extension.”<sup>22</sup> The email in question was addressed to Mr. Jon Nevett, of Ruby Glen, LLC (**Ruby Glen**).

90. On 23 June 2016, Ruby Glen informed ICANN that it believed NDC “failed to properly update its application” to account for “changes to the Board of Directors and potential control of [NDC]”.<sup>23</sup> On 27 June 2016, ICANN asked NDC to “confirm that there have not been changes to [its] application or [to its] organization that need to be reported to ICANN.” On the same day, NDC confirmed that “there have been no changes to [its] organization that would need to be reported to ICANN.”<sup>24</sup>
91. On 29 June 2016, Ms. Willett, then Vice-President of ICANN’s gTLD Operations, informed Ruby Glen that her team had investigated and that NDC had confirmed that there had been no changes to NDC’s ownership or control. As a result, she advised that “ICANN was continuing to proceed with the Auction as scheduled.”<sup>25</sup>
92. On 30 June 2016, Ruby Glen formally raised its concern about a possible change in control of NDC with ICANN’s ombudsman (**Ombudsman**). On 12 July 2016, the Ombudsman informed Ms. Willett that he had “not seen any evidence which would satisfy [him] that there ha[d] been a material change to the application. So [his] tentative recommendation [was] that there was nothing which would justify a postponement of the auction based on unfairness to the other applicants.”<sup>26</sup> The following day, Ms. Willett informed the .WEB contention set accordingly.
93. On 17 July 2016, two other .WEB applicants, Donuts and Radix FZC (**Radix**), filed an emergency Reconsideration Request, alleging that ICANN had failed to perform a “full

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<sup>22</sup> Mr. Rasco’s email dated 7 June 2016, Ex. C-35.

<sup>23</sup> Ms. Willett’s witness statement, 31 May 2019, Ex. A.

<sup>24</sup> Exchanges between Messrs. Rasco and Jared Erwin, Ex. C-96.

<sup>25</sup> Declaration of Ms. Willett in support of ICANN’s opposition to Plaintiff’s *ex parte* application for temporary restraining order, Ex. C-40, paras. 15-16.

<sup>26</sup> Ms. Willett’s witness statement, 31 May 2019, Ex. G.

and transparent investigation into the material representations made by NDC” and contesting ICANN’s decision to proceed with the ICANN auction.<sup>27</sup> Reconsideration is an ICANN accountability mechanism allowing any person or entity materially affected by an action or inaction of the Board or Staff to request reconsideration of that action or inaction.<sup>28</sup> Donuts’ and Radix’s Reconsideration Request was denied on 21 July 2016.<sup>29</sup>

94. On 22 July 2016, Ruby Glen filed a complaint against ICANN in the US District Court of the Central District of California, and an application for a temporary restraining order seeking to halt the .WEB auction (**Ruby Glen Litigation**). On 26 July 2016, the application for a temporary restraining order was denied.<sup>30</sup>
95. In the meantime, on 20 July 2016, the blackout period associated with the ICANN auction had begun. The blackout period extends from the deposit deadline, in this case 20 July 2016, until full payment has been received from the prevailing bidder (**Blackout Period**). During the Blackout Period, members of a contention set, including the .WEB contention set, “are prohibited from cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other’s, or any other competing applicants’ bids or bidding strategies, or discussing or negotiating settlement agreements or post-Auction ownership transfer arrangements, with respect to any Contention Strings in the Auction.”
96. On 22 July 2016, Mr. Kane, a representative of Afilias, wrote a text message to Mr. Rasco asking whether NDC would consider a private auction if ICANN were to delay the scheduled auction.<sup>31</sup> Mr. Rasco did not respond to this query, as he testified he considered

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<sup>27</sup> Reconsideration Request by Ruby Glen, LLC and Radix FZC, Ex. R-5, p. 2.

<sup>28</sup> See Bylaws, Ex. C-1, Article 4, Section 4.2.

<sup>29</sup> Reconsideration Request by Ruby Glen, LLC and Radix FZC, Ex. R-5, pp. 11-12.

<sup>30</sup> *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Cal.), Order on *Ex Parte* Application for Temporary Order (26 July 2016), Ex. R-9.

<sup>31</sup> See the exchange of text messages between Messrs. Kane and Rasco, Attachment E to Arnold & Porter’s letter to Mr. Enson dated 23 August 2016, Ex. R-18, p. 73.

it an attempt to engage in a prohibited discussion during the Blackout Period.<sup>32</sup>

97. Redacted - Third Party Designated Confidential Information

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98. On 27 and 28 July 2016, ICANN conducted the auction of last resort among the seven (7) applicants for the .WEB gTLD. As already mentioned, NDC won the auction while the Claimant was the second-highest bidder.

99. On 28 July 2016, Verisign filed a form with the U.S. Security and Exchange Commission stating that “[s]ubsequent to June 30, 2016, the Company incurred a commitment to pay approximately \$130.0 million for the future assignment of contractual rights, which are subject to third party consent.”<sup>34</sup>

100. On 31 July 2016, Mr. Rasco informed Ms. Willett that Redacted - Designated Confidential Information

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101. The following day, 2 August 2016, Donuts invoked the CEP with ICANN in regard to

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<sup>32</sup> Mr. Rasco’s witness statement, 10 December 2018, para. 17.

<sup>33</sup> Mr. Livesay’s witness statement, 1 June 2020, para. 27, and Ex. H attached thereto.

<sup>34</sup> Verisign’s Form 10-Q, Quarterly Report, Ex. C-45, p. 13.

<sup>35</sup> Ms. Willett’s email dated 31 July 2016, Ex. C-100, [PDF] pp. 1-2.

<sup>36</sup> Verisign statement regarding .WEB auction results, Ex. C-46.

.WEB (**Donuts CEP**).<sup>37</sup> The CEP is a non-binding process in which parties are encouraged to participate to attempt to resolve or narrow a dispute.<sup>38</sup> While the CEP is voluntary, the Bylaws create an incentive for parties to participate in this process by providing that failure of a Claimant to participate in good faith in a CEP exposes that party, in the event ICANN is the prevailing party in an IRP, to an award condemning it to pay all of ICANN's reasonable fees – including legal fees – and costs incurred by ICANN in the IRP.

102. On 8 August 2016, Ruby Glen filed an Amended Complaint against ICANN in the Ruby Glen Litigation. Also on 8 August 2016, Afiliis sent to Mr. Atallah a letter raising concerns about Verisign's involvement with NDC and in the ICANN auction, and, on the same day, submitted a complaint with the Ombudsman.
103. On 19 August 2016, ICANN informed the .WEB applicants that the .WEB contention set had been placed “on-hold” to reflect the pending accountability mechanism initiated by Donuts.
104. Redacted - Third Party Designated Confidential Information

105. On 9 September 2016, Afiliis sent ICANN a second letter regarding Afiliis' concerns about Verisign's involvement with NDC's application for .WEB, stating that “ICANN's Board and officers are obligated under the Articles, Bylaws and the Guidebook (as well as

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<sup>37</sup> Cooperative Engagement and Independent Review Processes Status Update, 8 August 2016, Ex. C-108, [PDF] p. 1.

<sup>38</sup> Bylaws, Ex. C-1, Article 4, Section 4.3 (e).

<sup>39</sup> Arnold & Porter's letter to Mr. Enson dated 23 August 2016, Ex. R-18, [PDF] pp. 1-8.

<sup>40</sup> See Respondent's Rejoinder, para. 35 and Transcript of the 11 May 2020 Hearing, Ex. R-29, p. 20:9-15.

international law and California law) to disqualify NDC's bid immediately and proceed with contracting of a registry agreement with Afilias, the second highest bidder", and asking ICANN to respond by no later than 16 September 2016.<sup>41</sup>

106. On 16 September 2016, Ms. Willett sent Afilias, Ruby Glen, NDC and Verisign a detailed Questionnaire and invited them to provide information and comments on the allegations raised by Afilias and Ruby Glen.<sup>42</sup> The Respondent avers that the purpose of the Questionnaire "was to assist ICANN in evaluating what action, if any, should be taken in response to the claims asserted by Afilias and Ruby Glen".<sup>43</sup> It is common ground that at the time, while ICANN, NDC and Verisign had knowledge of the provisions of the Domain Acquisition Agreement, of which each of them had a copy, Afilias and Ruby Glen did not. Responses to the Questionnaire were provided to ICANN on 7 October 2016 by Afilias<sup>44</sup> and Verisign<sup>45</sup>, and on 10 October 2016 by NDC.<sup>46</sup>
107. On 19 September 2016, the Ombudsman informed Afilias that he was declining to investigate Afilias' complaint regarding the .WEB auction because Ruby Glen had initiated both a CEP and litigation in respect of the same issue.<sup>47</sup>
108. On 30 September 2016, ICANN acknowledged receipt of Afilias' letters of 8 August 2016 and 9 September 2016, noted that ICANN had placed the .WEB contention set on hold "to reflect a pending ICANN Accountability Mechanism initiated by another member in the contention set", and added that Afilias would "be notified of future changes to the contention set status or updates regarding the status of relevant Accountability Mechanisms." ICANN further stated that it would "continue to take Afilias' comments,

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<sup>41</sup> Afilias' Letter to Mr. Atallah dated 9 September 2016, Ex. C-103.

<sup>42</sup> ICANN's letter to Mr. Kane dated 16 September 2016 and attached Questionnaire, Ex. C-50.

<sup>43</sup> Respondent's Rejoinder, para. 46.

<sup>44</sup> Afilias' letter to Ms. Willett dated 7 October 2016, Ex. C-51.

<sup>45</sup> Arnold & Porter's letter to Ms. Willett dated 7 October 2016, Ex. C-109.

<sup>46</sup> Mr. Rasco's email to ICANN dated 10 October 2016, Ex. C-110.

<sup>47</sup> Mr. Herb Waye's email to Mr. Hemphill dated 19 September 2016, Ex. C-101.

and other inputs that we have sought, into consideration as we consider this matter.”<sup>48</sup>

109. On 3 November 2016, the Board of ICANN held a Board workshop during which a briefing was presented by in-house counsel regarding the .WEB contention set (**November 2016 Workshop**).<sup>49</sup> A memorandum prepared by ICANN’s outside counsel and containing legal advice in anticipation of litigation regarding the .WEB contention set had been sent to “non-conflicted” ICANN Board members on 2 November 2016, in advance of the workshop.<sup>50</sup> As will be seen in the following section of this Final Decision, the November 2016 Workshop is of particular importance in this case. Suffice it to say for present purposes that, at least according to ICANN, during this workshop the Board “specifically [chose...] not to address the issues surrounding .WEB while an Accountability Mechanism regarding .WEB was pending”.<sup>51</sup> That decision of the ICANN Board was not communicated to Afilias at the time. Indeed, it was first made public and disclosed to Afilias 3 ½ years later, upon the filing of the Respondent’s Rejoinder in this IRP, filed on 1 June 2020.<sup>52</sup>
110. On 28 November 2016, the US District Court of the Central District of California dismissed Ruby Glen’s claims against ICANN in the Ruby Glen Litigation on the basis that “the covenant not to sue [in Module 6 of the Guidebook] bars Plaintiff’s entire action.”<sup>53</sup>
111. On 18 January 2017, the Department of Justice (**DOJ**) issued a civil investigative demand to Verisign, ICANN, and others regarding Verisign’s “proposed acquisition of [NDC’s] contractual rights to the .web generic top-level domain.”<sup>54</sup> The DOJ requested that ICANN take no action on .WEB during the pendency of the investigation. Between February

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<sup>48</sup> ICANN’s letter to Mr. Hemphill dated 30 September 2016, Ex. C-61.

<sup>49</sup> Joint Fact Chronology, and ICANN’s Privilege Log of 24 April 2020, pp. 29-30.

<sup>50</sup> Respondent’s Rejoinder, para. 40.

<sup>51</sup> *Ibid*, para. 3.

<sup>52</sup> There are multiple references to the November 2016 Workshop in the Respondent’s privilege log of 24 April 2020, but not to any decision made in respect of .WEB.

<sup>53</sup> *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Cal.), 28 November 2016, Ex. C-106.

<sup>54</sup> DOJ Civil Investigative Demand to Thomas Indelicarto of Verisign dated 18 January 2017, Ex. AC-31.

and June 2017, ICANN made several document productions and provided information to DOJ, Redacted - Third Party Designated Confidential Information

.<sup>55</sup> On 9 January 2018, a year after the issuance of the DOJ's investigative demand, the DOJ closed its investigation of .WEB without taking any action.

112. On 30 January 2018, the Donuts CEP closed, and ICANN gave Ruby Glen (the entity through which Donuts, Inc. had submitted an application for .WEB) until 14 February 2018 to file an IRP. Ruby Glen did not file an IRP in respect of .WEB.
113. On 15 February 2018, Mr. Rasco requested via email that ICANN move forward with the execution of a .WEB registry agreement with NDC in light of the termination of the DOJ investigation and the absence of any pending accountability mechanisms.<sup>56</sup>
114. On 23 February 2018, counsel for Afilias submitted a Documentary Information Disclosure Policy (**DIDP**) request to ICANN (**Afilias' First DIDP Request**) and asked for an update on ICANN's investigation of the .WEB contention set.<sup>57</sup> ICANN responded to Afilias' First DIDP Request on 24 March 2018.
115. On 28 February 2018, counsel for NDC sent a formal letter to ICANN requesting that it move forward with the execution of a registry agreement for .WEB with NDC.<sup>58</sup>
116. On 16 April 2018, counsel for Afilias wrote to the ICANN Board requesting an update on the status of the .WEB contention set, an update on the status of ICANN's investigation, and prior notification of any action by the Board related to .WEB, adding that Afilias "intend[ed] to initiate a CEP and a subsequent IRP against ICANN, if ICANN proceeds toward delegation of .WEB to NDC."<sup>59</sup>

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<sup>55</sup> Respondent's Rejoinder, para. 49.

<sup>56</sup> Mr. Rasco's email to ICANN dated 15 February 2018, Ex. C-182.

<sup>57</sup> Dechert's letter to the Board dated 23 February 2018, Ex. C-78.

<sup>58</sup> Irell & Manella's letter to Messrs. Jeffrey and Atallah dated 28 February 2018, Ex. R-20.

<sup>59</sup> Dechert's letter to the Board dated 16 April 2018, Ex. C-113.

117. On 23 April 2018, counsel for Afilias wrote to the ICANN Board to object to the non-disclosure of the documents requested in the First DIDP Request by reason of their confidentiality, and to offer to limit their disclosure to outside counsel.<sup>60</sup> This request was treated as a new DIDP request (**Second DIDP Request**)<sup>61</sup>. On the same date, counsel for Afilias submitted a reconsideration request challenging ICANN's response to Afilias' First DIDP Request (**Reconsideration Request 18-7**).<sup>62</sup>
118. On 28 April 2018, ICANN's outside counsel wrote to counsel for Afilias, confirming that the .WEB contention set was on-hold but declining to undertake to send Afilias prior notice of a change to its status on the ground that doing so "would constitute preferential treatment and would contradict Article 2, Section 2.3 of the ICANN Bylaws."<sup>63</sup> Afilias responded to that letter on 1 May 2018, reiterating the arguments it had previously made.<sup>64</sup>
119. On 23 May 2018, ICANN responded to Afilias' Second DIDP Request, and on 5 June 2018, Afilias' Reconsideration Request 18-7 was denied.
120. On 6 June 2018, ICANN took the .WEB contention set off-hold and notified the .WEB applicants by emailing the contacts identified in the applications.<sup>65</sup> In the following days, the normal process leading to the execution of a registry agreement was put in motion within ICANN in relation to the .WEB registry.
121. On 12 June 2018, Ms. Willett and other Staff approved the draft Registry Agreement for .WEB and its transmittal to NDC. On 14 June 2018, ICANN sent the draft .WEB Registry Agreement to NDC, which NDC promptly signed and returned to ICANN. On the same day, Ms. Willett and other Staff approved executing the .WEB Registry Agreement on

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<sup>60</sup> Dechert's letter to the Board dated 23 April 2018, Ex. C-79.

<sup>61</sup> See Determination of the Board Accountability Mechanisms Committee (BAMC) Reconsideration Request 18-7 dated 5 June 2018, Ex. R-32, p. 5.

<sup>62</sup> Afilias Domain No. 3 Limited Reconsideration Request, Ex. R-31 or VRSN-26.

<sup>63</sup> Jones Day's letter to Mr. Ali dated 28 April 2018, Ex. C-80.

<sup>64</sup> Dechert's letter to Mr. LeVee dated 1 May 2018, Ex. C-114.

<sup>65</sup> Exchange of emails between ICANN Staff dated 6 June 2018, Ex. C-166; and Mr. Erwin's email to Ms. Willett and Mr. Christopher Bare dated 6 June 2018, Ex. C-167.

ICANN's behalf.<sup>66</sup>

122. On 18 June 2018, prior to ICANN's execution of the .WEB Registry Agreement, Afilias invoked a CEP with ICANN regarding the .WEB gTLD.<sup>67</sup> Two days later, ICANN placed the .WEB contention set back on hold to reflect Afilias' invocation of a CEP. As a result, the extant .WEB Registry Agreement was voided.<sup>68</sup>
123. On 22 June 2018, Afilias filed a second reconsideration request (**Reconsideration Request 18-8**), seeking reconsideration of ICANN's response to Afilias' 23 April 2018 DIDP Request. On 6 November 2018, the Board, on the recommendation of the Board Accountability Mechanisms Committee, denied that request.<sup>69</sup>
124. A week later, on 13 November 2018, ICANN wrote to counsel for Afilias to confirm that the CEP for this matter was closed as of that date and to advise that ICANN would grant Afilias an extension of time to 27 November 2018 (fourteen (14) days following the close of the CEP) to file an IRP regarding the matters raised in the CEP, if Afilias chooses to do so. As already noted, Afilias filed its Request for IRP on the following day, 14 November 2018.

#### **IV. SUMMARY OF SUBMISSIONS AND RELIEF SOUGHT**

125. The submissions made in relation to Phase II are voluminous. The Panel summarizes these submissions below. Where appropriate, the Panel refers in the analysis section of this Final Decision to those parts of the submissions and evidence found by the Panel to be most pertinent to its analysis. In reaching its conclusions, however, the Panel has considered all of the Parties' submissions and evidence.
126. The submissions made and the relief initially sought in relation to the Claimant's Rule 7 Claim are set out in detail in the Panel's Decision on Phase I. The position adopted by the Claimant in relation to its Rule 7 Claim in Phase II is discussed below, in section V.E. of

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<sup>66</sup> Exchange of emails between ICANN Staff dated 14 June 2018, Ex. C-170.

<sup>67</sup> Dechert's letter to ICANN dated 18 June 2018, Ex. C-52.

<sup>68</sup> Exchange of emails between ICANN Staff dated 14 June 2018, Ex. C-170.

<sup>69</sup> ICANN, Approved Board Resolutions, Special Meeting of the ICANN Board, 6 November 2018, Ex. C-7, pp. 1-10.

this Final Decision.

**A. Claimant's Amended Request for IRP**

127. In its Amended Request for IRP dated 21 March 2019, the Claimant claims that the Respondent has breached its Articles and Bylaws as a result of the Board's and Staff's failure to enforce the rules for, and underlying policies of, ICANN's New gTLD Program, including the rules, procedures, and policies set out in the Guidebook and Auction Rules.<sup>70</sup>
128. The Claimant avers that NDC ought to have disclosed the Domain Acquisition Agreement to ICANN and modified its .WEB application to reflect that it had entered into the DAA with Verisign, or to account for the implications of the agreement's terms for its application. The Claimant submits that while it is evident that NDC violated the New gTLD Program Rules, the Respondent has failed to disqualify NDC from the .WEB contention set, or to disqualify NDC's bids in the .WEB auction.
129. The Claimant contends that the Respondent has breached its obligation, under its Bylaws, to make decisions by applying its documented policies "neutrally, objectively, and fairly," in addition to breaching its obligations under international law and California law to act in good faith. The Claimant also submits that the Respondent, by these breaches, has failed to respect one of the pillars of the New gTLD Program and one of ICANN's founding principles: to introduce and promote competition in the Internet namespace in order to break Verisign's monopoly.<sup>71</sup>
130. More specifically, the Claimant contends that NDC violated the Guidebook's prohibition against the resale, transfer, or assignment of its application, as NDC transferred to Verisign crucial application rights, including the right to reach a settlement or participate in a private auction. The Claimant also asserts that NDC's bids at the .WEB auction were invalid because they were made on Verisign's behalf, reflecting what the latter was willing to pay and implying no financial risk for NDC.

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<sup>70</sup> Amended Request for IRP, para. 2.

<sup>71</sup> *Ibid*, para. 5.

131. By way of relief, the Claimant requested the Panel to issue a binding declaration:
- (1) that ICANN has acted inconsistently with its Articles and Bylaws, breached the binding commitments contained in the AGB, and violated international law;
  - (2) that, in compliance with its Articles and Bylaws, ICANN must disqualify NDC's bid for .WEB for violating the AGB and Auction Rules;
  - (3) ordering ICANN to proceed with contracting the Registry Agreement for .WEB with Afilias in accordance with the New gTLD Program Rules;
  - (4) specifying the bid price to be paid by Afilias;
  - (5) that Rule 7 of the Interim Procedures is unenforceable and awarding Afilias all costs associated with the additional work needed to, among other things, address arguments and filings made by Verisign and/or NDC;
  - (6) declaring Afilias the prevailing party in this IRP and awarding it the costs of these proceedings; and
  - (7) granting such other relief as the Panel may consider appropriate in the circumstances.<sup>72</sup>

## **B. Respondent's Response**

132. In its Response dated 31 May 2019, the Respondent argues that it complied with its Articles, Bylaws, and policies in overseeing the .WEB contention set disputes and resulting accountability mechanisms.

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<sup>72</sup> Amended Request for IRP, para. 89.

133. The Respondent contends that it thoroughly investigated claims made prior to the .WEB auction about NDC’s alleged change of control, and notes that it was not alleged at the time that NDC had an agreement with Verisign regarding .WEB. Accordingly, what the Respondent investigated was an alleged change in ownership, management or control of NDC, which it found had not occurred.
134. With regard to alleged Guidebook violations resulting from the Domain Acquisition Agreement with Verisign, the Respondent notes that due to the pendency of the DOJ investigation and various accountability mechanisms – including this IRP – its Board has not yet had an opportunity to fully evaluate the Guidebook violations alleged by the Claimant, adding that those are hotly contested and would not in any event call for automatic disqualification of NDC.<sup>73</sup>
135. The Respondent explains that, with the exception of approximately two weeks in June 2018, after Afiliias’ DIDP-related Reconsideration Requests were resolved and before Afiliias initiated its CEP, the .WEB contention set has been on hold from August 2016 through today. The Respondent observes that during the entire period from July 2016 through June 2018, the Claimant took no action that could have placed the .WEB issues before the Board, although it could have.<sup>74</sup>
136. The Respondent adds that the Guidebook breaches alleged by the Claimant “are the subject of good faith dispute by NDC and VeriSign”. The Respondent also avers that while the Claimant’s IRP “is notionally directed at ICANN, it is focused exclusively on the conduct of NDC and VeriSign to which NDC and VeriSign have responses”.<sup>75</sup> The Respondent argues, speaking of its Board, that deferring consideration of the alleged violations of the Guidebook until this Panel renders its final decision is within the realm of reasonable business judgment.<sup>76</sup>

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<sup>73</sup> Respondent’s Response, para. 61.

<sup>74</sup> *Ibid*, para. 62. As noted above, the Claimant’s second Reconsideration Request was lodged on 22 June 2018, and therefore after the Respondent placed the .WEB contention set back on hold following the Claimant’s commencement of a CEP.

<sup>75</sup> Respondent’s Response, para. 63.

<sup>76</sup> *Ibid*, para. 66.

137. The Respondent underscores that the Guidebook does not require ICANN to deny an application where an applicant failed to inform ICANN that previously submitted information has become untrue or misleading. Rather, according to ICANN, the Guidebook gives it discretion to determine whether the changed circumstances are material and what consequences, if any, should follow. By disqualifying NDC, this Panel would, in ICANN's submission, usurp the Board's discretion and exceed the Panel's jurisdiction.
138. As for the Claimant's allegation that the Domain Acquisition Agreement between NDC and Verisign is anticompetitive, the Respondent notes that this is denied by Verisign and contradicted by the DOJ's decision not to take action following its investigation into the matter. The Respondent also denies Afilias' assertion that the sole purpose of the New gTLD Program was to create competition for Verisign. The Respondent also contends, relying on the evidence of its expert economist, Dr. Carlton, that there is no evidence that .WEB will be a unique competitive check on .COM, nor that the Claimant would promote .WEB more aggressively than Verisign.
139. As regards the applicable standard of review, the Respondent submits that an IRP panel is asked to evaluate whether an ICANN action or inaction was consistent with ICANN's Articles, Bylaws, and internal policies and procedures. However, with respect to IRPs challenging the ICANN Board's exercise of its fiduciary duties, the Respondent submits that an IRP Panel is not empowered to substitute its judgment for that of ICANN. Rather, its core task is to determine whether ICANN has exceeded the scope of its Mission or otherwise failed to comply with its foundational documents and procedures.<sup>77</sup>
140. The Respondent contends that all of Afilias' claims are time-barred under both the Bylaws in force in 2016 and the current Interim Procedures. The Bylaws in force in 2016 provided that an IRP had to be filed within thirty (30) days of the posting of the Board minutes relating to the challenged ICANN decision or action. The Interim Procedures now provide that an IRP must be filed within 120 days after a claimant becomes aware "of the material effect of the action or inaction" giving rise to the dispute, provided that an IRP may not be filed more than twelve (12) months from the date of such action or inaction.

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<sup>77</sup> Respondent's Response, para. 55.

The Respondent contends that Afiliás' claims regarding alleged deficiencies in ICANN's pre-auction investigation accrued on 12 September 2016, when it posted minutes regarding the Board's denial of Ruby Glen's Reconsideration Request challenging that investigation. The Respondent takes the position that the facts and claims supporting the Claimant's allegations of Guidebook and Auction Rules violations were set forth in Afiliás' letters dated August and September 2016, and were therefore known to the Claimant at that time.<sup>78</sup>

141. As for the Claimant's requested relief, the Respondent contends that it goes far beyond what is permitted by the Bylaws and calls for the Panel to decide issues that are reserved to the discretion of the Board.

### **C. Claimant's Reply**

142. In its Reply dated 4 May 2020 (revised on 6 May 2020), the Claimant rejects ICANN's self-description as a mere not-for-profit corporation, averring that the Respondent serves as the *de facto* international regulator and gatekeeper to the Internet's DNS space, with no government oversight.<sup>79</sup>
143. Regarding the standard of review, the Claimant denies that this case involves the exercise of the Board's fiduciary duties. The Panel is required to conduct an objective, *de novo* examination of the Dispute. Moreover, quite apart from the Board's alleged determination to defer consideration of the Claimant's claims until this Panel has issued its decision, the Claimant notes that this IRP also impugns the flawed analysis of the New gTLD Program Rules by the Staff, ICANN's inadequate investigation of the *Amici*'s conduct, its failure to disqualify NDC's application and auction bids, and its decision to proceed with contracting with NDC in respect of .WEB.<sup>80</sup>
144. The Claimant submits that the Respondent's defences are baseless and self-contradictory:

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<sup>78</sup> *Ibid*, paras. 73-76.

<sup>79</sup> Claimant's Reply, paras. 1-3.

<sup>80</sup> *Ibid*, para. 8.

on the one hand it argues that it appropriately handled Afiliias' concerns while on the other it asserts that its Board has deferred consideration of these concerns until the Panel's final decision in this IRP.<sup>81</sup> The Claimant reiterates that ICANN violated its Bylaws and Articles by not disqualifying NDC's application and bids for .WEB, and in proceeding to contract with NDC for the .WEB registry agreement.

145. The Claimant contends that the New gTLD Program Rules are mandatory. In its view, it is not within ICANN's discretion to overlook violations of those rules by some applicants, such as NDC, nor to allow non-applicants like Verisign to circumvent them by "enlisting a shell like NDC".<sup>82</sup> According to the Claimant, the Respondent improperly ignored NDC's clear violation of the prohibition against the resale, transfer or assignment of rights and obligations in connection with its application.
146. In addition, the Claimant contends that the public portions of NDC's application, left unchanged after its agreement with Verisign, deceived the Internet community as to the identity of the true party-in-interest behind NDC's .WEB application.<sup>83</sup> All in all, the Domain Acquisition Agreement constituted, according to the Claimant, a change of circumstances that rendered the information in NDC's application misleading, yet the Respondent did nothing to redress that situation even after it was provided with a copy of the Domain Acquisition Agreement.<sup>84</sup>
147. In reply to the Respondent's argument that the Guidebook does not impose, but merely allows ICANN to disqualify applications containing a material misstatement, misrepresentation, or omission, the Claimant counters that the Respondent must exercise any discretion it may have in this regard consistent with its Articles and Bylaws and in accordance with its obligation towards the Internet community to implement the New gTLD Program openly, transparently and fairly, treating all applicants equally. According to the Claimant, the Respondent's position, were it accepted, would wipe away years of

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<sup>81</sup> *Ibid*, para. 20.

<sup>82</sup> *Ibid*, para. 27.

<sup>83</sup> Claimant's Reply, para. 40.

<sup>84</sup> *Ibid*, para. 69.

carefully deliberated policy development work by the ICANN community.<sup>85</sup>

148. The Claimant also submits that NDC's bids in the auction were invalid for failure to comply with the Auction Rules.<sup>86</sup> In that respect, the Claimant stresses that while the Auction Rules provide that bids must be placed by or on behalf of a Qualified Applicant, in the present case the DAA makes it clear that NDC was making bids “Redacted - Third Party Designated Confidential Information”

<sup>87</sup> Afilias therefore claims that the New gTLD Program Rules required ICANN to declare NDC's bids invalid and award the .WEB gTLD to Afilias, as the next highest bidder.

149. The Claimant avers that ICANN's investigation of its stated concerns was superficial, self-serving, and designed to protect itself, without the transparency, openness, neutrality, objectivity, fairness and good faith required under the Bylaws. In that respect, the Claimant stresses that the Respondent received the Domain Acquisition Agreement on 23 August 2016, and ought to have disqualified NDC's application and bids upon review of its terms.

150. Instead, the Respondent issued its 16 September 2016 Questionnaire to Afilias, Verisign, NDC and Ruby Glen, making no mention of the fact that the Respondent had already sought and received input from Verisign, nor of the fact that at the time, ICANN, Verisign and NDC had knowledge of the contents of the Domain Acquisition Agreement, whereas Afilias had not. According to the Claimant, the Questionnaire was a “pure artifice”, designed to elicit answers that would help Verisign's cause if its arrangement with NDC was challenged at a later date and to protect ICANN from the type of criticism and concerns already raised by Afilias.<sup>88</sup>

151. The Claimant notes that there is no indication that the Respondent did anything with the responses it received to the Questionnaire, or what steps were taken to achieve an “informed resolution” of the concerns raised by Afilias. What is known is merely that the

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<sup>85</sup> *Ibid*, para. 85.

<sup>86</sup> *Ibid*, para. 88.

<sup>87</sup> *Ibid*, para. 95.

<sup>88</sup> Claimant's Reply, para. 114.

Board decided not to make a determination on the merits on Afilias' contentions against Verisign and NDC until all accountability mechanisms had been concluded, and that on 6 June 2018, the Respondent decided to remove the .WEB contention set from its on-hold status and to proceed with the delegation of .WEB to NDC. This, the Claimant asserts, suggests that the Respondent had in fact made a determination on the merits of Afilias' contentions.<sup>89</sup>

152. According to the Claimant, ICANN must exercise its discretion insofar as the application of the New gTLD Program Rules is concerned consistently with what the Claimant describes as the Respondent's competition mandate, that is, the mandate to promote competition and to constrain the market power of .COM.<sup>90</sup> In the Claimant's view, the DOJ's investigation is irrelevant to deciding this IRP as the DOJ's official policy is that no inference should be drawn from a decision to close a merger investigation without taking further action.
153. In response to the Respondent's contention that its claims are time-barred, the Claimant argues that the lack of merit of this defence is underscored by the Respondent's assertion that the Claimant's claims are in one sense premature and in another sense overdue. The Claimant recalls that (1) between August 2016 and the end of 2016, ICANN represented that it would seek the informed resolution of Afilias' concerns, and keep Afilias informed of the outcome; (2) between January 2017 and January 2018, the DOJ was conducting its antitrust investigation, and had asked ICANN to take no action on .WEB; and (3) between January 2018 and June 2018, Afilias repeatedly asked ICANN for information about the status of .WEB, which ICANN failed to provide until the Claimant was notified that the .WEB contention set had been taken off-hold, whereupon Afilias invoked the Cooperative Engagement Process.<sup>91</sup>
154. The Claimant disputes that the complaints it made in its 2016 letters are the same as those relied upon in its Amended Request for IRP: the former were based on public information

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<sup>89</sup> *Ibid*, para. 118.

<sup>90</sup> *Ibid*, paras. 125-128.

<sup>91</sup> Claimant's Reply, paras. 137-139.

only, and requested an investigation; the latter were prompted by the realization that in spite of its requests that NDC's application and bids be disqualified, ICANN had now signaled that it was proceeding to contract with NDC.

155. The Claimant contends that the Respondent misstates the relief that an IRP Panel may order. According to the Claimant, the Panel has the power to issue "affirmative declaratory relief" requiring the Respondent to disqualify NDC's application and bids and to offer the Claimant the rights to .WEB.<sup>92</sup>

#### **D. Respondent's Rejoinder**

156. In its Rejoinder Memorial dated 1 June 2020, the Respondent states that a feature that sets this IRP apart is that ICANN has not yet fully addressed the ultimate dispute underlying the Claimant's claims.<sup>93</sup> In that respect, the Respondent stresses that, since the inception of the New gTLD Program, it placed applications and contention sets "on hold" when related accountability mechanisms were initiated.<sup>94</sup> In its view, the Respondent followed its processes by specifically choosing, in November 2016, not to address the issues surrounding .WEB while an accountability mechanism regarding that gTLD was pending.<sup>95</sup> When it received the Domain Acquisition Agreement in August of 2016, ICANN did not disqualify NDC's application because the .WEB contention set was on hold at that time due to a pending accountability mechanism by the parent company of another .WEB applicant.<sup>96</sup> The Respondent argues that it was reasonable for the Board to make this choice because the results of the accountability mechanism, and the subsequent DOJ investigation, could have had an impact on any eventual analysis ICANN might be called upon to make.<sup>97</sup>

157. The Respondent explains that, in the November 2016 Workshop, Board members and

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<sup>92</sup> *Ibid*, paras. 147-155.

<sup>93</sup> Respondent's Rejoinder, para. 1.

<sup>94</sup> *Ibid*, paras. 2 and 89.

<sup>95</sup> *Ibid*, paras. 3 and 89.

<sup>96</sup> *Ibid*, para. 4.

<sup>97</sup> *Ibid*, paras. 41 and 91.

ICANN's in-house counsel discussed the issue of .WEB and chose to not take any action at that time regarding .WEB because an accountability mechanism was pending regarding .WEB. The Respondent states that it did not seem prudent for the Board to interfere with or pre-empt the issues that were the subject of the accountability mechanism. The Respondent underscores that the Claimant does not explain how the Board's determination not to make a decision regarding .WEB during the pendency of an accountability mechanism or other legal proceedings on the same issue represents an inconsistent application of documented policies.<sup>98</sup>

158. Responding to the Claimant's suggestion that ICANN was beholden to Verisign, the Respondent avers that it has an arms-length relationship with Verisign which is no different from ICANN's relationship with other registry operators, including Afilias.<sup>99</sup>
159. Regarding the applicable standard of review, the Respondent argues that the Panel must apply a *de novo* standard in making findings of fact and reviewing the actions or inactions of individual directors, officers or Staff members, but has to review actions or inactions of the Board only to determine whether they were within the realm of reasonable business judgment. In other words, in the Respondent's view, it is not for the Panel to opine on whether the Board could have acted differently than it did.<sup>100</sup>
160. The Respondent maintains that the Claimant's claims regarding actions or inactions of ICANN in August through October 2016 are time-barred under Rule 4 of the Interim Procedures.<sup>101</sup> The Respondent stresses that the Claimant's IRP was filed more than two (2) years after it sent letters complaining about the auction and NDC's relationship with Verisign.<sup>102</sup> According to the Respondent, the Claimant was aware, in 2016, of the actions and inactions that it seeks to challenge, along with the material effect of those

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<sup>98</sup> Respondent's Rejoinder, paras. 40-41 and 92.

<sup>99</sup> *Ibid*, paras. 51-53.

<sup>100</sup> *Ibid*, paras. 54-62.

<sup>101</sup> *Ibid*, paras. 9 and 63-64.

<sup>102</sup> *Ibid*, para. 65.

actions, even if it did not have a copy of the Domain Acquisition Agreement.<sup>103</sup> In any event, the Respondent contends that the Claimant ignores the final clause of Rule 4, which states that a statement of dispute may not be filed more than twelve (12) months from the date of the challenged action or inaction.<sup>104</sup> Responding to the equitable estoppel argument advanced by the Claimant, the Respondent argues that there is nothing in its 2016 letters to suggest that it encouraged the Claimant to delay the filing of an IRP, and that the Claimant has not alleged that it relied on those letters in deciding not to file an IRP.<sup>105</sup> The Respondent also notes that the Claimant was represented by experienced counsel throughout the period at issue.<sup>106</sup>

161. Responding to the Claimant's contentions pertaining to its post-auction investigation, the Respondent notes that the Claimant asserted no claim in that regard in its Amended Request for IRP, which focussed on pre-auction rumors.<sup>107</sup> In addition, the Respondent avers that its post-auction investigation was prompt, thorough, fair, and fully consistent with its Bylaws and Articles.<sup>108</sup>
162. The Respondent also observes that the Guidebook and Auction Rules violations alleged by the Claimant do not require the automatic disqualification of NDC and instead that ICANN is vested with significant discretion to determine what the penalty or remedy should be, if any.<sup>109</sup>
163. The Respondent contends that it has, as yet, taken no position on whether NDC violated the Guidebook.<sup>110</sup> The Respondent adds that determining whether NDC violated the Guidebook "is not a simple analysis that is answered on the face of the Guidebook" which,

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<sup>103</sup> *Ibid*, paras. 66-70.

<sup>104</sup> Respondent's Rejoinder, paras. 64-65.

<sup>105</sup> *Ibid*, paras. 72-75.

<sup>106</sup> *Ibid*, paras. 76-78.

<sup>107</sup> *Ibid*, paras. 104-105.

<sup>108</sup> *Ibid*, paras. 8 and 107-113.

<sup>109</sup> *Ibid*, paras. 80-88.

<sup>110</sup> *Ibid*, para. 81.

according to the Respondent, includes no provision that squarely addresses an arrangement like the Domain Acquisition Agreement. The Respondent submits that a “true determination of whether there was a breach of the Guidebook requires an in-depth analysis and interpretation of the Guidebook provisions at issue, their drafting history to the extent it exists, how ICANN has handled similar situations, and the terms of the DAA”. The Respondent argues that “[t]his analysis must be done by those with the requisite knowledge, expertise, and experience, namely ICANN.”<sup>111</sup>

164. The Respondent notes, referring to the evidence of the *Amici*, that there have been a number of arrangements that appear to be similar to the DAA in the secondary market for new gTLDs.<sup>112</sup> Because it has the ultimate responsibility for the New gTLD Program, the Board has reserved the right to individually consider any application to determine whether approval would be in the best interest of the Internet community.<sup>113</sup>
165. Turning to the Claimant’s arguments regarding competition, the Respondent denies that it has exercised its discretion to benefit Verisign, repeating that it has not “fully evaluated” the Domain Acquisition Agreement – and NDC’s related conduct – because the .WEB contention set has been on hold due to the invocation of ICANN’s accountability mechanisms and the DOJ investigation. Accordingly, the Claimant’s assertion that the Respondent has violated its so-called “competition promotion mandate” is not ripe for consideration.<sup>114</sup>
166. The Respondent adds that it is not required or equipped to make judgment about which applicant for a particular gTLD would more efficiently promote competition. Rather, ICANN complies with its core value regarding competition by coordinating and implementing policies that facilitate market-driven competition, and by deferring to the appropriate government regulator, such as the DOJ, the investigation of potential competition issues. The Respondent notes, pointing to the evidence of Drs. Carlton and

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<sup>111</sup> *Ibid*, para. 82.

<sup>112</sup> Respondent’s Rejoinder, para. 83.

<sup>113</sup> *Ibid*, para. 87.

<sup>114</sup> *Ibid*, para. 95.

Murphy, that there is no evidence that Verisign's operation of .WEB would restrain competition.<sup>115</sup>

167. Finally, the Respondent argues that the Claimant seeks relief which is beyond the Panel's jurisdiction and not available in these proceedings. While the Panel is empowered to declare whether the Respondent complied with its Articles and Bylaws, it cannot disqualify NDC's application, or bid, and offer Claimant the rights to .WEB.<sup>116</sup>

## **E. The *Amici*'s Briefs**

### **1. NDC's Brief**

168. In its *amicus* brief dated 26 June 2020, NDC alleges that ICANN has approved many post-delegation assignments of registry agreements for new gTLDs pursuant to pre-delegation financing and other similar agreements.<sup>117</sup> NDC notes that Afilias itself has participated extensively in the secondary market for new gTLDs.<sup>118</sup>
169. NDC argues that, having won the auction, it has the right and ICANN has the obligation under the Guidebook to execute the .WEB registry agreement, subject to compliance with the appropriate conditions. Although additional steps remain before the delegation of .WEB, NDC characterizes those as routine and administrative.<sup>119</sup>
170. Turning to the Panel's jurisdiction, NDC stresses that the Panel's remedial powers are significantly circumscribed. Section 4.3(o) of the Bylaws provides a closed list that only authorizes the Panel to take the actions enumerated therein. NDC contends that while the Panel is authorized to determine whether ICANN violated its Bylaws, it cannot decide the Claimant's claims on the merits or grant the affirmative relief sought by Afilias.<sup>120</sup>

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<sup>115</sup> *Ibid*, paras. 94-103.

<sup>116</sup> *Ibid*, paras. 114-124.

<sup>117</sup> NDC's Brief, paras. 32-37.

<sup>118</sup> *Ibid*, paras. 38-39.

<sup>119</sup> *Ibid*, paras. 55-56.

<sup>120</sup> *Ibid*, paras. 64-69.

171. NDC further argues that Section 4.3(o) does not permit the Panel to second-guess the Board's reasonable business judgment. If the Panel finds that there has been a violation of the Bylaws, the proper remedy is to issue a declaration to that effect. It would then be up to the Board to exercise its business judgment and decide what action to take in light of such declaration.<sup>121</sup>
172. According to NDC, the Panel's limited remedial authority is consistent with the terms of the Guidebook providing that ICANN retains the sole decision-making authority with respect to the Claimant's objections and NDC's .WEB application. NDC submits that only ICANN possesses the required expertise and resources to craft DNS policy and to weight the competing interests and policies that would factor into a decision on .WEB.<sup>122</sup>
173. NDC argues that if ICANN were to find that NDC violated the Guidebook or other applicable rules, ICANN's discretion to make determinations regarding gTLD applications would offer it a wide range of possible reliefs, not limited to the relief that the Claimant has asked the Panel to grant.<sup>123</sup>
174. Responding to the Claimant's argument that IRP decisions are intended to be final and enforceable, NDC contends that the binding nature of a dispute resolution procedure and the enforceability of a decision arising out of such procedure cannot expand the scope of the adjudicator's circumscribed remedial jurisdiction.<sup>124</sup> In that regard, the Cross-Community Working Group for Accountability (CCWG) did not, contrary to the Claimant's contention, recommend that IRP panels should be authorized to dictate a remedy in cases in which ICANN would be found to have violated its Articles or Bylaws. Rather, the CCWG stated that an IRP would result in a declaration that an action/failure to act complied or did not comply with ICANN's obligations.<sup>125</sup>

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<sup>121</sup> *Ibid*, paras. 70-74.

<sup>122</sup> NDC's Brief, paras. 75-79.

<sup>123</sup> *Ibid*, para. 80.

<sup>124</sup> *Ibid*, paras. 81-84.

<sup>125</sup> *Ibid*, paras. 85-89.

175. Finally, NDC denies making any material misrepresentations to ICANN, as there had been no change to its management, control or ownership since the filing of its .WEB application.<sup>126</sup> NDC also contends that it did not violate any ICANN rules by agreeing with Verisign to a post-auction transfer of .WEB. In arranging for such a post-auction transfer, NDC asserts that it acted consistently with what the industry understood was permissible.<sup>127</sup> In that respect, NDC argues that Afiliás' own participation in the secondary market – on both sides of transfers – belies its protestations in this case.<sup>128</sup> In addition, NDC submits that Afiliás itself violated the Guidebook by contacting NDC during the Blackout Period.<sup>129</sup>
176. For these reasons, NDC requests that the Panel deny in its entirety the relief requested by the Claimant.<sup>130</sup>

## 2. Verisign's Brief

177. In its *amicus* brief also dated 26 June 2020, Verisign declares that it joins in the sections of NDC's brief setting forth the background of this IRP and the scope of the Panel's authority, including as to the issues properly presented to the Panel for decision. In the submission of Verisign, the only question properly before the Panel is whether ICANN violated its Bylaws when it decided to defer a decision on the Claimant's objections, and the Panel should decline to determine the merits or lack thereof of these objections, or to award .WEB to the Claimant. According to Verisign, the Domain Acquisition Agreement complies with the Guidebook, is consistent with industry practices under the New gTLD Program, and there is no basis for refusing to delegate .WEB based on ICANN's mandate to promote competition.<sup>131</sup>
178. The Domain Acquisition Agreement, according to its terms, does not constitute a resale,

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<sup>126</sup> *Ibid*, paras. 96-99.

<sup>127</sup> *Ibid*, paras. 100-107.

<sup>128</sup> *Ibid*, paras. 108-113.

<sup>129</sup> *Ibid*, paras. 114-119.

<sup>130</sup> *Ibid*, para. 120.

<sup>131</sup> Verisign's Brief, pp. 1-2.

assignment, or transfer of rights or obligations with respect to NDC's .WEB application, nor does it require Verisign's consent for NDC to take any action necessary to comply with the Guidebook or with NDC's obligations under the application. Verisign argues that the only sale, assignment or transfer contemplated in the Domain Acquisition Agreement is the possible future and conditional assignment of the registry agreement for .WEB. Verisign contends that Section 10 of Module 6 of the Guidebook is intended to limit the acquisition of rights over the gTLD *by applicants*, providing that applicants would only acquire rights with respect to the subject gTLD upon execution of a post-delegation registry agreement with ICANN. Verisign contends that Section 10 does not prohibit future transfers of rights. Verisign further argues that restrictions on the assignment or transfer of a contract are to be narrowly construed consistent with the purpose of the contract.<sup>132</sup> Verisign argues that the Domain Acquisition Agreement provides only for a possible future assignment of the registry agreement of .WEB upon ICANN's prior consent.<sup>133</sup>

179. Verisign avers that the Domain Acquisition Agreement is consistent with industry practices under the Guidebook, including assignments of gTLDs approved by ICANN. According to Verisign, there exists a robust secondary marketplace with respect to the New gTLD Program in which Afilias itself has participated. Verisign argues that the Domain Acquisition Agreement contemplates nothing more than what has already often occurred under the Program.<sup>134</sup> Verisign further claims that it would be fundamentally unfair – and a violation of the equal treatment required under the Bylaws – if ICANN or the Panel were to adopt a new interpretation of the anti-assignment provision of the Guidebook.<sup>135</sup>
180. In addition, Verisign argues that the drafting history of the Guidebook contradicts the Claimant's claims. According to Verisign, ICANN purposely declined to include proposed limits on post-delegation assignments of registry agreements, choosing instead to rely on ICANN's right, upon a post-delegation request for assignment of a registry agreement, to

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<sup>132</sup> *Ibid*, paras. 2-4, 6 and 11-20.

<sup>133</sup> *Ibid*, paras. 4 and 21-34.

<sup>134</sup> Verisign's Brief, paras. 5, 9-10 and 35-45.

<sup>135</sup> *Ibid*, para. 46.

approve such assignment.<sup>136</sup>

181. Verisign contends that, in an attempt to contrive support for its contention that NDC sold the application to Verisign, the Claimant takes out of context select obligations of NDC under the Domain Acquisition Agreement to protect Verisign’s loan of funds to NDC for the auction.<sup>137</sup> Redacted - Third Party Designated Confidential Information

<sup>138</sup> In addition, Verisign underscores that there was no obligation for NDC to disclose Verisign’s support in the resolution of the contention set. As Verisign puts it, “confidentiality in such matters is common”.<sup>139</sup>

182. Verisign argues that the Guidebook requires an amendment to the application only when previously submitted information becomes untrue or inaccurate, which was not the case here since the Domain Acquisition Agreement did not make Verisign the owner of NDC’s application.<sup>140</sup> Furthermore, Verisign asserts that the mission statement in a new gTLD application is irrelevant to its evaluation.<sup>141</sup>

183. Verisign also argues that there is no basis for refusing to delegate .WEB based on ICANN’s mandate to promote competition.<sup>142</sup> According to Verisign, ICANN has no regulatory authority – including over matters of competition – and was not intended to supplant existing legal structures by establishing a new system of Internet governance.<sup>143</sup> In Verisign’s submission, ICANN has acted upon its commitment to enable competition by helping to create the conditions for a competitive DNS and by referring competition

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<sup>136</sup> *Ibid*, paras. 49-51.

<sup>137</sup> *Ibid*, para. 52.

<sup>138</sup> *Ibid*, para. 57.

<sup>139</sup> *Ibid*, para. 62.

<sup>140</sup> *Ibid*, paras. 65-76.

<sup>141</sup> *Ibid*, paras. 77-86.

<sup>142</sup> *Ibid*, paras. 88-93.

<sup>143</sup> Verisign’s Brief, paras. 94-101.

issues to the relevant authorities.<sup>144</sup>

184. Verisign claims that there is no threat or injury to competition resulting from its potential operation of the .WEB registry, and that the Claimant has submitted no economic evidence to support the contrary view.<sup>145</sup> Verisign further stresses that it does not have a dominant market position and that it is not a “monopoly”, as it has less than 50% of the relevant market.<sup>146</sup> In the view of the expert economists retained by Verisign and the Respondent, there is no evidence that .WEB will be a particularly significant competitive check on .COM.<sup>147</sup>
185. Verisign concludes by reiterating that this Panel should only determine whether ICANN properly exercised its reasonable business judgment when it deferred making a decision on Afiliás’ claims regarding the .WEB auction. To the extent that the Panel considers the substance of the Claimant’s claims, Verisign submits that they are meritless and should be rejected.<sup>148</sup>

## **F. Parties’ Responses to *Amici*’s Briefs**

### **1. Afiliás’ Response to *Amici*’s Briefs**

186. The Claimant begins its 24 July 2020 Response to the *Amici*’s Briefs by addressing what it describes as the omissions and misrepresentations of key facts in the *Amici*’s submissions.<sup>149</sup> The Claimant insists on the fact that Verisign failed to apply for .WEB by the set deadline<sup>150</sup> and provides no explanation for that failure. It observes that had Verisign applied for .WEB in 2012, its status as an applicant would have been known and the public

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<sup>144</sup> *Ibid.*, paras. 102-107.

<sup>145</sup> *Ibid.*, paras. 108-112.

<sup>146</sup> *Ibid.*, paras. 112-119.

<sup>147</sup> *Ibid.*, paras. 125-134.

<sup>148</sup> *Ibid.*, para. 140.

<sup>149</sup> Claimant’s Response to *Amici*’s Briefs, paras. 5-66.

<sup>150</sup> While not material to the issues in dispute, there is some confusion in the Claimant’s submissions as to what the deadline was. In the Claimant’s Response, the deadline is said to be 13 June 2012 (para. 9); in the Claimant’s PHB, it is said to be 20 April 2012 (para. 10); while in the Joint Chronology, it is stated that it was 30 May 2012.

portions of its application would have been available for the public and governments to comment upon.<sup>151</sup>

187. Turning to the circumstances of the execution of the Domain Acquisition Agreement, the Claimant notes that as a small company with limited funding, NDC had no chance of obtaining .WEB for itself and was thus the perfect vehicle to allow Verisign to fly “under the radar” of the other .WEB applicants and to blindsides them with a high bid that none could have seen coming.<sup>152</sup> The Claimant asks, if the *Amici* believed that their arrangement complied with the New gTLD Program Rules, why go through such lengths to conceal the Domain Acquisition Agreement not only to their competitors, but also to ICANN.<sup>153</sup> The Claimant notes in this regard Verisign’s inquiry to ICANN, shortly after the execution of the DAA, about ICANN’s practice when approached to approve the assignment of a new registry agreement. On that occasion, Verisign mentioned neither the DAA, nor .WEB.<sup>154</sup> The Claimant vehemently denies that the other transactions identified by the *Amici* as industry practice are analogous to the Domain Acquisition Agreement.<sup>155</sup>
188. According to the Claimant, the *Amici*’s pre-auction conduct, including the execution of the Confirmation of Understandings of 26 July 2016, also exemplifies their concerted attempts to conceal the DAA and Verisign’s interest in .WEB. In regard to the post-auction period, the Claimant argues that the *Amici* misrepresent the Claimant’s letters of 8 August and 9 September 2016 as asserting the same claims as those made in this IRP, and adds that they have failed to explain how and why ICANN’s outside counsel came to contact Verisign’s outside counsel, by phone, to request information about the DAA.
189. With respect to the *Amici*’s reliance on ICANN’s purported “decision not to decide” of November 2016, the Claimant denies the existence of the “well-known practice” upon which the Board’s decision was allegedly based; states that this alleged practice is

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<sup>151</sup> Claimant’s Response to *Amici*’s Briefs, paras. 8-16.

<sup>152</sup> *Ibid*, para. 20.

<sup>153</sup> *Ibid*, para. 22.

<sup>154</sup> *Ibid*, paras. 24-29.

<sup>155</sup> *Ibid*, para. 23.

inconsistent with ICANN’s conduct at the time; that not taking action on a contention set while an accountability mechanism is pending is not among ICANN’s documented policies;<sup>156</sup> that ICANN never informed Afiliás of such decision until well into this IRP;<sup>157</sup> and that such decision is not even documented.<sup>158</sup>

190. The Claimant also notes that there is no indication that the Staff had undertaken any analysis of the compatibility of the DAA with the New gTLD Program Rules when the Staff moved toward contracting with NDC in June 2018, as soon as the Board rejected Afiliás’ request to reconsider the denial of its most recent document disclosure request.<sup>159</sup> Nor is it known what assessment of that question had been made by the Board. In this regard, the Claimant claims there is a contradiction between the Respondent’s statement in this IRP that it has not yet considered the Claimant’s complaints, and the Respondent’s submission to the Emergency Arbitrator that ICANN had evaluated these complaints.<sup>160</sup>

191. According to the Claimant, the *Amici* misrepresent the nature of the Domain Acquisition Agreement. The Claimant notes that Redacted - Third Party Designated Confidential Information and were therefore not “executory” in nature.<sup>161</sup> The Claimant also rejects any analogy between the Domain Acquisition Agreement and a financing agreement.<sup>162</sup> In the Claimant’s submission, it is self-evident that the DAA was an attempt to circumvent the New gTLD Program Rules, and this should have been patently clear to the Staff and Board upon its review. The Domain Acquisition Agreement makes plain that NDC resold, assigned or transferred to Verisign several rights and obligations in its application for .WEB, including: Redacted - Third Party Designated Confidential Information

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<sup>156</sup> *Ibid*, paras. 54-55.

<sup>157</sup> Claimant’s Response to *Amici*’s Briefs, para. 56.

<sup>158</sup> *Ibid*, paras. 49-58.

<sup>159</sup> *Ibid*, para. 62.

<sup>160</sup> *Ibid*, para. 65.

<sup>161</sup> *Ibid*, paras. 67-71.

<sup>162</sup> *Ibid*, paras. 72-73.

192. The Claimant avers that NDC violated the Guidebook by failing to promptly inform ICANN of the terms of the Domain Acquisition Agreement since those terms made the information previously submitted in NDC's .WEB application untrue, inaccurate, false or misleading. The Claimant stresses that the Guidebook does not exempt the section of the application that details the applicant's business plan from the obligation to notify changes to ICANN. In any event, NDC also failed to update its responses regarding the technical aspects of NDC's planned operation of the .WEB registry. The Claimant argues as well that NDC intentionally failed to disclose the Domain Acquisition Agreement prior to the auction, when Mr. Rasco was specifically asked whether there were any changed circumstances needing to be reported to ICANN.<sup>164</sup>
193. The Claimant reiterates its arguments about NDC having violated the Guidebook by submitting invalid bids – made on behalf of a third party – at the .WEB auction. In the Claimant's submission, the *Amici's* examples of market practice are inapposite for a variety of reasons, and none of them reflects the level of control that the Domain Acquisition Agreement gave Verisign.<sup>165</sup>
194. Responding to the *Amici's* arguments pertaining to the discretion enjoyed by ICANN in the administration of the New gTLD Program, the Claimant contends that such discretion is circumscribed by the Articles and Bylaws, as well as principles of international law, including the principle of good faith.<sup>166</sup> The Claimant underscores that the Bylaws require ICANN to operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness. The Claimant argues that due process and procedural fairness require, among other procedural protections, that decisions be based on evidence and on appropriate inquiry into the facts. According to the Claimant,

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<sup>163</sup> *Ibid*, paras. 74-98.

<sup>164</sup> Claimant's Response to *Amici's* Briefs, paras. 99-114.

<sup>165</sup> *Ibid*, paras. 121-136.

<sup>166</sup> *Ibid*, paras. 140-144.

ICANN repeatedly failed to comply with those principles in regards to Afilias' claims. The Claimant notes again that even in this IRP the Respondent has taken diametrically opposed positions as to whether or not it has evaluated Afilias' concerns.<sup>167</sup>

195. The Claimant also argues that ICANN is required by its Bylaws to afford impartial and non-discriminatory treatment, an obligation that is consistent with the principles of impartiality and non-discrimination under international law. The Claimant submits that, upon receipt of the Domain Acquisition Agreement, and without conducting any investigation on the matter, ICANN accepted the *Amici*'s positions on their agreement at face value, and incorporated them into a questionnaire that was designed to elicit answers to advance the *Amici*'s arguments, and that was based on information that ICANN and the *Amici* had in their possession – but which they knew was unavailable to Afilias.<sup>168</sup>
196. The Claimant avers that the Respondent also failed to act openly and transparently as required by the Articles, Bylaws and international law. The Claimant contends that, far from acting transparently, ICANN allowed NDC to enable Verisign to secretly participate in the .WEB auction in disregard of the New gTLD Program Rules, failed to investigate NDC's conduct and instead proceeded to delegate .WEB to NDC in an implicit acceptance of its conduct at the auction, all the while keeping Afilias in the dark about the status of its investigation regarding the .WEB gTLD for nearly two years.<sup>169</sup> The Claimant further claims that the Respondent failed to respect its legitimate expectations despite its commitment to make decisions by applying documented policies consistently, neutrally, objectively and fairly. According to the Claimant, had the Respondent followed the New gTLD Program Rules, it would necessarily have disqualified NDC from the application and bidding process.<sup>170</sup>
197. As regards the applicable standard of review, the Claimant denies that the Board's conduct in November 2016 constitutes a decision protected by the business judgment rule. The

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<sup>167</sup> *Ibid*, paras. 145-147.

<sup>168</sup> Claimant's Response to *Amici*'s Briefs, paras. 148-149.

<sup>169</sup> *Ibid*, paras. 151-158.

<sup>170</sup> *Ibid*, paras. 159-161.

Claimant also stresses that neither the *Amici* nor the Respondent assert that the business judgment rule applies to the decision taken by ICANN in June 2018 to proceed with delegating .WEB to NDC. The Claimant takes the position that its claims regarding (1) the Respondent’s failure to disqualify NDC, (2) its failure to offer Afilias the rights to .WEB and (3) the delegation process for .WEB after a superficial investigation of the Claimant’s complaints, do not concern the Board’s exercise of its fiduciary duties. The Claimant contends finally that, even assuming *arguendo* that the business judgment rule has any application, the secrecy regarding the Board’s November 2016 conduct makes it impossible for this Panel to evaluate the reasonableness of that conduct.<sup>171</sup>

198. Responding to the *Amici*’s claims regarding its own conduct, the Claimant denies having violated the Blackout Period. It contends that the provisions relating to Blackout Period are designed to prevent bid rigging and do not prohibit any and all contact among the members of the contention set.<sup>172</sup>
199. The Claimant states that the *Amici* misrepresent the scope and effect of ICANN’s competition mandate. The Claimant argues that ICANN must act to promote competition pursuant to its Bylaws, and that it failed to do so when it permitted Verisign to acquire .WEB in a program designed to challenge .COM’s dominance. The Claimant stresses that Dr. Carlton – the economist retained by the Respondent – expressed views on the competitive benefits of introducing new gTLDs in 2009 that differ from those expressed in his report prepared for the purpose of this IRP.<sup>173</sup> According to the Claimant, any decision furthering Verisign’s acquisition of .WEB is inconsistent with ICANN’s competition mandate. In the Claimant’s view, .WEB cannot be considered as “just another gTLD”, since it has been uniquely identified by members of the Internet community as the next best competitor for .COM. The Claimant contends that the high price paid by Verisign for .WEB was at least partly driven by the benefits it would derive from keeping that

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<sup>171</sup> *Ibid*, paras. 165-178.

<sup>172</sup> *Ibid*, paras. 179-184.

<sup>173</sup> Claimant’s Response to *Amici*’s Briefs, paras. 164 and 185-198.

competitive asset out of the hands of its competitors.<sup>174</sup> The Claimant reiterates its submission that the DOJ's decision to close its investigation is irrelevant to the Panel's analysis.<sup>175</sup>

200. Turning to the Panel's remedial authority, the Claimant argues that the *Amici* are wrong in asserting that the Panel's authority is limited to issuing a declaration as to whether ICANN acted in conformity with its Articles and Bylaws when its Board deferred making any decision on .WEB in November 2016. The Claimant urges that meaningful and effective accountability requires review and redress of ICANN's conduct. In that regard, the Claimant invokes the international law principle that any breach of an engagement involves an obligation to make reparation.<sup>176</sup> Finally, the Claimant contends that the Panel must determine the scope of its authority based on the text, context, object and purposes of the IRP, and not only on Section 4.3(o) of the Bylaws, which is not exhaustive and should be read, *inter alia*, with reference to Section 4.3(a).<sup>177</sup>

## 2. ICANN's Response to the *Amici*'s Briefs

201. In its brief Response dated 24 July 2020 to the *Amici*'s Briefs, the Respondent notes that the position advocated by the *Amici* in their respective briefs is generally consistent with its own position as regards the following three (3) issues: (1) the Panel's jurisdiction and remedial authority, (2) the nature and implications of the Bylaws' provisions in relation to competition, and (3) whether Verisign's potential operation of .WEB would be anticompetitive.<sup>178</sup>
202. The Respondent reiterates that it does not take a position on what it describes as the Claimant's and NDC's "allegations against each other" regarding their respective pre-auction, and auction conduct, or whether NDC violated the Guidebook and Auction

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<sup>174</sup> *Ibid*, paras. 199-209.

<sup>175</sup> *Ibid*, paras. 210-213.

<sup>176</sup> *Ibid*, paras. 218-220.

<sup>177</sup> *Ibid*, paras. 223-236.

<sup>178</sup> Respondent's Response to *Amici*'s Briefs, paras. 2-6.

Rules by the execution of the DAA, adding that it will consider those issues after this IRP concludes.<sup>179</sup>

## **G. Post-Hearing Submissions**

203. The Parties and *Amici* have filed comprehensive post-hearing submissions in which they have reiterated their respective positions on all issues in dispute. In the summary below, the Panel focuses on those aspects of the post-hearing submissions that comment on the hearing evidence, or put forward new points.

### **1. Claimant's Post-Hearing Brief**

204. In its Post-Hearing Brief dated 12 October 2020, the Claimant argues that the two fundamental questions before the Panel are whether the Respondent was required to (i) determine that NDC is ineligible to enter into a registry agreement for .WEB for having violated the New gTLD Program Rules and, if so, (ii) offer the .WEB gTLD to the Claimant. The Claimant submits that the hearing evidence leaves no doubt that these questions must be answered in the affirmative.

205. The evidence revealed that the Respondent's failure to act upon the Claimant's complaints was a result of the unjustified position that these were motivated by "sour grapes" for having lost the auction. According to the Claimant, this attitude permeated every aspect of the Respondent's consideration of the Claimant's concerns, including its decision, in the course of 2018, to approve a gTLD registry contract for NDC.<sup>180</sup>

206. The Claimant notes that Ms. Willett acknowledged that the decision of an applicant to participate in an Auction of Last Resort is one of the applicant's rights under a gTLD application. Redacted - Third Party Designated Confidential Information <sup>.181</sup>

207. The Claimant argues that the evidence of Mr. Livesay confirms the competitive significance of .WEB, in that Verisign's CEO was directly involved in the 2014 initiative

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<sup>179</sup> *Ibid*, para. 7.

<sup>180</sup> Claimant's PHB, paras. 1-2.

<sup>181</sup> Claimant's PHB, para. 16.

to seek to participate in the gTLD market. Mr. Livesay also confirmed, as did Mr. Rasco, that Redacted - Third Party Designated Confidential Information

According to the Claimant, the evidence of these witnesses demonstrates that they harboured serious doubts as to whether they were acting in compliance with the Program Rules; otherwise, why conceal the DAA's terms from ICANN's scrutiny, and keep Verisign's involvement in NDC's application hidden from the Internet community? In sum, the Claimant submits that the *Amici's* conduct evidence an attempt to "cheat the system".<sup>182</sup>

208. In the pre-auction period, the Claimant focuses on Mr. Rasco's representation to the Ombudsman that there had been no changes to the NDC application, a statement that cannot be reconciled with the terms of the DAA, according to the Claimant. Also plainly incorrect, in the submission of the Claimant, is Mr. Rasco's assurance to Ms. Willett, as evidenced in the latter's email communication to the Ombudsman, that the decision not to resolve the contention set privately "was in fact his".
209. The Claimant notes that from the moment Verisign's involvement in NDC's application for .WEB was made public, the Respondent treated Verisign as though it was the *de facto* applicant for .WEB, for example, by directly contacting Verisign about questions concerning NDC's application and working with Verisign on the delegation process for .WEB. In regard to Verisign's detailed submission of 23 August 2016, which included a copy of the DAA, the Claimant notes that only the Claimant's outside counsel and Mr. Scott Hemphill have been able to review it and that the Internet community remains unaware of the Agreement's details. The Claimant finds surprising that Ms. Willett, in spite of her leadership position within ICANN in respect of the Program, would have never reviewed – indeed seen – the DAA, or Verisign's 23 August 2016 letter.<sup>183</sup>
210. The Claimant also notes Ms. Willett's inability to address questions concerning the Questionnaire that was sent to some contention set members under cover of her letter

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<sup>182</sup> *Ibid*, paras. 21-23.

<sup>183</sup> *Ibid*, paras. 46-56.

dated 16 September 2016, including the fact that some questions were misleading for anyone, such as the Claimant, who had no knowledge of the terms of the DAA. The Claimant also notes that the Respondent presented no evidence explaining what it did with the responses to the Questionnaire, other than Mr. Disspain confirming that the responses were never considered by the Board.

211. Turning to the “load-bearing beam of ICANN’s defense in this case”, the November 2016 Board decision to defer consideration of Afilias’ complains, the Claimant submits that the evidence belies that any such decision was in fact made. Rather, according to the Claimant, both Ms. Burr and Mr. Disspain testified that ICANN simply adhered to its practice to put the process on hold once an accountability mechanism has been initiated, a practice that the Claimant says has not been proven in fact to exist. The Claimant quotes the evidence of Ms. Willett, who testified that work and communications within ICANN would continue while an accountability mechanism was pending, simply that the contention set would not move to the next phase; and points to the fact that the Staff were engaging with NDC and Verisign in December 2017 and January 2018 on the subject of the assignment of .WEB even though Ruby Glen had not yet resolved its CEP, or ICANN considered Afilias’ concerns. The Claimant also sees a contradiction between the Respondent’s claim that it has not yet taken a position on the merits of Afilias’ complaints, and the evidence of Ms. Willett that ICANN would not delegate a gTLD until a pending matter was resolved.<sup>184</sup>
212. The Claimant reviews in its PHB the evidence concerning the genesis of Rule 7 of the Interim Procedures, as it reveals the degree to which, in its submission, the Respondent was willing to go to make things easier for itself and for Verisign to defend against future efforts by the Claimant to challenge ICANN’s conduct. The Claimant notes that Ms. Eisner and Mr. McAuley did speak over the phone on 15 October 2018, and that shortly thereafter, Ms. Eisner reversed her positions and expanded the categories of *amicus* participation to cover the circumstances in which the *Amici* found themselves at the time.<sup>185</sup>

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<sup>184</sup> Claimant’s PHB, paras. 61-76.

<sup>185</sup> *Ibid*, paras. 77-91.

213. Insofar as the DAA is concerned, the Claimant notes that the evidence confirms that NDC and Verisign performed exactly as the language of the DAA provides.<sup>186</sup>
214. The Claimant argues that ICANN violated its Articles and Bylaws through its disparate treatment of Afilias and Verisign. For instance, the Claimant notes that ICANN: failed to provide timely answers to Afilias' letters while Verisign was able to reach ICANN easily to discuss .WEB, even though it was a non-applicant; informally invited Verisign's counsel to comment on Afilias' concerns; discussed the .WEB registry agreement with NDC, all the while stating that ICANN was precluded from acting on Afilias' complaints due to the pendency of an accountability mechanism; and also advocated for the *Amici* and against Afilias throughout this IRP. According to the Claimant, further evidence of disparate treatment can be found in the Staff's decision to make Rule 4 retroactive so as to catch the Claimant's CEP.<sup>187</sup>
215. According to the Claimant, the Staff's decision to take the .WEB contention set off hold and to conclude a registry agreement with NDC also violated the Bylaws and ICANN's obligation to enforce its policies fairly. The Claimant argues that the Board delegated the authority to enforce the New gTLD Program Rules to Staff who authorized the .WEB registry agreement to be sent to NDC and would have countersigned it if the Claimant had not initiated a CEP. The Board did not act to stop the process even though it was aware that the execution of the .WEB registry agreement was imminent.<sup>188</sup>
216. In addition, the Claimant contends that ICANN failed to enable and promote competition in the DNS contrary to its Bylaws. The Claimant submits that the only decision ICANN could have taken regarding .WEB to promote competition would have been to reject NDC's application and delegate .WEB to Afilias. In its view, ICANN cannot satisfy its competition mandate by relying on regulators or the DOJ's decision to close its .WEB investigation.<sup>189</sup>

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<sup>186</sup> *Ibid*, para. 103.

<sup>187</sup> Claimant's PHB, paras. 126-138.

<sup>188</sup> *Ibid*, paras. 139-143.

<sup>189</sup> *Ibid*, paras. 144-154.

217. In relation to its Rule 7 Claim, the Claimant maintains that the Staff improperly coordinated with Verisign the drafting of that rule. In response to a question raised by the Panel, the Claimant explained that its Rule 7 Claim remains relevant at the present stage of the IRP because the Respondent's breach of its Articles and Bylaws in regard to the development of Rule 7 justifies an award of costs in the Claimant's favour.<sup>190</sup>
218. As regards the Respondent's argument based on the business judgment rule, the Claimant points to the evidence of Ms. Burr concerning the nature of Board workshops to advance the position that a workshop is not a forum where the Respondent's Board can take any action at all, still less one that is protected by the business judgment rule. The Claimant also asserts that the evidence of the Respondent's witnesses supports its position that no affirmative decision regarding .WEB had been taken during the November 2016 workshop. Finally, the Claimant reiterates that there is no evidence of an ICANN policy or practice to defer decisions while accountability mechanisms are pending.<sup>191</sup>
219. Turning to the limitations issue, the Claimant avers that the Respondent's position that the Claimant's claims are time-barred is inherently inconsistent with its assertion that ICANN has not yet addressed the fundamental issues underlying those claims. According to the Claimant, its claims are based on conduct of the Staff and Board that culminated in irreversible violations of Afilias' rights when the Staff proceeded with the delegation of .WEB to NDC on 6 June 2018. Consequently, the Claimant argues that its claims are not time-barred pursuant to Rule 4 of the Interim Procedures.
220. Responding to the Respondent's argument that the claims brought in the Amended Request for IRP are time-barred because Afilias raised the same issues in its letters of August and September 2016, the Claimant contends that in the face of ICANN's representations that it was considering the matter, it would have been unreasonable for Afilias to file contentious dispute resolution proceedings in 2016. The Claimant adds that those letters described how NDC had violated the New gTLD Program Rules – not how ICANN had violated its

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<sup>190</sup> *Ibid*, para. 157.

<sup>191</sup> Claimant's PHB, paras. 159-170.

Articles and Bylaws.<sup>192</sup>

221. The Claimant further contends that, because of the circumstances in which Rule 4 of the Interim Procedures was adopted, it cannot be applied to its claims. The Claimant avers that four (4) days after the Claimant commenced its CEP – understanding that its claims had never been subject to any time limitation – ICANN launched a public comment process concerning the addition of timing requirements to the rules governing IRPs. In spite of the fact that the public comment period on proposed Rule 4 remained open, ICANN included Rule 4 in the draft Interim Procedures that were presented to the Board for approval, and adopted by the Board on 25 October 2018. The Respondent further provided that the Interim Procedures would apply as from 1 May 2018, and no carve out was made for pending CEPs or IRPs. According to the Claimant, the decision to make Rule 4 retroactive can only have been made in an attempt to preclude Afilias from arguing that its CEP had been filed prior to the adoption of the new rules. The Claimant avers that ICANN’s enactment and invocation of Rule 4 is an abuse of right and is contrary to the international law principle of good faith.<sup>193</sup>
222. In response to the argument that Afilias should have submitted a reconsideration request to the Board, the Claimant argues that, prior to June 2018, there was no action or inaction by the Staff or Board to be reconsidered.<sup>194</sup>
223. The Claimant contends that the Board waived its right to individually consider NDC’s application by failing to do so at a time where such review would have been meaningful. The Claimant underscores that the Board failed to do so in November 2016, and again in early June 2018 when it was informed that the Staff was going to conclude a registry agreement for .WEB with NDC. According to the Claimant, there is no evidence to suggest that the Board ever intended to consider whether NDC had violated the New gTLD Program Rules, and it is now for this Panel to decide the Claimant’s claims.<sup>195</sup>

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<sup>192</sup> *Ibid*, paras. 177-183.

<sup>193</sup> Claimant’s PHB, paras. 184-192.

<sup>194</sup> *Ibid*, paras. 193-195.

<sup>195</sup> *Ibid*, paras. 196-202.

224. Moving to the issue of the Panel’s jurisdiction, the Claimant emphasizes that this is the first IRP under both ICANN’s revised Bylaws and the Interim Procedures. The Claimant stresses that the IRP is a “final, binding arbitration process” and that the Panel is “charged with hearing and resolving the Dispute”. According to the Claimant, this is particularly important in light of the litigation waiver that ICANN required all new gTLD applicants to accept and to avoid an accountability gap that would leave claimants without a means of redress against ICANN’s conduct. The Claimant submits that the Panel’s jurisdiction extends to granting the remedies that Afilias has requested. In the Claimant’s view, the inherent jurisdiction of an arbitral tribunal sets the baseline for the Panel’s jurisdiction and any deviation must be justified by the text of the Bylaws. In that respect, the Claimant also invokes the international arbitration principle that a tribunal has an obligation to exercise the full extent of its jurisdiction.<sup>196</sup>
225. The Claimant notes that the CCWG intended to enhance ICANN’s accountability with an expansive IRP mechanism to ensure that ICANN remains accountable to the Internet community. In Afilias’ view, the CCWG’s report “provides binding interpretations for the provisions of ICANN’s Bylaws that set forth the jurisdiction and powers of an IRP panel – none of which are inconsistent with the CCWG Report.”<sup>197</sup>
226. The Claimant alleges that in the Ruby Glen Litigation before the Ninth Circuit, ICANN represented that the litigation waiver would neither affect the rights of New gTLD Program applicants nor be exculpatory, with the implication that the IRP could do anything that the courts could. In Afilias’ view, ICANN’s position before the Ninth Circuit contradicts ICANN’s position in this IRP when it asserts that the Panel cannot order mandatory or non-interim affirmative relief.<sup>198</sup>
227. In relation to the relief it is requesting from the Panel, the Claimant avers that the CCWG Report states that claimants have a right to “seek redress” against ICANN through an IRP. According to the Claimant, unless the Panel directs ICANN to remedy the alleged

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<sup>196</sup> *Ibid*, paras. 203-210.

<sup>197</sup> Claimant’s PHB, paras. 211-220.

<sup>198</sup> *Ibid*, paras. 221-228.

violations, there is a serious risk that this dispute will go unresolved. For that reason, the Claimant requests that the Panel issue a decision that is legally binding on the Parties and that fully resolves the Dispute. By way of injunctive relief, the Claimant asks the Panel to: reject NDC's application for the .WEB gTLD; disqualify NDC's bids at the ICANN auction; deem NDC ineligible to execute a registry agreement for the .WEB gTLD; offer the registry rights to the .WEB gTLD to Afilias, as the next highest bidder in the ICANN auction; set the bid price to be paid by Afilias for the .WEB gTLD at USD 71.9 million; pay the Claimant's fees and costs.<sup>199</sup>

## 2. Respondent's Post-Hearing Brief

228. In its Post-Hearing Brief dated 12 October 2020, the Respondent argues that the Claimant has effectively abandoned its competition claim, which was rooted in the notion that ICANN's founding purpose was to promote competition and that this competition mandate and ICANN's Core Values regarding competition required it to disqualify NDC and block Verisign's potential operation of .WEB. The Respondent contends that without this competition claim, the Claimant's case boils down to whether the Respondent was required to disqualify NDC for a series of alleged violations of the Guidebook and Auction Rules.<sup>200</sup> As to those, the Respondent reiterates that it has not decided whether the DAA violates the Guidebook or Auction Rules, or the appropriate remedy for any violation that may be found. Relying on the evidence of Mr. Disspain, the Respondent contends that the propriety of the DAA is a matter for the ICANN Board.
229. According to the Respondent, the practice of placing contention sets on hold while accountability mechanisms are pending is well known. Accordingly, the Board's decision to defer making a decision on .WEB in November 2016 should have come as no surprise to the Claimant and is entitled to deference from this Panel. As for the transmission of a registry agreement for .WEB to NDC in June 2018, the Respondent claims that it did not reflect a decision that the DAA was compliant with the Guidebook and Auction Rules, but

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<sup>199</sup> *Ibid.*, paras. 229-246. The Parties' submissions on costs are summarized below, in the section of this Final Decision dealing with the Claimant's cost claim.

<sup>200</sup> Respondent's PHB, paras. 1-6.

was merely a ministerial act triggered by the removal of the set's on hold status.<sup>201</sup>

230. The Respondent recalls that the Panel's jurisdiction is circumscribed by the Bylaws in relation to the types of disputes that may be addressed, the claims that can be raised, the remedies available, the time within which a Dispute may be brought, and the standard of review.<sup>202</sup> The Respondent contends that the Panel can only address alleged violations that are asserted in the Amended Request. In relation to those, the Panel's remedial authority is limited to issuing a declaration as to whether a Covered Action constituted an action or inaction that violated the Articles or Bylaws. According to the Respondent, the relief requested by the Claimant clearly exceeds the Panel's limited remedial authority, which does not include the authority to disqualify NDC's bid, proceed to contracting with Afilias, specify the price to be paid by Afilias, or invalidate Rule 7. The Respondent argues that the Panel is authorized to shift costs only on a finding that the losing party's claim or defence is frivolous or abusive. The Respondent submits that the CCWG's Supplemental Proposal dated 23 February 2016 does not expand the Panel's remedial authority. If there is any inconsistency, the Bylaws clearly control.<sup>203</sup>
231. The Respondent argues that there is no "gap" created by the litigation waiver and avers that it takes the same position in this IRP as it did in the Ruby Glen Litigation, where it sought to enforce the litigation waiver. The Respondent submits that the Claimant's position in this regard is based on the false premise that remedies available in IRPs must be co-extensive with remedies available in litigation.<sup>204</sup>
232. The Respondent also contends that the Panel is required to apply the prescribed standard of review. The first sentence of Section 4.3(i) of the Bylaws establishes a general *de novo* standard, and Subsection (iii) then creates a carve-out, providing that actions of the Board in the exercise of its fiduciary duty are entitled to deference provided that they are within the realm of "reasonable judgment". The Respondent argues that all actions by the Board

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<sup>201</sup> Respondent's PHB, paras. 10-12.

<sup>202</sup> *Ibid*, para. 14.

<sup>203</sup> *Ibid*, paras. 15-45.

<sup>204</sup> *Ibid*, paras. 46-48.

on behalf of ICANN are subject to a fiduciary duty to act in good faith in the interests of ICANN.<sup>205</sup>

233. Turning to time limitation, the Respondent notes that the Panel has jurisdiction only over claims brought within the time limits established by Rule 4 of the Interim Procedures, and contends that the limitations and repose periods set out in Rule 4 are jurisdictional in nature.<sup>206</sup> According to the Respondent, the Claimant's claim that ICANN had an unqualified obligation to disqualify NDC is barred by the repose period and the time limitation, which are dispositive.<sup>207</sup> The Respondent contends that the Claimant's claim that the Staff violated the Articles and Bylaws in their investigation of pre-auction rumors or post-auction complaints is also time-barred and therefore outside the jurisdiction of the Panel.<sup>208</sup> The Respondent denies that it is equitably estopped from relying on its time limitation defence, and avers that the repose and limitations periods apply retroactively because of the express terms of the Interim Procedures. According to the Respondent, if the Claimant wished to challenge Rule 4, it could have brought such a claim in this IRP, as it did with Rule 7.<sup>209</sup>
234. Regarding the merits of the Claimant's claims, the Respondent notes the Claimant's decision not to cross-examine Mr. Kneuer, Dr. Carlton, or Dr. Murphy, indicating the abandonment of its competition claim, and reiterates that ICANN does not have the mandate, authority, expertise or resources to act as a competition regulator of the DNS.<sup>210</sup> According to the Respondent, the unrebutted economic evidence establishes that .WEB will not be competitively unique such that Verisign's operation of .WEB would be anticompetitive.<sup>211</sup>

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<sup>205</sup> Respondent's PHB, paras. 49-57.

<sup>206</sup> *Ibid*, paras. 58-61.

<sup>207</sup> *Ibid*, paras. 62-69.

<sup>208</sup> *Ibid*, paras. 70-72.

<sup>209</sup> *Ibid*, paras. 73-85.

<sup>210</sup> *Ibid*, paras. 86-101.

<sup>211</sup> *Ibid*, paras. 102-129.

235. The Respondent further contends that it was not required to disqualify NDC based on alleged violations of the Guidebook and Auction Rules. According to the Respondent, “it is not a foregone conclusion that NDC is or is not in breach”.<sup>212</sup> The Respondent argues that the Guidebook and Auction Rules grant it significant discretion to determine whether a breach of their terms has occurred and the appropriate remedy, and that ICANN has not yet made that determination.<sup>213</sup> The Respondent maintains that it, and not the Panel, is in the best position to make a determination as to the propriety of the DAA, and its consistency with the Guidebook or Auction Rules.<sup>214</sup> According to the Respondent, its commitment to transparency and accountability is not relevant to the Claimant’s contention regarding NDC’s alleged violations.<sup>215</sup>
236. The Respondent reiterates that the Board complied with ICANN’s obligations by deciding not to take any action regarding the .WEB contention set while accountability mechanisms were pending, and that the Panel should defer to this reasonable business judgment.<sup>216</sup> The Respondent adds that its obligations to act transparently did not require the Board to inform Afiliats of its 3 November 2016 decision. In that respect, the Respondent argues that the Claimant has not put forward a single piece of evidence suggesting that it would have acted differently had it known that the Board decided in November 2016 to take no action while the contention set remained on hold.<sup>217</sup>
237. The Respondent takes the position that the Claimant has not properly challenged ICANN’s transmittal of a form registry agreement to NDC in June 2018 and, in any event, that in doing so it acted in accordance with Guidebook procedures and the Articles and Bylaws.<sup>218</sup>
238. According to the Respondent, the Claimant’s claims that ICANN’s pre- and post- auction

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<sup>212</sup> Respondent’s PHB, para. 138.

<sup>213</sup> *Ibid.*, paras. 136-150.

<sup>214</sup> *Ibid.*, paras. 151-156.

<sup>215</sup> *Ibid.*, paras. 157-158.

<sup>216</sup> *Ibid.*, para. 159.

<sup>217</sup> *Ibid.*, paras. 182-189.

<sup>218</sup> *Ibid.*, paras. 190-197.

investigations violated the Articles and Bylaws have no merit and in any event are time-barred.<sup>219</sup>

239. As regards the Rule 7 Claim, the Respondent submits that to the extent it is maintained, it must be rejected both as lacking merit and because there is no valid basis for an order shifting costs on the ground of Rule 7's alleged wrongful adoption.<sup>220</sup>

### **3. *Amici's* Post-Hearing Brief**

240. In their joint Post-Hearing Brief dated 12 October 2020, the *Amici* submit that adverse inferences against the Claimant should be made with respect to every issue in the IRP based on "Afilias purposefully, voluntarily and knowingly withholding" evidence from the Panel. According to the *Amici*, the Claimant's executives whose witness statements were withdrawn had substantial direct personal knowledge and special industry expertise material to virtually every contested issue in the IRP.<sup>221</sup>
241. The *Amici* argue that the Panel's jurisdiction is limited to declaring whether the Respondent violated its Bylaws, and does not extend to making findings of fact in relation to third-party claims or awarding relief contravening third party rights.<sup>222</sup> As a result, the *Amici* submit that the Panel lacks authority to find that the Domain Acquisition Agreement violates the Guidebook or that the *Amici* engaged in misconduct.<sup>223</sup> According to the *Amici*, the Panel should limit its review to ICANN's decision making process and only make non-binding recommendations that relate to that process, as opposed to the decision ICANN should make.<sup>224</sup>
242. The *Amici* contend that a decision granting the Claimant's requested relief, or making findings on the Domain Acquisition Agreement or their conduct, would violate their due

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<sup>219</sup> *Ibid*, paras. 198-217.

<sup>220</sup> Respondent's PHB, paras. 218-231.

<sup>221</sup> *Ibid*, paras. 6 and 13-21.

<sup>222</sup> *Ibid*, paras. 22-49.

<sup>223</sup> *Ibid*, paras. 62-67.

<sup>224</sup> *Ibid*, paras. 68-81.

process rights because of their limited participation in the IRP.<sup>225</sup>

243. According to the *Amici*, the Domain Acquisition Agreement complies with the Guidebook. The *Amici* also allege that transactions comparable to the Domain Acquisition Agreement have regularly occurred as part of the gTLD Program, with ICANN's knowledge and approval and consistent with the Guidebook.<sup>226</sup> They further urge that Section 10 of the Guidebook prohibits only the sale and transfer of an entire application, and does not prohibit agreements between an applicant and a third party to request ICANN to approve a future assignment of a registry agreement.<sup>227</sup> The *Amici* aver that ICANN has approved many assignments of registry agreements under such circumstances.<sup>228</sup>
244. The *Amici* state that they did not seek to evade scrutiny by maintaining the Domain Acquisition Agreement confidential during the auction, and argue that the Guidebook did not require disclosure of that agreement prior to the auction. They note that the DAA was always intended to be, and will be subject to the same scrutiny as the numerous other post-delegation assignments of new gTLDs. In addition, the *Amici* deny that the confidentiality of the Domain Acquisition Agreement provided them with any undue advantage.<sup>229</sup>
245. The *Amici* argue that there is no evidence of anticompetitive intent or effect, and submit that Afilias has abandoned its competition claims. In addition, the *Amici* urge that ICANN is not an economic regulator, that competition is not a review criterion under the New gTLD Program, and that ICANN's competition mandate was fulfilled by the DOJ investigation.<sup>230</sup>
246. Finally, the *Amici* note that the Claimant never rebutted the evidence of its own violation of the Guidebook when a representative of the Claimant contacted NDC during

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<sup>225</sup> *Ibid*, paras. 82-86.

<sup>226</sup> *Ibid*, paras. 8 and 87-123.

<sup>227</sup> *Amici's* PHB, paras. 100-109.

<sup>228</sup> *Ibid*, paras. 124-153.

<sup>229</sup> *Ibid*, paras. 153-180.

<sup>230</sup> *Ibid*, paras. 181-205.

the Blackout Period.<sup>231</sup>

## H. Submissions Regarding the Donuts Transaction

247. As noted in the History of the Proceedings’ section of this Final Decision, the *Amici* have requested that the Panel take into consideration their submissions concerning the 29 December 2020 merger between Afilias, Inc. and Donuts, Inc. Those submissions, and that of the Parties, are summarized below.
248. In counsel’s letter of 9 December 2020, the *Amici* described the contemplated transaction, based on publicly disclosed information, as a sale to Donuts of Afilias, Inc.’s entire existing registry business, with only the .WEB application itself being retained within an Afilias, Inc. shell. This, the *Amici* averred, is information that the Claimant ought to have disclosed to the Panel as it is inconsistent with the Claimant’s claims and requested relief in this IRP. Moreover, the *Amici* contended that by withdrawing the witness statements of its party representatives in this IRP, the Claimant sought to prevent the Respondent and the *Amici* from eliciting this information.
249. In its response of 16 December 2020 to the *Amici*’s letter, the Claimant submitted that Afilias, Inc.’s arrangement with Donuts has no bearing on the issues in dispute in the IRP. The Claimant explained that the contemplated transaction concerned the registry business of Afilias, Inc., not its registrar business<sup>232</sup>, and that the Claimant as an entity, as well as its .WEB application, had been carved out of the transaction. The Claimant added that after the transaction it will remain part of a group of companies that will control a significant registrar business. Accordingly, the Claimant averred that its new structure will not impact its ability to launch .WEB. Finally, the Claimant noted that it has informed the Respondent of a possible sale of its registry business back in September 2020.

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<sup>231</sup> *Ibid*, paras. 206-214.

<sup>232</sup> Registry operators are parties to Registry Agreements with ICANN that set forth their rights, duties and obligations as operators. Companies known as “registrars” sell domain name registrations to entities and individuals within existing gTLDs. See Respondent’s Rejoinder, 31 May 2019, paras. 17 and 23. As explained in the preamble of the Guidebook, Ex. C-3, “[e]ach of the gTLDs has a designated ‘registry operator’ and, in most cases, a Registry Agreement between the operator (or sponsor) and ICANN. The registry operator is responsible for the technical operation of the TLD, including all of the names registered in the TLD. The gTLDs are served by 900 registrars, who interact with registrants to perform domain name registration and other related services.” (p. 2 of the PDF).

250. Also on 16 December 2020, the Respondent confirmed that it was aware that Afilias, Inc. and Donuts had entered into an agreement by which the latter would acquire the former's TLD registry business, excluding the Claimant's .WEB application. The Respondent submitted that these developments reinforced the importance for the Panel not to exceed its "limited jurisdiction to determine only whether a Covered Action by ICANN violated the Articles of Bylaws and to issue a declaration to that effect."
251. On 21 December 2020, with leave of the Panel, the *Amici* replied to the Parties' letters of 16 December 2020. According to the *Amici*, the Claimant's response only reinforced the "the inappropriateness and inadvisability of the Panel deciding allegations concerning the transactions at issue." That is because, according to the *Amici*, it is a fundamental principle and tenet of the Respondent's Bylaws and IRP procedures that matters involving multiple parties and interests such as the matters at issue in this case are to be addressed in the first instance by the Respondent. The *Amici* also reiterated their claim that the Claimant has not been transparent about its plans and that of Afilias, Inc. as they affected the Claimant's ability to execute on its proposed deployment of .WEB.
252. On 30 December 2020, the day after the closing of the Donuts transaction, Afilias responded to the *Amici*'s letter of 21 December 2020, stating that it "was yet another attempt to divert the Panel's attention from the relevant issue to be arbitrated in this IRP." The Claimant rejected the notion that the Donuts transaction, much like the other transactions the *Amici* had pointed to in their written submissions, bear any resemblance to the Domain Acquisition Agreement, and it listed what it considers are key differences between the two (2) situations.

## V. ANALYSIS

### A. Introduction

253. As the Panel observed in its Procedural Order No. 5, this IRP is an ICANN accountability mechanism, the Parties to which are the Claimant and the Respondent. As such, it is not the forum for the resolution of potential disputes between the Claimant and the *Amici*, two (2) non-parties that are participating in this IRP as *amici curiae*, or of divergence and

potential disputes between the *Amici* and the Respondent by reason of the latter's actions or inactions in addressing the question of whether the DAA complies with the New gTLD Program Rules.

254. The Claimant's core claims against the Respondent in this IRP arise from the Respondent's failure to reject NDC's application for .WEB, disqualify its bids at the auction, and deem NDC ineligible to enter into a registry agreement with the Respondent in relation to .WEB because of NDC's alleged breaches of the Guidebook and Auction Rules.<sup>233</sup> The Respondent's impugned conduct engages its Staff's actions or inactions in relation to allegations of non-compliance with the Guidebook and Auction Rules on the part of NDC, communicated in correspondence to the Respondent in August and September 2016, and the Staff's decision to move to delegate .WEB to NDC in June 2018 by proceeding to execute a registry agreement in respect of .WEB with that company; as well as the Board's decision not to pronounce upon these allegations, first in November 2016, and again in June 2018 when, to the knowledge of the Board, the .WEB contention set was taken off hold and the Staff put in motion the process to delegate the .WEB gTLD to NDC.
255. As already noted, the Claimant's core claims serve to support the Claimant's requests that the Panel disqualify NDC's bid for .WEB and, in exchange for a bid price to be specified by the Panel and paid by the Claimant, order the Respondent to proceed with contracting the Registry Agreement for .WEB with the Claimant.
256. The Claimant's core claims have been articulated with increasing particulars as these proceedings progressed. This, in the opinion of the Panel, is understandable in light of the manner in which the Respondent's defences have themselves evolved, most particularly the defence based on the Board's 3 November 2016 decision to defer consideration of the issues raised in connection with .WEB. This reason alone justifies rejection of the Respondent's contention that the Claimant failed to sufficiently plead a violation of the Respondent's Articles and Bylaws in connection with ICANN's post-auction investigation of Afiliás' allegations that NDC violated the Guidebook and Auction Rules. In any event,

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<sup>233</sup> See Afiliás' PHB, para. 247. See also Claimant's Reply, para. 16, where the Claimant describes its "principal claim".

the Panel considers that the Claimant's core claims are comprised within the broad allegations of breach made in the Amended Request for IRP.<sup>234</sup>

257. The Respondent's main defences are, first, that the Claimant's claims regarding the Respondent's actions or inactions in 2016 are time-barred. While reserving its position about the propriety of the DAA under the New gTLD Program Rules, the Respondent also denies that it was obligated to disqualify NDC, whether it be by reason of its alleged competition mandate or as a necessary consequence of a violation of the Guidebook or Auction Rules. The Respondent also contends that it complied with its Articles and Bylaws when it decided not to take any action regarding the .WEB contention set while accountability mechanisms in relation to .WEB were pending, and that the Panel should defer to the Board's reasonable business judgment in coming to that decision. As noted, the Respondent rejects as unauthorized under the Bylaws, the Claimant's requests that the Respondent be ordered to proceed with contracting the Registry Agreement for .WEB with the Claimant, at a bid price to be specified by the Panel.
258. The Panel begins its analysis by considering the Respondent's time limitations defence. The Panel then addresses the standard by which the Respondent's actions or inactions should be reviewed. Thereafter, the Panel turns to examining the Respondent's conduct against the backdrop of the entire chronology of events, and considers whether it was open to the Respondent, both its Staff and its Board, not to pronounce upon the DAA's alleged non-compliance with the Guidebook and Auction Rules following the Claimant's complaints, an inaction that endures to this day. The Panel then considers, in turn, the Claimant's Rule 7 Claim, and the scope of the Panel's remedial authority in light of its findings that the Respondent, as set out in these reasons, violated its Articles and Bylaws. The Panel concludes its analysis by designating the prevailing party, as required by Section 4.3(r) of the Bylaws, and determining the Claimant's cost claim.

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<sup>234</sup> See, e.g., Amended Request for IRP, para. 2.

## **B. The Respondent's Time Limitations Defence**

### **1. Applicable Time Limitations Rule**

259. Three (3) successive limitations regimes have been referred to as potentially relevant to determining the timeliness of the Claimant's claims in this IRP.
260. Prior to 1 October 2016, at a time when only Board actions could be the subject of an IRP, the Bylaws required that a request for independent review be filed within thirty (30) days of the posting of the Board's minutes relating to the challenged Board decision.<sup>235</sup>
261. New ICANN Bylaws came into force as of 1 October 2016. However, these did not contain any provision setting a time limitation for the filing of an IRP. Since the supplementary rules for IRPs in force at the time did not contain a time limitation provision either, it is common ground that, during the period from 1 October 2016 to 25 October 2018, IRPs were subject neither to a limitation period nor to a repose period.
262. The Respondent's time limitations defence is based on Rule 4 of the Interim Procedures which, inclusive of the footnote that forms part of the Rule, reads as follows:

#### **4. Time for Filing<sup>3</sup>**

An INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of a DISPUTE. A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.

In order for an IRP to be deemed to have been timely filed, all fees must be paid to the ICDR within three business days (as measured by the ICDR) of the filing of the request with the ICDR.

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<sup>3</sup> The IOT recently sought additional public comment to consider the Time for Filing rule that will be recommended for inclusion in the final set of Supplementary Procedures. In the event that the final Time for Filing procedure allows additional time to file than this interim Supplementary Procedure allows, ICANN committed to the IOT that the final Supplementary Procedures will include transition language that provides potential claimants the benefit of that additional time, so as not to prejudice those potential claimants.

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<sup>235</sup> See Bylaws (as amended on 11 February 2016), Ex. C-23, Article IV, Section 3.3.

263. This Rule 4 came into being as part the new Interim Procedures adopted by the Board on 25 October 2018. As set out in some detail in the Panel’s Decision on Phase I, this was the culmination of a development process within ICANN’s IOT that began on 19 July 2016, with the circulation to IOT members of a first draft of proposed Updated Supplementary Procedures, and concluded on 22 October 2018, when draft Interim Supplementary Procedures were sent to the Board for adoption.<sup>236</sup>
264. While the Interim Procedures were adopted on 25 October 2018, the first paragraph of their preamble provides that “[t]hese procedures apply to all independent review process proceedings filed after 1 May 2018.” Rule 2 of the Interim Procedures confirms the retroactive application of the Interim Procedures in two (2) ways: first, by providing that they apply to IRPs submitted to the ICDR after the Interim Procedures “go onto effect”; and second, by providing that IRPs commenced prior to the Interim Procedures’ “adoption” (on 25 October 2018) shall be governed by the procedures “in effect at the time such IRPs were commenced”. For IRPs commenced after 1 May 2018, this would point to the Interim Procedures.
265. Ms. Eisner acknowledged in her evidence that Rule 4 was the subject of considerable debate within the IOT. She also confirmed that by October 2018, “ICANN org”<sup>237</sup> was anxious to get a set of procedures in place. Indeed, Ms. Eisner had noted during the IOT meeting held of 11 October 2018 that “we at ICANN org are getting nervous about being on the precipice of having an IRP filed”.<sup>238</sup> It is recalled that on 10 October 2018, the day prior to this meeting, the Claimant had, in the context of its pending CEP, provided the Respondent’s in-house counsel with a draft of the Claimant’s Request for an IRP in connection with .WEB.<sup>239</sup>
266. Underlying the footnote to Rule 4 is the fact that the Interim Procedures were conceived as a provisional instrument, designed to apply until the Respondent, in accordance with the

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<sup>236</sup> See Decision on Phase I, paras. 139-171.

<sup>237</sup> “ICANN org” is an expression used to refer to ICANN’s Staff and organization, as opposed to ICANN’s Board or its supporting organizations and committees. See Merits hearing transcript, 4 August 2020, p. 391:6-15 (Ms. Burr).

<sup>238</sup> Merits hearing transcript, 5 August 2020, pp. 495 and 498; see also pp. 479-480 (Ms. Eisner).

<sup>239</sup> See Decision on Phase I, para. 151, and Merits hearing transcript, 5 August 2020, p. 494 (Ms. Eisner).

applicable governance processes, will come to develop and adopt final supplementary procedures for IRPs. Specifically in relation to the introduction of a “Time for Filing” provision in the Interim Procedures, Ms. Eisner explained that the IOT:

[...] agreed at some point and finalized language on a footnote that would confirm that if there was a future change in a deadline for time for filing, that ICANN would work to make sure no one was prejudiced by that. [...]

The footnote that was included in the Rule 4 was about the change between the -- we are putting the interim rules into effect. And then if in the future a discussion where people were suggesting that there should be basically no statute of limitations on the ability to challenge an act of ICANN, if that were to be the predominant view, and what the Board put into effect that there would be some sort of stopgap measure put in so that anyone who was not able to file under the interim rules and the timing set out there but could have filed if the other rules, the broader rules had been in effect, that we would put in a stopgap to make sure that no one was prejudiced by that differentiation because we had agreed on a different timing for the final set.<sup>240</sup>

267. In its Post-Hearing Brief dated 12 October 2020, the Respondent advised that as of that date, final Supplementary Procedures had not been completed or adopted.<sup>241</sup>
268. Having identified and placed in context the rule on which the Respondent relies in support of its time limitations defence, the Panel turns to consider the merits of that defence.

## **2. Merits of the Respondent’s Time Limitations Defence**

269. It is the Respondent’s contention that the Claimant’s claim that ICANN had an unqualified obligation to disqualify NDC upon receiving the DAA in August 2016 is barred by the repose period of Rule 4 because the Claimant challenges actions or inactions that occurred in 2016, more than two (2) years before the Claimant filed its IRP in November 2018. The Respondent adds that the limitations period of Rule 4 also bars the Claimant’s claims because the Claimant was aware of the material effect of the alleged actions or inactions of ICANN by August and September 2016, as evidenced by its letters of 8 August 2016 and 9 September 2016, demanding that ICANN disqualify NDC.
270. The Claimant’s position is that its claims against the Respondent for violating its Articles

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<sup>240</sup> Merits hearing transcript, 5 August 2020, pp. 496-498 (Ms. Eisner).

<sup>241</sup> Respondent’s PHB, fn 103, p. 38.

and Bylaws, as opposed to its claims that NDC had violated the New gTLD Program Rules, accrued no earlier than on 6 June 2018, when the Respondent proceeded with the delegation process for .WEB with NDC,<sup>242</sup> and that even if the time limitations and repose periods were applicable to its claims against the Respondent, which the Claimant contends they are not, they would have been tolled by its CEP that lasted from 18 June 2018 to 13 November 2018.

271. The Panel has carefully reviewed the Claimant's August and September 2016 correspondence relied upon by the Respondent, and cannot accept the latter's contention that the claims asserted by Afilias in its 2016 letters to ICANN are the same as the claims asserted by the Claimant in this IRP. Whereas the Claimant's 2016 letters sought to demonstrate NDC's alleged violations of the New gTLD Program Rules, the Claimant's IRP, using these violations as a predicate, impugns the conduct of the Respondent itself in response to NDC's conduct. Stated otherwise, the Claimant's claims in this IRP concern not NDC's conduct, but rather the Respondent's actions or inactions in response to NDC's conduct.<sup>243</sup>
272. As amplified later in these reasons, when the Panel considers the Respondent's handling of the Claimant's complaints, the Panel does not accept, as urged by the Respondent, that the Claimant can be faulted for having waited for some form of determination by the Respondent before alleging in an IRP that the Respondent's actions or inaction violated its Articles and Bylaws. The Panel recalls that, in its responses to the Claimant's letters of 8 August 2016 and 9 September 2016, the Staff indicated, on 16 September 2016, that ICANN would pursue "informed resolution" of the questions raised by the Claimant and Ruby Glen,<sup>244</sup> and, in ICANN's letter of 30 September 2016, that it would "continue to take Afilias' comments, and other inputs that [it] ha[d] sought, into consideration as [it] consider[ed] this matter."<sup>245</sup>

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<sup>242</sup> *Ibid*, para. 179.

<sup>243</sup> Claimant's PHB, para. 182.

<sup>244</sup> ICANN's letter to Mr. Kane dated 16 September 2016 and attached Questionnaire, Ex. C-50.

<sup>245</sup> ICANN's letter to Mr. Hemphill dated 30 September 2016 and attached Questionnaire, Ex. C-61.

273. The first of these letters attached a detailed Questionnaire designed to assist ICANN in evaluating the concerns raised by Afiliás and Ruby Glen, and the second represented in no uncertain terms that the Respondent’s consideration of this matter was continuing. In such circumstances, there is force to the Claimant’s contention that commencing contentious dispute resolution proceedings at that time would have interfered with the “informed resolution” that ICANN had represented it would undertake, and would likely have attracted an objection of prematurity.
274. The Panel also recalls, a fact that is not in dispute, that the Respondent did not communicate to the Claimant any view or determination in respect of the many questions raised in the Questionnaire attached to the Respondent’s letter of 16 September 2016. As for the Board’s decision in November 2016 to defer consideration of the complaints raised in relation to NDC’s conduct, it is common ground that it was never communicated to the Claimant or otherwise made public, and that it was disclosed for the first time upon the filing of the Respondent’s Rejoinder in this case, on 1 June 2020.
275. From November 2016 to the beginning of the year 2018, as seen already, the .WEB contention set was on hold by reason of the pendency of an accountability mechanism and the DOJ investigation. The situation evolved with the DOJ’s decision to close its investigation on 9 January 2018, the closure of Donuts’ CEP on 30 January 2018, and the expiration on 14 February 2018 of the 14-day period given to Ruby Glen to file an IRP. Shortly thereafter, the Claimant, on 23 February 2018, formally requested an update on ICANN’s investigation of the .WEB contention set and requested documents by way of its First DIDP Request.<sup>246</sup> The Claimant also requested that the Respondent take no action in regard to .WEB pending conclusion of this DIDP Request.
276. The Claimant was notified on 6 June 2018 that the Respondent had removed the .WEB contention set from its on-hold status.<sup>247</sup> While the Claimant was still ignorant of any determination by the Respondent in respect of the concerns raised in August and

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<sup>246</sup> Dechert’s letter to the Board dated 23 February 2018, Ex. C-78.

<sup>247</sup> ICANN Global Support’s email to Mr. Kane dated 7 June 2018, Ex. C-62, p. 1. Mr. Kane was in Australia at the time, which is why the date on the Afiliás’ copy is 7 June 2018, although ICANN sent it on 6 June 2018.

September 2016, which were the subject of the Respondent’s Questionnaire of 16 September 2016, a necessary implication of the Respondent’s decision was that these concerns did not stand – or no longer stood – in the way of the delegation of .WEB to NDC. In the Panel’s opinion, this is when the Claimant’s complaints about NDC’s conduct crystallized into a claim against the Respondent. To quote from Rule 4, but recalling that in June 2018 it had not yet been adopted, this is when the Claimant “[became] aware of the material effect of the action or inaction giving rise to the DISPUTE”.

277. The Claimant commenced its CEP on 18 June 2018, twelve days after the removal of the .WEB contention set from its on-hold status. As already explained, potential IRP claimants are “strongly encouraged” to engage in this non-binding process for the purpose of attempting to narrow the Dispute, and an additional incentive to do so resides in their exposure to a cost-shifting decision if they fail to partake in a CEP and ICANN prevails in the IRP.<sup>248</sup>
278. The rules applicable to a CEP are described in an ICANN document dated 11 April 2013 (**CEP Rules**).<sup>249</sup> The CEP Rules provide that, if the parties have failed to agree a resolution of all issues in dispute upon conclusion of the CEP, the potential IRP claimant’s time to file a request for independent review shall be extended for each day of the CEP but in no event, absent agreement, for more than fourteen (14) days.
279. The Claimant’s CEP was terminated by the Respondent on 13 November 2018. Consistent with the CEP Rules, the Respondent informed the Claimant that “ICANN will grant Afiliis an extension of time to 27 November 2018 (14 days following the close of CEP) to file an IRP”, adding that “this extension will not alter any deadlines that may have expired before the initiation of the CEP”.<sup>250</sup> The Claimant commenced its IRP the next day, on 14 November 2018.
280. The Respondent has not challenged the application of the CEP Rules to the Claimant’s

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<sup>248</sup> Bylaws, Ex. C-1, Article 4, Section 4.3(e)(i)-(ii).

<sup>249</sup> Cooperative Engagement Process Rules, 11 April 2013, Ex. C-121.

<sup>250</sup> Exchange of emails between ICANN and Dechert, Ex. C-54.

CEP and the time for the filing of its IRP. In response to the Claimant's argument that the retroactive time limitations period set out in Rule 4 was tolled from 18 June 2018 to 13 November 2018, while its CEP was pending, the Respondent argued that the tolling was irrelevant because the limitations period had already long expired based on its submission that the Claimant's claims had accrued in August/September 2016, a submission that this Panel has rejected.

281. In sum, the Panel finds that the Claimant's core claims against the Respondent, as summarized above in paragraph 251 of this Final Decision, only accrued on 6 June 2018. Since the Claimant's CEP had the effect of tolling the time available to the Claimant to file an IRP until 27 November 2018, fourteen (14) days after closure of the CEP, the Claimant's IRP was timely and the Respondent's time limitations defence insofar as the Claimant's core claims are concerned must be rejected.

282. The Claimant has accused the Respondent of having enacted Rule 4 and given it retroactive effect in order to retroactively time bar its claims in this IRP. In support of this contention, the Claimant advances the following factual allegations:

- The Respondent only launched the solicitation of public comments concerning the addition of timing requirements to the draft procedures governing IRPs on 22 June 2018, shortly after Afiliás filed its CEP;
- In spite of the fact that the public comment period on proposed Rule 4 remained open, Rule 4 was included in the proposed Interim Procedures presented to the Board for approval on 25 October 2018;
- Having received a draft of the Claimant's IRP in the context of its CEP on 10 October 2018, the Respondent decided to give retroactive effect to the Interim Procedures to 1 May 2018, six (6) weeks prior to the initiation of the Claimant's CEP, with no carve-out for pending CEPs (of which there were several) or IRPs

(of which there was none); and

- Having terminated the Claimant’s CEP on 13 November 2018, and received its IRP on 14 November 2018, the Respondent was able to rely on the retroactive application of the Interim Procedures to support its Rule 4 time limitations defence.

283. In light of the Panel’s finding as to the accrual date of the Claimant’s core claims, it is not necessary further to consider these allegations. However, the Panel does wish to record its view that, from a due process perspective, the retroactive application of a time limitations provision is inherently problematic. A retroactive law changes the legal consequences of acts committed or the legal status of facts and relationships prior to the enactment of the law.<sup>251</sup> The potential for unfairness is apparent and thus, in many legal systems, there are restrictions on, and presumptions against, giving legal rules a retroactive effect.

284. Between 1 October 2016 and 25 October 2018, there was no time limitation for the filing of an IRP in respect of the Respondent’s actions or failures to act. Yet an IRP timely filed under the Bylaws, say on 18 June 2018, would, if Rule 4 of the Interim Procedures were given effect to, retroactively be barred and the claims advanced therein defeated with no consideration of their merits because of the retroactive application of the Interim Procedures adopted on 25 October 2018. The fact that only a single case, the Claimant’s IRP, was in fact affected by the retroactive application of the Interim Procedures only heightens the due process concern. The Panel recalls that under Section 4.3(n)(i) of the Bylaws, the rules of procedure for the IRP to be developed by the IOT “should apply fairly to all parties”.

### **C. Standard of Review**

285. The standard of review applicable to an IRP under the Bylaws is provided in Section 4.3(i) of the Bylaws and Rule 11 of the Interim Procedures, which are in substance identical.

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<sup>251</sup> David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888*, p. 41. See also Black’s Law Online Dictionary, 2<sup>nd</sup> ed., s.v. “retroactive statute”: <https://thelawdictionary.org/retroactive-statute/> (consulted on 7 February 2021): “a law that imposes a new obligation on past things or a law that starts from a date in the past.”

Section 4.3(i) of the Bylaws reads in relevant parts as follows:

(i) Each IRP Panel shall conduct an objective, *de novo* examination of the Dispute.

(i) With respect to Covered Actions, the IRP Panel shall make findings of fact to determine whether the Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws.

(ii) All Disputes shall be decided in compliance with the Articles of Incorporation and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.

(iii) For Claims arising out of the Board's exercise of its fiduciary duties, the IRP Panel shall not replace the Board's reasonable judgment with its own so long as the Board's action or inaction is within the realm of reasonable business judgment.

286. It is common ground that, except for claims potentially falling under sub-paragraph (iii) of Section 4.3(i), the Panel must conduct an objective, *de novo* examination of claims that actions or failures to act on the part of the Respondent violate its Articles or Bylaws, and make appropriate findings of fact in light of the evidence. The Parties therefore agree that this is the standard applicable to the Panel's review of actions or failures to act on the part of the Respondent's Staff.

287. There is profound divergence between the Parties as to the import of sub-paragraph (iii) of Section 4.3(i), relating to Claims arising out of the Board's exercise of its fiduciary duties. The Respondent argues that the effect of this rule is to incorporate the "business judgment rule" into the independent review of ICANN's Board action, a doctrine which the Respondent avers is recognized in California<sup>252</sup> and, according to the California Supreme Court, which "exists in one form or another in every American jurisdiction".<sup>253</sup> More specifically, the Parties diverge both as to the scope of the carve-out made in Section 4.3 (i)(iii), and the question of whether the Board actions and inactions that are impugned by the Claimant involve the Board's exercise of its fiduciary duties.

288. These questions are addressed when the Panel comes to consider the merits of the Claimant's claims. For present purposes, it is noted that the Parties agree that, to the extent

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<sup>252</sup> Respondent's PHB, para. 50.

<sup>253</sup> *Landen v. La Jolla Shores Clubdominium Homeowners Ass'n*, 21 Cal. 4th 249, 257 (1999) (quoting *Frances T. v. Vill. Green Owners Ass'n*, 42 Cal. 3d 490, 507 n.14 (1986), RLA-13).

the Panel finds that the business judgment rule as it may have been incorporated in Section 4.3(i)(iii) of the Bylaws has any application in the present case, it refers to a “judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions.”<sup>254</sup>

#### **D. Merits of the Claimant’s Core Claims**

289. While the Panel has found that the Claimant’s core claims against the Respondent crystallized on 6 June 2018, the Panel’s view is that a proper analysis of the Claimant’s claims requires an examination of the Respondent’s conduct – that of its Board, individual Directors, Officers and Staff – against the backdrop of the entire chronology of events leading to the Respondent’s decision of 6 June 2018. Before embarking on this examination, however, the Panel considers it useful to recall the key standards against which the Respondent has determined that its conduct should be assessed.

##### **1. Relevant Provisions of the Articles and Bylaws**

290. Article 2, paragraph III of the Respondent’s Articles reads, in part, as follows:

The Corporation shall operate in a manner consistent with these Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law and through open and transparent processes that enable competition and open entry in Internet-related markets.[...]

291. Under its Bylaws, the Respondent has committed to “act in a manner that complies with and reflects ICANN’s Commitments and respects ICANN’s Core Values”.<sup>255</sup>

292. The Respondent’s Commitments that are relied upon by the Claimant or appear germane to its claims, are expressed as follows in the Bylaws:

In performing its Mission, ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law, through open and transparent processes that enable competition and

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<sup>254</sup> *Lee v. Interinsurance Exch.*, 50 Cal. App. 4th 694, 711 (1996) (quoting *Barnes v. State Farm Mut. Auto Ins. Co.*, 16 Cal. App. 4th 365, 378 (1993)).

<sup>255</sup> Bylaws, Ex. C-1, Section 1.2.

open entry in Internet-related markets. Specifically, ICANN commits to do the following (each, a "**Commitment**," and collectively, the "**Commitments**"):

[...]

(v) Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties); and

(vi) Remain accountable to the Internet community through mechanisms defined in these Bylaws that enhance ICANN's effectiveness.<sup>256</sup>

293. As for ICANN's Core Values, which are to "guide the decisions and actions" of the Respondent, they include:

(iv) Introducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process;

(v) Operating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN's other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community;<sup>257</sup>

294. The Bylaws further provide that ICANN's Commitments and Core Values "are intended to apply in the broadest possible range of circumstances".<sup>258</sup>

295. Finally, under Article 3 of the Bylaws, entitled Transparency, the Respondent has committed that it and its constituent bodies:

[...] shall operate to the maximum extent possible in an open and transparent manner and consistent with procedures designed to ensure fairness, [...]<sup>259</sup>

296. Bearing the standards set out in those commitments and core values in mind, the Panel turns to consider the Respondent's conduct, beginning with the Claimant's complaints about the Respondent's pre-auction investigation.

## 2. Pre-Auction Investigation

297. The Claimant has criticized the Respondent's pre-auction investigation of the allegation

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<sup>256</sup> Bylaws, Ex. C-1, Section 1.2(a)(v)(vi).

<sup>257</sup> *Ibid*, Section 1.2 (b) (v) and (vi).

<sup>258</sup> *Ibid*, Section 1.2 (b) (c).

<sup>259</sup> *Ibid*, Section 3.1.

by Ruby Glen that NDC had failed properly to update its application following an alleged change of ownership or control of NDC. This allegation was prompted by Mr. Rasco's email of 7 June 2016 to Mr. Nevett, where he stated that the "powers that be" had indicated there was no change in position and that NDC would not be seeking an extension of the auction date. The Claimant strenuously argues that Mr. Rasco's representations, first to an employee of ICANN's New gTLD Operations section, Mr. Jared Erwin,<sup>260</sup> and then to the Ombudsman,<sup>261</sup> were both misleading (in the first case) and erroneous (in the second).

298. As regards the Respondent's pre-auction investigation – on which, in the opinion of the Panel, very little turns insofar as the Claimant's core claims are concerned – the Panel accepts the evidence of Ms. Willett that prior to the auction, the Respondent was unaware of Verisign's involvement in NDC's application. Having considered the witness and documentary evidence on this question, which is preponderant, the Panel finds that the allegation presented to the Respondent was one of change of control within NDC, that it was promptly investigated by Ms. Willett's team and the Respondent's Ombudsman, and that in light of the representations made by Mr. Rasco, it was reasonable for the Respondent to conclude, as Ruby Glen and the other applicants in the contention set were advised in Ms. Willett's letter of 13 July 2016, that the Respondent "found no basis to initiate the application change request process or postpone the auction."<sup>262</sup> The Panel therefore rejects the Claimant's contention that the Respondent violated its Bylaws by the manner in which it investigated and resolved the pre-auction allegations of change of control within NDC.

### **3. Post-auction Actions or Inactions**

#### **(i) Overview**

299. The evidence leads the Panel to a different conclusion insofar as the post-auction actions and inactions of the Respondent are concerned. What the evidence establishes is that upon it being revealed that Verisign had entered into an agreement with NDC and provided funds

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<sup>260</sup> Exchanges between Messrs. Erwin and Rasco, Ms. Willett's witness statement, 31 May 2019, Ex. B.

<sup>261</sup> Exchanges between Messrs. LaHatte and Rasco, Mr. Rasco's witness statement, 30 May 2020, Ex. N, [PDF] p. 2.

<sup>262</sup> Ms. Willett's letter to members of the .WEB/.WEBS contention set dated 13 July 2016, Ex. C-44.

in support of NDC's successful bid for .WEB, questions were immediately raised by two (2) members of the .WEB contention set as to the propriety of NDC's conduct as a gTLD applicant in light of the New gTLD Program Rules. As explained later in these reasons, the Panel accepts that these questions, including the fundamental question of whether or not the DAA violates the Guidebook and the Auction Rules, are better left, in the first instance, to the consideration of the Respondent's Staff and Board. However, it needs to be emphasized that this deference is necessarily predicated on the assumption that the Respondent will take ownership of these issues when they are raised and, subject to the ultimate independent review of an IRP Panel, will take a position as to whether the conduct complained of complies with the Guidebook and Auction Rules. After all, these instruments originate from the Respondent, and it is the Respondent that is entrusted with responsibility for the implementation of the gTLD Program in accordance with the New gTLD Program Rules, not only for the benefit of direct participants in the Program but also for the benefit of the wider Internet community.

300. The evidence in the present case shows that the Respondent, to this day, while acknowledging that the questions raised as to the propriety of NDC's and Verisign's conduct are legitimate, serious, and deserving of its careful attention, has nevertheless failed to address them. Moreover, the Respondent has adopted contradictory positions, including in these proceedings, that at least in appearance undermine the impartiality of its processes.
301. In the paragraphs below, the Panel sets out its reasons for making those findings and reaching this conclusion.

**(ii) The Claimant's 8 August and 9 September 2016 Letters**

302. In the first of these two (2) letters, Mr. Hemphill, at the time, Afilias' Vice President and General Counsel, makes clear that while he has not been able to review a copy of the agreement(s) between NDC and Verisign, what has been made public about the arrangements between the two (2) companies raises sufficient concerns for Afilias to "request that ICANN promptly undertake an investigation" and "take appropriate action against NDC and its .WEB application for violations of the Guidebook, as we had

requested". Mr. Hemphill concludes his letter by urging the Respondent to stay any further action in relation to .WEB and, in particular, not to act upon any request for NDC or Verisign to enter into a registry agreement for .WEB with the Respondent.<sup>263</sup>

303. The Claimant's 9 September 2016 letter, noting that the Respondent had not responded to its earlier letter of 8 August, reiterated the request that the Respondent take no steps in relation to .WEB until ICANN, its Ombudsman, or its Board had reviewed NDC's conduct and determined whether or not to disqualify NDC's bid and reject its application. The letter then proceeds to explain, in detail, the reasons why, in the opinion of Afilias, the Respondent was obliged to disqualify NDC's application and proceed to contract for .WEB with Afilias. Specifically, Afilias articulated, by reference to the New gTLD Program Rules, the Articles and the Bylaws, why it considered that NDC had violated the Guidebook and Auction Rules and why ICANN was under a duty to contract with the next highest bidder in the auction. The Claimant concluded its letter by requesting a response by no later than 16 September 2016.<sup>264</sup>
304. The Claimant is not the only member of the contention set that raised questions, after the auction, about the propriety of Verisign's involvement in, and support for, the application of NDC. Contemporaneously with the Claimant's letters just reviewed, on 8 August 2016 Ruby Glen filed an Amended Complaint in the proceedings it had commenced in the US District Court prior to the auction. In its Amended Complaint, Ruby Glen questioned the legality of the auction for .WEB and sought an order enjoining the execution of a registry agreement pending resolution of its claims.
305. Before coming to the Questionnaire that the Respondent sent out on 16 September 2016, in part in response to Afilias' two (2) letters, the Panel recalls that in the meantime the Respondent had initiated a dialogue directly with Verisign, when outside counsel for the Respondent communicated by telephone with Verisign's outside counsel. The exact request that was made of Verisign's counsel remains unknown. However, it is undisputed that it was prompted by the Claimant's and Ruby Glen's complaints about the propriety of

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<sup>263</sup> Afilias' letter to Mr. Atallah dated 8 August 2016, Ex. C-49, pp. 1 and 3-4.

<sup>264</sup> Afilias' letter to Mr. Atallah dated 9 September 2016, Ex. C-103.

NDC's arrangements with Verisign. Why the Respondent chose to request assistance at that point directly from Verisign, a non-applicant, rather than from NDC, is a question that was largely left unaddressed apart from outside counsel for the Respondent explaining, during the hearing held in connection with Afiliás' Application of 29 April 2020, that counsel knew Verisign's lead counsel from prior cases, and therefore decided to contact him.<sup>265</sup>

306. On 23 August 2016, in response to this request, Verisign's and NDC's counsel, unbeknownst to the Claimant and likely to the other members of the contention set (except NDC), filed a submission with the Respondent on behalf of NDC and Verisign in the form of an eight (8) page letter and five (5) attachments, one of which was the DAA. The letter states that it is being submitted in response to the request by ICANN's counsel for information regarding the agreement between NDC and Verisign relating to .WEB. Redacted - Third Party Designated Confidential Information

<sup>266</sup> The *Amici's* counsel's letter was marked as "Highly Confidential – Attorneys' Eyes Only", while the attached DAA, as already mentioned, was marked as "Confidential Business Information – Do Not Disclose". The letter of 23 August 2016 sent on behalf of the *Amici* was not posted on ICANN's website or disclosed to the Claimant because of its sender's request that it be kept confidential.<sup>267</sup>

### **(iii) The 16 September 2016 Questionnaire**

307. Turning to the Respondent's Questionnaire of 16 September 2016, the evidence reveals that it resulted from a collaborative effort by and between Ms. Willett, who prepared a first

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<sup>265</sup> Transcript of the 11 May 2020 Hearing, Ex. R-29, p. 20:12-15 (Mr. Enson: "The lawyers ... -- ICANN and Verisign had been adverse to one another on a number of occasions. The lawyers know each other well and there is nothing extraordinary or sinister about me picking up the phone to call Mr. Johnston about an issue like this.") See also the response from counsel for the Claimant: Merits hearing transcript, 3 August 2020, p. 53:1-10 (Claimant's Opening).

<sup>266</sup> Arnold & Porter's letter to Mr. Enson dated 23 August 2016, Ex. C-102.

<sup>267</sup> See Merits hearing transcript, 6 August 2020, pp. 690-691 (Ms. Willett).

draft of the questions, and Respondent's counsel. At that time, Ms. Willett held the position of Vice-President, gTLD Operations, Global Division of ICANN, reporting directly to Mr. Atallah.<sup>268</sup> The Questionnaire was sent out to Afilias, Ruby Glen, NDC, and Verisign, under cover of a letter of even date signed by Ms. Willett.<sup>269</sup> Ms. Willett was asked why the Questionnaire was not sent to all members of the contention set, but the question was objected to on the ground of privilege.

308. The Panel has already noted that Ms. Willett's cover letter refers in introduction to questions having been raised in various fora about whether NDC should have participated in the 27-28 July 2016 auction, and whether NDC's application should have been rejected. The letter goes on to note:

To help facilitate informed resolution of these questions, ICANN would find it useful to have additional information.

Accordingly, ICANN invites Ruby Glen, NDC, Afilias, and Verisign, Inc. (Verisign) to provide information and comment on the topics listed in the attached. Please endeavor to respond to all of the topics/questions for which you have information to do so. To allow ICANN promptly to evaluate these matters, please provide response [...] no later than 7 October 2016.<sup>270</sup>

309. Ms. Willett was asked what she meant when she stated that the Respondent was seeking information to facilitate "informed resolution". It was put to her that this "sounds like an investigation at the end of which ICANN would resolve the questions that had been raised". In response, Ms. Willett denied that she was undertaking an investigation, and stated that the responses eventually received to the Questionnaire were simply passed on to counsel.<sup>271</sup>
310. The Questionnaire is six (6) pages long and lists twenty (20) "topics" on which the entities to which it was addressed are invited to comment. The introductory paragraph echoes Ms. Willett's cover letter in stating that "all responses to these questions will be taken into

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<sup>268</sup> Merits hearing transcript, 5 August 2020, p. 545 (Ms. Willett). Ms. Willett left the employ of the Respondent in December 2019.

<sup>269</sup> ICANN's letter to Mr. Kane dated 16 September 2016 and attached Questionnaire, Ex. C-50.

<sup>270</sup> *Ibid.*, p. 1 [emphasis added].

<sup>271</sup> Merits hearing transcript, 6 August 2020, pp. 696-697 (Ms. Willett) : "[...] I was not undertaking an investigation. ICANN counsel handled and administered the CEP process. So the responses which I received to these letters I passed along to counsel."

consideration in ICANN’s evaluation of the issues raised [...]”.<sup>272</sup>

311. As already noted, while the Respondent, NDC and Verisign had knowledge of the terms of the DAA at that time, Afilias and Ruby Glen did not. It seems to the Panel evident that this asymmetry of information put Afilias and Ruby Glen at a significant disadvantage in addressing the topics listed in the Questionnaire in the context of “ICANN’s evaluation of the issues raised”. By way of example, the first topic asked for evidence regarding whether ownership or control of NDC changed after NDC applied for .WEB. The Respondent, NDC and Verisign were able to comment on the alleged change of ownership or control resulting from the contractual arrangements between the *Amici* by reference to the actual terms of the DAA. However, Afilias and Ruby Glen were not.
312. Other topics in the Questionnaire would attract very different answers depending on whether the responding party had knowledge of the terms of the DAA. By way of examples:

4. In his 8 August 2016, letter, Scott Hemphill stated: “A change in control can be effected by contract as well as by changes in equity ownership.” Do you think that an applicant’s making a contractual promise to conduct particular activities in which it is engaged in a particular manner constitutes a “change in control” of the applicant? Do you think that compliance with such a contractual promise constitutes such a change in control? Please give reasons.

5. Do you think that AGB Section 1.2.7 requires an applicant to disclose to ICANN all contractual commitments it makes to conduct its affairs in particular ways? If not, in what circumstances (if any) would disclosure be required? [...]

7. Do you think that changes to an applicant’s financial condition that do not negatively reflect on an applicant’s qualifications to operate the gTLD should be deemed material? If so, why? Do you think that an applicant’s obtaining a funding commitment from a third party to fund bidding at auction negatively affects that applicant’s qualifications to operate the gTLD? Please explain why, describing your view of the relevance of (a) the funding commitment the applicant received and (b) the consideration the applicant gave to obtain that commitment (e.g., a promise to repay; a promise to use a particular backend provider; an option to receive some ownership interest in the applicant in the future; some promise about how the gTLD will be operated).[...]

9. Do you think that requiring applicants to disclose funding commitments (whether through loans, contributions from affiliated companies, or otherwise) they obtain for auction bids would help or harm the auction process? Would a requirement that applicants disclose their funding arrangements create problems for applicants (for example, making funding commitments harder to obtain)? To what extent, if any, do you think scrutinizing such arrangements (beyond determining whether they negatively reflect on an applicant’s

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<sup>272</sup> ICANN’s letter to Mr. Kane dated 16 September 2016 and attached Questionnaire, Ex. C-50, p. 2 [emphasis added].

qualifications) would be within ICANN's proper mission? Would required disclosure of applicants' funding sources pose any threat to robust competition?

313. Another noteworthy feature of the Questionnaire is that while it contains many references to Mr. Hemphill's letters, it does not refer to the letter of 23 August 2016 from counsel for the *Amici*, nor in terms to the DAA. This was because one and the other had been marked confidential when submitted to the Respondent. Ms. Willett was asked about ICANN's practice when presented with a request to keep correspondence confidential:

[...] our practice was that we respected those requests for confidentiality and we did not post those -- such correspondences, with one exception.

At some point if some other party asked for something to be published or it became desirable and relevant to something else, I recall, again, it's been years, so I don't recall a specific example, but as a general practice, I recall that ICANN might ask the sender if it would be possible to publish a letter, but we respected their requests for confidential correspondence.<sup>273</sup>

314. The Panel is of the view that the Respondent could have, and ought to have requested Verisign and NDC for authorization to disclose the DAA to the other addresses of its Questionnaire, be it on an "external counsel's eyes only" basis. There is no evidence that this possibility was explored. It seems to the Panel that in the context of an information gathering exercise such as that in which the Respondent chose to engage with its Questionnaire, it would have been, to quote Ms. Willett's evidence, both "desirable" and "relevant" to do so. The Panel also believes that ICANN's evaluation of the issues would have been better informed had Afiliias and Ruby Glen been given an opportunity to know, and address directly, the arguments advanced on behalf of the *Amici* in response to the concerns they had raised. At the very least, the Respondent could have disclosed that the Questionnaire had been prepared with knowledge of the terms of the DAA, which would have given interested parties an opportunity to seek to obtain a copy of the agreement, either voluntarily by requesting it from the *Amici*, or through compulsion by available legal means.
315. The foregoing leads the Panel to find that the preparation and issuance of the Respondent's Questionnaire in the circumstances just reviewed violated the Respondent's commitment,

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<sup>273</sup> Merits hearing transcript, 6 August 2020, pp. 690-691 (Ms. Willett).

under the Bylaws, to operate in an open and transparent manner and consistent with procedures designed to ensure fairness.

316. As noted, Afilias, NDC and Verisign forwarded responses to the Questionnaire, but Ruby Glen did not. Ms. Willett testified that she passed on the responses she received to ICANN's legal team, without undertaking her own analysis. She was not sure what counsel did with them.<sup>274</sup> As for any external follow-up, it is common ground that no feedback whatsoever was given to the Claimant of the Respondent's evaluation of these responses.

**(iv) The Respondent's Letter of 30 September 2016**

317. In the meantime, on 30 September 2016, Mr. Atallah, on behalf of the Respondent, acknowledged receipt of Afilias' 8 August and 9 September 2016 letters and, as found by the Panel when considering the Respondent's time limitations defence, represented in explicit terms that the Respondent's consideration of this matter was continuing. It bears noting that in 2016, Mr. Atallah was President of the Respondent's Global Domains Division, reporting to the CEO, and was the person responsible for overseeing the administration of the New gTLD Program.<sup>275</sup>

**(v) Findings as to the Seriousness of the Issues Raised by the Claimant, and the Respondent's Representation that It Would Evaluate Them**

318. In the Panel's opinion, the implication of the Respondent's decision to prepare and send out its 16 September 2016 Questionnaire, and of Mr. Atallah's letter of 30 September 2016 in response to the Claimant's letters of 8 August and 9 September 2016, was that the questions raised by the Claimant and Ruby Glen in connection with NDC's conduct and the latter's arrangements with Verisign were serious and deserving of the Respondent's consideration. This was admitted by the Respondent in its pleadings in this IRP, where the

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<sup>274</sup> Merits hearing transcript, 6 August 2020, pp. 719-720 (Ms. Willett).

<sup>275</sup> Merits hearing transcript, 7 August 2020, pp. 917-918 (Mr. Disspain).

Respondent averred:

[...] ...determining that NDC violated the Guidebook is not a simple analysis that is answered on the face of the Guidebook. There is no Guidebook provision that squarely addresses an arrangement like the DAA. A true determination of whether there was a breach of the Guidebook requires an in-depth analysis and interpretation of the Guidebook provisions at issue, their drafting history to the extent it exists, how ICANN has handled similar situations, and the terms of the DAA. This analysis must be done by those with the requisite knowledge, expertise, and experience, namely ICANN.<sup>276</sup>

319. In making its finding as to the seriousness of the questions raised by the Claimant, the Panel is mindful of Ms. Willett’s evidence when asked, in cross-examination, whether she considered that the concerns that Afiliis had raised were serious. Her answer was that she “considered them to be sour grapes”, and she admitted that she may have shared that view with others within ICANN.<sup>277</sup> However, Ms. Willett having testified that she never even read the DAA when these events were unfolding, nor had she read the 23 August 2016 letter sent to the Respondent on behalf of the *Amici*, the Panel must conclude that her stated view was more in the nature of a personal impression than a considered opinion. Moreover, in all appearance her impression was not shared by those who invested time in assisting her preparing the Questionnaire, or by Mr. Atallah who subsequently confirmed that ICANN was continuing to consider the questions raised by the Claimant. In any event, and as just seen, it is not the position formally adopted by the Respondent in this IRP.
320. The questions raised by the Claimant that are, in the opinion of the Panel, serious and deserving of the Respondent’s consideration, include the following, which the Panel merely cites as examples:
- Whether, in entering into the DAA, NDC violated the Guidebook and, more particularly, the section providing that an “Applicant may not resell, assign, or transfer any of applicant’s rights or obligations in connection with the application”.
  - Whether the execution of the DAA by NDC constituted a “change in circumstances

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<sup>276</sup> Respondent’s Rejoinder, para. 82.

<sup>277</sup> Merits hearing transcript, 6 August 2020, p. 746 (Ms. Willett).

that [rendered] any information provided in the application false and misleading”.

- Whether by entering into the DAA after the deadline for the submission of applications for new gTLDs, and by agreeing with NDC provisions designed to keep the DAA strictly confidential, Verisign impermissibly circumvented the “roadmap” provided for applicants under the New gTLD Program Rules, and in particular the public notice, comment and evaluation process contemplated by these Rules.

321. The Panel expresses no view on the answers that should be given to those questions and the other questions arising from the execution of the DAA by NDC and Verisign, other than to reiterate, as acknowledged by the Respondent, that they are deserving of careful consideration.

322. The Panel has no hesitation in finding, based on the above, that that the Respondent represented by its conduct that the questions raised by the Claimant and “others in the contention set” were worthy of the Respondent’s consideration, and that the Respondent would consider, evaluate, and seek informed resolution of the issues arising therefrom. By reason of this conduct on the part of the Respondent, the Panel cannot accept the Respondent’s contention that there was nothing for the Respondent to consider, decide or pronounce upon in the absence of a formal accountability mechanism having been commenced by the Claimant. The fact of the matter is that the Respondent *represented* that it would consider the matter, and made that representation at a time when Ms. Willett confirmed the Claimant had no pending accountability mechanism.<sup>278</sup> Moreover, since the Respondent is responsible for the implementation of the New gTLD Program in accordance with the New gTLD Program Rules, it would seem to the Panel that the Respondent itself had an interest in ensuring that these questions, once raised, were addressed and resolved. This would be required not only to preserve and promote the integrity of the New gTLD

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<sup>278</sup> Merits hearing transcript, 6 August 2020, p. 745 (Ms. Willett).

Program, but also to disseminate the Respondent’s position on those questions within the Internet community and allow market participants to act accordingly.

**(vi) The November 2016 Board Workshop**

323. The Panel comes to the November 2016 Workshop session at which “the Board chose not to take any action at that time regarding .WEB because an Accountability Mechanism was pending regarding .WEB.”<sup>279</sup>
324. The existence of this November 2016 Workshop was revealed for the first time in the Respondent’s Rejoinder, filed on 1 June 2020. For example, no mention of it is made in the chronology of events contained in the Respondent’s Response,<sup>280</sup> where it was merely pleaded, with no reference to the workshop session, that the Board had not yet had an opportunity to fully address the issues being pursued by Afiliis in this IRP and that “[d]eferring such consideration until this Panel renders its final decision is well within the realm of reasonable business judgment”.<sup>281</sup>
325. The Panel had the benefit of hearing the evidence of two (2) witnesses who were in attendance at the November 2016 Workshop: Mr. Disspain, a long-standing member of ICANN’s Board, and Ms. Burr, who attended the workshop as an observer shortly before being herself appointed to the Board. Both of these witnesses are intimately familiar with the Respondent and its processes, and both testified openly and credibly.
326. This is how Mr. Disspain described the November 2016 Workshop session in his witness statement:

10. In November 2016, the Board received a briefing from ICANN counsel on the status of, and issues being raised regarding, .WEB. The communications during that session, in which ICANN’s counsel, John Jeffrey (ICANN’s General Counsel) and Amy Stathos (ICANN’s Deputy General Counsel), were integrally involved, are privileged and, thus, I will not disclose details of those discussions so as to avoid waiving the privilege. I recall that, prior to this session, the Board received Board briefing materials directly from ICANN’s counsel that set forth relevant information about the disputes regarding .WEB, the parties’ legal and factual contentions and a set of options the Board could consider.

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<sup>279</sup> Respondent’s Rejoinder, paras. 40-41.

<sup>280</sup> Respondent’s Response, paras. 40-54.

<sup>281</sup> Respondent’s Response, para. 66.

During the session, Board members discussed these topics and asked questions of, and received information and advice from, ICANN’s counsel.

11. At the November 2016 session, the Board chose not to take any action at that time regarding the claims arising from the .WEB auction, including the claim that, by virtue of the agreement between Verisign and NDC, NDC had committed violations of the Applicant Guidebook which merited the disqualification of its application for .WEB and the rejection of its winning bid. Given the Accountability Mechanisms that had already been initiated over .WEB, and given the prospect of further Accountability Mechanisms and legal proceedings, the Board decided to await the results of such proceedings before considering and determining what action, if any, to take at that time. [...]

327. In the course of his cross-examination, Mr. Disspain had the opportunity to add the following to the evidence set out in his witness statement:

- The workshop session of 3 November 2016 was separate and distinct from the actual Board meeting, which took place on 5 November 2016.<sup>282</sup>
- The session was attended by a significant number of Board members, in his estimation more than 50%.<sup>283</sup> Also in attendance were ICANN’s CEO, its in-house lawyers, and likely Mr. Atallah.<sup>284</sup>
- The letters that Afiliis had sent Mr. Atallah were known to those in attendance and “would have been part of the briefing”;<sup>285</sup> the Questionnaire prepared by ICANN in response to these letters was also known.<sup>286</sup> However, the DAA, the 23 August 2016 letter sent on behalf of the *Amici*, and the Questionnaire were not part of the briefing materials.<sup>287</sup>

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<sup>282</sup> Merits hearing transcript, 7 August 2020, pp. 918-919 (Mr. Disspain).

<sup>283</sup> *Ibid.*, p. 923 (Mr. Disspain).

<sup>284</sup> Merits hearing transcript, 7 August 2020, p. 924 (Mr. Disspain).

<sup>285</sup> Merits hearing transcript, 7 August 2020, p. 917 (Mr. Disspain).

<sup>286</sup> Merits hearing transcript, 7 August 2020, p. 928 (Mr. Disspain).

<sup>287</sup> Merits hearing transcript, 7 August 2020, pp. 930-931 (Mr. Disspain).

- There was a full and open discussion, that likely lasted more than fifteen (15) minutes.
- Rather than “proactively decide” or “agree” its course of action, the Board “made a choice” to follow its longstanding practice of not doing anything when there is a pending outstanding accountability mechanism.<sup>288</sup>
- The Board made this choice without the need for a vote, straw poll or show of hands.<sup>289</sup>

328. Ms. Burr explained that Board workshops are informal working sessions. A quorum is not required, attendance is not taken, nor are minutes prepared or resolutions passed.<sup>290</sup>

329. It is common ground that the choice, or decision, made by the Board at its November 2016 Workshop session was not communicated to Afilias or otherwise made public. In response to a question from the Panel, Mr. Disspain indicated that the question of whether the Board’s 3 November 2016 decision would or would not be communicated to the members of the .WEB contention set was not discussed at the workshop session.<sup>291</sup> Indeed, Mr. Disspain only became aware through his involvement in this IRP that the November 2016 Board decision to defer consideration of the issues raised in relation to .WEB was only communicated to the Claimant – and made public – when it was revealed in the Respondent’s Rejoinder.

330. Mr. Disspain was invited by the Panel to confirm that after the November 2016 Board workshop, he knew that the question of whether NDC’s bid was compliant with the New gTLD Program Rules had been raised by Afilias and was a “pending question, one on which the Board had not pronounced and had decided not to address.” [emphasis added]

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<sup>288</sup> Merits hearing transcript, 7 August 2020, pp. 938-939 (Mr. Disspain).

<sup>289</sup> Merits hearing transcript, 7 August 2020, p. 935 (Mr. Disspain).

<sup>290</sup> Merits hearing transcript, 4 August 2020, pp. 282-286 (Ms. Burr).

<sup>291</sup> Merits hearing transcript, 7 August 2020, p. 975 (Mr. Disspain).

Mr. Disspain provided this confirmation. The Panel can safely assume that what was true for Mr. Disspain was equally true for his fellow Board members who were in attendance at the workshop.

331. The Respondent urges that it was not a violation of the Respondent’s Bylaws for the Board, on 3 November 2016, to defer consideration of the complaints that had been raised in relation to NDC’s application and auction bids for .WEB. It is common ground that there were Accountability Mechanisms in relation to .WEB pending at the time, and it seems to the Panel reasonable for the Board to have decided to await the outcome of these proceedings before considering and determining what action, if any, it should take. The Panel notes that it reaches that conclusion without needing to rely on the provisions of Section 4.3(i)(iii) of the Bylaws, and determining whether or not that decision involved the Board’s exercise of its fiduciary duties.
332. The Panel does find, however, that it was a violation of the commitment to operate “in an open and transparent manner and consistent with procedures to ensure fairness”<sup>292</sup> for the Respondent to have failed to communicate the Board’s decision to the Claimant. As noted already, the Respondent had clearly represented in its letters of 16 and 30 September 2016 that it would evaluate the issues raised in connection with NDC’s application and auction bids for .WEB. Since the Board’s decision to defer consideration of these issues contradicted the Respondent’s representations, it was incumbent upon the Respondent to communicate that decision to the Claimant.

**(vii) The Respondent’s Decision to Proceed with Delegation of .WEB to NDC in June 2018**

333. Mr. Disspain confirmed that by early 2018, the situation as described in paragraph 327 above “remained unchanged.”<sup>293</sup> That is, the question of whether NDC’s bid, post-DAA, was compliant with the New gTLD Program Rules had been raised and remained a pending question on which the Board had yet to pronounce. The extent to which the Respondent’s

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<sup>292</sup> See Bylaws Ex. C-1, Art. 3.

<sup>293</sup> Merits hearing transcript, 7 August 2020, pp. 976-977 (Mr. Disspain).

Staff had, by early 2018, progressed in their consideration of the questions that had been raised by the Claimant, if at all, is unknown. However, the evidence establishes that no determination of these questions was communicated to the Claimant, and that neither those questions nor any Staff position in relation thereto were brought back to the Board for its consideration. Ms. Willett explained in the course of her cross-examination that the on-hold status of an application or contention set does not mean “that all work ceases”, or that the Respondent is prevented from continuing to gather information.<sup>294</sup> Hence, the fact that the contention set was on hold throughout the period from November 2016 to June 2018 would not justify the lack of progress in evaluating the issues that had been raised in connection with .WEB.

334. This brings the Panel to considering the Respondent’s decision to put the .WEB contention set “off hold” on 6 June 2018, the day after Afiliat’s Reconsideration Request 18-7 was denied.<sup>295</sup> As seen, this immediately set back in motion the Respondent’s internal process leading to the execution of a registry agreement. On 12 June 2018, Ms. Willett and other ICANN staff approved a draft registry agreement for .WEB; the registry agreement was forwarded for execution to NDC on 14 June 2018; the agreement was promptly signed and returned to ICANN and, on the same day, ICANN’s Staff approved executing the .WEB Registry Agreement with NDC on behalf of ICANN.
335. In the opinion of the Panel, the Respondent’s decision to move to delegation without having pronounced on the questions raised in relation to .WEB was inconsistent with the representations made in Ms. Willett’s letter of 16 September 2016, the text in the introduction to the attached Questionnaire,<sup>296</sup> and Mr. Atallah’s letter of 30 September 2016.<sup>297</sup> The Panel also finds this conduct to be inconsistent with the Board’s decision of 3 November 2016 which, while it deferred consideration of the .WEB issues, nevertheless acknowledged that they were deserving of consideration, a position reiterated

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<sup>294</sup> Merits hearing transcript, 6 August 2020, pp. 697-698 (Ms. Willett).

<sup>295</sup> See above, para. 117.

<sup>296</sup> ICANN’s letter to Mr. Kane dated 16 September 2016 and attached Questionnaire, Ex. C-50.

<sup>297</sup> ICANN’s letter to Mr. Hemphill dated 30 September 2016, Ex. C-61.

by the Respondent in this IRP.

336. Mr. Disspain testified about the Respondent's decision to put the contention set off hold in June 2018. While he had made the point in his witness statement that this was a decision made by ICANN's Staff,<sup>298</sup> he confirmed at the hearing that the Board was aware, ahead of time, that the .WEB contention set would be put off hold. He added, however, that he and his fellow Board members fully expected the Claimant to make good on its promise to initiate an IRP, which would result in the contention set being put back on hold.<sup>299</sup>
337. Mr. Disspain was asked by the Panel what would the Board have done had the Claimant, contrary to his and his colleagues' expectation, *not* initiated an IRP. Might that not have resulted in a registry agreement for .WEB being signed by the Staff on behalf of the Respondent without the Board having the opportunity to address the questions it had chosen to defer in November 2016? Mr. Disspain, understandably, did not want to speculate as to what the Board would have done.<sup>300</sup> However, when shown internal correspondence evidencing that signature of the registry agreement for .WEB on behalf of ICANN had in fact been approved by ICANN's Staff after receipt of the executed copy of the agreement by NDC, he did confirm that Board approval is not required for the execution of a registry agreement by ICANN.<sup>301</sup> Thus, clearly, a registry agreement with NDC for .WEB could have been executed by ICANN's Staff and come into force without the Board having pronounced on the propriety of the DAA under the Guidebook and Auction Rules.
338. In the course of her examination, Ms. Willett was asked the following hypothetical question:

**[PANEL MEMBER]:** [...] If [...] an applicant had failed to respect the guidebook, but there had been no accountability mechanism to complain about that noncompliance, would you, by reason of the absence of an accountability mechanism, have sent a draft Registry Agreement for execution?

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<sup>298</sup> Mr. Disspain's witness statement, 1 June 2020, para. 13.

<sup>299</sup> Merits hearing transcript, 7 August 2020, pp. 978-980 (Mr. Disspain).

<sup>300</sup> *Ibid.*, pp. 981-982 (Mr. Disspain).

<sup>301</sup> *Ibid.*, pp. 1002-1004 (Mr. Disspain).

**THE WITNESS:** No, I don't believe we would have. If we determined that an applicant had violated the terms of the guidebook, I don't believe that my team and I would have given our approvals to proceed with contracting.<sup>302</sup>

339. In the Panel's view, Ms. Willett's evidence in answer to this question reflects the kind of ownership of compliance issues with the New gTLD Program Rules that the Respondent did not display in its dealing with the concerns raised in connection with NDC's arrangements with Verisign.
340. The Panel observes that the Respondent's Staff's failure to take a position on the question of whether the DAA complies with the New gTLD Program Rules before moving to delegation stands in contrast with the resolution that was brought to the pre-auction allegation of change of control within NDC, which had also been raised, initially, in correspondence. Ms. Willett confirmed in her evidence that the Respondent's pre-auction investigation was prompted by Ruby Glen's email of 23 June 2016.<sup>303</sup> Once the investigation was completed, Ms. Willett informed Ruby Glen of ICANN's decision<sup>304</sup> and advised Ruby Glen that if dissatisfied with the decision, it could invoke ICANN's accountability mechanisms.<sup>305</sup> No such decision was made by ICANN's Staff in relation to the issues raised by the Claimant that could have formed the basis for a formal accountability mechanism, in the context of which positions would have been adopted, battle lines would have been drawn, and an adversarial process such as an IRP would have resulted in a reasoned decision binding on the parties.
341. What the Panel has described as a failure on the part of the Respondent to take ownership of the issues arising from the concerns raised by the Claimant and Ruby Glen finds expression in the Respondent's submission in this IRP that the dispute arising out of NDC's arrangement with Verisign is in reality a dispute between the Claimant and the *Amici*. For example, the Respondent writes in its Response:

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<sup>302</sup> Merits hearing transcript, 6 August 2020, pp. 749-750 (Ms. Eisner).

<sup>303</sup> Merits hearing transcript, 6 August 2020, p. 617 (Ms. Willett).

<sup>304</sup> See Ms. Willett's letter to members of the .WEB/.WEBS contention set dated 13 July 2016, Ex. C-44.

<sup>305</sup> Merits hearing transcript, 6 August 2020, pp. 621-622 (Ms. Willett).

[...] the Guidebook breaches that Afilias alleges are the subject of good faith dispute by NDC and Verisign, both of which are seeking to participate in this IRP pursuant to their *amicus* applications. [...] While Afilias' Amended IRP Request is notionally directed at ICANN, it is focused exclusively on the conduct of NDC and Verisign, to which NDC and Verisign have responses. [...]<sup>306</sup>

342. Another example can be found in the Respondent's post-hearing brief where it is stated:

The testimony at the hearing established that there is a good-faith and fundamental dispute between *Amici* and *Afilias* about whether the DAA violated the Guidebook or Auction Rules, meaning that reasonable minds could differ on whether NDC is in breach of either and, if so, whether this qualification is the appropriate remedy. Accordingly, Afilias' additional argument that ICANN can only exercise its discretion reasonably by disqualifying NDC must be rejected.<sup>307</sup>

343. It may be fair to say, as averred in the Respondent's Response, that "ICANN has been caught in the middle of this dispute between powerful and well-funded businesses".<sup>308</sup> However, in the Panel's view, it is not open to the Respondent to add, as it does in the same sentence of its Response, "[and ICANN] has not taken sides", as if the Respondent had no responsibility in bringing about a resolution of the dispute by itself taking a position as to the propriety of NDC's arrangements with Verisign.

344. In the opinion of the Panel, there is an inherent contradiction between proceeding with the delegation of .WEB to NDC, as the Respondent was prepared to do in June 2018, and recognizing that issues raised in connection with NDC's arrangements with Verisign are serious, deserving of the Respondent's consideration, and remain to be addressed by the Respondent and its Board, as was determined by the Board in November 2016. A necessary implication of the Respondent's decision to proceed with the delegation of .WEB to NDC in June 2018 was some implicit finding that NDC was not in breach of the New gTLD Program Rules and, by way of consequence, the implicit rejection of the Claimant's allegations of non-compliance with the Guidebook and Auction Rules. This is difficult to reconcile with the submission that "ICANN has taken no position on

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<sup>306</sup> See Respondent's Response, para. 63.

<sup>307</sup> Respondent's PHB, para. 90 [emphasis added].

<sup>308</sup> Respondent's Response, para. 4.

whether NDC violated the Guidebook”.<sup>309</sup>

345. The same can be said of the Respondent taking the position, shortly after Afilias filed its IRP, that it would only keep the .WEB contention set on hold until 27 November 2018, so as to allow the Claimant to file a request for interim relief, barring which the Respondent would take the contention set off hold.<sup>310</sup> It seems to the Panel that the Respondent was once again adopting a position that could have resulted in .WEB being delegated to NDC without the Board having determined whether NDC’s arrangements with Verisign complied within the New gTLD Program Rules.
346. The Panel also finds it contradictory for the Respondent to assert in pleadings before this Panel that the Respondent has not yet considered the Claimant’s complaints, having represented to the Emergency Panelist earlier in these proceedings that ICANN “ha[d] evaluated these complaints” and that the “time ha[d] therefore come for the auction results to be finalized and for .WEB to be delegated so that it can be made available to consumers”.<sup>311</sup>
347. In sum, the Panel finds that it was inconsistent with the representations made to the Claimant by ICANN’s Staff, and the rationale of the Board’s decision, in November 2016, to defer consideration of the issues raised in relation to NDC’s application for .WEB, for the Respondent’s Staff, to the knowledge of the Respondent’s Board, to proceed to delegation without addressing the fundamental question of the propriety of the DAA under the New gTLD Program Rules. The Panel finds that in so doing, the Respondent has violated its commitment to make decisions by applying documented policies objectively and fairly.
348. As a direct result of the foregoing, the Panel has before it a party – the Claimant – attacking a decision – the Respondent’s failure to disqualify NDC’s application and auction bids – that the Respondent insists it has not yet taken. Moreover, the Panel finds itself in the

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<sup>309</sup> Respondent’s Rejoinder, para. 81.

<sup>310</sup> See Decision on Phase I, para. 40.

<sup>311</sup> ICANN’s Opposition to Afilias Domains No. 3 LTD.’s Request for Emergency Panelist and Interim Measures of Protection, para. 3.

unenviable position of being presented with allegations of non-compliance with the New gTLD Program Rules in circumstances where the Respondent, the entity with primary responsibility for this Program, has made no first instance determination of these allegations, whether through actions of its Staff or Board, and declines to take a position as to the propriety of the DAA under the Guidebook and Auction Rules in this IRP. The Panel addresses these peculiar circumstances further in the section of this Final Decision addressing the proper relief to be granted.

**(viii) Other Related Claims**

349. In addition to what the Panel has described as the Claimant’s core claims, the Claimant has advanced a number of related claims, including that the Respondent violated its Articles and Bylaws through its disparate treatment of Afilias and Verisign, and by failing to enable and promote competition in the DNS.
350. As regards the allegation of disparate treatment, it rests for the most part on facts already considered by the Panel in analysing the Claimant’s core claims, such as turning to Verisign rather than NDC to obtain information about NDC’s arrangements with Verisign, allowing for asymmetry of information to exist between the recipients of the 16 September 2016 Questionnaire, delaying providing a response to Afilias’ letters of 8 August and 9 September 2016, submitting Rule 4 for adoption in spite of it being the subject of an ongoing public comment process, and making that rule retroactive so as to encompass the Claimant’s claims within its reach. Accordingly, the Panel does not consider it necessary, based on the allegation of disparate treatment, to add to its findings in relation to the Claimant’s core claims.
351. Turning to the claim that the Respondent failed to enable and promote competition in the DNS, it was summarized in the Claimant’s PHB as the contention that “to the extent ICANN has discretion regarding the enforcement of the New gTLD Program Rules, ICANN may not exercise its discretion in a manner that would be inconsistent with its competition mandate (or with its other Articles and Bylaws).”<sup>312</sup> As seen, the Respondent

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<sup>312</sup> Claimant’s PHB, para. 145.

has not as yet exercised whatever discretion it may have in enforcing the New gTLD Program Rules in relation to .WEB, and therefore this claim, as just summarized, appears to the Panel to be premature.

352. For reasons expressed elsewhere in this Final Decision, the Panel is of the opinion that it is for the Respondent to decide, in the first instance, whether NDC violated the Guidebook and Auction Rules and, assuming the Respondent determines that it did, what consequences should follow. Likewise, the Respondent is invested with the authority to approve an eventual transfer of a possible registry agreement for .WEB from NDC to Verisign, which it may or may not be called upon to exercise depending on whether NDC's application is rejected and its bids disqualified. That said, and even though it is not strictly necessary to decide the question, the Panel accepts the submission that ICANN does not have the power, authority, or expertise to act as a competition regulator by challenging or policing anticompetitive transactions or conduct. Compelling evidence to that effect was presented by Ms. Burr and Mr. Kneuer, supported by Mr. Disspain, and it is consistent with a public statement once endorsed by the Claimant, in which it was asserted:

While ICANN's mission includes the promotion of competition, this role is best fulfilled through the measured expansion of the name space and the facilitation of innovative approaches to the delivery of domain name registry services. *Neither ICANN nor the GNSO have the authority or expertise to act as anti-trust regulators.* Fortunately, many governments around the world do have this expertise and authority, and do not hesitate to exercise it in appropriate circumstances.<sup>313</sup>

353. As noted in the History of the Proceedings section of this Final Decision,<sup>314</sup> the Parties came to the understanding that it would be for this Panel to determine the Claimant's Request for Emergency Interim Relief upon the Respondent agreeing that the .WEB gTLD contention set would remain on hold until the conclusion of this IRP. For the reasons set out in the section of this Final Decision analysing the Claimant's cost claim,<sup>315</sup> the Panel is of the view that the Claimant's Request for Emergency Interim Relief was well founded, and that it should be granted with effect until such time as the Respondent has considered

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<sup>313</sup> Registry Operators' Submission Re: Objections to the Proposed Versign Settlement, Ex. R-21, p. 8 [emphasis added].

<sup>314</sup> See above, para. 40.

<sup>315</sup> See below, paras. 402-407.

the present Final Decision.

354. As regards the Donuts transaction of 29 December 2020, the Panel does not consider it relevant to the issues determined in this Final Decision. It will be for the Respondent to consider, in the first instance, whether this transaction is of relevance to the Claimant's request that following a possible disqualification of NDC's bid for .WEB, the Respondent must, in accordance with the New gTLD Program Rules, contract the Registry Agreement for .WEB with the Claimant.

#### **E. The Rule 7 Claim**

355. The Panel recalls that the Rule 7 Claim was first raised as a defence to the *Amici's* requests, based on Rule 7 of the Interim Procedures, to participate in this IRP as *amici curiae*. In its Decision on Phase I, the Panel granted the *Amici's* requests – subject to modalities set out in that decision – and, to the extent the Claimant wished to maintain its Rule 7 Claim, joined those aspects of the claim over which the Panel found it has jurisdiction to the claims to be decided in Phase II. The *Amici* have since participated in this IRP to the full extent permitted by the Decision on Phase I, as described in earlier sections of this Final Decision.
356. The Panel included in its list of questions to be addressed in post-hearing briefs a request to the Claimant to clarify what remained to be decided in connection with its Rule 7 Claim given the Decision on Phase I and the conduct of the IRP in accordance with that ruling. The Claimant's response is that the Rule 7 Claim remains relevant to justify an award of costs in its favour.
357. As explained in the sections of this Final Decision dealing, respectively, with the designation of the prevailing party and the Claimant's cost claim, there is, in the opinion of the Panel, no basis on which the Claimant could be awarded costs in relation to Phase I or in relation to the outstanding aspects of the Rule 7 Claim. This being so, it is the Panel's opinion that no useful purpose would be served by the Rule 7 Claim being addressed beyond the findings and observations contained in the Panel's Decision on Phase I, which the Respondent's Board has no doubt reviewed and can act upon, as appropriate. The Panel wishes to make clear that in making this Final Decision, the Panel expresses no view on

the merit of those outstanding aspects of the Rule 7 Claim over which the Panel found that it has jurisdiction, beyond that expressed in paragraph 408 of these reasons.

#### **F. Determining the Proper Relief**

358. The remedial authority of IRP Panels is set out in Section 4.3(o) of the Bylaws, which reads as follows:

(o) Subject to the requirements of this Section 4.3, each IRP Panel shall have the authority to:

(i) Summarily dismiss Disputes that are brought without standing, lack substance, or are frivolous or vexatious;

(ii) Request additional written submissions from the Claimant or from other parties;

(iii) Declare whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws, declare whether ICANN failed to enforce ICANN's contractual rights with respect to the IANA Naming Function Contract or resolve PTI service complaints by direct customers of the IANA naming functions, as applicable;

(iv) Recommend that ICANN stay any action or decision, or take necessary interim action, until such time as the opinion of the IRP Panel is considered;

(v) Consolidate Disputes if the facts and circumstances are sufficiently similar, and take such other actions as are necessary for the efficient resolution of Disputes;

(vi) Determine the timing for each IRP proceeding; and

(vii) Determine the shifting of IRP costs and expenses consistent with Section 4.3(r).

[emphasis in the original]

359. Of relevance to situating the remedial authority of IRP Panels in their proper context are the provisions of Section 4.3(x), which it is useful to cite in full:

(x) The IRP is intended as a final, binding arbitration process.

(i) IRP Panel decisions are binding final decisions to the extent allowed by law unless timely and properly appealed to the en banc Standing Panel. En banc Standing Panel decisions are binding final decisions to the extent allowed by law.

(ii) IRP Panel decisions and decisions of an en banc Standing Panel upon an appeal are intended to be enforceable in any court with jurisdiction over ICANN without a *de novo* review of the decision of the IRP Panel or en banc Standing Panel, as applicable, with respect to factual findings or conclusions of law.

(iii) ICANN intends, agrees, and consents to be bound by all IRP Panel decisions of Disputes of Covered Actions as a final, binding arbitration.

(A) Where feasible, the Board shall consider its response to IRP Panel decisions at the Board's next meeting, and shall affirm or reject compliance with the decision on the public record based on an expressed rationale. The decision of the IRP Panel, or en banc Standing Panel, shall be final regardless of such Board action, to the fullest extent allowed by law.

(B) If an IRP Panel decision in a Community IRP is in favor of the EC, the Board shall comply within 30 days of such IRP Panel decision.

(C) If the Board rejects an IRP Panel decision without undertaking an appeal to the en banc Standing Panel or rejects an en banc Standing Panel decision upon appeal, the Claimant or the EC may seek enforcement in a court of competent jurisdiction. In the case of the EC, the EC Administration may convene as soon as possible following such rejection and consider whether to authorize commencement of such an action.

(iv) By submitting a Claim to the IRP Panel, a Claimant thereby agrees that the IRP decision is intended to be a final, binding arbitration decision with respect to such Claimant. Any Claimant that does not consent to the IRP being a final, binding arbitration may initiate a non-binding IRP if ICANN agrees; provided that such a non-binding IRP decision is not intended to be and shall not be enforceable.

*[italics in the original]*

360. The Panel also notes the provisions of Section 4.3(t) which, among others, require each IRP Panel decision to “specifically designate the prevailing party as to each part of a Claim”.
361. In the opinion of the Panel, the Claimant is entitled to a declaration that the Respondent violated its Articles and Bylaws to the extent found by the Panel in the previous sections of this Final Decision, and to being designated the prevailing party in respect of the liability portion of its core claims.
362. As foreshadowed earlier in these reasons, the Panel is firmly of the view that it is for the Respondent, that has the requisite knowledge, expertise, and experience, to pronounce in the first instance on the propriety of the DAA under the New gTLD Program Rules, and on the question of whether NDC’s application should be rejected and its bids at the auction disqualified by reason of its alleged violations of the Guidebook and Auction Rules.
363. The Panel also accepts the Respondent’s submission that it would be improper for the Panel to dictate what should be the consequence of NDC’s violation of the New gTLD Program

Rules, assuming a violation is found. The Panel is mindful of the Claimant’s contention that whatever discretion the Respondent may have is necessarily constrained by the Respondent’s obligation to enforce the New gTLD Program Rules objectively and fairly. Nevertheless, the Respondent does enjoy some discretion in addressing violations of the Guidebook and Auction Rules and it is best that the Respondent first exercises its discretion before it is subject to review by an IRP Panel.

364. In the opinion of the Panel, the foregoing conclusions are consistent with the authority of IRP Panels under Section 4.3 (o) (iii) of the Bylaws, which grants the Panel authority to “declare” whether a Covered Action constituted an action or inaction that violated the Articles or Bylaws.

#### **G. Designating the Prevailing Party**

365. Section 4.3(t) of the Bylaws requires the Panel to designate the prevailing party “as to each part of a Claim”.<sup>316</sup> This designation has relevance, among others, to the Panel’s exercise of its authority under Section 4.3(r) of the Bylaws to shift costs by providing for the “losing party” to pay the administrative costs and/or fees of the “prevailing party” in the event the Panel identifies the losing party’s Claim or defence as frivolous or abusive.<sup>317</sup>
366. The Panel has already determined that the Claimant is entitled to be designated as the prevailing party in relation to the liability portion of its core claims. In the opinion of the Panel, the Claimant should also be designated the prevailing party in relation to its Request for Emergency Interim Relief, insofar as the Respondent eventually agreed to keep .WEB on hold until this IRP is concluded, consistent with the rationale of the Board’s decision of November 2016 to defer consideration of the issues raised in relation to .WEB and the status of NDC’s application, post-DAA, while accountability mechanisms remained

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<sup>316</sup> The equivalent provision in the Interim Procedures, Ex. C-59, Rule 13 b., differs slightly in that it requires the IRP Panel Decision to “specifically designate the prevailing party as to each Claim”.

<sup>317</sup> See also Section 4.3(e)(ii) of the Bylaws, which requires an IRP Panel to award to ICANN all reasonable fees and costs incurred by ICANN in the IRP in the event it is the prevailing party in a case in which the Claimant failed to participate in good faith in a CEP.

pending.

367. With respect to Phase I of this IRP, the Claimant has argued that the prevailing party remained to be determined depending on the outcome of Phase II.<sup>318</sup> This is correct in regard to those aspects of the Claimant's Rule 7 Claim that were joined to the Claimant's other claims in Phase II, pursuant to the Panel's Decision on Phase I. However, the Respondent prevailed in Phase I on the question of whether the Panel had jurisdiction over actions or failures to act committed by the IOT and, importantly, on the principle of the *Amici*'s requests to participate in the IRP as *amici curiae*. These requests were both granted, albeit with narrower participation rights than those advocated by the Respondent.<sup>319</sup> In light of the foregoing, the Panel does not consider that the Claimant can be designated as the prevailing party in respect of Phase I of the IRP.
368. Turning to the requests for relief sought by the Claimant, the Respondent must be designated as the prevailing party in regard to all aspects of the Claimant's requests for relief other than (a) the request for a declaration that ICANN acted inconsistently with its Articles and Bylaws as described, among others, in paragraph 8 of this Final Decision and the *Dispositif*, and (b) the outstanding aspects of the Rule 7 Claim. With regard to the latter, which the Panel has determined have become moot by the participation of the *Amici* in this IRP in accordance with the Panel's Decision on Phase I, the Claimant cannot be designated as the prevailing party either, the matter not having been adjudicated upon. For the reasons set out in next section of this Final Decision, however, the fact that those aspects of the Rule 7 Claim have become moot and are therefore not decided in this Final Decision is without consequence on the Claimant's cost claim in relation to the Rule 7 Claim because, in the opinion of the Panel, it simply cannot be argued that the Respondent's defence to the Rule 7 Claim was frivolous and abusive.

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<sup>318</sup> See *Afilias' Reply Costs Submission*, para. 9.

<sup>319</sup> See *Decision on Phase I*, paras. 96-97.

## VI. COSTS

### A. Submissions on Costs

369. In its decision on Phase I, the Panel deferred to Phase II the determination of costs in relation to Phase I of this IRP.<sup>320</sup> The Parties' submissions on costs therefore relate to both phases of the IRP.

#### 1. Claimant's Submissions on Costs

370. The Claimant submitted its cost submissions in a brief separate from, but filed simultaneously with its PHB, on 12 October 2020.<sup>321</sup> The Claimant argues that it should be declared the prevailing party on all of its claims in the IRP. Relying on Section 4.3(r) of the Bylaws, the Claimant requests that the Panel shift all of its fees and costs to the Respondent on the ground that the Respondent's defences in the IRP were "frivolous or abusive". In the alternative, the Claimant argues that the Respondent should at least bear all of its costs and fees related to the participation of the *Amici* in the IRP and the Emergency Interim Relief proceedings.

371. The Claimant states that there was no need for this IRP to be as procedurally and substantively complicated as it has been.<sup>322</sup> First, the Claimant avers that the Respondent used the CEP as cover to push through "interim procedures" that would provide the Respondent with a limitations defence. Second, the Claimant argues that the Respondent ought not to have forced the Claimant to seek emergency interim relief to protect against the .WEB contention set being taken off hold. Third, the Claimant blames the Respondent's belated disclosure of the DAA for the need for it to have filed an Amended Request for IRP. Fourth, the Claimant reproaches the Respondent for pressing for the *Amici*'s participation in the IRP, particularly Verisign, which was not even a member of the contention set. Finally, the Claimant contends that the Respondent ought

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<sup>320</sup> Decision on Phase I, para. 205(c).

<sup>321</sup> The Claimant's Submissions on Costs were corrected on 16 October 2020 apparently due to a technical problem with Afiliast's exhibit management software.

<sup>322</sup> Claimant's Submissions on Costs, paras. 1-2.

not to have hidden its central defence – the Board’s decision of November 2016 – until the filing of its Rejoinder.

372. In the Claimant’s submission, the Respondent’s central defence in this IRP – articulated for the first time on 1 June 2020 and based on an alleged Board decision taken during the November 2016 Workshop – frivolously and abusively sought to immunize the Respondent from any accountability and to render the present IRP an empty shell.<sup>323</sup> The Claimant argues that it was abusive for the Respondent to center its defence around a decision that had never been made public or disclosed to Afiliis prior to the Respondent’s Rejoinder.<sup>324</sup>
373. The Claimant also contends that the Respondent’s defence frivolously and abusively sought to deprive the Claimant of an effective forum. In that regard, the Claimant avers that ICANN’s enactment of the Interim Procedures, weeks before the Claimant filed its IRP, was frivolous and abusive because it allowed the Respondent to advance a time-limitation defence that would otherwise not have been available to it previously and to enable the participation of the *Amici* in the IRP. In the Claimant’s view, the circumstances in which ICANN enacted the Interim Procedures made it clear that they were specifically targeted to undermine the Claimant’s position in the present IRP.<sup>325</sup>
374. The Claimant submits that ICANN’s refusal to put .WEB on hold after the filing of the IRP was also frivolous and abusive and needlessly forced the Claimant to pursue a “costly, distracting, and unwarranted Emergency Interim Relief phase”. The Claimant avers that the Respondent’s action was frivolous and abusive because the Respondent later abandoned its refusal to put .WEB on hold – but only after the Claimant had incurred extensive fees and costs on the Request for Emergency Interim Relief.<sup>326</sup>
375. The Claimant argues as well that the Respondent must bear its costs and fees associated with the *Amici*’s participation in the IRP. This is so because, in the submission of

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<sup>323</sup> Claimant’s Submissions on Costs, para. 16.

<sup>324</sup> *Ibid*, paras. 12-17.

<sup>325</sup> *Ibid*, paras. 19-25.

<sup>326</sup> *Ibid*, paras. 26-27.

the Claimant, the Respondent abusively included Rule 7 in the Interim Supplementary Procedures in view of the present IRP and then used the *Amici* as surrogates for its defence.

## **2. Respondent's Submissions on Costs**

376. The Respondent's submissions on costs are set out in its PHB dated 12 October 2020.

377. The Respondent takes the position that the Bylaws and Interim Procedures authorize the Panel to shift costs only in the event of a finding that, when viewed in its entirety, a party's case was frivolous or abusive. The Respondent stresses that while this is an uncommonly high standard for international arbitration, it is more permissive than the "American rule" under which legal fees cannot ordinarily be shifted to the non-prevailing party. The Respondent also recalls that, under the Bylaws, it is the Respondent that bears all the administrative costs of maintaining the IRP mechanism, including the fees and expenses of the panelists and the ICDR.<sup>327</sup>

378. ICANN states that it does not view the Claimant's case as a whole to be frivolous or abusive, even though, in the Respondent's submission, the Claimant has from time to time employed abusive tactics and taken positions that clearly have no merit. The Respondent therefore does not seek an award for costs.

379. The Respondent argues that the Claimant cannot plausibly contend that ICANN's defence triggers the Panel's authority to allocate legal expenses in favour of the Claimant. For these reasons, ICANN contends that the Parties should bear their own legal expenses.<sup>328</sup>

## **3. Claimant's Reply Submission on Costs**

380. In its Reply Costs Submissions dated 23 October 2020, the Claimant argues that the Panel is empowered to shift costs if any part of the Respondent's defence lacked merit or was otherwise improper. In the Claimant's view, the standard for cost shifting must be informed, not by the California Code of Civil Procedure, which is relied upon by

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<sup>327</sup> Respondent's PHB, paras. 232-234.

<sup>328</sup> *Ibid*, paras. 235-240.

the Respondent, but by international arbitration norms and ICANN’s obligation to conduct its activities “consistently, neutrally, objectively, and fairly” and “transparently.”<sup>329</sup>

381. The Claimant avers that the Respondent’s PHB underscores that its defence has been frivolous and abusive, both in general and in its particulars.<sup>330</sup> The Claimant argues that the three (3) main planks of ICANN’s substantive defence were each frivolous and abusive: the belatedly disclosed Board decision of November 2016,<sup>331</sup> the allegedly limited remedial jurisdiction of the Panel,<sup>332</sup> and the time bar defence, based on Rule 4, which was made applicable to this IRP by distorting the Respondent’s rule-making process and violating the “fundamental rule” against retroactivity.<sup>333</sup> The Claimant also asserts that the Respondent’s alleged reliance on the *Amici* as a defensive tactic allegedly to deflect attention from its own conduct has been frivolous and abusive, “both in conception and execution” in that it was facilitated by improper collaboration with Verisign in the process of adoption of Rule 7, and by using the *Amici* participation as an excuse to avoid answering the Claimant’s claims.<sup>334</sup>

382. In light of the foregoing, the Claimant requests that the Panel order the Respondent to pay the Claimant: USD 11,291,997.13 in compensation for the total fees and costs incurred by the Claimant in this IRP; or, in the alternative: USD 2,383,703.11 for the Claimant’s fees and costs incurred in relation to the *Amici* participation; and USD 823,811.88 for the fees and costs incurred in relation to the Emergency Interim Relief phase, along with pre- and post-award interest “at a reasonable rate from the date of this filing”.<sup>335</sup>

#### **4. Respondent’s Response Submission on Costs**

383. In its 23 October 2020 Response to Afiliias’ Costs Submission, the Respondent contends

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<sup>329</sup> Claimant’s Reply Submissions on Costs, paras. 3-4.

<sup>330</sup> *Ibid.*, para. 5.

<sup>331</sup> *Ibid.*, para. 6.

<sup>332</sup> *Ibid.*, para. 7.

<sup>333</sup> *Ibid.*, para. 8.

<sup>334</sup> *Ibid.*, para. 9.

<sup>335</sup> *Ibid.*, paras. 10-11.

that the Claimant's request for an order requiring ICANN to pay all its costs and legal fees should be denied because it is legally and factually baseless. In the Respondent's submission, the Claimant applies an incorrect standard for cost shifting, since Section 4.3(r) of the Bylaws allows the Panel to shift legal expenses and costs only when a party's IRP Claim or defence as a whole is found to be frivolous or abusive.<sup>336</sup> The Respondent further argues that the Claimant's cost-shifting arguments are misplaced and baseless since its arguments in defence were not frivolous or abusive.<sup>337</sup> Finally, the Respondent avers that the Claimant's legal fees and costs are unreasonable as to both their total amount and their allocation as between the subject matters in relation to which separate cost shifting requests are made.<sup>338</sup>

384. For those reasons, the Respondent requests that the Claimant's request for an order requiring the Respondent to reimburse its costs and legal fees should be denied in its entirety.<sup>339</sup>

## **B. Analysis Regarding Costs**

### **1. Applicable Provisions**

385. The Panel begins its analysis by citing the provisions of the Bylaws and Interim Procedures that are relevant to the Claimant's cost claim.

386. Section 4.3(r) of the Bylaws reads as follows:

(r) ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members. Except as otherwise provided in Section 4.3(e)(ii), each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, including the costs of all legal counsel and technical experts. Nevertheless, except with respect to a Community IRP, the IRP Panel may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.

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<sup>336</sup> Respondent's Reply Submissions on Costs, paras. 4-8.

<sup>337</sup> *Ibid*, paras. 9-24.

<sup>338</sup> *Ibid*, paras. 25-28.

<sup>339</sup> *Ibid*, para. 29.

387. Rule 15 of the Interim Procedures is to the same effect:

15. Costs

The IRP Panel shall fix costs in its IRP PANEL DECISION. Except as otherwise provided in Article 4, Section 4.3(e)(ii) of ICANN's Bylaws, each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, as defined in Article 4, Section 4.3(d) of ICANN's Bylaws, including the costs of all legal counsel and technical experts.

Except with respect to a Community IRP, the IRP PANEL may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.

388. As discussed in the previous section of this Final Decision, it is pursuant to the provisions of Section 4.3(t) that the Panel is required to designate the prevailing party "as to each part of a Claim".<sup>340</sup>

## 2. Discussion

389. A threshold issue that falls to be determined is whether the Respondent is correct in arguing that costs and legal expenses can only be shifted, pursuant to Section 4.3(r) and Rule 15, if a Claim as a whole, or an IRP defence as a whole, is found by the Panel to be frivolous or abusive. In support of its position, the Respondent relies on the definition of Claim in Section 4.3(d) of the Bylaws, which reads as follows:

(d) An IRP shall commence with the Claimant's filing of a written statement of a Dispute (a "**Claim**") with the IRP Provider (described in Section 4.3(m) below). For the EC to commence an IRP ("**Community IRP**"), the EC shall first comply with the procedures set forth in Section 4.2 of Annex D.

390. Based on this definition, the Respondent submits that "costs and legal expenses may be shifted onto the Claimant only if the Request for IRP as a whole is frivolous or abusive".<sup>341</sup> By parity of reasoning, the Respondent argues that the same standard must apply to the Panel's authority to shift legal expenses onto ICANN which, so the argument goes, can only be done if ICANN's defence as a whole is found to be frivolous or abusive.

391. The Panel cannot accept the Respondent's proposed interpretation of the Bylaws

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<sup>340</sup> Rule 13 b. of the Interim Procedures, Ex. C-59, requires the Panel to designate the prevailing party "as to each Claim".

<sup>341</sup> ICANN's Response to Afiliias' Costs Submission, para. 5.

and Interim Procedures, which the Panel considers to be inconsistent with Section 4.3(t) of the Bylaws and Rule 13 b. of the Interim Procedures, and which would considerably restrict the scope of application of a carve-out that is already very narrow. The Panel's reasons in that respect are as follows.

392. The cost-shifting authority of IRP Panels is contingent upon two (2) findings. First, that the party claiming its costs be the prevailing party; and second, that the IRP Panel identify the losing party's Claim or defence as frivolous or abusive.
393. The Panel's obligation to designate the prevailing party is based on Section 4.3(t), which requires the Panel to make such a designation "as to each part of a Claim". It seems to the Panel that there would be no purpose in designating a prevailing party as to "each part of a Claim" if the Panel were required to consider "a Claim" as an indivisible whole for the purpose of the Panel's cost-shifting authority.
394. The Respondent's argument also fails if consideration is given to the slightly different wording used in Rule 13 b. of the Interim Procedures, which calls for the designation of the prevailing party "as to each Claim".
395. Finally, it would seem that the interpretation of the applicable provisions advocated by the Respondent would be unfair if it mandated that a single, isolated well-founded element of a Claim otherwise manifestly frivolous or abusive would suffice to save a Claimant from a potential cost-shifting order.
396. The better interpretation, one that harmonizes the provisions of Sections 4.3(r) and 4.3(t) of the Bylaws (that are clearly meant to operate in tandem) and reflects the practice of international arbitration, is the interpretation that allows IRP Panels to shift costs in relation to "parts" of the losing party's Claim or defence, which parts are the necessary reflection of the "parts" in respect of which the other party is designated as the prevailing party.
397. Applying the relevant provisions of the Bylaws and Interim Procedures, properly construed, to the facts of this IRP, the only parts of the Claimant's case as to which it has been designated as the prevailing party are the liability portion of its core claims and its Request for Emergency Interim Relief. This being so, those are the only parts of

the Claimant's case as to which the Panel needs to evaluate whether the Respondent's defence was frivolous or abusive.

398. While the Respondent has failed in its defence of the conduct of its Staff and Board in relation to the Claimant's core claims, the Panel cannot accept the Claimant's submission that ICANN's defence of its conduct in relation to these aspects of the case was frivolous or abusive.
399. To state the obvious, not every claim or defence that does not prevail in an IRP will result in an award of costs. The applicable cost shifting rule requires that the claim or defence be found to be frivolous or abusive. This standard binds the Parties as well as the Panel.
400. The Bylaws and Interim Procedures do not define the terms "frivolous" or "abusive". The Respondent has contended that they should be interpreted having regard to their well-established meaning under California law. The Panel agrees with the Claimant that there are good reasons not to seek guidance for the interpretation of those terms in a California statutory standard, which operates in an environment where the default rule is the so-called "American Rule" under which legal fees cannot ordinarily be shifted to the non-prevailing party.
401. In the opinion of the Panel, the terms "frivolous" and "abusive" as used in the Bylaws and Interim Procedures should be given their ordinary meanings. According to the Merriam-Webster Dictionary, "frivolous" means "of little weight or importance", "having no sound basis (as in fact or law)" or "lacking in seriousness".<sup>342</sup> According to Black's Law Dictionary, "[a]n answer or plea is called 'frivolous' when it is clearly insufficient on its face, and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purposes of delay or to embarrass the plaintiff."<sup>343</sup> For its part, the term "abusive" is defined by the Merriam-Webster Dictionary as "characterized by wrong or improper use or action"<sup>344</sup>, while the term "abuse" is defined in Black's Law

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<sup>342</sup> Merriam-Webster *s.v.* "frivolous": <https://www.merriam-webster.com/dictionary/frivolous> (consulted on 23 March 2021).

<sup>343</sup> Black's Law Online Dictionary, 2<sup>nd</sup> ed., *s.v.* "frivolous": <https://thelawdictionary.org/frivolous/> (consulted on 23 March 2021).

<sup>344</sup> Merriam-Webster *s.v.* "abusive": <https://www.merriam-webster.com/dictionary/abusive> (consulted on 23 March 2021).

Dictionary as a “misuse of anything”.<sup>345</sup>

402. In the case of the Claimant’s core claims, the Respondent’s defences consisted in the main of the time limitations defence, and the rejection of the Claimant’s arguments based on the Respondent’s so-called competition mandate and on the asserted manifest incompatibility of the DAA with the provisions of the Guidebook and Auction Rules. The Respondent also raised as a defence the deference owed to its Board’s business judgment when it decided to take no action regarding the .WEB contention set while a related accountability mechanism was pending.
403. The time limitations defence was asserted by the Respondent in circumstances where the validity of Rule 4, unlike that of Rule 7, had not been directly challenged by the Claimant. While the Panel has expressed concern as a matter of principle with the retroactive application of a time limitations rule, the Respondent’s reliance on a rule, the validity of which had not been challenged and that on its face appeared to provide a defence, was not, in the opinion of the Panel, abusive or frivolous.
404. As regards the Respondent’s other defences, the Panel does not accept that it was frivolous or abusive for the Respondent to argue that it was reasonable for its Board to defer consideration of the issues raised with .WEB while accountability mechanisms were pending; that the propriety of the DAA under the New gTLD Program Rules was a debatable issue requiring careful consideration by the Respondent’s Board; or that the Respondent did not have the “competition mandate” contended for by the Claimant. These were all defensible positions and there is no evidence that they were advanced for an improper purpose or in bad faith. While the Respondent did fail in its contention that there was nothing for its Staff or Board to pronounce upon in the absence of a formal accountability mechanism challenging their action or inaction in relation to .WEB, the Respondent’s position in this respect cannot, in the opinion of the Panel, be said to have been frivolous or abusive. Accordingly, the Claimant’s claim for reimbursement of its costs in relation to the liability portion of its core claims must be dismissed.

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<sup>345</sup> Black’s Law Online Dictionary, 2<sup>nd</sup> ed., s.v. “abuse”: <https://thelawdictionary.org/abuse/> (consulted on 23 March 2021).

405. The Panel does consider that the Claimant’s cost claim in relation to its Request for Emergency Interim Relief is meritorious. The Claimant was forced to introduce this request as a result of the Respondent’s refusal to keep the .WEB contention set on hold in spite of the Claimant having commenced an IRP upon the termination of its CEP. When this decision was made, the .WEB contention set had already been on hold for more than two (2) years, precisely because accountability mechanisms were pending. The Board’s decision to defer consideration of the questions raised in relation to .WEB in November 2016 was likewise based on the fact that accountability mechanisms were pending. This is how the Claimant describes the sequence of events in its Request for Emergency Interim Relief:

13. On 13 November 2018, Afilias and ICANN participated in a final CEP meeting, following which ICANN terminated the CEP. On 14 November 2018, Afilias filed its Request for IRP. Hours later, ICANN responded by informing Afilias that it intended to take the .WEB contention set “off hold” on 27 November 2018 even though Afilias had commenced an ICANN accountability procedure that follows-on from a failed CEP.<sup>30</sup> ICANN provided Afilias with no explanation justifying its decision.

14. On 20 November 2018, Afilias wrote to ICANN about its decision to proceed with the delegation of .WEB despite Afilias’ commencement of the IRP.<sup>31</sup> In its letter, Afilias questioned ICANN’s motives for removing the hold on .WEB, given that ICANN had voluntarily delayed the delegation of .WEB for several years and the lack of any apparent harm to ICANN if the .WEB contention set were to remain on hold for the duration of the IRP. Afilias requested an explanation justifying what appeared to be rash and arbitrary conduct by ICANN in proceeding with delegation of .WEB at this time, as well as the production of relevant documents. Afilias wrote to ICANN again on 24 November 2018 requesting a response to its 20 November 2018 letter.

15. ICANN did not respond to Afilias’ letter until after 9:00 pm EDT on 26 November 2018—quite literally the eve of the deadline that ICANN previously set for Afilias to submit this Interim Request to prevent ICANN from taking the .WEB contention set “off hold.”<sup>32</sup> ICANN noted in its response that ICANN’s practice is to remove the hold on contention sets following CEP, notwithstanding the pendency of an IRP and despite the unanimous criticism of this practice in previous IRPs. ICANN also rejected Afilias’ request to produce documents related to its dealings with NDC and VeriSign about .WEB. Instead, ICANN inexplicably offered to keep the .WEB contention set “on hold” for another two weeks, until 11 December 2018, something that Afilias had not requested and that did not remotely address any of the concerns Afilias had raised.<sup>33</sup>

16. It is because of ICANN’s unreasonable conduct and refusal to act in a transparent manner—as required by its Articles and Bylaws—that Afilias has been forced to file, at significant cost and expense, this Interim Request.

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<sup>30</sup> Email from Independent Review (ICANN) to A. Ali and R. Wong (Counsel for Afilias) (14 Nov. 2018), [Ex. C-64], p. 1.

<sup>31</sup> Letter from A. Ali (Counsel for Afilias) to Independent Review (ICANN) (20 Nov. 2018), [Ex. C-65].

<sup>32</sup> Letter from J. LeVee (Jones Day) to A. Ali (Counsel for Afiliias) (26 Nov. 2018), [Ex. C-66].

<sup>33</sup> Letter from J. LeVee (Jones Day) to A. Ali (Counsel for Afiliias) (26 Nov. 2018), [Ex. C-66], p. 1.

406. Having forced the Claimant to initiate emergency interim relief proceedings, the Respondent eventually changed course and agreed to keep .WEB on hold until the conclusion of this IRP.
407. In the opinion of the Panel, the Respondent's requirement, as part of its defence strategy, that the Claimant introduce a Request for Emergency Interim Relief at the outset of the IRP, failing which the Respondent would lift the "on hold" status of the .WEB contention set, was "abusive" within the meaning of the cost shifting provisions of the Bylaws and Interim Procedures, all the more so in light of the Respondent's subsequent decision to agree to keep the .WEB contention set on hold until the conclusion of this IRP. In the opinion of the Panel, this conduct on the part of the Respondent was unjustified and obliged the Claimant to incur wasted costs that it would be unfair for the Claimant to have to bear.
408. The Claimant has claimed in relation to its Request for Emergency Interim Relief an amount of USD 823,811.88. This is said to represent 50% of the Claimant legal fees from 14 November 2018 to 10 December 2018; 33% of the Claimant's total fees from 11 December 2018 through 31 March 2019; and 50% of its fees from 1 April 2019 through 14 May 2019.
409. The Respondent has challenged the reasonableness of the fees claimed by the Claimant in relation to its Request for Emergency Interim Relief, pointing out that it entailed the preparation and presentation of the request, one supporting brief, and requests for production of documents which were resolved by 12 December 2018.<sup>346</sup> As noted in the History of the Proceedings' section of this Final Decision, the Parties asked the Emergency Panelist to postpone further activity in January 2019.

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<sup>346</sup> See ICANN's Response to Afiliias' costs Submission, para. 28.

410. The Panel has difficulty accepting that such a significant amount of fees as that claimed by the Claimant in regard to the Request for Emergency Interim Relief can reasonably be attributed to the preparation of this request and the subsequent proceedings before the Emergency Panelist. Exercising its discretion in relation to the fixing of the legal expenses reasonably incurred that may be ordered to be reimbursed pursuant to a cost-shifting decision, the Panel reduces the Claimant's claim on account of the Request for Emergency Interim Relief to USD 450,000, inclusive of pre-award interest.
411. This leaves for consideration the Claimant's cost claim in relation to the outstanding aspects of the Rule 7 Claim which, pursuant to the Panel's Decision on Phase I, were joined to the Claimant's other claims in Phase II, a cost claim that the Panel takes to have been subsumed in the Claimant's global cost claim in relation to the *Amici* participation. In the opinion of the Panel, it suffices to read the Panel's Decision on Phase I to conclude that it cannot seriously be argued that the Respondent's defence to the Rule 7 Claim was frivolous and abusive. It follows from this assessment of the Respondent's defence that the fact that those aspects of the Rule 7 Claim have been found by the Panel to have become moot and are therefore not decided in this Final Decision is without consequence on the Claimant's cost claim in relation to the Rule 7 Claim. In other words, the Panel has sufficient familiarity with the Parties' respective positions on the merits of the outstanding aspects of the Rule 7 Claim to know, and hereby to determine, that regardless of the outcome, the Panel would not have accepted the submission that the Respondent's defence to this claim was frivolous and abusive.
412. The ICDR has informed the Panel that the administrative fees of the ICDR and the fees and expenses of the Panelists, the Emergency Panelist, and the Procedures Officer in this IRP total USD 1,198,493.88. The ICDR has further advised that the Claimant has advanced, as part of its share of these non-party costs of the IRP, an amount of USD 479,458.27. In accordance with the general rule set out in Section 4.3(r) of the Bylaws, the Claimant is entitled to be reimbursed by the Respondent the share of the non-party costs of the IRP that it has incurred, in the amount of USD 479,458.27.

## VII. *DISPOSITIF*

413. For the reasons set out in this Final Decision, the Panel unanimously decides as follows:

1. **Declares** that the Respondent has violated its *Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers*, as approved by the ICANN Board on 9 August 2016, and filed on 3 October 2016 (**Articles**), and its *Bylaws for Internet Corporation for Assigned Names and Numbers*, as amended on 18 June 2018 (**Bylaws**), by (a) its staff (**Staff**) failing to pronounce on the question of whether the Domain Acquisition Agreement entered into between Nu DotCo, LLC (**NDC**) and Verisign Inc. (**Verisign**) on 25 August 2015, as amended and supplemented by the “Confirmation of Understanding” executed by these same parties on 26 July 2016 (**DAA**), complied with the New gTLD Program Rules following the Claimant’s complaints that it violated the Guidebook and Auction Rules, and, while these complaints remained unaddressed, by nevertheless moving to delegate .WEB to NDC in June 2018, upon the .WEB contention set being taken “off hold”; and (b) its Board, having deferred consideration of the Claimant’s complaints about the propriety of the DAA while accountability mechanisms in connection with .WEB remained pending, nevertheless (i) failing to prevent the Staff, in June 2018, from moving to delegate .WEB to NDC, and (ii) failing itself to pronounce on these complaints while taking the position in this IRP, an accountability mechanism in which these complaints were squarely raised, that the Panel should not pronounce on them out of respect for, and in order to give priority to the Board’s expertise and the discretion afforded to it in the management of the New gTLD Program;
2. **Declares** that in so doing, the Respondent violated its commitment to make decisions by applying documented policies objectively and fairly;
3. **Declares** that in preparing and issuing its questionnaire of 16 September 2016 (**Questionnaire**), and in failing to communicate to the Claimant the decision made by the Board on 3 November 2016, the Respondent has violated its commitment to operate in an open and transparent manner and consistent with procedures to ensure

fairness;

4. **Grants** in part the Claimant's Request for Emergency Interim Relief dated 27 November 2018, and directs the Respondent to stay any and all action or decision that would further the delegation of the .WEB gTLD until such time as the Respondent has considered the present Final Decision;
5. **Recommends** that the Respondent stay any and all action or decision that would further the delegation of the .WEB gTLD until such time as the Respondent's Board has considered the opinion of the Panel in this Final Decision, and, in particular (a) considered and pronounced upon the question of whether the DAA complied with the New gTLD Program Rules following the Claimant's complaints that it violated the Guidebook and Auction Rules and, as the case may be, (b) determined whether by reason of any violation of the Guidebook and Auction Rules, NDC's application for .WEB should be rejected and its bids at the auction disqualified;
6. **Designates** the Claimant as the prevailing party in relation to the above declarations, decisions, findings, and recommendations, which relate to the liability portion of the Claimant's core claims and the Claimant's Request for Emergency Interim Relief dated 27 November 2018;
7. **Dismisses** the Claimant's other requests for relief in connection with its core claims and, in particular, the Claimant's request that that the Respondent be ordered by the Panel to disqualify NDC's bid for .WEB, proceed with contracting the Registry Agreement for .WEB with the Claimant in accordance with the New gTLD Program Rules, and specify the bid price to be paid by the Claimant, all of which are premature pending consideration by the Respondent of the questions set out above in sub-paragraph 410 (5);
8. **Designates** the Respondent as the prevailing party in respect of the matters set out in the immediately preceding paragraph;
9. **Determines** that the outstanding aspects of the Rule 7 Claim that were joined to the Claimant's other claims in Phase II have become moot by the participation of

the *Amici* in this IRP in accordance with the Panel’s Decision on Phase I and, for that reason, decides that no useful purpose would be served by the Rule 7 Claim being addressed beyond the findings and observations contained in the Panel’s Decision of Phase I;

10. **Fixes** the total costs of this IRP, consisting of the administrative fees of the ICDR, and the fees and expenses of the Panelists, the Emergency Panelist, and the Procedures Officer at USD 1,198,493.88, and in accordance with the general rule set out in Section 4.3(r) of the Bylaws, **declares** that the Respondent shall reimburse the Claimant the full amount of the share of these costs that the Claimant has advanced, in the amount of USD 479,458.27;
11. **Finds** that the Respondent’s requirement, as part of its defence strategy, that the Claimant introduce a Request for Emergency Interim Relief at the outset of the IRP, failing which the Respondent would lift the “on hold” status of the .WEB contention set, was abusive within the meaning of the cost shifting provisions of the Bylaws and Interim Procedures in light of the Respondent’s subsequent decision to agree to keep the .WEB contention set on hold until the conclusion of this IRP; and, as a consequence of this finding,
12. **Grants** the Claimant’s request that the Panel shift liability for the Claimant’s legal fees in connection with its Request for Emergency Interim Relief, **fixes** at USD 450,000, inclusive of pre-award interest, the amount of the legal fees to be reimbursed to the Claimant on account of the Emergency Interim Relief proceedings, and **orders** the Respondent to pay this amount to the Claimant within thirty (30) days of the date of notification of this Final Decision, after which 30 day-period this amount shall bear interest at the rate of 10% *per annum*;
13. **Dismisses** the Claimant’s other requests for the shifting of its legal fees in connection with this IRP;
14. **Dismisses** all of the Parties’ other claims and requests for relief.

414. This Final Decision may be executed in counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Place of the IRP: London, England

*(s) Catherine Kessedjian*

*(s) Richard Chernick*

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Catherine Kessedjian

Richard Chernick

*(s) Pierre Bienvenu*

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Pierre Bienvenu, Ad. E., Chair

Dated: 20 May 2021

## Attachment B to Board Reference Materials

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS  
BEFORE THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

**ICDR Case No. 01-18-0004-2702**

**AFILIAS DOMAINS NO. 3 LIMITED,  
(n/k/a ALTANOVO DOMAINS LTD.)  
*Claimant***

**v.**

**INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,  
*Respondent***

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**DECISION ON AFILIAS' ARTICLE 33 APPLICATION**

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21 December 2021

Members of the IRP Panel

Catherine Kessedjian  
Richard Chernick  
Pierre Bienvenu Ad. E., Chair

Administrative Secretary to the IRP Panel

Virginie Blanchette-Séguin

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## I. OVERVIEW

1. In this decision the Panel rules on an application by the Claimant presented under Article 33 of the International Arbitration Rules of the ICDR (amended and effective 1 June 2014) (**ICDR Rules**) entitled “Afilias Domains No. 3 Limited’s Rule 33 Application for an Additional Decision and for Interpretation”, dated 21 June 2021 (**Application**). The Application states that it requests an additional decision and interpretation of the Panel’s Final Decision in this IRP (**Final Decision**).<sup>1</sup>
2. For the reasons set out below, the Panel unanimously denies the Application in its entirety.

## II. HISTORY OF PROCEEDINGS

3. The history of the proceedings in this IRP up to 12 February 2020, the date of the Decision on Phase I, is set out at paragraphs 33 to 67 of that decision. The history of the proceedings between 12 February 2020 and 20 May 2021, the date of the Final Decision, is set out at paragraphs 35 to 81 of the Final Decision. Both narratives are incorporated by reference in this decision.
4. In its Final Decision, the Panel found, among others, that the Respondent had acted contrary to its Articles and Bylaws in the manner in which it had dealt with the Claimant’s complaints that NDC had breached the Guidebook and Auction Rules through its arrangements with Verisign in connection with NDC’s application for .WEB.<sup>2</sup> However, the Panel denied the Claimant’s request that the Respondent be ordered to disqualify NDC’s bid for .WEB and proceed with contracting the Registry Agreement for .WEB with the Claimant, in exchange for a price to be specified by the Panel and paid by the Claimant.<sup>3</sup>
5. On 21 June 2021, the Parties filed a Joint Request for Corrections to the Panel’s Final Decision pursuant to Article 33 of the ICDR Rules, seeking the correction of certain clerical or typographical errors and of the numbering of certain paragraphs in the Final Decision. On 15 July 2021, the Panel issued a Decision on the Parties’ Joint Request for Corrections confirming that the requested corrections all related to errors that were clerical or typographical in nature and, as such, fell within the scope of Article 33. The Panel granted the Parties’ Joint Request for Corrections, held that the Final Decision should be corrected as jointly requested by the Parties, and attached for the Parties’ convenience a corrected version dated 15 July 2021 of the Final Decision.

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<sup>1</sup> Unless otherwise indicated, all capitalized terms in the present decision have the meaning ascribed to these defined terms in the Final Decision dated 20 May 2021. All references to, and citations from, the Final Decision in the present decision are to the corrected version of the Final Decision dated 15 July 2021.

<sup>2</sup> Final Decision, para. 8.

<sup>3</sup> *Ibid*, para. 9.

6. As already indicated, Afilias' own Application under Article 33 was also filed on 21 June 2021. Following receipt of the Application, the Panel, by email dated 23 June 2021, invited the Parties to consult and submit either a joint proposal for a briefing schedule on Afilias' Application or the Parties' respective positions as to the procedure to be followed in respect of this Application. The Panel also asked that the Parties reach out to the *Amici* to ascertain their positions in respect of the Application.
  
7. On 28 June 2021, the Parties proposed the following briefing schedule for the Application:
 

6 August 2021	ICANN Response to Claimant's Rule 33 Application (If permitted to participate in these additional proceedings, the <i>Amici</i> would file a joint submission on this date.)
20 September 2021	Afilias Rejoinder to ICANN Response (if <i>Amici</i> are not permitted to participate)
30 September 2021	Afilias Rejoinder to ICANN Response and Response to <i>Amici</i> Observations (if <i>Amici</i> are permitted to participate)
  
8. In the same communication Afilias noted that it objected to the *Amici*'s announced intention to participate in this new phase of the IRP, while ICANN indicated that it had no objection to their participation. The Parties added that they proposed to leave it to the Panel to decide whether there should be a hearing on Afilias' Application.
  
9. On 28 June 2021, the *Amici* requested an opportunity to make submissions in response to Afilias' Application and suggested the adoption of a more expedited briefing schedule than that proposed by the Parties. On 1 July 2021, Afilias objected to the *Amici*'s request to make submissions on its Article 33 Application as well as to their suggestion regarding the briefing schedule.
  
10. On 3 July 2021, the Panel granted the *Amici*'s request to make submissions on Afilias' Article 33 Application. The Panel reasoned that the *Amici* having participated in Phase II of the IRP to the full extent permitted by the Panel's Decision on Phase I, it was both appropriate and just that they be given an opportunity to make representations on Afilias' Article 33 Application, which directly relates to the Final Decision.
  
11. In its communication of 3 July 2021, the Panel indicated that it was prepared to accept the briefing schedule proposed by the Parties even though it was longer than what might be expected for an application of that nature. The Panel's acceptance of that schedule came, however, with the caveat that by reason of pre-existing commitments on the part of its members, the Panel might not be in a position to issue its decision on Afilias' Article 33 Application within thirty (30) days after 30 September 2021, the date proposed for the filing of the last submission on the Application, as required under Article 33(2) of the ICDR Rules. The Panel added that while in its experience

it would be exceptional for a hearing to be held in connection with an application for interpretation, correction, and/or for an additional award, the matter would be left open pending consideration of the written submissions to be made by the Parties and *Amici* in connection with the Application.

12. On 3 July 2021, the Respondent confirmed its waiver of the 30-day requirement provided by Article 33(2) with respect to the Panel's determination of Afilias' Article 33 Application. The Claimant and the *Amici* did the same on 5 July 2021.
13. In the event, the Parties and the *Amici* filed their respective submissions in accordance with the agreed Briefing Schedule. These submissions are summarized in the next section of this decision.
14. On 5 October 2021, having considered the comprehensive submissions contained in the Application, the Respondent's Response thereto, the *Amici*'s Submission, and the Claimant's Reply to the Application, the Panel advised the Parties and the *Amici* that it did not see a need to hold a hearing in relation to the Application.
15. As noted in the Final Decision,<sup>4</sup> in late 2020 the Claimant's former parent company, Afilias, Inc., merged with Donuts, Inc. The Claimant explains in the Application that it and its .WEB application were carved out of the merger transaction and that the Claimant is now known as Altanovo Domains Ltd. While the Claimant is now part of a group of companies that is separate from Afilias, Inc. and Donuts, Inc., the Claimant has chosen "for the sake of consistency and ease of reference"<sup>5</sup> to continue to refer to itself as "Afilias" throughout the Application. Having noted the Claimant's change of corporate name and affiliation, the Panel adopts the same approach and refers to the Claimant as "Afilias" throughout this decision.

### **III. POSITIONS OF THE PARTIES AND RELIEF REQUESTED**

16. The Application and the submissions filed in relation thereto are voluminous, running in total to more than 250 pages. While summaries of these submissions are included below to provide context, the Panel notes that in coming to its decision on the Application it has carefully considered all of the Parties' and *Amici*'s arguments and submissions, as well as the authorities submitted in support thereof.

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<sup>4</sup> Final Decision, paras. 11 and 247-252.

<sup>5</sup> Application, para. 1, fn. 1.

## **A. Afilias' Article 33 Application**

### **1. Overview**

17. In its Application, Afilias requests both an additional decision<sup>6</sup> and an interpretation of the Final Decision.<sup>7</sup> In Afilias' submission, by failing to resolve all the "claims and issues" presented by Afilias, the Panel "failed to satisfy its mandate" and "undermined the very purposes of the IRP", especially by its decision to refer Afilias' claim arising from NDC's alleged violation of the New gTLD Program Rules back to ICANN's Board and Staff to "pronounce" upon "in the first instance".<sup>8</sup>

### **2. Request for an Additional Decision**

18. Afilias argues that the purpose of an additional award is to ensure that an arbitral tribunal fulfills its mandate and avoids rendering an award that is *infra petita*, that is, that fails to resolve all claims presented to the tribunal as required by the arbitration agreement. In Afilias' view, such an award is subject to set aside, including under the English Arbitration Act (**EAA**), is unjust to the party that has presented the claim and constitutes a waste of the parties' time and resources.<sup>9</sup>
19. Afilias contends that any omission to decide a properly submitted claim is grounds for an additional award, and that the Panel must resolve all of the claims and issues before it in a manner consistent with its mandate as set out in Section 4.3(g) of the Bylaws.<sup>10</sup> That section provides that the "IRP Panel shall be charged with hearing and resolving the Dispute, considering the Claim and ICANN's written response". Afilias argues that the term "Claim" (with a capital "C") refers to a claimant's "written statement of a Dispute" which describes the Covered Actions that the claimant considers has given rise to a Dispute. In turn, the Bylaws define "Covered Actions" as "any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members, that give rise to a Dispute."<sup>11</sup> Afilias adds that each "IRP Panel shall conduct an objective, *de novo* examination of the Dispute",<sup>12</sup> that the "IRP is intended as a final, binding arbitration

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<sup>6</sup> The Panel agrees with the Claimant that the term "decision" can, in the context of this IRP, be used interchangeably with the term "award", which is used in the ICDR Rules. See Application, para. 1, fn. 2.

<sup>7</sup> Application, para. 1.

<sup>8</sup> *Ibid*, para. 2.

<sup>9</sup> *Ibid*, paras. 5-7.

<sup>10</sup> *Ibid*, paras. 8-11.

<sup>11</sup> *Ibid*, para. 11, quoting from Sections 4.3(d), 4(3)(b)(iii)(A) and 4.3(b)(ii) of the Bylaws, Ex. C-1 [emphasis omitted].

<sup>12</sup> Application, para. 12, quoting from Section 4.3(i) of the Bylaws, Ex. C-1.

process”,<sup>13</sup> and that IRP decisions “are intended to be enforceable in any court with jurisdiction over ICANN”.<sup>14</sup>

20. According to Afilias, the Panel failed to fulfill its mandate with respect to three (3) claims that were put to it for resolution.<sup>15</sup>
21. First, Afilias argues that the Panel did not resolve its claim regarding the following Covered Actions: that ICANN violated its Articles and Bylaws by (a) not rejecting NDC’s application, and/or (b) not declaring NDC’s bids at the ICANN auction invalid, and/or (c) not deeming NDC ineligible to enter into a registry agreement for .WEB because of its violations of the New gTLD Program Rules, and (d) not offering .WEB to Afilias as the next highest bidder. Afilias defines this claim as its **Rules Breach Claim**.<sup>16</sup> Afilias stresses that its claim was not that ICANN failed to decide or pronounce on the propriety of the DAA, and NDC’s and Verisign’s other conduct. Rather, the question raised by Afilias was whether ICANN’s failure to disqualify NDC and to offer .WEB to Afilias was consistent with the Articles, Bylaws and New gTLD Program Rules, and that question was fully argued in this IRP.<sup>17</sup>
22. Afilias avers that ICANN supported the *Amic*’s request to participate in these proceedings for the specific purpose of responding substantively to Afilias’ Rules Breach Claim.<sup>18</sup> According to Afilias, the Panel’s findings of fact cannot be reconciled with its referral of the claim back to the Board for “pronouncement” “in the first instance”.<sup>19</sup> In Afilias’ view, the Panel failed to resolve the Rules Breach Claim as required by its mandate<sup>20</sup> and invented a prerequisite that the Board must “pronounce”, “decide” or “determine” the matter in the first instance before a claimant can assert in an IRP that ICANN has breached its Articles and Bylaws by failing to act as required based on that violation.<sup>21</sup> This, argues the Claimant, eliminates ICANN’s accountability.<sup>22</sup> Afilias adds that

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<sup>13</sup> Application, para. 14, quoting from Section 4.3(x) of the Bylaws, Ex. C-1.

<sup>14</sup> Application, para. 14, quoting from Section 4.3(x)(ii) of the Bylaws, Ex. C-1.

<sup>15</sup> Application, para. 15.

<sup>16</sup> *Ibid*, para. 16.

<sup>17</sup> *Ibid*, paras. 21-27 and 35-36.

<sup>18</sup> *Ibid*, paras. 28-31.

<sup>19</sup> *Ibid*, paras. 17 and 52-58.

<sup>20</sup> *Ibid*, paras. 37-43, 49-50 and 62.

<sup>21</sup> *Ibid*, paras. 44-48, 51, 54 and 63.

<sup>22</sup> *Ibid*, paras. 64-66.

the issue of remedy for the Rules Breach Claim had also been properly submitted and fully arbitrated before the Panel.<sup>23</sup>

23. Second, Afilias contends that the Panel failed to resolve its claim that ICANN violated its obligation to conduct its activities in accordance with relevant principles of international law. Afilias defines this as its **International Law Claim**, a claim it argues was properly presented to the Panel. Afilias avers that it elaborated as to what the four (4) following specific facets of the international law principle of good faith required of ICANN: (1) procedural fairness and due process, (2) impartiality and non-discriminatory treatment, (3) openness and transparency, and (4) respect for legitimate expectations. In Afilias' view, the Panel never denied that obligations under international law apply to ICANN, but did not address Afilias' International Law Claim or provide reasoning for its failure to do so.<sup>24</sup> According to Afilias, the Panel must now resolve in an additional decision the International Law Claim regarding ICANN's failure to disqualify NDC contrary to ICANN's international law obligations.<sup>25</sup>
24. Third, Afilias submits that the Panel did not resolve its claim that ICANN violated its Articles and Bylaws through its inequitable and disparate treatment of Afilias as compared to its treatment of NDC and Verisign. That is what Afilias defines in the Application as its **Disparate Treatment Claim**. It is argued that the Panel failed to determine that claim even though the Panel made findings of fact establishing its validity. Afilias therefore argues that the Panel must issue an additional decision resolving its Disparate Treatment Claim. Afilias characterizes as manifestly unfair the Panel's view, expressed in the Final Decision, that it was not "necessary, based on the allegations of disparate treatment, to add to its findings in relation to the Claimant's core claims". According to Afilias, it is not open to an IRP panel to determine that it is not "necessary" to decide a claim that was put to it, and then fail to resolve the claim on that basis.<sup>26</sup>

### 3. Requests for Interpretation

25. In addition to its request for an additional decision, Afilias asks the Panel to provide an interpretation of several allegedly "ambiguous and vague points of substance and reasoning contained in the Final Decision".<sup>27</sup> According to Afilias, the precise meaning and scope of certain aspects of the Final Decision are required for any future resolution of the Dispute, and indeed also for

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<sup>23</sup> Application, paras. 67-70.

<sup>24</sup> *Ibid*, paras. 18 and 71-84.

<sup>25</sup> *Ibid*, paras. 80-84.

<sup>26</sup> *Ibid*, paras. 19 and 85-89, quoting from para. 350 of the Final Decision.

<sup>27</sup> Application, paras. 90-114.

the pronouncement to be made by the Respondent's Board.<sup>28</sup> Afilias underscores that an IRP results in a precedent-setting decision which serves as the basis for the global Internet community to hold ICANN accountable. In that context, Afilias asks the Panel to provide interpretations of the Final Decision that are sufficient to remove all ambiguity and obscurity from the terms and phrasing employed as well as from the broader reasoning relied upon to reach its conclusions.<sup>29</sup>

26. The issues which, according to Afilias, require interpretation are the following:<sup>30</sup>

- a) What is the scope and meaning of the terms "pronounce" and "pronouncement" as used by the Panel in stating that ICANN Staff did not "pronounce" on Afilias' complaints and in recommending that the Board should now "pronounce" on Afilias' complaints?<sup>31</sup>
- b) Did the Panel determine that the Board must always "pronounce" on Staff action or inaction as a pre-condition for an IRP panel to decide a dispute based on Staff action or inaction? If so, what is the source for this pre-condition in the Bylaws? And, if not, then why has this pre-condition been inserted, given the Panel's observations that some sort of decision on Afilias' complaints was taken by Staff, which was at least implicitly approved by the Board through its inaction?<sup>32</sup>
- c) What law (if any) did the Panel apply in this IRP – just California law or California and international law? If the latter, to which claims and issues did the Panel apply California law, and to which did it apply international law?<sup>33</sup>
- d) On what legal or evidentiary basis did the Panel determine that ICANN has "the requisite knowledge, expertise, and experience, to pronounce" on Afilias' complaints compared to the Panel?<sup>34</sup>
- e) What standard of proof did the Panel apply to each of Afilias' submissions in support of its claims?<sup>35</sup>

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<sup>28</sup> Application, para. 91.

<sup>29</sup> *Ibid*, paras. 90-94.

<sup>30</sup> *Ibid*, para. 94.

<sup>31</sup> *Ibid*, paras. 95-99.

<sup>32</sup> *Ibid*, paras. 100-103.

<sup>33</sup> *Ibid*, paras. 104-107.

<sup>34</sup> *Ibid*, paras. 108-111.

<sup>35</sup> *Ibid*, paras. 112-114.

27. It bears mentioning that some of the above-cited issues as to which Afiliias requests interpretation are further distilled in series of additional questions that Afiliias requests the Panel to address. For example, Afiliias' request for interpretation of the terms pronounce and pronouncement (issue a) above) includes the request that the Panel address the following questions "regarding the nature of a 'pronouncement'":

- a) What constitutes a "pronouncement" and what is the foundation in ICANN's documents or applicable law for the "pronouncement" requirement, particularly in light of the Bylaws' definition that Covered Actions in respect of which claims may be brought include both Board and Staff action and inaction?
- b) What should have been the form and substance of ICANN's "pronouncement" on Afiliias' complaints?
- c) On what sources did the Panel rely to fashion its "pronouncement" remedy?
- d) Before ICANN issues the "pronouncement" recommended by the Panel, must Afiliias and other Internet community members be given an opportunity to be heard by the Board?
- e) Must the Respondent's "pronouncement" be issued following an opportunity for Afiliias and other Internet community members to receive and comment on all relevant evidence and argument?
- f) What materials, documentary or otherwise, must ICANN consider before it issues the "pronouncement" recommended by the Panel?
- g) Must the "pronouncement" be issued in a written form and made public on ICANN's website?
- h) Must the "pronouncement" be issued with full and adequate supporting reasoning following Board deliberation?
- i) Must the "pronouncement" be issued with findings of fact and conclusions of law?
- j) Must the "pronouncement" be issued without the participation of Board members with conflicts of interest?

28. By way of further example, the last of the issues as to which Afiliias seeks interpretation of the Final Decision, relating to the standard of proof applied by the Panel (issue e) in paragraph 26 above), includes the request that:

... the Panel provide this interpretation regarding the following issues:

- a) Whether Rule 4 of the Interim Supplementary Procedures was enacted in order to time bar Afiliias' claims (Paragraphs 279 through to 281 in connection with paragraphs 1 through 3 of the *Dispositif*)?
- b) Whether the pre-auction investigation, including ICANN's communications with Mr. Rasco, violated the Articles and Bylaws (Paragraphs 294 through to 295 in connection with paragraph 7 of the *Dispositif*)?
- c) Whether the preparation and issuance of the Questionnaire absent disclosure of the DAA violated the Articles and Bylaws (Paragraphs 307 through to 312 in connection with paragraph 7 of the *Dispositif*)?
- d) Whether the failure to disclose the "decision" from the 3 November 2016 Board workshop violated the Articles and Bylaws (Paragraphs 321 through to 329 in connection with paragraph 3 of the *Dispositif*)?
- e) Whether the failure to "pronounce" on Afiliias' complaints regarding NDC violated the Articles and the Bylaws (Paragraphs 330 through to 344 of the Decision in connection with paragraph 1 of the *Dispositif*)?

f) Whether proceeding toward delegation of .WEB to NDC without a “pronouncement” violated the Articles and Bylaws (Paragraphs 330 through to 344 in connection with paragraph 1 of the *Dispositif*)?

g) Whether the disparate treatment of Afiliás violated the Articles and Bylaws (paragraph 347 in connection with paragraph 7 of the *Dispositif*)?

h) Whether the failure to promote competition violated the Articles and Bylaws (paragraphs 348 through to 348 of the Decision in connection with paragraph 1 of the *Dispositif*)?<sup>36</sup>

29. Afiliás concludes the Application by deploring that the Panel, in its view, failed to address all of the claims presented to it for decision and resolution and to provide a sufficiently well-reasoned decision free of ambiguity as required by the Bylaws and good arbitral practice. The Final Decision, Afiliás complains, has seriously undermined the dispute resolution system upon which the global Internet community relies to hold ICANN accountable, and put the Board in an untenable position by failing to provide it with any guidance as to the considerations that should inform its “pronouncement”.<sup>37</sup>

#### **4. Request for Relief**

30. By way of relief, Afiliás requests the Panel to issue:

... an Amended Final Decision:

- (1) Finally deciding and resolving in a well-reasoned manner Afiliás’ Rules Breach Claim, International Law Claim and Disparate Treatment Claim; and
- (2) Providing the interpretations as set out in [the section requesting interpretation of the Application].<sup>38</sup>

### **B. Respondent’s Response to Afiliás’ Article 33 Application**

#### **1. Overview**

31. In its Response to the Application (**Response**), ICANN submits that the Application is an abuse of Article 33 of the ICDR Rules. In spite of its title, which the Respondent characterizes as misleading, the Respondent contends that the Application does not seek an additional decision on any claim purportedly omitted from the Final Decision or an interpretation of any purported ambiguity in the Final Decision. According to the Respondent, the Application in reality seeks that the Panel reconsider and reverse its determination that ICANN, rather than the Panel, is charged with interpreting and applying the New gTLD Program Rules and resolving disputes among

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<sup>36</sup> Application, para. 114.

<sup>37</sup> *Ibid*, paras. 115-123.

<sup>38</sup> *Ibid*, para. 124.

applicants. Requests for reconsideration, the Respondent contends, are not permitted by Article 33 of the ICDR Rules, nor by the EAA.<sup>39</sup>

32. The Respondent argues that Article 33 provides for a limited exception to the *functus officio* doctrine and does not allow a party to seek reconsideration of the substance of a final award, nor offers a tribunal for a Panel to issue an amended award that conflicts with and supersedes a final award.<sup>40</sup> The *infra petita* doctrine, it is argued, does not apply to an application to the tribunal for an additional award, but rather to a challenge to the final award in court on the basis that the tribunal has failed to consider and decide all claims properly submitted to it.<sup>41</sup> As for Afilias' requests for interpretation, the Respondent avers that they are based on a series of willful misreadings and distortions of the Final Decision.

## 2. Request for an Additional Decision

33. ICANN submits that the Panel resolved Afilias' Rules Breach Claim. According to ICANN, Afilias wrongly suggests that ICANN never argued that the Panel should not act as the decision-maker of first instance for the Rules Breach Claim. On the contrary, the Respondent submits, its principal defense to Afilias' Rules Breach Claim was that ICANN, not an IRP Panel, was the appropriate decision-maker.<sup>42</sup>
34. ICANN underscores that the Guidebook and Auction Rules give it discretion with regard to the interpretation and application of the New gTLD Program Rules.<sup>43</sup> ICANN submits that the Panel unequivocally denied Afilias' request for a declaration that the Bylaws and Articles require that ICANN find NDC in breach of the New gTLD Program Rules, disqualify NDC and proceed to enter a Registry Agreement for .WEB with Afilias.<sup>44</sup> In ICANN's view, Afilias now seeks a different decision and is re-arguing its case.<sup>45</sup>
35. ICANN contends that the Panel did not act *extra petita* in determining that it is for ICANN to pronounce in the first instance on the Rules Breach Claim, and that that determination cannot be revisited through an Article 33 application. In this regard, the Respondent avers that Afilias mischaracterizes the Panel's decision in order to attack it. By rejecting Afilias' request for a

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<sup>39</sup> Response, paras. 1-2.

<sup>40</sup> *Ibid*, paras. 1 and 8-11.

<sup>41</sup> *Ibid*, paras. 12-14.

<sup>42</sup> *Ibid*, para. 19.

<sup>43</sup> *Ibid*, paras. 18-22.

<sup>44</sup> *Ibid*, para. 23.

<sup>45</sup> *Ibid*, paras. 24-26.

declaration that ICANN violated its Bylaws and Articles by not finding NDC in breach of the New gTLD Program Rules, and by not disqualifying NDC's application for .WEB, the Panel was acting within its authority under Article 4.3(o)(iii) of the Bylaws, as the authority to grant declaratory relief necessarily entails the authority to deny it.<sup>46</sup>

36. With respect to the International Law Claim, ICANN avers that Afilias did not assert any discrete "international law claim", but rather sought an undifferentiated declaration "that ICANN has acted inconsistently with its Articles and Bylaws, breached the binding commitments contained in the [Guidebook], and violated international law."<sup>47</sup> ICANN argues that the Panel resolved this issue in two ways: (1) it found that ICANN violated its Bylaws by never determining whether NDC violated the New gTLD Program Rules, and (2) it rejected Afilias' claim that ICANN was subject to a competition mandate that compelled it to reject NDC's application.<sup>48</sup> According to ICANN, the Panel would not have had jurisdiction to adjudicate a freestanding international law claim had one in fact been presented by the Claimant.<sup>49</sup>
37. ICANN further argues that while Afilias made various arguments based on international law, those added little to the plain terms of the Bylaws.<sup>50</sup> In ICANN's words, the International Law Claim "is just a repackaging of Afilias' Rules Breach Claim" and Afilias' "gripe" is that the Panel did not refer to international law in determining whether ICANN violated the Articles and Bylaws. ICANN opines that that complaint is misguided because the Panel did refer to international law and, even if the Panel had omitted any reference to international law, that would not be ground for an additional decision.<sup>51</sup> ICANN states that the Panel granted Afilias' claim regarding the violation by ICANN of its Articles and Bylaws by failing to enforce the New gTLD Program Rules and proceeding to delegate .WEB to NDC, so that claim did not demand a more in-depth examination of international law.<sup>52</sup> ICANN also contends that an additional decision addressing Afilias' international law argument is unnecessary and beyond the scope of the Panel's authority, since there is no "claim" that has not been dealt with.<sup>53</sup>

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<sup>46</sup> Response, paras. 27-36.

<sup>47</sup> *Ibid*, paras. 37-38, quoting from Afilias' Amended Request for IRP, para. 89(1).

<sup>48</sup> Response, para. 39.

<sup>49</sup> *Ibid*, paras. 40-41.

<sup>50</sup> *Ibid*, paras. 42-44.

<sup>51</sup> *Ibid*, paras. 45-48.

<sup>52</sup> *Ibid*, para. 49.

<sup>53</sup> *Ibid*, paras. 50-51.

38. ICANN likewise argues that the Claimant’s Amended Request for IRP, Reply Memorial, and List of Phase II Issues do not state a “Disparate Treatment Claim”, and only refer to disparate treatment in support of the Rules Breach Claim or competition claim.<sup>54</sup> ICANN argues that Afilias substantially expanded its “disparate treatment” arguments in its Post-Hearing Brief and its accompanying Revised Issues List, but (assuming those could be considered claims) that Afilias could not introduce new claims in its post-hearing submissions, after the evidentiary record had closed and when ICANN had no opportunity to respond.<sup>55</sup>
39. In ICANN’s submission, the Panel correctly found that the substance of Afilias’ allegations of disparate treatment were considered in the analysis of Afilias’ core claims. ICANN argues that Afilias cannot use its Article 33 Application to ask the Panel to reconsider its deliberate decision not to make additional findings with respect to the Claimant’s allegations of disparate treatment.<sup>56</sup>

### 3. Requests for Interpretation

40. ICANN notes at the outset that requests for interpretation should be granted only where an award is ambiguous in such a way that the parties may legitimately disagree as to their obligations under it.<sup>57</sup> ICANN argues that Afilias’ requests for interpretation are based on improperly isolating particular words and phrases to create the appearance of ambiguity where none exists.<sup>58</sup> Moreover, it is contended that nearly all of the matters on which Afilias seeks further interpretation do not go to the dispositive part of the Final Decision and are therefore not appropriate subjects for interpretation under Article 33.<sup>59</sup>
41. ICANN argues that there is no ambiguity in the Panel’s use of the term “pronounce”, which is used interchangeably in the Final Decision with “decide”, “determine” or “resolve”.<sup>60</sup> In its view, Afilias is misusing Article 33 to seek a further decision on a series of issues that have never been briefed by the Parties or put to the Panel, notably on the procedure the Board should follow in its consideration and resolution of Afilias’ complaints against NDC. ICANN avers that the Panel has no jurisdiction to provide advice on such issues.<sup>61</sup>

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<sup>54</sup> Response, paras. 52-53.

<sup>55</sup> *Ibid*, para. 54.

<sup>56</sup> *Ibid*, paras. 55-56.

<sup>57</sup> *Ibid*, paras. 57-60.

<sup>58</sup> *Ibid*, para. 61.

<sup>59</sup> *Ibid*, paras. 62-63.

<sup>60</sup> *Ibid*, paras. 64-66.

<sup>61</sup> *Ibid*, paras. 67-68.

42. According to ICANN, Afiliás wrongly asserts that the Final Decision holds that, for all future IRP challenges, the action or inaction at issue must first be submitted to the Board for pronouncement before an IRP may be pursued.<sup>62</sup> On the contrary, ICANN gives several examples of findings by the Panel, in Afiliás' favor, in respect of actions and inactions on which the Board never pronounced.<sup>63</sup> In ICANN's submission, what Afiliás is arguing is that the Panel reached the wrong conclusion or that its reasoning or analysis is insufficient, and that type of challenge is meritless in the context of an Article 33 application.<sup>64</sup>
43. Turning to the request for interpretation concerning the law applied by the Panel, ICANN argues that the Panel addressed the governing law at Section I.H of the Final Decision, when stating that the "rules applicable to the present IRP are, in the main, those set out in the Bylaws and the Interim Procedures," including the section of the Bylaws requiring ICANN "to carr[y] out its activities in accordance with relevant principles of international law and international conventions and applicable local law". According to ICANN, Afiliás wrongly asserts that the Panel determined that California law is the primary governing law for ICANN, whereas the Panel stated only that the Interim Supplementary Procedures, Articles and Bylaws are to be interpreted in accordance with California law in case of ambiguity.<sup>65</sup> With respect to Afiliás' contention that the Panel failed to consider its submissions inviting application of international law, ICANN notes that the Panel repeatedly stated in the Final Decision that ICANN must carry "out its activities in conformity with relevant principles of international law and international conventions."<sup>66</sup>
44. ICANN argues that the Panel should reject the request that it set out in detail the basis on which it determined that ICANN has the knowledge, expertise, and experience to act as first-instance decision-maker for disputes among applicants under the New gTLD Program Rules, as this is not a proper subject for an additional award under Article 33 of the ICDR Rules.<sup>67</sup> In Respondent's submission, a request for interpretation cannot be used to seek revision, reformulation, or additional explanation for a given decision. In addition, ICANN contends that this determination by the Panel is correct and self-evident considering that ICANN created the New gTLD Program Rules and has ultimate responsibility for the program and for resolving disputes thereunder.<sup>68</sup>

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<sup>62</sup> Response, para. 69.

<sup>63</sup> *Ibid*, para. 70.

<sup>64</sup> *Ibid*, paras. 71-73.

<sup>65</sup> *Ibid*, paras. 74-77.

<sup>66</sup> *Ibid*, paras. 78-79, referring to the Final Decision at paras. 28, 290 and 292.

<sup>67</sup> Response, paras. 80-81.

<sup>68</sup> *Ibid*, para. 82.

45. ICANN argues finally that the Panel set out the standard of proof in the Final Decision, namely the balance of probabilities, and applied that standard in the normal manner under which more startling propositions such as allegations of fraud require more cogent evidence.<sup>69</sup>

#### **4. Costs**

46. ICANN claims that it is entitled to recover its costs and legal fees in responding to Afilias' Article 33 Application. ICANN contends that Afilias' application is abusive because it is unquestionably an improper use of Article 33, seeking as it does reconsideration of core elements of the Final Decision, and requesting that the Panel issue additional declarations and advisory opinions on a series of questions that were never put to the Panel during the course of the IRP.<sup>70</sup>
47. ICANN also submits that the Application is frivolous since it has no sound basis and is based on a series of indefensible and willful misreadings of the Final Decision.<sup>71</sup>

#### **5. Request for Relief**

48. ICANN submits that Afilias' Article 33 Application should be denied in its entirety and that it as Respondent should be awarded its costs and legal fees incurred as a result of Afilias' Application, in the amount of US \$ 236,884.39, plus the Panel's fees to resolve the Application.<sup>72</sup>

### **C. *Amici's* Submission on Afilias' Article 33 Application**

#### **1. Overview**

49. The *Amici* aver that the Final Decision comprehensively addressed and resolved all of the claims and material issues raised by Afilias, consistent with both the evidence presented at the hearing and the limits on the Panel's jurisdiction and remedial authority under the Bylaws. Nonetheless, the *Amici* argue, "Afilias is back again, seeking the same relief based on the same arguments."<sup>73</sup> The *Amici* state that while Afilias styled its demand as an application pursuant to Article 33, in reality Afilias seeks reconsideration of the Final Decision – a reconsideration that is improper and unauthorized by Article 33 or any other rule. In the *Amici's* submission, there can be no doubt that

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<sup>69</sup> Response, paras. 83-87.

<sup>70</sup> *Ibid*, paras. 88-91.

<sup>71</sup> *Ibid*, para. 92.

<sup>72</sup> *Ibid*, paras. 93-94 and its Appendix B.

<sup>73</sup> *Amici's* Submission on Afilias' Article 33 Application (***Amici's* Submission**), para. 4.

the Application seeks reversal of the Panel's decision rejecting what Afiliias characterizes as its "core claims" in this IRP.

## 2. Request for an Additional Decision

50. The *Amici* submit that Afiliias' request for an additional decision with respect to the three (3) purported claims identified in the Application are unjustified and should be rejected. The *Amici* stress that an arbitral tribunal has wide discretion to determine whether a request for an additional decision is "justified".<sup>74</sup>
51. According to the *Amici*, each of the "claims" asserted in the Application is in reality an argument rather than a claim, and is therefore not suitable for an additional decision pursuant to Article 33 of the ICDR Rules.<sup>75</sup> The *Amici* contend that, in each case, acceptance of Afiliias' additional argument or ground would require a reversal of the Final Decision with respect to the considered claim. In the *Amici's* submission, the only "claim" at issue in this IRP that the Panel was obligated to decide was whether ICANN breached its Articles and Bylaws. As for ICANN's impugned "actions or failures to act", these were not distinct claims but grounds or arguments on which that claim was based.<sup>76</sup>
52. The *Amici* argue alternatively that, even if Afiliias' additional arguments or grounds were characterized as claims, the Panel sufficiently addressed each of them such that there still would be no basis for an additional decision.<sup>77</sup>
53. The *Amici* set out the applicable standard required to be met for a tribunal to issue an additional decision under Article 33. For starters, it is impressed that, exactly as the Panel did in this case, a tribunal can avoid any ambiguity concerning the fact that it has resolved all claims put to it by recording in the *Dispositif* that it rejects all other claims and submissions.<sup>78</sup> The *Amici* then contend that requests for an additional decision are intended to cover only obvious cases of omission; that a tribunal may decide claims impliedly; and that additional decisions are unavailable where an arbitral tribunal intentionally has chosen not to address a claim.<sup>79</sup> The *Amici* also aver that requests for an additional decision are not intended to be used by an aggrieved party to reargue a

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<sup>74</sup> *Amici's* Submission, paras. 21-23.

<sup>75</sup> *Ibid*, paras. 24-25.

<sup>76</sup> *Ibid*, paras. 26-29.

<sup>77</sup> *Ibid*, paras. 30-32.

<sup>78</sup> *Ibid*, para. 33.

<sup>79</sup> *Ibid*, paras. 34-36.

particular point.<sup>80</sup> The *Amici* argue as well that Afilias attempts to confuse the issues by conflating the standard for an additional decision with the scope of the Panel’s so-called “mandate”.<sup>81</sup> Finally, the *Amici* say that Afilias is mistaken where it suggests that the Final Decision would be subject to set aside in the English courts on the ground that it is *infra petita*. On the contrary, it is argued that the standard to set aside an award as *infra petita* under the EAA is consistent with the high standard for an additional decision under Article 33 of the ICDR Rules and international arbitration practice.<sup>82</sup>

54. Applying those principles to the case at hand, the *Amici* argue that, even if the Rules Breach Claim were a “claim”, it was sufficiently addressed in the Final Decision.<sup>83</sup> The *Amici* first note that the Panel having dismissed all of the Parties’ other claims in the *Dispositif*, that necessarily encompassed the Rules Breach Claim. They go on to argue that the scope and detail of Afilias’ argument itself demonstrate that the alleged omission of a decision on the Rules Breach Claim does not constitute an “obvious case of omission”. The *Amici* also submit that the Panel impliedly rejected the Rules Breach Claim by denying the affirmative relief that Afilias had been seeking and by concluding instead that ICANN must pronounce in the first instance as to the propriety of NDC’s alleged conduct.<sup>84</sup> In this regard, the *Amici* reject the Claimant’s assertion that the Panel never reached the issue of the remedies requested by the Claimant.
55. In the submission of the *Amici*, the route by which the Panel approached the issues in the IRP rendered an express decision on the so-called Rules Breach Claim moot. That is so because the Panel found that it did not have the authority to decide what Afilias characterizes as the threshold issue of the Rules Breach Claim, namely, whether the DAA and NDC’s other conduct violated the New gTLD Program Rules. Likewise, the Claimant’s contention that the Respondent’s “failure” to disqualify NDC or other purported inaction violated the Articles and Bylaws is a false premise in so far as the Panel determined that it was reasonable for the Board to defer consideration of the complaints that had been raised in relation to NDC’s application and its auction bids.
56. The *Amici* also say that Afilias used its request concerning the Rules Breach Claim to dispute the soundness of the Panel’s reasoning and findings, and to reargue its case in the underlying IRP.<sup>85</sup> The *Amici* argue that Afilias’ complaints about the Panel’s reasoning are unfounded and that there

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<sup>80</sup> *Amici’s* Submission, para. 37.

<sup>81</sup> *Ibid*, paras. 38-39.

<sup>82</sup> *Ibid*, paras. 40-41.

<sup>83</sup> *Ibid*, para. 43.

<sup>84</sup> *Ibid*, paras. 44-47.

<sup>85</sup> *Ibid*, paras. 47-51.

was ample IRP precedent for the Panel’s decision that ICANN must indeed pronounce in the first instance as to whether there has been a violation of the New gTLD Program Rules.<sup>86</sup>

57. Turning to the International Law Claim, the *Amici* reiterate the submission that this is an argument – or a reason in support of an argument – rather than a “claim”, and that, in any event, it was sufficiently addressed in the Final Decision in so far as the same facts and circumstances that underpin the Rules Breach Claim form the basis for the International Law Claim.<sup>87</sup> The *Amici* add that the International Law Claim added nothing to Afiliás’ claim that ICANN breached the Articles and Bylaws by violating commitments in those instruments because the principles of international law invoked by Afiliás are equally reflected in the Bylaws.<sup>88</sup> In addition, the *Amici* aver that since the International Law Claim relates to the same request for affirmative relief that Afiliás sought in connection with its Rules Breach Claim, the rejection of such request for relief in the Final Decision impliedly rejected the International Law Claim associated with this request.<sup>89</sup>
58. As for the Disparate Treatment Claim, the *Amici* submit that, even if it were a “claim”, it was sufficiently addressed in the Final Decision. The *Amici* note that the Panel found that ICANN breached its commitment to apply documented policies objectively and fairly.<sup>90</sup> According to the *Amici*, the Panel did not decline to decide the Disparate Treatment Claim, but rather declined to add additional findings of fact because the claim was already upheld based on findings of fact that the Panel had made in connection with Afiliás’ “core claims”.<sup>91</sup>
59. In any event, the *Amici* describe as mistaken the assertion that it is not open to an IRP panel to determine that it is not necessary to decide a claim or issue, and cites another IRP panel that has adopted this approach.

### 3. Requests for Interpretation

60. The *Amici* submit that the Claimant’s requests for interpretation are unjustified, misuse Article 33 for improper purposes, and should be summarily dismissed.
61. The *Amici* say that Afiliás seeks to transform the purpose and narrow interpretation process contemplated by Article 33 into an *ex-post* review of the Final Decision to effectively appeal that

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<sup>86</sup> *Amici’s* Submission, paras. 52-53.

<sup>87</sup> *Ibid*, paras. 56-58.

<sup>88</sup> *Ibid*, paras. 59-66.

<sup>89</sup> *Ibid*, para. 67.

<sup>90</sup> *Ibid*, paras. 69-70.

<sup>91</sup> *Ibid*, paras. 71-74.

decision, delay resolution of the .WEB gTLD and influence ICANN's future actions. According to the *Amici*, interpretation of an arbitral award is only really helpful where the ruling is so ambiguous that the parties could legitimately disagree as to its meaning.<sup>92</sup>

62. Turning to Afiliias' specific requests for interpretation, the *Amici* argue that it is not necessary to interpret the term "pronounce". In their submission, there is no ambiguity as to the meaning of the term "pronounce", which, in context, is a transitive verb meaning to declare officially or authoritatively.<sup>93</sup> The *Amici* further contend that Afiliias' requests regarding (1) the basis for the Panel's use of the term "pronounce" and (2) the process, form and substance of an adequate pronouncement would exceed the Panel's authority under Article 33. The *Amici* insist that Article 33 cannot be used to seek an explanation of the factual basis for the Panel's determinations or reasoning.<sup>94</sup> According to the *Amici*, Afiliias' request that the Panel state whether the Board must always "pronounce" on Staff's action or inaction is also not a proper request for interpretation since it concerns ICANN's future obligations and is therefore beyond the Panel's jurisdiction.<sup>95</sup>
63. The *Amici* argue that Article 33 does not permit Afiliias to request a detailed explanation regarding the law the Panel applied in reviewing and reaching its conclusions.<sup>96</sup> Moreover, the real complaints advanced under this rubric are that the Panel's application of the law and reasoning was erroneous, not, as it must under Article 33, that there is ambiguity.
64. According to the *Amici*, Afiliias' request regarding ICANN's knowledge, expertise, and experience is also improper because a party cannot use interpretation requests to ascertain which precise documents and other evidence the tribunal relied on in support of its findings. The *Amici* state that such evidence was presented in pre-hearing submissions and at the IRP hearing itself. In the *Amici*'s submission, this is another attempt to argue that the Panel's conclusion is wrong.<sup>97</sup>
65. The *Amici* submit that Afiliias' request regarding the standard of proof is similarly beyond the scope of Article 33 and should also be denied. According to the *Amici*, the Panel unambiguously applied the principle that, in international arbitration, the standard is the balance of probabilities and that allegations of dishonesty will attract close scrutiny in order to ensure that that standard is met.

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<sup>92</sup> *Amici*'s Submission, paras. 76-81.

<sup>93</sup> *Ibid*, paras. 83-85.

<sup>94</sup> *Ibid*, paras. 86-90.

<sup>95</sup> *Ibid*, paras. 91-92.

<sup>96</sup> *Ibid*, paras. 93-94.

<sup>97</sup> *Ibid*, paras. 95-98.

The *Amici* add that, in any event, that question would not affect how the award should be carried out and that Afiliias impermissibly asks the Panel to correct the substance of its decision.<sup>98</sup>

66. Finally, the *Amici* aver that the Final Decision is fully consistent with the purposes of the IRP and that, in any event, those purposes have no relevance to the narrow issues permitted to be addressed by an Article 33 Application. According to the *Amici*, Afiliias' "purposes of the IRP" argument is a near *verbatim* repeat of the same argument it has made throughout these proceedings in an attempt to induce the Panel to ignore the limits on its jurisdiction set forth in the Bylaws.<sup>99</sup>
67. The *Amici* reject as ill-founded the contention that the Panel did not follow IRP precedents by finding that it is for ICANN to pronounce first on Afiliias' objections regarding the .WEB auction, and point to a number of IRP decisions declining to go beyond declaring whether ICANN's action violated the Articles or Bylaws.
68. In sum, the *Amici* say that the Panel's decision not to issue a ruling on the underlying dispute and instead to defer to ICANN to first pronounce on the dispute affirms, rather than undermines, the IRP process and policies set forth in the Bylaws and confirmed in prior IRP decisions.<sup>100</sup>

#### **D. Afiliias' Reply in Support of the Application**

69. In its 70-page Reply in support of the Application (**Afiliias' Reply**), Afiliias revisits each of the grounds set out in the Application and takes issue with the submissions of the Respondent and *Amici* concerning the scope of Article 33 of the ICDR Rules.

##### **1. Framework for Interpreting Article 33**

70. According to Afiliias, ICANN and the *Amici* urge the Panel to adopt an extremely narrow interpretation of Article 33. Afiliias argues that based on the text and purpose of Article 33, the applicable provisions of the EAA, and the Parties' dispute resolution agreement, any omission to decide a properly submitted claim is grounds for an additional award.<sup>101</sup>
71. Regarding the Parties' dispute resolution agreement included in the Guidebook, Afiliias argues that ICANN's decision to delegate .WEB to NDC was a "final decision", which decision would have

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<sup>98</sup> *Amici's* Submission, paras. 99-104.

<sup>99</sup> *Ibid*, paras. 105-115.

<sup>100</sup> *Ibid*, p. 58 (unnumbered paragraph).

<sup>101</sup> Afiliias' Reply, paras. 2 and 10-18.

taken effect and been irreversible had Afilias not commenced a CEP.<sup>102</sup> Afilias adds that Article 33 must be interpreted and given effect based on the IRP's dispute resolution system or framework – and not in the abstract with reference to general arbitral practice and scholarly commentary.<sup>103</sup> Afilias also denies that it is asking the Panel to “reverse” or “reconsider” any dispute that was resolved by the Panel consistent with its mandate.<sup>104</sup>

## 2. Request for an Additional Decision

72. In relation to the so-called Rules Breach Claim, Afilias argues that ICANN's failure to conclude that NDC breached the Auction Rules, and to disqualify NDC's application were “covered actions”, and that ICANN was required to take those actions to satisfy its obligation to make decisions by applying its documented policies neutrally, objectively and fairly.<sup>105</sup> Afilias argues further that while the Panel denied the “affirmative” or “binding declaratory” relief that it was seeking in relation to the Rules Breach Claim, it omitted to resolve Afilias' requests for declaratory relief on this Rules Breach Claim, *i.e.*, that ICANN was required to enforce the New gTLD Program Rules as specified by Afilias, and that ICANN's failure to do so violated the Articles, Bylaws, and New gTLD Program Rules.<sup>106</sup>
73. Afilias rejects the notion that the Panel resolved the claim for declaratory relief on the Rules Breach Claim on jurisdictional grounds, as submitted by the Respondent and the *Amici*. However, it adds that if that is indeed what the Panel intended, then the Panel must say so in a well-reasoned decision consistent with the Bylaws.<sup>107</sup>
74. Afilias argues that ICANN's jurisdictional objection based on the Panel's alleged lack of jurisdiction to resolve disputes under the New gTLD Program Rules is untimely and incorrect.<sup>108</sup> Afilias further avers that if the Panel resolved the Rules Breach Claim on jurisdictional grounds, then Afilias has been deprived of due process and its right to be heard because ICANN never made any jurisdictional objection to Afilias' claim for declaratory relief in connection with the New gTLD Program Rules.<sup>109</sup> Besides, still in Afilias' submission, there are no legal or factual bases on which

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<sup>102</sup> Afilias' Reply, paras. 19-20.

<sup>103</sup> *Ibid*, paras. 20-28.

<sup>104</sup> *Ibid*, para. 31.

<sup>105</sup> *Ibid*, para. 32.

<sup>106</sup> *Ibid*, para. 34.

<sup>107</sup> *Ibid*, para. 35.

<sup>108</sup> *Ibid*, para. 36.

<sup>109</sup> *Ibid*, paras. 38-43.

the Panel could have resolved the claim for lack of jurisdiction.<sup>110</sup> Afilias takes issue with ICANN and the *Amici's* position that the Board functions as a first instance decision-maker on all matters arising from the New gTLD Program Rules.<sup>111</sup> Afilias insists that the Panel did not state in the Final Decision that it did not have jurisdiction to determine the Rules Breach Claim, and that in any event such conclusion could not be reconciled with other findings of fact and rulings made in the Final Decision.<sup>112</sup>

75. Afilias argues that the Panel's conclusion that ICANN violated its Articles and Bylaws by failing to "pronounce" on Afilias' complaint constituted a declaration that Afilias had never requested.<sup>113</sup> Afilias considers that the Panel's recommendation that ICANN "stay any and all action or decision that would further the delegation of the .WEB gTLD until such time as [ICANN's] Board has considered the opinion of the Panel in this Final Decision" is illogical and inconsistent with the Panel's conclusion regarding ICANN's persistent refusal to take any position on Afilias' complaints.<sup>114</sup>
76. Afilias concludes this section of its Reply by clarifying that it is not seeking an order that ICANN conclude that NDC violated the New gTLD Program Rules, and that it should disqualify NDC's application on that basis, but rather an additional decision that "declares on Afilias' requested declaratory relief in connection to the Rules Breach Claim", and recommendations with respect to that declaration.<sup>115</sup>
77. With respect to the International Law Claim, Afilias argues that the Panel acknowledged the claim but did not address it, whether as a matter of jurisdiction or on the merits.<sup>116</sup> According to Afilias, a finding in its favor on the International Law Claim would not require the Panel to overturn the decisions that it has already rendered; it would rather necessitate that the Panel declare that ICANN failed to interpret and apply the New gTLD Program Rules in accordance with the international principle of good faith.<sup>117</sup> That declaration is especially important if the Panel declines to make an additional decision on Afilias' Rules Breach Claim, and simply remands the core claims to the Respondent's Board with no further guidance.

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<sup>110</sup> Afilias' Reply, para. 44.

<sup>111</sup> *Ibid*, paras. 45-48.

<sup>112</sup> *Ibid*, paras. 49-51.

<sup>113</sup> *Ibid*, paras. 52-54.

<sup>114</sup> *Ibid*, paras. 55-57.

<sup>115</sup> *Ibid*, para. 58.

<sup>116</sup> *Ibid*, para. 59.

<sup>117</sup> *Ibid*, para. 61.

78. Afilias urges that it presented a distinct International Law Claim for the Panel's determination and that there is no mention of the claim in the body of the Panel's reasoning nor any reference to it in the Final Decision's *Dispositif*.<sup>118</sup> In Annex A of the Reply, Afilias sets out the various instances where it allegedly made clear that it was presenting an independent claim based on an alleged breach of international law. Afilias argues that it explicitly took the position that international law is an independent source of obligation and basis for decision.<sup>119</sup>
79. According to Afilias, its International Law Claim is within the Panel's jurisdiction. In this regard, Afilias avers that the Bylaws require ICANN to carry out its activities in conformity with relevant principles of international law in addition to its obligations under the Articles and Bylaws.<sup>120</sup> In Afilias' submission, ICANN is wrong to argue that the Panel sufficiently referred to the International Law Claim in the part of the Final Decision preceding the *Dispositif*.<sup>121</sup> Afilias argues that the Panel did not implicitly resolve Afilias' International Law Claim in its decision either, as the Panel announced that the law applicable to the "quasi-contractual documents of ICANN" was California law and did not mention international law except in the section entitled "Applicable Law".<sup>122</sup>
80. Turning to the Disparate Treatment Claim, Afilias argues that there is no debate that this claim was not decided since the Panel explicitly stated that it did "not consider it necessary, based on the allegation of disparate treatment, to add to its findings in relation to the Claimant's core claims".<sup>123</sup> Afilias rejects the notion that its Disparate Treatment Claim was sufficiently dealt with through Afilias' core claims. According to Afilias, the Panel's factual findings in dealing with its core claims are more than sufficient for the Panel to conclude that Afilias was treated disparately, and what is lacking is a decision to that effect and a declaration in the Final Decision's *Dispositif*.<sup>124</sup>
81. Afilias also rejects ICANN and the *Amici's* assertion that any resolution now of its allegedly unresolved claims would in some way be inconsistent with the *Dispositif* in the Decision. In this respect, Afilias denies that it is seeking "reconsideration", "revocation" or "reversal" of the Final Decision on the claims that were decided and contends that the Panel would not need to alter a

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<sup>118</sup> Afilias' Reply, paras. 63-64.

<sup>119</sup> *Ibid*, paras. 65-68.

<sup>120</sup> *Ibid*, paras. 69-71.

<sup>121</sup> *Ibid*, paras. 72-76.

<sup>122</sup> *Ibid*, paras. 77-83.

<sup>123</sup> *Ibid*, paras. 84-87.

<sup>124</sup> *Ibid*, paras. 88-89.

single word of the Decision's existing *Dispositif* in order to decide the outstanding claims and issue the corresponding declarations on each of these claims.<sup>125</sup>

### 3. Requests for Interpretation

82. Afilias states that it requests interpretation of the Final Decision “simply because there are core elements of the Decision that struck [its counsel] as simply inconsistent, incongruous and hard to follow”.<sup>126</sup> Afilias contends that Article 33 of the ICDR Rules expressly provides the Parties with a proper method to request formally that the Panel clarify its decision.<sup>127</sup> According to Afilias, both ICANN and the *Amici* reinforce the Final Decision's ambiguity and thus the need for the requested interpretations.<sup>128</sup> In the Claimant's submission, those clarifications would go a long way towards minimizing any future unfair or discriminatory treatment of Afilias by ICANN in the context of ICANN's implementation of the Panel's Final Decision.<sup>129</sup>
83. Afilias argues that interpretation is rarely granted simply because it is rarely sought. Afilias stresses that this IRP being the first to be conducted under ICANN's new enhanced accountability rules, it is certainly one that falls within the purview of the rare instances where interpretation is warranted.<sup>130</sup>
84. Afilias argues that its requested interpretation of the term “pronounce” is necessary so that Afilias and future IRP applicants can understand whether there is a jurisdictional pre-requisite requiring some form of formal Board pronouncement before an IRP may be commenced; what form such a pronouncement must take; and what the interrelationship is between the requirement of a pronouncement and the fact that the Bylaws provide a clear jurisdictional basis for an IRP based on Board or Staff inaction and action.<sup>131</sup> What Afilias characterizes as a disagreement between ICANN and the *Amici* on the meaning of the term “pronounce” shows that the *Dispositif* is vague and ambiguous.<sup>132</sup> Afilias contends that it is critical that the Panel interpret this holding for the effective execution of the Final Decision in this case and beyond.<sup>133</sup>

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<sup>125</sup> Afilias' Reply, paras. 91-94 and Annex B thereto.

<sup>126</sup> *Ibid*, para. 96.

<sup>127</sup> *Ibid*, para. 97.

<sup>128</sup> *Ibid*, paras. 98 and 102-104.

<sup>129</sup> *Ibid*, para. 99.

<sup>130</sup> *Ibid*, paras. 100-104.

<sup>131</sup> *Ibid*, para. 106.

<sup>132</sup> *Ibid*, paras. 107-110.

<sup>133</sup> *Ibid*, paras. 111-114.

85. According to Afiliias, without the requested clarification on ICANN's knowledge, expertise and experience, Afiliias, ICANN and the *Amici* will be unable to determine when a future panel addressing .WEB (or other future claims in an IRP) might decline to decide claims otherwise properly before it.<sup>134</sup> In Afiliias' view, it is puzzling that the Panel afforded deference to ICANN based on the latter's knowledge, expertise and experience, considering that the Panel is required to resolve Disputes consistent with the Articles and Bylaws, in the context of prior IRP decisions, and that prior IRP decisions have consistently rejected the application of a deferential standard when reviewing ICANN's decisions.<sup>135</sup>
86. With respect to the requested clarification of the applicable law, Afiliias contends that it is necessary for the effective execution of the Final Decision since the applicable law determines the content of ICANN's legal obligations.<sup>136</sup>
87. Afiliias argues that an interpretation of the standard of proof, including precisely where the Panel applied a heightened standard, is critical to the effective execution of the Decision since the standard applied by the Panel will necessarily guide any analysis performed by the Board and any future IRP panels.<sup>137</sup>
88. According to Afiliias, fairness and due process also require the Panel to interpret and clarify its decision. The Panel's decision to give the Board a "second chance" to consider and pronounce upon NDC's conduct and the DAA's compliance with the New gTLD Program Rules, without providing any guidance on important issues such as those as to which an interpretation is requested, gives ICANN a "free hand". Afiliias avers that ICANN's hands are by no means clean and that it "should not be allowed to use the Panel's opaque reasoning to wash them clean".<sup>138</sup>

#### 4. Costs

89. Afiliias accepts that the Panel has, in principle, the power to allocate the costs of the Application as between the Parties.<sup>139</sup> However, Afiliias submits that ICANN's costs claim is without merit because even if Afiliias does not prevail (in whole or in part), the Respondent is not entitled to its costs since

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<sup>134</sup> Afiliias' Reply, paras. 115-117.

<sup>135</sup> *Ibid*, paras. 118-119.

<sup>136</sup> *Ibid*, paras. 120-123.

<sup>137</sup> *Ibid*, paras. 124-126.

<sup>138</sup> *Ibid*, paras. 127-129.

<sup>139</sup> *Ibid*, para. 131.

the Application cannot be said to be frivolous or abusive as these terms have been defined and applied in the Final Decision.<sup>140</sup>

#### **IV. ANALYSIS**

90. As the Claimant correctly points out at the outset of its Reply, the Panel must first decide the scope of Article 33 of the ICDR Rules.<sup>141</sup> This is so as a matter of logic and in view of the diametrically opposed positions taken by the Claimant and the Respondent on this question, whether it be in regard to the Claimant's request for an additional decision or its requests for interpretation.

91. Having identified the applicable standards to a request for an additional decision and a request for interpretation, the Panel will turn to considering, first, the request for an additional decision in respect of each of the three (3) claims the Panel is said to have failed to decide or resolve; and second, the various requests for interpretation of the Final Decision.

##### **A. Article 33 of the ICDR Rules**

###### **1. Overview**

92. Article 33 of the ICDR Rules reads as follows:

###### **Article 33: Interpretation and Correction of Award**

1. Within 30 days after the receipt of an award, any party, with notice to the other party, may request the arbitral tribunal to interpret the award or correct any clerical, typographical, or computational errors or make an additional award as to claims, counterclaims, or setoffs presented but omitted from the award.

2. If the tribunal considers such a request justified after considering the contentions of the parties, it shall comply with such a request within 30 days after receipt of the parties' last submissions respecting the requested interpretation, correction, or additional award. Any interpretation, correction, or additional award made by the tribunal shall contain reasoning and shall form part of the award.

3. The tribunal on its own initiative may, within 30 days of the date of the award, correct any clerical, typographical, or computational errors or make an additional award as to claims presented but omitted from the award.

4. The parties shall be responsible for all costs associated with any request for interpretation, correction, or an additional award, and the tribunal may allocate such costs.

93. It is generally accepted that the opportunity given to an arbitral tribunal to correct or interpret an award, and to make an additional award on claims presented but omitted from the award, is a

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<sup>140</sup> Afiliias' Reply, paras. 130-138.

<sup>141</sup> *Ibid*, para. 2.

narrow exception to the basic rule of finality of awards, and the principle that once an arbitral tribunal has issued a final award it is “*functus officio*”.<sup>142</sup> To quote from a leading treatise:

There are strong policies counseling against alteration of an award after it has been made. One of the most fundamental purposes of the arbitral process is to obtain a speedy, final resolution of the parties’ disputes, without the costs and delays of litigation. Further, as discussed below, most national legal systems provide that an arbitral tribunal is “*functus officio*” once it has made its award. This again reflects the powerful interest in the finality of awards, free from continuing dispute about their correctness, completeness, or meaning. A liberal approach to “corrections” or “interpretations” is in obvious tension with these policies.<sup>143</sup>

94. It is noted in this same treatise that while the EAA does not expressly provide that the issuance of a final award terminates the arbitral tribunal’s mandate, the *functus officio* doctrine is “well-settled in England as a common law rule.”<sup>144</sup>
95. It follows from the foregoing that unless a request for correction, interpretation or for an additional award meets the conditions laid out in Article 33 of the ICDR Rules, an arbitral tribunal has no authority to reconsider, supplement or vary a final award. The same is true of the Panel’s Final Decision which, under English law and pursuant to the Respondent’s Bylaws, is final and binding.<sup>145</sup> As noted by the Claimant in its Reply, the Parties agree that the “final decision” of an IRP panel under the Respondent’s Articles, Bylaws and Interim Procedures is the same as an “award” under the New York Convention and the EAA.<sup>146</sup>

## 2. Applicable Standard to a Request for an Additional Award

96. Article 33 of the ICDR Rules sets out explicitly the basic conditions that must be met for a party to obtain an additional award from an arbitral tribunal. The request must first identify “claims, counterclaims or setoffs presented but omitted from the award”; second, the moving party must persuade the tribunal that the request for an additional award is “justified”.
97. Section 57(3) of the EAA provides that an arbitral tribunal may “make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award”. In the context of Section 57(3) of the EAA, the English courts have held that “the terms of s 57(3)(b) are apt to refer to a head of claim for damages or some other

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<sup>142</sup> David D. Caron and Lee M. Caplan, “Part VI The Award, Ch. Post-Award Proceedings” in *The UNCITRAL Arbitration Rules: A Commentary*, Oxford University Press, 2013, p. 802 [Caron].

<sup>143</sup> Gary B. Born, “Chapter 24: Correction, Interpretation and Supplementation of International Arbitral Awards” *International Commercial Arbitration*, 3<sup>rd</sup> ed., Kluwer Law International, 2021, p. 3370 [Born].

<sup>144</sup> *Ibid*, p. 3378.

<sup>145</sup> See Bylaws, Section 4.3(x).

<sup>146</sup> Afiliias’ Reply, fn. 4.

remedy (including specifically claims for interest or costs) but not to an issue which is part of the process by which a decision is arrived at on one of those claims".<sup>147</sup>

98. A similar distinction was drawn in respect of the word "issues" as used in Section 68(2)(d) of the EAA, which provides that an award may be challenged for "serious irregularity" in the event of a "failure by the tribunal to deal with all the issues that were put to it", where such failure "has caused or will cause substantial injustice to the applicant". In interpreting the word "issues" as used in that provision, the English courts have observed:

(ii) There is a distinction to be drawn between "issues" on the one hand and "arguments", "points", "lines of reasoning" or "steps" in an argument, although it can be difficult to decide quite where the line demarcating issues from arguments falls. [...]

(iii) While there is no expressed statutory requirement that the Section 68(2)(d) issue must be "essential", "key" or "crucial", a matter will constitute an "issue" where the whole of the applicant's claim could have depended upon how it was resolved, such that "fairness demanded" that the question be dealt with [...].

(vi) If the tribunal has dealt with the issue in any way, Section 68(2)(d) is inapplicable and that is the end of the enquiry [...]; it does not matter for the purposes of Section 68(2)(d) that the tribunal has dealt with it well, badly or indifferently.

(vii) It matters not that the tribunal might have done things differently or expressed its conclusions on the essential issues at greater length [...].

(viii) A failure to provide any or any sufficient reasons for the decision is not the same as failing to deal with an issue [...]. A failure by a tribunal to set out each step by which they reach its conclusion or deal with each point made by a party is not a failure to deal with an issue that was put to it [...].

(ix) There is not a failure to deal with an issue where arbitrators have misdirected themselves on the facts or drew from the primary facts unjustified inferences [...]. The fact that the reasoning is wrong does not as such ground a complaint under Section 68(2)(d) [...].

(x) A tribunal does not fail to deal with issues if it does not answer every question that qualifies as an "issue". It can "deal with" an issue where that issue does not arise in view of its decisions on the facts or its legal conclusions. A tribunal may deal with an issue by so deciding a logically anterior point such that the other issue does not arise [...]. If the tribunal decides all those issues put to it that were essential to be dealt with for the tribunal to come fairly to its decision on the dispute or disputes between the parties, it will have dealt with all the issues [...].<sup>148</sup>

99. It follows from the foregoing that a request for an additional award is not appropriate if it relates to an arbitral tribunal's omission to deal, not with a claim but rather with arguments or grounds in support of a claim.<sup>149</sup>

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<sup>147</sup> *Torch Offshore LLC v. Cable Shipping Inc.*, [2004] EWHC (Comm) 787, para. 27 (Eng.) [emphasis added].

<sup>148</sup> *Symbion Power*, [2017] EWHC (TCC) 348 (Eng.), para. 18, quoting *Sec'y of State for the Home Dep't v. Raytheon Sys. Ltd.*, [2014] EWHC (TCC) 4375 (Eng.), para. 33.

<sup>149</sup> The *Amici* cite an article highlighting the distinction between a "claim" and a "ground for relief put forward in support of a claim", in which the author notes that "[g]rounds [...]" are the reasons forming the basis of a claim". Klaus Reichert, "Prayers for Relief – The Focus for Organization" in *Evolution and Adaptation: The Future of International Arbitration*, Jean Engelmayr Kalicki and Mohamed Abdel Raouf (eds.), Kluwer Law International, 2019, p. 717.

100. Turning to the requirement that the claim subject to the application for an additional award has been “omitted from the award”, Gary B. Born observes in the above-quoted treatise:

The mere fact that an arbitral tribunal has not expressly addressed a particular claim does not automatically require issuance of an additional award: a tribunal may be taken to have impliedly rejected claims as to which it does not grant relief (although the better practice is clearly to address issues explicitly and although the failure to do so may give rise to claims that the award is, in some respects, unreasoned).<sup>150</sup>

101. It is also generally accepted that requests for an additional award are not available to revisit a tribunal’s decision deliberately not to address a particular claim or issue, for example because it considers it unnecessary to do so in light of its decisions on other issues. In the words of the late Professor David D. Caron, when commenting on deliberate omissions to address a claim in the context of Article 39 of the UNCITRAL Rules:<sup>151</sup>

Article 39 obviously has no effect in cases of deliberate omission where an arbitral tribunal has for specific reasons intentionally chosen not to address a claim or issue in the award. Nevertheless, to avoid any misunderstandings, it is good practice for an arbitral tribunal to document in the award the disposition of each of the parties’ respective claims, no matter how small or inconsequential their bearing is on the outcome of the case.<sup>152</sup>

102. Turning to the second requirement of Article 33 of the ICDR Rules for a party to obtain an additional award, it seems to be common ground between the Parties that it is for the arbitral tribunal, in its discretion, to decide whether a request for an additional award is “justified” within the meaning of Article 33.

103. In its discussion of the legal standard applicable to a request for an additional award under English law and pursuant to Article 33 of the ICDR Rules, the Claimant submits that “any omission to decide a properly submitted claim – whether deliberate, inadvertent, or otherwise – is grounds for an additional award.”<sup>153</sup> In light of the text of Article 33 and the authorities canvassed above, the Panel finds this to be an overly broad expression of the standard to be met by an applicant for an additional award, and must therefore reject it.

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<sup>150</sup> Born, *supra* note 143, p. 3407.

<sup>151</sup> Article 39 of the 2010 UNCITRAL Rules reads as follows:

1. Within 30 days after the receipt of the termination order or the award, a party, with notice to the other parties, may request the arbitral tribunal to make an award or an additional award as to claims presented in the arbitral proceedings but not decided by the arbitral tribunal.
2. If the arbitral tribunal considers the request for an award or additional award to be justified, it shall render or complete its award within 60 days after the receipt of the request. The arbitral tribunal may extend, if necessary, the period of time within which it shall make the award.
3. When such an award or additional award is made, the provisions of article 34, paragraphs 2 to 6, shall apply.

<sup>152</sup> Caron, *supra* note 142, p. 823. See also Jan Paulsson and Georgios Petrochilos, *UNCITRAL Arbitration Rules, Section IV, Article 39 [Additional Award]*, Kluwer Law International, 2017, p. 356.

<sup>153</sup> Application, para. 8. See also Afiliias’ Reply, para. 11.

### 3. Applicable Standard to a Request for Interpretation of an Award

104. For a request to interpret an award to be “justified”, the moving party must demonstrate “that the award is ambiguous and requires clarification for its effective execution”.<sup>154</sup> It is also well accepted that a request for interpretation cannot be used to invite reconsideration of an award, or to challenge a tribunal’s reasoning:

- The power to issue an interpretation does not “enable the arbitrator to change his mind on any matter which has been decided by the award, and attempts to use the section for this purpose should be firmly resisted.”<sup>155</sup>
- It is well settled that such a request is limited to an interpretation of the award in the form of clarification; and that it cannot extend to a request to modify or annul the award or take the form of an appeal or review of the award.<sup>156</sup>
- A request for an interpretation may not be used to challenge the tribunal’s reasoning or dispositions.<sup>157</sup>
- Tribunals should reject any request which goes beyond the interpretation of the award; provisions in arbitration rules for the interpretation of awards are not meant to empower the tribunal to change the substance of their ruling.<sup>158</sup>

105. As was succinctly put in the decision of an ICC tribunal:

As to the scope of “interpretation”, which might be regarded as broader than the “correction” feature, there is virtual unanimity that an application of that sort cannot be used to seek revision, reformulation or additional explanations of a given decision.<sup>159</sup>

106. In support of its requests for interpretation, the Claimant contends that Article 33 of the ICDR Rules is “a vehicle for one or both parties to secure clarification of the award where necessary”, including regarding “its exact meaning and scope”; and that this mechanism “is to provide clarification of the award by *resolving any ambiguity and vagueness in its terms*”.<sup>160</sup> Such a formulation of the standard to request interpretation omits mention of the need to safeguard against indirect requests for reconsideration or challenges of the tribunal’s reasoning presented under the guise of a request for

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<sup>154</sup> Born, *supra* note 143, p. 3401.

<sup>155</sup> *Al Hadha Trading Co. v. Tradigrain S.A.*, [2002] Lloyd’s Law Reports 512, para. 66, quoting *Mustill & Boyd on Commercial Arbitration*, 2<sup>nd</sup> ed., Companion Volume 2001, p. 341. See also Born, *supra* note 143, p. 3405 (“In practice, requests for interpretation will ordinarily only be successful if directed to specific portions of the dispositive part of the award.”); and Julian David Mathew Lew, Loukas Mistelis, *et al.*, “Chapter 24 Arbitration Award” in *Comparative International Commercial Arbitration*, Kluwer Law International, 2003, p. 658 [Lew] (“Interpretation of an award is justified only when the ruling, rather than the discussion of facts and arguments, is expressed in vague terms or where there is ambiguity as to how the award should be executed.”)

<sup>156</sup> *Methanex Corp. v. United States*, UNCITRAL, Letter to Parties from Tribunal ¶ 2, 25 September 2002.

<sup>157</sup> Born, *supra* note 143, p. 3405.

<sup>158</sup> Lew, *supra* note 155, p. 659, § 24-97.

<sup>159</sup> *Procedural Order of 6 January 2003 in ICC Case 11451 (Extract)*, in ICC, *Decisions on ICC Arbitration Procedure: A Selection of Procedural Orders Issued by Arbitral Tribunals Acting Under the ICC Rules of Arbitration (2003-2004)*, pp. 19 (2010).

<sup>160</sup> Application, para. 92 [emphasis in the original].

interpretation. As noted below, it is altogether clear that the Claimant is not merely seeking “clarification” of the Final Decision, but rather a reversal of its key findings and conclusions.

107. Having identified the standards applicable, respectively, to a request for an additional award and a request for interpretation, the Panel turns to considering the various requests set out in the Application.

## **B. Afilias’ Request for an Additional Decision**

108. Three (3) claims are said to have been presented by the Claimant but omitted by the Panel in the Final Decision. The Panel addresses each of them in turn.

### **1. The “Rules Breach Claim”**

109. As noted already, the Claimant defines the “Rules Breach Claim” as:

...the [...] specifically pled Covered Actions: that ICANN violated its Articles and Bylaws by (a) not rejecting NDC’s application, and/or (b) not declaring NDC’s bids at the ICANN auction invalid, and/or (c) not deeming NDC ineligible to enter into a registry agreement for .WEB because of its violations of the New gTLD Program Rules, and (d) not offering .WEB to Afilias as the next highest bidder [...].<sup>161</sup>

110. The Claimant avers that in omitting to decide Afilias’ claim that ICANN breached its Articles and Bylaws through its *inaction* – and instead referring the claim back to the ICANN Board to “pronounce” on it “in the first instance” – the Panel failed to resolve that specific claim, as required by Article 4.3(g) of the Bylaws, and thus acted *infra petita*.

111. The Claimant argues that it had sought two (2) separate types of relief with respect to the “Rules Breach Claim”: first, “declaratory relief”; and second, “affirmative” or “binding declaratory relief” (also referred to by the Claimant and the Respondent as “injunctive relief”, a terminology which the Panel adopts in this decision to avoid confusion with the first “type” of relief).<sup>162</sup> According to the Claimant, while the Panel denied the request for injunctive relief, the Panel omitted to resolve Afilias’ request for declaratory relief on the so-called Rules Breach Claim. The Claimant submits:

The Panel’s denial of Afilias’ requested injunctive relief did not and could not encompass Afilias’ requested declaratory relief. The Panel thus left Afilias’ principal claim undecided – even though it had been extensively arbitrated by Afilias, ICANN, and the Amici, and submitted to the Panel for resolution.<sup>163</sup>

112. With respect, the Panel finds this reasoning to be mistaken and based on false premises.

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<sup>161</sup> Application, para. 16; see also para. 4(1). Covered Actions is defined at Sec. 4.3(b)(ii) of the Bylaws as “any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute.”

<sup>162</sup> Application, para. 68 (“Afilias sought both declaratory relief and affirmative declaratory relief (what ICANN more accurately called ‘injunctive’ relief) for its Rules Breach Claim in the IRP.”); Afilias’ Reply, para. 34.

<sup>163</sup> Afilias’ Reply, para. 34.

113. The Panel recalls that the Claimant requested the following relief in its Amended Request for IRP:

89. Reserving its rights to amend the relief requested below, inter alia, to reflect document production and further witness evidence, Afilias respectfully requests the IRP Panel to issue a binding Declaration:

- (1) that ICANN has acted inconsistently with its Articles and Bylaws, breached the binding commitments contained in the AGB, and violated international law;
- (2) that, in compliance with its Articles and Bylaws, ICANN must disqualify NDC's bid for .WEB for violating the AGB and Auction Rules;
- (3) ordering ICANN to proceed with contracting the Registry Agreement for .WEB with Afilias in accordance with the New gTLD Program Rules;
- (4) specifying the bid price to be paid by Afilias;
- (5) that Rule 7 of the Interim Procedures is unenforceable and awarding Afilias all costs associated with the additional work needed to, among other things, address arguments and filings made by VeriSign and/or NDC;
- (6) declaring Afilias the prevailing party in this IRP and awarding it the costs of these proceedings; and
- (7) granting such other relief as the Panel may consider appropriate in the circumstances.<sup>164</sup>

114. In its Post-hearing Brief, the Claimant articulated its request for declaratory relief as follows:

238. As an initial matter, ICANN agrees that "declarations finding that ICANN violated the Articles or Bylaws would be within the Panel's authority." Thus the Panel can indisputably declare that ICANN has breached:

- Sections 1.2(a)(v), 1.2(c) of the Bylaws by failing to reject NDC's application, and/or disqualify its bids, and/or deem it ineligible to execute a registry agreement because NDC violated the following sections of the New gTLD Program Rules: Sections 1 and 10 of Module 6, Section 1.2.7 of Module 1, and Sections 4.3.1(5) and 4.3.1(7) of Module 4 of the AGB, as well as Rules 12, 13, 32 of the Auction Rules;
- Sections 1.2(a)(v) and 2.3 of the Bylaws by the arbitrary, capricious, disparate, and discriminatory manner in which it treated Afilias;
- Article III of ICANN's Articles of Incorporation and Sections 1.2(a), 1.2(b), and 3.1 of the Bylaws by failing to act transparently to the maximum extent feasible;
- Article III of ICANN's Articles of Incorporation and Sections 1.2(a) and 1.2(b)(iv) of the Bylaws by failing to act in accordance with its competition mandate;
- Sections 1.2(a), 1.1(a)(i), 1.2(a)(iv), 3.1, 3.6(a)(i)-(ii), 4.3(n)(i), and 4.3(n)(ii) of the Bylaws by adopting Rule 7 of the Interim Supplemental Procedures for IRP;
- Article III of ICANN's Articles of Incorporation and Sections 1.2, 1.2(a), 1.2(c) of the Bylaws by failing to conduct itself in accordance with relevant principles of international law, specifically the obligation of good faith.<sup>165</sup>

115. As for the Claimant's request for injunctive relief, it was set out in the immediately following paragraphs of the Claimant's Post-Hearing Brief:

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<sup>164</sup> Amended Request for IRP, para. 89.

<sup>165</sup> Claimant's PHB, para. 238.

239. In light of the foregoing declarations, the Panel should also grant Afiliás' requested injunctive remedies as well as its request for costs (as set forth in Afiliás' separate submission on costs filed herewith). Such remedies are entirely within the Panel's jurisdiction and are necessary to "[e]nsure that ICANN ... complies with its Articles of Incorporation and Bylaws" and to achieve a "binding, final resolution[]" of this dispute that is "consistent with international arbitration norms" and that is "enforceable in any court with proper jurisdiction."

240. Specifically, as injunctive relief, in addition to granting such other relief as the Panel considers appropriate in the circumstances of this case, the Panel should order and recommend that ICANN:

- Reject NDC's application for the .WEB gTLD;
- Disqualify NDC's bids at the ICANN auction for the .WEB gTLD;
- Deem NDC ineligible to execute a registry agreement for the .WEB gTLD;
- Offer the registry rights to the .WEB gTLD to Afiliás, as the next highest bidder in the ICANN auction;
- Set the bid price to be paid by Afiliás for the .WEB gTLD at USD 71.9 million;
- Pay Afiliás' fees and costs as set out in Afiliás' accompanying costs submission<sup>166</sup>.

116. In paragraph 254 of the Final Decision, the Panel described the Claimant's principal claims in the IRP, which the Panel characterized as the Claimant's "core claims".<sup>167</sup> In the immediately following paragraph, paragraph 255, the Panel described the request for relief associated with the Claimant's core claims. For ease of reference, the Panel reproduces these two (2) paragraphs in full:

254. The Claimant's core claims against the Respondent in this IRP arise from the Respondent's failure to reject NDC's application for .WEB, disqualify its bids at the auction, and deem NDC ineligible to enter into a registry agreement with the Respondent in relation to .WEB because of NDC's alleged breaches of the Guidebook and Auction Rules. The Respondent's impugned conduct engages its Staff's actions or inactions in relation to allegations of non-compliance with the Guidebook and Auction Rules on the part of NDC, communicated in correspondence to the Respondent in August and September 2016, and the Staff's decision to move to delegate .WEB to NDC in June 2018 by proceeding to execute a registry agreement in respect of .WEB with that company; as well as the Board's decision not to pronounce upon these allegations, first in November 2016, and again in June 2018 when, to the knowledge of the Board, the .WEB contention set was taken off hold and the Staff put in motion the process to delegate the .WEB gTLD to NDC.

255. As already noted, the Claimant's core claims serve to support the Claimant's requests that the Panel disqualify NDC's bid for .WEB and, in exchange for a bid price to be specified by the Panel and paid by the Claimant, order the Respondent to proceed with contracting the Registry Agreement for .WEB with the Claimant.<sup>168</sup>

117. It is immediately apparent that the Claimant is seeking to recast as a distinct claim – the so-called Rules Breach Claim – what the Panel described in the Final Decision as the Claimant's core claims and the request for relief that the Claimant had sought in respect thereof. Properly understood, the Claimant's request for an additional award in relation to the Rules Breach Claim is thus but an

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<sup>166</sup> Claimant's PHB, para. 240.

<sup>167</sup> In support of the statement at paragraph 32 of its Reply that the Rules Breach Claim was its "principal claim", the Claimant refers to the paragraph of the Final Decision that describes the "core claims".

<sup>168</sup> Final Decision, paras. 254-255 [emphasis added].

expression of the Claimant's disagreement with the Panel's determination of its core claims and the denial of the request for relief associated therewith.

118. It can also be seen that the Panel's description of the Claimant's core claims includes the constituent elements of what the Claimant now calls the "Rules Breach Claim". Moreover, as attested to by the words emphasized in the above quote of paragraph 254 of the Final Decision, it was well understood that the Claimant's claims encompassed the alleged *inaction* of the Respondent when Afilias first asserted that the Respondent was required to reject NDC's application for .WEB,<sup>169</sup> declare NDC's bids at the ICANN auction invalid,<sup>170</sup> and/or deem NDC ineligible to enter into a registry agreement for .WEB because of its violations of the New gTLD Program Rules,<sup>171</sup> and offer .WEB to Afilias as the next highest bidder.<sup>172</sup>
119. In the Panel's opinion, it simply cannot be argued that the Final Decision omitted to deal with the "claim" that the Respondent had wrongfully failed to address these assertions, when they were first raised and thereafter later on in the process in June 2018. Insofar as the Respondent's Staff is concerned, the Panel found, at paragraph 413(1):

Declares that the Respondent has violated its [Articles and Bylaws] by (a) its staff (Staff) failing to pronounce on the question of whether the [DAA] complied with the New gTLD Program Rules following the Claimant's complaints that it violated the Guidebook and Auction Rules, and, while these complaints remained unaddressed, by nevertheless moving to delegate .WEB to NDC in June 2018, upon the .WEB contention set being taken "off hold";<sup>173</sup>

120. Insofar as the alleged inaction of the Respondent's Board is concerned, the Panel decided:

331. The Respondent urges that it was not a violation of the Respondent's Bylaws for the Board, on 3 November 2016, to defer consideration of the complaints that had been raised in relation to NDC's application and auction bids for .WEB. It is common ground that there were Accountability Mechanisms in relation to .WEB pending at the time, and **it seems to the Panel reasonable for the Board to have decided to await the outcome of these proceedings before considering and determining what action, if any, it should take. The Panel notes that it reaches that conclusion without needing to rely on the provisions of Section 4.3(i)(iii) of the Bylaws, and determining whether or not that decision involved the Board's exercise of its fiduciary duties.**

332. The Panel does find, however, that it was a violation of the commitment to operate "in an open and transparent manner and consistent with procedures to ensure fairness" for the Respondent to have failed to communicate the Board's decision to the Claimant. As noted already, the Respondent had clearly represented in its letters of 16 and 30 September 2016 that it would evaluate the issues raised in connection with NDC's application and auction bids for .WEB. Since the Board's decision to defer consideration of these issues contradicted the Respondent's representations, it was incumbent upon the Respondent to communicate that decision to the Claimant.<sup>174</sup>

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<sup>169</sup> Which corresponds to subparagraph a) of the Rules Breach Claim, as framed by the Claimant in the Application, at para. 16.

<sup>170</sup> Which corresponds to subparagraph b) of the Rules Breach Claim, as framed by the Claimant in the Application, at para. 16.

<sup>171</sup> Which corresponds to subparagraph c) of the Rules Breach Claim, as framed by the Claimant in the Application, at para. 16.

<sup>172</sup> Which corresponds to subparagraph d) of the Rules Breach Claim, as framed by the Claimant in the Application, at para. 16.

<sup>173</sup> Final Decision, para. 413(1) [emphasis added].

<sup>174</sup> *Ibid*, paras. 331-332 [emphasis added].

121. The Panel having found that the Respondent was not obligated to act upon the Claimant's complaints during the pendency of these proceedings, the Panel thus necessarily also found that the Respondent's failure to act in this respect (*i.e.*, its alleged *inaction*) was *not* a violation of its Articles and Bylaws. That is precisely the declaratory relief that the Claimant contends the Panel omitted to deal with under the rubric of the Rules Breach Claim.

122. As regards the Respondent's impugned inaction in June 2018, the Panel made the following additional findings – in favor of the Claimant – in respect of both the Staff's and Board's conduct:

347. In sum, the Panel finds that it was inconsistent with the representations made to the Claimant by ICANN's Staff, and the rationale of the Board's decision, in November 2016, to defer consideration of the issues raised in relation to NDC's application for .WEB, for the Respondent's Staff, to the knowledge of the Respondent's Board, to proceed to delegation without addressing the fundamental question of the propriety of the DAA under the New gTLD Program Rules. The Panel finds that in so doing, the Respondent has violated its commitment to make decisions by applying documented policies objectively and fairly.<sup>175</sup>

123. As regards the Claimant's request for relief in relation to its core claims, or Rules Breach Claim, there can be no question that it was denied, and that the associated claims were therefore fully dealt with. In the section of the Final Decision entitled "Determining the Proper Relief", the Panel quoted Section 4.3(o) of the Bylaws, which defines the authority of IRP panels, and decided that "the Claimant [was] entitled to a declaration that the Respondent violated its Articles and Bylaws to the extent found by the Panel in the previous sections of this Final Decision [...]."<sup>176</sup> The Panel then turned to the relief sought by the Claimant in respect of what is being referred to in the Application as the Rules Breach Claim, and explained in the following terms its decision to deny it:

362. As foreshadowed earlier in these reasons, the Panel is firmly of the view that it is for the Respondent, that has the requisite knowledge, expertise, and experience, to pronounce in the first instance on the propriety of the DAA under the New gTLD Program Rules, and on the question of whether NDC's application should be rejected and its bids at the auction disqualified by reason of its alleged violations of the Guidebook and Auction Rules.

363. The Panel also accepts the Respondent's submission that it would be improper for the Panel to dictate what should be the consequence of NDC's violation of the New gTLD Program Rules, assuming a violation is found.<sup>177</sup>

124. This decision is carried forward in the *Dispositif* as follows:

**Dismisses** the Claimant's other requests for relief in connection with its core claims and, in particular, the Claimant's request that that the Respondent be ordered by the Panel to disqualify NDC's bid for .WEB, proceed with contracting the Registry Agreement for .WEB with the Claimant in accordance with the New gTLD Program Rules, and specify the bid price to be paid by the Claimant, all of which are premature pending consideration by the Respondent of the questions set out above in sub-paragraph 410(5).<sup>178</sup>

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<sup>175</sup> Final Decision, para. 347 [emphasis added].

<sup>176</sup> *Ibid*, para. 361.

<sup>177</sup> *Ibid*, paras. 362-363.

<sup>178</sup> *Ibid*, para. 413(7) [emphasis added]

125. It is equally apparent that the so-called declaratory relief that the Claimant is seeking in the Application would directly contradict the Panel's decision that it is for the Respondent to pronounce in the first instance on the substance of the constituent elements of the Rules Breach Claim. In this regard, the Panel must reject the Claimant's argument that "the Panel would not need to alter a single word of the Decision's existing *Dispositif* in order to decide the outstanding claims and issue the corresponding declarations on each."<sup>179</sup> In support of this argument, the Claimant has reproduced in Annex B to the Reply the amendments to the *Dispositif* of the Final Decision that it contends would be required in order for the Panel to grant the relief it is requesting in relation to the Rules Breach Claim. The language that the Claimant requests be added to the *Dispositif* reads as follows:

**Declares** that ICANN violated its Articles and Bylaws by (a) not rejecting NDC's application, (b) not declaring NDC's bids at the ICANN auction invalid, (c) not deeming NDC ineligible to enter into a registry agreement for .WEB because of its violations of the New gTLD Program Rules, and (d) not offering .WEB to Afilias as the next highest bidder;<sup>180</sup>

126. In the Panel's opinion, it would appear undisputable that the Claimant's proposed additional declaration directly contradicts the Panel's "firm view", as it was put in paragraphs 362 and 363 of the Final Decision, that it is for the Respondent to pronounce in the first instance on the propriety of the DAA under the New gTLD Program Rules, and on the question of whether NDC's application should be rejected and its bids at the auction disqualified by reason of its alleged violations of the Guidebook and Auction Rules; as well as the finding that it would be improper for the Panel to dictate what should be the consequence of NDC's violation of the New gTLD Program Rules, assuming a violation is found. Having expressed that opinion, made that decision and fully exercised its authority in relation to the Rules Breach Claim in the Final Decision by dismissing the relief sought in relation to the Claimant's core claims, the Panel is *functus officio* and without any authority to issue an additional award regarding that "claim" or any other claim dealt with in the Final Decision.

## 2. The "International Law Claim"

127. The Claimant defines the "International Law Claim" in the Application in the following terms:

Claimant's claim that ICANN breached its Articles and Bylaws by failing to conduct its activities in accordance with relevant principles of international law by failing to enforce the New gTLD Program Rules and proceeding to delegate .WEB to NDC despite NDC breaches of the Rules;<sup>181</sup>

and

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<sup>179</sup> Reply, para. 94.

<sup>180</sup> Annex B to the Reply, at proposed additional para. 5.

<sup>181</sup> Application, para. 4.

Afilias claimed from the very outset that ICANN violated its obligation to conduct its activities in conformity with relevant principles of international law by failing to enforce the New gTLD Program Rules and by proceeding to delegate .WEB to NDC.<sup>182</sup>

128. Two (2) preliminary observations are in order. As the first of these formulations makes clear, the contention that the Respondent “*breached its Articles and Bylaws by failing to conduct its activities in accordance with relevant principles of international law*” illustrates that the Claimant’s arguments based on international law served to support the Claimant’s claim that the Respondent had violated its Articles and Bylaws through the actions and inactions that were being impugned by the Claimant in this IRP. This is so because under its Articles and Bylaws the Respondent is obligated to carry out its activities in conformity with relevant principles of international law and international conventions, as well as applicable local law. This was expressly noted by the Panel in the Applicable Law section of the Final Decision:

28. Section 1.2(a) of the Bylaws provides that “[i]n performing its Mission, ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law [...]”. The Panel notes that Article III of the Articles is to the same effect as Section 1.2(a) of the Bylaws.<sup>183</sup>

129. The other preliminary observation arises from the second formulation of the Claimant’s “International Law Claim”, and the fact that it is based on the same facts and circumstances as the Rules Breach Claim. Indeed, the contention that the Respondent violated international law “*by failing to enforce the New gTLD Program Rules and proceeding to delegate .WEB to NDC*” is inseparable from the Claimant’s core claims in the IRP, as described in the Final Decision. As noted already, the Panel is of the view that the core claims, including the so-called Rules Breach Claim, were fully dealt with in the Final Decision.
130. While the Claimant presented various arguments based on principles of international law in support of its core claims, it did not advance a distinct claim based on international law. Indeed, the Claimant had observed that the principles of international law it was relying on provided “independent” but “generally overlapping” safeguards to those arising from the terms of the Articles and Bylaws,<sup>184</sup> and submitted that these international law principles were a “lens” through which the Panel should view the provisions of the Bylaws.<sup>185</sup> The excerpts reproduced in Annex A of the Claimant’s Reply exemplify these observations and submissions rather than establish that the Claimant had articulated and advanced an international law claim separate and distinct from its core claims. In sum, the principles of international law relied upon by the Claimant were presented as providing

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<sup>182</sup> Application, para. 38.

<sup>183</sup> Final Decision, para. 28.

<sup>184</sup> Afilias’ Response to the *Amici*’s Briefs, para. 143.

<sup>185</sup> Claimant’s PHB, fn. 203.

*an additional basis* for the Panel to find in the Claimant's favor in regard to its core claims, or what is now presented as the Rules Breach Claim.

131. As noted in the Panel's discussion of the applicable standard to a request for an additional award, there is a fundamental distinction between, on the one hand, a "claim" and, on the other, grounds or arguments put forward in support of a claim. A request for an additional award is not appropriate if it relates to an arbitral tribunal's omission to deal, not with a claim, but with one or more arguments or grounds put forward in support of a claim.
132. In the present case, the Panel was well aware of the provisions of Section 1.2(a) of the Bylaws, and the Claimant's arguments based on certain principles of international law. The Final Decision explicitly refers to both Section 1.2(a)<sup>186</sup> and the Claimant's arguments based on principles of international law.<sup>187</sup> The Panel found in favor of the Claimant by the application of the Respondent's commitments, under the Bylaws, to make decisions by applying documented policies objectively and fairly (*Dispositif*, para. 2) and to operate in an open and transparent manner and consistent with procedures to ensure fairness (*Dispositif*, para. 3). The fact that the Panel did not explicitly take the further step to articulate how these same findings in relation to the same claim could find support in certain principles of international law does not provide a ground for a request for an additional decision.
133. The Claimant not having presented an international law claim that was separate and distinct from the Claimant's core claims, it cannot be argued in relation to the Claimant's international law arguments that a claim was "presented but omitted from the award", as required by Article 33 of the ICDR Rules. The Panel is of the view that it has fully dealt with and resolved the Claimant's core claims, and must therefore reject the request for an additional decision in respect of what is now described as the "International Law Claim".

### **3. The "Disparate Treatment Claim"**

134. The Claimant defines the "Disparate Treatment Claim" as follows:

Claimant's claim that ICANN breached its Articles and Bylaws by treating Affiliates inequitably and disparately when compared to the manner in which it treated NDC and non-applicant Verisign.<sup>188</sup>

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<sup>186</sup> See, among others, para. 28 of the Final Decision. See also para. 290, where the Panel quotes Article 2, paragraph III of the Respondent's Articles.

<sup>187</sup> See paras. 129, 131, 194-196, 200 and 221 of the Final Decision. The Panel noted in para. 195 of the Final Decision that the requirement under the Bylaws to afford impartial and non-discriminatory treatment was "consistent with the principles of impartiality and non-discrimination under international law."

<sup>188</sup> Application, para. 4. See also para. 85.

135. In respect of the Claimant's allegation of disparate treatment, the Panel stated the following in the Final Decision:

350. As regards the allegation of disparate treatment, it rests for the most part on facts already considered by the Panel in analysing the Claimant's core claims, such as turning to Verisign rather than NDC to obtain information about NDC's arrangements with Verisign, allowing for asymmetry of information to exist between the recipients of the 16 September 2016 Questionnaire, delaying providing a response to Afiliias' letters of 8 August and 9 September 2016, submitting Rule 4 for adoption in spite of it being the subject of an ongoing public comment process, and making that rule retroactive so as to encompass the Claimant's claims within its reach. Accordingly, the Panel does not consider it necessary, based on the allegation of disparate treatment, to add to its findings in relation to the Claimant's core claims.<sup>189</sup>

136. This paragraph makes clear that the Panel's decision not to make further findings in relation to what the Claimant describes as the Disparate Treatment Claim was deliberate. Equally clear is the fact that the Panel considered the allegation of disparate treatment and provided reasons for its decision in regard thereto: the allegation of disparate treatment supported the Claimant's core claims; the Panel had fully disposed of those claims; and the Panel therefore "[did] not consider it necessary to add to its findings in relation to the Claimant's core claims". As explained previously in this decision, such a conclusion cannot be revisited in the context of a request for an additional award.<sup>190</sup>
137. Having already fully exercised its authority in the Final Decision in relation to the allegation of disparate treatment, the Panel is *functus officio* and without any authority to issue an additional decision regarding what the Claimant describes in the Application as the Disparate Treatment Claim.

#### 4. Conclusion

138. For all of these reasons, the Panel must decline to issue an additional decision in respect of the three (3) "claims" that the Claimant contends had been presented but allegedly omitted by the Panel in the Final Decision. In the Panel's opinion, the first two (2) "claims" set out in the Application are *post hoc* constructs that seek to repackage the claims actually presented to the Panel and recast the manner in which they were advanced. The Panel is of the view that these "claims" were not actually presented as distinct claims, nor were "omitted" within the meaning of Article 33 of the ICDR Rules. As for the allegation of disparate treatment, the Final Decision evidences that it was considered and dealt with to the extent the Panel felt it necessary. Moreover, and in any event, an attestation of the Panel's resolution of *all* claims that had been put before it is

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<sup>189</sup> Final Decision, para. 350.

<sup>190</sup> See, in the context of Article 39 of the UNCITRAL Rules: Caron, *supra* note 142, p. 823. See also Jan Paulsson and Georgios Petrochilos, *UNCITRAL Arbitration Rules, Section IV, Article 39 [Additional Award]*, Kluwer Law International, 2017, p. 356.

provided in the last paragraph of the Final Decision's *Dispositif*, in which the Panel "[d]ismisse[d] all of the Parties' other claims and requests for relief".

### **C. Afilias' Requests for Interpretation of the Final Decision**

139. The five (5) "issues" which the Claimant contends are "vague, ambiguous, confusing, and/or contradictory"<sup>191</sup> and requiring interpretation are the following:

- a) What is the scope and meaning of the terms "pronounce" and "pronouncement" as used by the Panel in stating that ICANN Staff did not "pronounce" on Afilias' complaints and in recommending that the Board should now "pronounce" on Afilias' complaints?<sup>192</sup>
- b) Did the Panel determine that the Board must always "pronounce" on Staff action or inaction as a pre-condition for an IRP panel to decide a dispute based on Staff action or inaction? If so, what is the source for this pre-condition in the Bylaws? And, if not, then why has this pre-condition been inserted, given the Panel's observations that some sort of decision on Afilias' complaints was taken by Staff, which was at least implicitly approved by the Board through its inaction?<sup>193</sup>
- c) What law (if any) did the Panel apply in this IRP – just California law or California and international law? If the latter, to which claims and issues did the Panel apply California law, and to which did it apply international law?<sup>194</sup>
- d) On what legal or evidentiary basis did the Panel determine that ICANN has "the requisite knowledge, expertise, and experience, to pronounce" on Afilias' complaints compared to the Panel?<sup>195</sup>
- e) What standard of proof did the Panel apply to each of Afilias' submissions in support of its claims?<sup>196</sup>

140. The Panel addresses each of these requests for interpretation in turn.

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<sup>191</sup> Application, para. 94.

<sup>192</sup> *Ibid*, paras. 94 and 95-99.

<sup>193</sup> *Ibid*, paras. 94 and 100-103.

<sup>194</sup> *Ibid*, paras. 94 and 104-107.

<sup>195</sup> *Ibid*, paras. 94 and 108-111.

<sup>196</sup> *Ibid*, paras. 94, 112-114.

## 1. Alleged Ambiguity of the term “Pronounce”

141. Afiliias argues that there is ambiguity as to the scope and meaning of the terms “pronounce” and “pronouncement” as used by the Panel in the Final Decision.<sup>197</sup> Its request for interpretation of these terms includes the request “that the Panel address the following questions regarding the nature of a ‘pronouncement’”:

- a) What constitutes a “pronouncement” and what is the foundation in ICANN’s documents or applicable law for the “pronouncement” requirement, particularly in light of the Bylaws’ definition that Covered Actions in respect of which claims may be brought include both Board and Staff action and inaction?
- b) What should have been the form and substance of ICANN’s “pronouncement” on Afiliias’ complaints?
- c) On what sources did the Panel rely to fashion its “pronouncement” remedy?
- d) Before ICANN issues the “pronouncement” recommended by the Panel, must Afiliias and other Internet community members be given an opportunity to be heard by the Board?
- e) Must the Respondent’s “pronouncement” be issued following an opportunity for Afiliias and other Internet community members to receive and comment on all relevant evidence and argument?
- f) What materials, documentary or otherwise, must ICANN consider before it issues the “pronouncement” recommended by the Panel?
- g) Must the “pronouncement” be issued in a written form and made public on ICANN’s website?
- h) Must the “pronouncement” be issued with full and adequate supporting reasoning following Board deliberation?
- i) Must the “pronouncement” be issued with findings of fact and conclusions of law?
- j) Must the “pronouncement” be issued without the participation of Board members with conflicts of interest?<sup>198</sup>

142. The terms “pronounce” or “pronouncement” are used throughout the Final Decision, including in the following two (2) sub-paragraphs of the *Dispositif*.<sup>199</sup>

1. **Declares** that the Respondent has violated its *Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers*, as approved by the ICANN Board on 9 August 2016, and filed on 3 October 2016 (**Articles**), and its Bylaws for Internet Corporation for Assigned Names and Numbers, as amended on 18 June 2018 (**Bylaws**), by (a) its staff (Staff) failing to pronounce on the question of whether the Domain Acquisition Agreement entered into between Nu DotCo, LLC (**NDC**) and Verisign Inc. (**Verisign**) on 25 August 2015, as amended and supplemented by the “Confirmation of Understanding” executed by these same parties on 26 July 2016 (**DAA**), complied with the New gTLD Program Rules following the Claimant’s complaints that it violated the Guidebook and Auction Rules, and, while these complaints remained unaddressed, by nevertheless moving to delegate .WEB to NDC in June 2018, upon the .WEB contention set being taken “off hold”; and (b) its Board, having deferred consideration of the Claimant’s complaints about the propriety of the DAA while accountability mechanisms in connection with .WEB remained pending, nevertheless (i) failing to prevent the Staff, in June 2018, from moving to delegate .WEB to NDC, and (ii) failing itself to pronounce on these complaints while taking the position in this IRP, an accountability mechanism in which these complaints were squarely raised, that the Panel should not

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<sup>197</sup> Application, paras. 95-99.

<sup>198</sup> *Ibid*, para. 99.

<sup>199</sup> Final Decision, para. 413 [emphasis added].

pronounce on them out of respect for, and in order to give priority to the Board's expertise and the discretion afforded to it in the management of the New gTLD Program;

[...]

5. **Recommends** that the Respondent stay any and all action or decision that would further the delegation of the .WEB gTLD until such time as the Respondent's Board has considered the opinion of the Panel in this Final Decision, and, in particular (a) considered and pronounced upon the question of whether the DAA complied with the New gTLD Program Rules following the Claimant's complaints that it violated the Guidebook and Auction Rules and, as the case may be, (b) determined whether by reason of any violation of the Guidebook and Auction Rules, NDC's application for .WEB should be rejected and its bids at the auction disqualified;

143. The context for the declarations and the recommendation just quoted – and the use therein of the terms “pronounce” and “pronouncement” – is provided in the following extracts of the Final Decision:<sup>200</sup>

299. The evidence leads the Panel to a different conclusion insofar as the post-auction actions and inactions of the Respondent are concerned. What the evidence establishes is that upon it being revealed that Verisign had entered into an agreement with NDC and provided funds in support of NDC's successful bid for .WEB, questions were immediately raised by two (2) members of the .WEB contention set as to the propriety of NDC's conduct as a gTLD applicant in light of the New gTLD Program Rules. As explained later in these reasons, the Panel accepts that these questions, including the fundamental question of whether or not the DAA violates the Guidebook and the Auction Rules, are better left, in the first instance, to the consideration of the Respondent's Staff and Board. However, it needs to be emphasized that this deference is necessarily predicated on the assumption that the Respondent will take ownership of these issues when they are raised and, subject to the ultimate independent review of an IRP Panel, will take a position as to whether the conduct complained of complies with the Guidebook and Auction Rules. After all, these instruments originate from the Respondent, and it is the Respondent that is entrusted with responsibility for the implementation of the gTLD Program in accordance with the New gTLD Program Rules, not only for the benefit of direct participants in the Program but also for the benefit of the wider Internet community.

300. The evidence in the present case shows that the Respondent, to this day, while acknowledging that the questions raised as to the propriety of NDC's and Verisign's conduct are legitimate, serious, and deserving of its careful attention, has nevertheless failed to address them. Moreover, the Respondent has adopted contradictory positions, including in these proceedings, that at least in appearance undermine the impartiality of its processes.

[...]

322. The Panel has no hesitation in finding, based on the above, that that the Respondent represented by its conduct that the questions raised by the Claimant and “others in the contention set” were worthy of the Respondent's consideration, and that the Respondent would consider, evaluate, and seek informed resolution of the issues arising therefrom. By reason of this conduct on the part of the Respondent, the Panel cannot accept the Respondent's contention that there was nothing for the Respondent to consider, decide or pronounce upon in the absence of a formal accountability mechanism having been commenced by the Claimant. The fact of the matter is that the Respondent represented that it would consider the matter, and made that representation at a time when Ms. Willett confirmed the Claimant had no pending accountability mechanism. Moreover, since the Respondent is responsible for the implementation of the New gTLD Program in accordance with the New gTLD Program Rules, it would seem to the Panel that the Respondent itself had an interest in ensuring that these questions, once raised, were addressed and resolved. This would be required not only to preserve and promote the integrity of the New gTLD Program, but also to disseminate the Respondent's position on those questions within the Internet community and allow market participants to act accordingly.

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<sup>200</sup> Final Decision, paras. 299-300, 322, 330-331, 335, 344, 347-347 and 352 [emphasis added, except in para. 330 where the emphasis is in the original].

[...]

330. Mr. Disspain was invited by the Panel to confirm that after the November 2016 Board workshop, he knew that the question of whether NDC's bid was compliant with the New gTLD Program Rules had been raised by Afilias and was a "pending question, one on which the Board had not pronounced and had decided not to address." [emphasis added] Mr. Disspain provided this confirmation. The Panel can safely assume that what was true for Mr. Disspain was equally true for his fellow Board members who were in attendance at the workshop.

331. The Respondent urges that it was not a violation of the Respondent's Bylaws for the Board, on 3 November 2016, to defer consideration of the complaints that had been raised in relation to NDC's application and auction bids for .WEB. It is common ground that there were Accountability Mechanisms in relation to .WEB pending at the time, and it seems to the Panel reasonable for the Board to have decided to await the outcome of these proceedings before considering and determining what action, if any, it should take. The Panel notes that it reaches that conclusion without needing to rely on the provisions of Section 4.3(i)(iii) of the Bylaws, and determining whether or not that decision involved the Board's exercise of its fiduciary duties.

[...]

335. In the opinion of the Panel, the Respondent's decision to move to delegation without having pronounced on the questions raised in relation to .WEB was inconsistent with the representations made in Ms. Willett's letter of 16 September 2016, the text in the introduction to the attached Questionnaire, and Mr. Atallah's letter of 30 September 2016. The Panel also finds this conduct to be inconsistent with the Board's decision of 3 November 2016 which, while it deferred consideration of the .WEB issues, nevertheless acknowledged that they were deserving of consideration, a position reiterated by the Respondent in this IRP.

[...]

344. In the opinion of the Panel, there is an inherent contradiction between proceeding with the delegation of .WEB to NDC, as the Respondent was prepared to do in June 2018, and recognizing that issues raised in connection with NDC's arrangements with Verisign are serious, deserving of the Respondent's consideration, and remain to be addressed by the Respondent and its Board, as was determined by the Board in November 2016. A necessary implication of the Respondent's decision to proceed with the delegation of .WEB to NDC in June 2018 was some implicit finding that NDC was not in breach of the New gTLD Program Rules and, by way of consequence, the implicit rejection of the Claimant's allegations of non-compliance with the Guidebook and Auction Rules. This is difficult to reconcile with the submission that "ICANN has taken no position on whether NDC violated the Guidebook".

[...]

347. In sum, the Panel finds that it was inconsistent with the representations made to the Claimant by ICANN's Staff, and the rationale of the Board's decision, in November 2016, to defer consideration of the issues raised in relation to NDC's application for .WEB, for the Respondent's Staff, to the knowledge of the Respondent's Board, to proceed to delegation without addressing the fundamental question of the propriety of the DAA under the New gTLD Program Rules. The Panel finds that in so doing, the Respondent has violated its commitment to make decisions by applying documented policies objectively and fairly.

348. As a direct result of the foregoing, the Panel has before it a party – the Claimant – attacking a decision – the Respondent's failure to disqualify NDC's application and auction bids – that the Respondent insists it has not yet taken. Moreover, the Panel finds itself in the unenviable position of being presented with allegations of non-compliance with the New gTLD Program Rules in circumstances where the Respondent, the entity with primary responsibility for this Program, has made no first instance determination of these allegations, whether through actions of its Staff or Board, and declines to take a position as to the propriety of the DAA under the Guidebook and Auction Rules in this IRP. The Panel addresses these peculiar circumstances further in the section of this Final Decision addressing the proper relief to be granted.

[...]

352. For reasons expressed elsewhere in this Final Decision, the Panel is of the opinion that it is for the Respondent to decide, in the first instance, whether NDC violated the Guidebook

and Auction Rules and, assuming the Respondent determines that it did, what consequences should follow. [...]

144. In the opinion of the Panel, there is and can be no ambiguity as to the meaning of the words “pronounce” and “pronouncement” in the Final Decision when read in their proper context. These words are used by the Panel interchangeably with the words “decide” (paras. 322 and 352), “resolve” (para. 322) and “determine” (para. 352), thus confirming that they are to be given their usual dictionary meaning, *to wit*: “to give a judgement, or opinion or statement formally, officially or publicly”;<sup>201</sup> “to formally state an official opinion or decision”<sup>202</sup>; “to utter formally, officially, and solemnly; to declare aloud and in a formal manner. In this sense a Court is said to ‘pronounce’ judgment or a sentence”.<sup>203</sup>
145. The Panel notes that Google’s English dictionary provided by Oxford Languages lists among the synonyms of the verb “to pronounce” the verbs: “to declare”, “to rule”, “to adjudicate”, and “to judge”.<sup>204</sup> That the verb “to pronounce” and the noun “pronouncement” were used in the Final Decision in the sense just indicated is also confirmed by the fact that the word “pronounce” is used in paragraph 413(1) of the Final Decision, quoted above, to refer to the decision that the Panel itself was invited to make by the Claimant in this IRP.
146. Finally, the Panel observes that when the word “pronounced” was used by a member of the Panel to seek confirmation from Mr. Disspain, a long-time serving member of the Respondent’s Board, that after the November 2016 Board workshop he knew that the question of whether NDC’s bid was compliant with the New gTLD Program Rules had been raised by Afiliias and was a “*pending question, one on which the Board had not pronounced and had decided not to address*”,<sup>205</sup> Mr. Disspain had no difficulty understanding the question, and neither the Claimant nor the Defendant raised objection that it somehow lacked clarity.

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<sup>201</sup> Oxford Learner’s Dictionaries, s.v. “Pronounce”, <https://www.oxfordlearnersdictionaries.com/us/definition/english/pronounce> (“to give a judgement, opinion or statement formally, officially or publicly”).

<sup>202</sup> MacMillan Dictionary, s.v. “Pronounce”, <https://www.macmillandictionary.com/us/dictionary/american/pronounce> (“to formally state an official opinion or decision”).

<sup>203</sup> The Law Dictionary (on-line version), s.v. “Pronounce”, <https://thelawdictionary.org/pronounce> (“To utter formally, officially, and solemnly; to declare aloud and in a formal manner. In this sense a court is said to ‘pronounce’ judgment or a sentence.”)

<sup>204</sup> Google Dictionary provided by Oxford Languages, s.v. “Pronounce”, [https://www.google.com/search?q=pronounce+meaning&rlz=1C1GCEB\\_enCA924CA924&ei=ZuuwYfvdAbOcptQPn8iNgAo&ved=0ahUKEwj7qJaf3dT0AhUzjokEHR9kA6AQ4dUDCA4&uact=5&og=pronounce+meaning&gs\\_lcp=Cgdnd3Mtd2l6EAMyCAgAEAcQChAeMgglABAHEAoQHjIGCAAQBxAeMgYIABAHEB4yBggAEAcQHjIGCAAQBxAeMgYIABAHEB4yBggAEAcQHjIGCAAQBxAeMgYIABAHEB46BAgAEBM6BggAEB4QEzoiCAAQBR AeEBM6CAgAEAcQHhATSgQIQRgASgQIRhgAUMQCWN8EYMcNaAFwAHgAqAFkiAGYApIBazluMZgBAKABAcABAQ&scient=gws-wiz.](https://www.google.com/search?q=pronounce+meaning&rlz=1C1GCEB_enCA924CA924&ei=ZuuwYfvdAbOcptQPn8iNgAo&ved=0ahUKEwj7qJaf3dT0AhUzjokEHR9kA6AQ4dUDCA4&uact=5&og=pronounce+meaning&gs_lcp=Cgdnd3Mtd2l6EAMyCAgAEAcQChAeMgglABAHEAoQHjIGCAAQBxAeMgYIABAHEB4yBggAEAcQHjIGCAAQBxAeMgYIABAHEB4yBggAEAcQHjIGCAAQBxAeMgYIABAHEB46BAgAEBM6BggAEB4QEzoiCAAQBR AeEBM6CAgAEAcQHhATSgQIQRgASgQIRhgAUMQCWN8EYMcNaAFwAHgAqAFkiAGYApIBazluMZgBAKABAcABAQ&scient=gws-wiz.)

<sup>205</sup> Merits hearing transcript, 7 August 2020 (Mr. Disspain), pp. 976-977, quoted in Final Decision, para. 330, and quoted above in this decision at para. 143. See also Merits hearing transcript, 7 August 2020 (Mr. Rasco), pp. 898.

147. In their Submission on the Application, the *Amici* refer to a press release dated 9 June 2021 issued by counsel for the Claimant announcing that they had “[...] Secure[d] Another Victory Against ICANN in .Web Arbitration”. This press release concerns the Final Decision and it describes in terms free from ambiguity the Panel’s decision that the Respondent’s Board should consider and pronounce upon the Claimant’s claims:

The ICDR Panel has directed ICANN’s Board to conduct an objective and fair review of Afiliias’ Complaints, consider whether NDC violated ICANN’s rules and what the consequences should be if a determination of illegality is made.<sup>206</sup>

148. For all of the above reasons, the Panel has no hesitation in rejecting outright the contention that the terms “pronounce” or “pronouncement” as used in the Final Decision raise any ambiguity. By way of consequence, the Panel must deny the request for an interpretation of those terms.

149. The Panel also denies as falling manifestly outside the scope of Article 33 the Claimant’s request that the Panel address the ten (10) questions said to regard the “nature of a ‘pronouncement’”. As the Respondent correctly notes, many of those questions seek advisory opinions from the Panel on the procedures and processes that the Board should follow when it comes to consider and resolve the Claimant’s complaints against NDC and the DAA, issues as to which neither party made submissions or sought findings or declarations and which are not addressed in the Final Decision.<sup>207</sup>

## **2. Alleged Ambiguity as to the Purported Requirement of a Pronouncement as a Pre-Condition to Asserting a Claim in an IRP**

150. The Claimant’s second request for interpretation comes in the form of three (3) questions:

Did the Panel determine that the Board must always “pronounce” on Staff action or inaction as a pre-condition for an IRP panel to decide a dispute based on Staff action or inaction? If so, what is the source for this pre-condition in the Bylaws? And, if not, then why has this pre-condition been inserted, given the Panel’s observations that some sort of decision on Afiliias’ complaints was taken by Staff, which was at least implicitly approved by the Board through its inaction?<sup>208</sup>

151. This second request for interpretation seeks to build on the Claimant’s assertion that the effect of the Final Decision is that the impugned action or inaction of the Respondent’s Staff must first be submitted to the Board for pronouncement before an IRP may be pursued.<sup>209</sup> On the basis of that assertion, Afiliias requests “that the Panel provide an interpretation that explains whether its

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<sup>206</sup> See *Amici’s* Submission, para. 19, fn. 27.

<sup>207</sup> Response, para. 68.

<sup>208</sup> Application, para. 94.

<sup>209</sup> *Ibid*, paras. 100 and 103.

decision to remand to the Board for “pronouncement” assumes or requires that all future IRP challenges to Staff action or inaction must first be pronounced upon by the Board.”<sup>210</sup>

152. However, not only does the Claimant fail to support its basic assertion by reference to specific language in the Final Decision, the assertion is actually disproved by some of the Panel’s actual findings in the Final Decision. Indeed, and as the Respondent observes, “the Panel found in Afllias’ favor with regard to actions and inactions [of the Staff] for which the ICANN Board never pronounced.”<sup>211</sup> For example, the Panel found that the Staff had acted contrary to the Respondent’s Articles and Bylaws by preparing and issuing the Questionnaire of 16 September 2016 and, in June 2018, by moving toward the delegation of .WEB without the question of whether NDC had violated the New gTLD Program Rules having been determined. These Staff actions or inactions had not previously been submitted to the Board for pronouncement, and the Panel’s findings in relation thereto therefore contradict and disprove the assertion and associated concerns on which this second request for interpretation is premised.
153. This suffices for the Panel to find that the Claimant’s second request for interpretation is based on a false premise and, in any event, that it fails to identify an ambiguity in the Final Decision requiring clarification or interpretation.

### **3. Alleged Ambiguity as to the Law Applied by the Panel**

154. The Claimant’s third request for interpretation of the Final Decision concerns to the law applied by the Panel in this IRP. The Claimant contends that the Final Decision is vague and ambiguous as to the actual law applied by the Panel and requests the Panel:

...to provide an interpretation of its decision on the applicable law that clarifies (a) whether it held that California law is the sole law applicable to ICANN, (b) what specific law, if any, it applied to interpret the obligations contained in ICANN’s Articles and Bylaws, and (c) whether international law is an independent source of obligation in light of the Articles’ and Bylaws’ requirement that ICANN “shall conduct its activities in conformity with relevant principles of international law.”<sup>212</sup>

155. The Application asserts that the Panel “apparently determined that California law should be applied to the Dispute”.<sup>213</sup> After reproaching the Panel for recording in the Final Decision that the Claimant “did not express disagreement with ICANN’s position” concerning the application of California law,<sup>214</sup> the Claimant goes on further to assert that the Panel “does not identify the substantive law

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<sup>210</sup> Application, para. 103.

<sup>211</sup> Response, para. 70.

<sup>212</sup> Application, para. 107.

<sup>213</sup> *Ibid*, para. 104.

<sup>214</sup> *Ibid*, paras. 105-106.

(if any) it deemed applicable” to its rulings (other than those on privilege issues and the substance of the business judgment rule).<sup>215</sup>

156. These assertions completely distort the Final Decision in so far as the applicable law is concerned.
157. Before quoting the relevant section of the Final Decision on the Applicable Law, it bears recalling that this IRP proceeded in two (2) phases, and that while the Final Decision completed Phase II, it was the Final Decision *in the IRP*. As a consequence, some sections of the Introduction to the Final Decision relate to Phase I, some to Phase II, while others relate to the IRP as a whole. This explains why certain paragraphs of the Final Decision reproduce entire paragraphs from the Decision in Phase I, while others, in order to abbreviate the Final Decision, incorporate by reference whole sections of the Phase I Decision.<sup>216</sup>
158. The Panel reproduces below in full the Applicable Law section of the Final Decision:

#### H. Applicable Law

27. The rules applicable to the present IRP are, in the main, those set out in the Bylaws and the Interim Procedures.

28. Section 1.2(a) of the Bylaws provides that “[i]n performing its Mission, ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law [...]”. The Panel notes that Article III of the Articles is to the same effect as Section 1.2(a) of the Bylaws.

29. At the hearing on Phase I, counsel for the Respondent, in response to a question from the Panel, submitted that in case of ambiguity the Interim Procedures, as well as the Articles and other “quasi-contractual” documents of ICANN, are to be interpreted in accordance with California law, since ICANN is a California not-for-profit corporation. The Claimant did not express disagreement with ICANN’s position in this respect.

30. As noted later in these reasons, the issues of privilege that arose in the document production phase of this IRP were resolved applying California law, as supplemented by US federal law.<sup>217</sup>

159. As indicated in the above quoted paragraphs, the only issues that the Panel stated were resolved applying California law were the issues of privilege that arose in the document production phase of this IRP.<sup>218</sup> As for the statement the Claimant reproaches the Panel for having repeated in the Final Decision, namely that the Claimant “did not express disagreement with ICANN’s position”, paragraph 29 of the Final Decision states explicitly that it was made in answer to a question at the hearing on Phase I and that it concerned the law applicable to the interpretation of the Interim

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<sup>215</sup> Application, paras. 104-106; see also paras. 78-79.

<sup>216</sup> See, for example, para. 35 of the Final Decision which incorporates by reference paras. 33-67 of the Phase I Decision.

<sup>217</sup> Final Decision, paras. 27-30 [emphasis added].

<sup>218</sup> *Ibid*, para. 30. This is further elaborated on in paragraph 59 of the Final Decision. The Panel also declined the Respondent’s invitation to apply California law to determine the meaning of the terms “frivolous” and “abusive” as used in Section 4.3 (r) of the Bylaws (Final Decision, para. 400).

Procedures, as well as the Articles and other “quasi-contractual” documents of ICANN, in case of ambiguity. As the Claimant itself notes in the Application, paragraph 29 of the Final Decision reproduced *verbatim* paragraph 27 of the Phase I Decision and concerned issues that had been discussed in Phase I.<sup>219</sup>

160. As regards the other issues in dispute, the first paragraph of the Applicable Law section of the Final Decision states that the “rules applicable to the present IRP are, in the main, those set out in the Bylaws and the Interim Procedures”, while the next paragraph quotes extensively from Section 1.2(a) of the Bylaws, including its reference to relevant principles of international law.
161. In the Panel’s opinion, the Final Decision is explicit as to the rules that the Panel has applied to arrive at its various findings and conclusions and, consistent with paragraph 28 of the Final Decision, these rules are, in the main, those set out in the Bylaws and the Interim Procedures. As regards the Respondent’s time limitations defence, the Panel identified the relevant rule of the Interim Procedures in the section of the Final Decision entitled “Applicable Time Limitation Rule”.<sup>220</sup> In so far as the merits of the Claimant’s claims are concerned, “the key standards against which the Respondent has determined that its conduct should be assessed” are set out in the section of the Final Decision entitled “Relevant Provisions of the Articles and Bylaws”,<sup>221</sup> many of which are quoted in full.
162. In the Panel’s opinion, in regard to the law applied by the Panel in this IRP, the Application fails to identify any ambiguity requiring clarification or interpretation. The Claimant’s third request for interpretation must therefore be denied.

#### **4. Alleged Ambiguity as to the Basis for the Determination Concerning ICANN’s Knowledge, Expertise and Experience**

163. The Claimant’s fourth request for interpretation of the Final Decision is directed to an alleged ambiguity as to the basis for the Panel’s determination concerning ICANN’s knowledge, expertise and experience. However, instead of pointing to language that, by reason of its alleged ambiguity, might require clarification or interpretation,<sup>222</sup> the Claimant criticizes that determination and seeks an explanation as to the basis on which it was made:

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<sup>219</sup> Application, para. 79.

<sup>220</sup> Final Decision, paras. 259-268.

<sup>221</sup> *Ibid*, paras. 289-296.

<sup>222</sup> In regard to the Respondent’s knowledge, expertise and experience with the gTDL Program Rules, the Panel noted that the Guidebook and Auction Rules “originate from the Respondent and it is the Respondent that is entrusted with responsibility for the implementation of the gTDL Program in accordance with the gTLD Program Rules [...]” (Final Decision, para. 299). The Respondent does not cite this observation in its discussion of its fourth request for interpretation, nor does it refer to the

Afilias requests the Panel to provide an interpretation that clarifies the basis on which it determined that ICANN has the “knowledge, expertise, and experience” that uniquely qualifies it, as opposed to the Panel, to “pronounce” on Afilias’ complaints regarding ICANN’s obligations with respect to NDC’s violations of the New gTLD Program Rules.<sup>223</sup>

164. This is not a proper request for interpretation. As noted earlier in this decision, a request for interpretation may not be used to challenge the tribunal’s reasoning or dispositions, to seek revision, reformulation or additional explanations of a given decision, or “to ascertain which precise documents and other evidence the tribunal relied on in support of the findings in question.”<sup>224</sup>
165. This suffices to dispose of the Claimant’s fourth request for interpretation, which must be denied as being unauthorized under Article 33 of the ICDR Rules.

## **5. Alleged Ambiguity as to the Standard and Burden of Proof Applied by the Panel**

166. Finally, the Claimant argues that there is an ambiguity in the Final Decision as to the standard and burden of proof applied by the Panel. In the Claimant’s submission, the ambiguity stems from paragraphs 32 and 33 of the Final Decision, which the Panel cites below along with paragraph 31, which introduces the section of the Final Decision entitled “Burden and Standard of Proof”:

### **I. Burden and Standard of Proof**

31. It is a well-known and accepted principle in international arbitration that the party advancing a claim or defence carries the burden of proving its case on that claim or defence.

32. As regards the standard (or degree) of proof to which a party will be held in determining whether it has successfully carried its burden, it is generally accepted in practice in international arbitration that it is normally that of the balance of probabilities, that is, “more likely than not”. That said, it is also generally accepted that allegations of dishonesty or fraud will attract very close scrutiny of the evidence in order to ensure that the standard is met. To quote from a leading textbook, “[t]he more startling the proposition that a party seeks to prove, the more rigorous the arbitral tribunal will be in requiring that proposition to be fully established.”

33. These principles were applied by the Panel in considering the issues in dispute in Phase II of this IRP.<sup>225</sup>

167. In relation to this last request for interpretation, the Claimant begins by asserting, based on the above-quoted language of paragraph 32, that “the Panel state[d] that it applied a heightened standard of proof to some issues before it, in light of allegations of dishonesty or fraud”.

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evidence of Ms. Christine Willett and Ms. Samantha Eisner, two (2) members of the Respondent’s Staff, or that of Ms. J. Beckwith Burr and Mr. Christopher Disspain, two (2) Board members, all of whom filed witness statements and testified at the evidentiary hearing (see Final Decision, paras. 68 and 70).

<sup>223</sup> Application, para. 111 [emphasis added].

<sup>224</sup> Stuart Isaacs, “Chapter 22: Life after Death: The Arbitral Tribunal’s Role Following its Final Award” in Neil Kaplan & Michael J. Moser (eds.), *Jurisdiction, Admissibility and Choice of Law in International Arbitration*, Kluwer Law International, 2018, p. 367.

<sup>225</sup> Final Decision, paras. 31-33.

The Claimant goes on to state that the Panel failed to identify at any point in the Decision the issues to which it applied these principles such that “the standard of proof applicable to the issues ultimately resolved in the *Dispositif* is left indeterminable.”<sup>226</sup> Based on that reasoning, the Claimant requests that:

... the Panel provide this interpretation regarding the following issues:

a) Whether Rule 4 of the Interim Supplementary Procedures was enacted in order to time bar Afiliás' claims (Paragraphs 279 through to 281 in connection with paragraphs 1 through 3 of the *Dispositif*)?

b) Whether the pre-auction investigation, including ICANN's communications with Mr. Rasco, violated the Articles and Bylaws (Paragraphs 294 through to 295 in connection with paragraph 7 of the *Dispositif*)?

c) Whether the preparation and issuance of the Questionnaire absent disclosure of the DAA violated the Articles and Bylaws (Paragraphs 307 through to 312 in connection with paragraph 7 of the *Dispositif*)?

d) Whether the failure to disclose the “decision” from the 3 November 2016 Board workshop violated the Articles and Bylaws (Paragraphs 321 through to 329 in connection with paragraph 3 of the *Dispositif*)?

e) Whether the failure to “pronounce” on Afiliás' complaints regarding NDC violated the Articles and the Bylaws (Paragraphs 330 through to 344 of the Decision in connection with paragraph 1 of the *Dispositif*)?

f) Whether proceeding toward delegation of .WEB to NDC without a “pronouncement” violated the Articles and Bylaws (Paragraphs 330 through to 344 in connection with paragraph 1 of the *Dispositif*)?

g) Whether the disparate treatment of Afiliás violated the Articles and Bylaws (paragraph 347 in connection with paragraph 7 of the *Dispositif*)?

h) Whether the failure to promote competition violated the Articles and Bylaws (paragraphs 348 through to 348 of the Decision in connection with paragraph 1 of the *Dispositif*)?<sup>227</sup>

168. The Panel finds no basis in paragraph 32 or elsewhere in the Final Decision for the Claimant's assertion that the Panel “applied a *heightened standard* of proof to some of the issues before it, in light of allegations of dishonesty or fraud”, and the Claimant does not cite any. To the contrary, paragraph 32 identifies *one* standard of proof – the balance of probabilities – and adds that allegations of dishonesty or fraud will attract close scrutiny to ensure “*that the standard is met*”.<sup>228</sup> The Panel goes on to state that “these principles were applied by the Panel in considering *the issues in dispute in Phase II of this IRP*”,<sup>229</sup> without differentiating among these issues.

169. Nowhere in the Final Decision is there any suggestion that the Panel applied a different standard of proof than the standard identified in paragraph 32, or that it was felt appropriate to apply to any

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<sup>226</sup> Final Decision, paras. 112-113.

<sup>227</sup> Afiliás' Article 33 Application, para. 114.

<sup>228</sup> Final Decision, para. 32 [emphasis added].

<sup>229</sup> *Ibid*, para. 33 [emphasis added].

of the issues determined by the Panel close scrutiny to ensure that the standard was met. Indeed, the only explicit reference to the standard of proof in the Final Decision (other than in paragraph 32) provides confirmation that the standard applied was that identified in that paragraph.

[...] Having considered the witness and documentary evidence on [the Respondent's pre-auction investigation], which is preponderant, the Panel finds [...].<sup>230</sup>

170. As discussed in the Decision on Phase I, the Claimant had made allegations of misconduct on the part of the Respondent and members of its Staff in relation to the adoption of Rule 7 of the Interim Procedures. The Respondent's good faith in the enactment of Rule 4 was also impugned by the Claimant in its submissions concerning the time limitation defence. However, and for reasons set out in the Final Decision, the Panel did not make any finding in relation to the Rule 7 Claim<sup>231</sup> or the Claimant's allegations concerning the adoption of Rule 4.<sup>232</sup>
171. In sum, and contrary to the Claimant's assertions, the Panel did not apply a "heightened standard of proof to some of the issues". Accordingly, and quite aside from the Claimant's failure to identify any ambiguity requiring interpretation or clarification, there is no basis for the Claimant's request that the Panel identify the issues as to which it applied a heightened standard of proof, nor for its request that the Panel address the eight (8) questions listed as part of its fifth request for interpretation.
172. For these reasons, the Claimant's fifth request for interpretation is denied.

## **6. Conclusion**

173. For the reasons explained in this section, the Panel declines to provide an interpretation of the Final Decision regarding the five (5) issues identified in the Application. In the Panel's opinion, none of those five (5) requests meets the requirements for interpretation of an award set out in Article 33 of the ICDR Rules.

### **D. Costs**

174. The Respondent claims its costs and legal fees incurred as a result of the Application, as well as the Panel's fees in resolving the Application. According to the Respondent, the Application is both "frivolous" and "abusive" as these terms were defined by the Panel in the Final Decision.

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<sup>230</sup> Final Decision, para. 298. Inexplicably, the Claimant includes a request for interpretation regarding the standard applied to that issue in the list of questions cited in the text at para. 167 (see para. b).

<sup>231</sup> Final Decision, paras. 7, 355-357 and 413(9).

<sup>232</sup> *Ibid*, paras. 282-284.

175. The Claimant accepts that the Panel has the power to allocate the costs of the Application as between the Parties, and agrees with the Respondent that the “frivolous or abusive” standard set out in Section 4.3(r) of the Bylaws applies.<sup>233</sup> However, the Claimant urges that the Application is neither frivolous, nor abusive.
176. Article 33 (4) of the ICDR Rules, already cited, provides that the parties are responsible for all costs associated with any request for interpretation, correction, or an additional award, and that the Tribunal “may allocate such costs.”
177. Section 4.3(r) of the Bylaws reads as follows:
- (r) ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members. Except as otherwise provided in Section 4.3(e)(ii), each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, including the costs of all legal counsel and technical experts. Nevertheless, except with respect to a Community IRP, the IRP Panel may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.<sup>234</sup>
178. In the Final Decision, the Panel defined frivolous as used in Section 4.3(r) as “of little weight or importance”, “having no sound basis (as in fact or law)”, “lacking in seriousness” or “clearly insufficient on its face”.<sup>235</sup> As for the term “abusive”, the Panel defined it as “characterized by wrong or improper use or action”.<sup>236</sup>
179. The Panel has dismissed the Application in its entirety. In the opinion of the Panel, under the guise of seeking an additional decision, the Application is seeking reconsideration of core elements of the Final Decision. Likewise, under the guise of seeking interpretation, the Application is requesting additional declarations and advisory opinions on a number of questions, some of which had not been discussed in the proceedings leading to the Final Decision.
180. In such circumstances, the Panel cannot escape the conclusion that the Application is “frivolous” in the sense of it “having no sound basis (as in fact or law)”. This finding suffices to entitle the Respondent to the cost shifting decision it is seeking and obviates the necessity of determining whether the Application is also “abusive”.
181. The Respondent avers that it has incurred US \$236,884.39 in legal fees opposing Afiliás’ Article 33 Application and submits that this sum is reasonable. The Respondent points out that the Application consisted of 68 pages of text with over 200 footnotes; cited 17 new authorities comprising more

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<sup>233</sup> Afiliás’ Reply, para. 131.

<sup>234</sup> Bylaws, Section 4.3(r) [emphasis added].

<sup>235</sup> Final Decision, para. 401.

<sup>236</sup> *Ibid.*

than 170 pages; and sought far-reaching relief, all of which required the Respondent to take the Application seriously and respond accordingly. A schedule of fees incurred in responding to the Application was attached as Appendix B to the Response. In regard to the amount claimed by the Respondent for its legal fees, the Panel notes that while the Claimant has denied that the Application is frivolous or abusive, it did not challenge the reasonableness of the amount of fees claimed by the Respondent.

182. The Panel finds that the amount of fees incurred by the Respondent to respond to the Application, as detailed in Appendix B to the Response, is reasonable. Considering the Panel's above finding in paragraph 180, the Panel considers that the Respondent, which is clearly "the prevailing party" in respect of the Application, should be reimbursed its legal fees under Section 4.3(r) of the Bylaws, and the Panel so orders.
183. The ICDR has informed the Panel that the fees and expenses of the Panelists in relation to the Application total US \$140,335.30, and that there are no administrative fees of the ICDR in relation to the Application. The ICDR has further advised that the entire advance on non-party costs in relation to the Application has been paid by the Respondent.
184. Considering the outcome of the IRP as a whole, including the findings of breach of the Articles and Bylaws by the Respondent as set out in the Final Decision, the Panel denies the Respondent's claim that the Claimant also be made to bear the fees of the Panel members in relation to the Application, which, as part of the administrative costs of the IRP, shall be borne by the Respondent in accordance with the default rule set out in Section 4.3 (r) of the Bylaws.

## V. **DISPOSITIF**

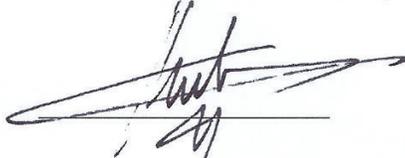
185. For the reasons set out in this decision, the Panel hereby unanimously:

1. **Denies** in its entirety Afiliat Domains No. 3 Limited's Rule 33 Application for an Additional Decision and for Interpretation, dated 21 June 2021 (**Application**);
2. **Grants** the Respondent's request that the Panel shift liability for the legal fees incurred by the Respondent in connection with the Application, **fixes** at US \$236,884.39 the amount of the legal fees to be reimbursed to the Respondent by the Claimant on account of those legal fees, and **orders** the Claimant to pay this amount to the Respondent within thirty (30) days of the date of notification of this decision, after which 30-day period this amount shall bear interest at the rate of 10% *per annum*;
3. **Fixes** the costs of the Application, consisting of the fees and expenses of the Panel members, at US \$140,335.30;
4. **Denies** the Respondent's request that the Claimant bear the fees of the Panel members in connection with the Application, and **declares** that the costs of

the Application, inclusive of the fees and expenses of Panel members, shall be borne in their entirety by the Respondent.

186. This Decision may be executed in counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Place of the IRP: London, England



Catherine Kessedjian

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Richard Chernick

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Pierre Bienvenu, Ad. E., Chair

Dated: 21 December 2021

the Application, inclusive of the fees and expenses of Panel members, shall be borne in their entirety by the Respondent.

186. This Decision may be executed in counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Place of the IRP: London, England

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Catherine Kessedjian



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Richard Chernick

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Pierre Bienvenu, Ad. E., Chair

Dated: 21 December 2021

the Application, inclusive of the fees and expenses of Panel members, shall be borne in their entirety by the Respondent.

186. This Decision may be executed in counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Place of the IRP: London, England

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Catherine Kessedjian

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Richard Chernick



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Pierre Bienvenu, Ad. E., Chair

Dated: 21 December 2021

## Attachment C to Board Reference Materials

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1 (310) 620-5710  
stevenmarenberg@paulhastings.com

July 23, 2021

**VIA E-MAIL AND FEDEX**

Mr. Maarten Botterman  
Chair, Board of Directors  
Internet Corporation for Assigned Names  
and Numbers  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536  
[maarten.botterman@board.icann.org](mailto:maarten.botterman@board.icann.org)

Re: *Afilias Domains No. 3 Limited v. Internet Corporation for Assigned Names and Numbers, ICDR Case No. 01-18-0004-2702 - Request that Afilias be disqualified from all .WEB proceedings based on violations of the Blackout Period*

Dear Mr. Botterman, Chair, and Members of the ICANN Board:

This letter is submitted on behalf of Nu Dotco, LLC (“NDC”), Awardee of the new .WEB gTLD, and VeriSign, Inc. (“Verisign”), an interested party, together *Amici* in the .WEB Independent Review Proceedings (“IRP”) initiated by Afilias and subject to the Panel’s 20 May 2021 Final Decision. This letter requests that ICANN reject any and all claims and objections by Afilias regarding the auction, Award or assignment of .WEB on the grounds that Afilias should be disqualified from all such proceedings and thus lacks standing to assert any objections with respect to the auction, Award or any related assignment.<sup>1</sup>

The grounds for this request are that Afilias intentionally committed serious violations of the Blackout Period rules mandated by the Auction Rules Clause 6, and the new gTLD Bidder Agreement Section 2.6, by engaging in negotiations and other prohibited conduct with other contention set members during the Blackout Period. The Blackout Rules are clear on their face and admit of no exception. The violation by Afilias is confirmed in written documents authored by Afilias and is beyond dispute.

This request is further made on grounds that Afilias’ Blackout Period violations were in furtherance of an improper scheme to coerce another contention set member, NDC, to accept terms of a “private auction” in which (i) pricing would be fixed in advance of the auction and (ii) Afilias would guarantee that proceeds of the auction be paid to other participants in exchange for losing the auction. The conduct by Afilias and others in furtherance of their collusive scheme included,

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<sup>1</sup> NDC and Verisign reserve the right to submit at a later date additional evidence and argument relevant to other issues raised by ICANN’s review of the Panel’s Final Decision.

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among other acts: (a) coordinated, serial objections to the .WEB auction based on false representations to ICANN regarding a change in ownership or control of NDC—properly rejected by ICANN in a decision confirmed by the Panel in its Final Decision; (b) baseless litigation against ICANN to delay the public auction for .WEB—dismissed by two courts as without merit; and (c) attempts to rig the .WEB auction by dividing auction participants into “strong” and “weak” participants, with “weak” participants predetermined to lose the auction in exchange for the payment of a pre-defined sum.

These collusive schemes by Afilias and other members of the contention set have delayed the delegation of .WEB for almost 5 years. This has operated to the detriment of the entire DNS community.

NDC refused to be part of Afilias’ collusive schemes. A fair and competitive public auction thus proceeded on 27-28 July 2016. NDC submitted the highest bid at the auction, approximately \$142,000,000, and the Award was in its favor.

As a result of NDC’s successful bid, the proceeds of the auction were deposited with ICANN to be used for the benefit of the entire Internet community through their investment in the Domain Name System as determined by ICANN and the community. Contrary to Afilias’ Blackout Period scheme, those proceeds were *not* paid to participants who had colluded in advance that they would lose the auction.<sup>2</sup>

## I. The Final Decision by the IRP Panel

In its Final Decision, the Panel dismissed Afilias’ requests that the Panel should either (i) order the disqualification of NDC’s bid or (ii) order ICANN “to disqualify NDC’s bid for .WEB, proceed with contracting the Registry Agreement for .WEB with the Claimant ..., and specify the bid price to be paid by the Claimant.” (Final Decision, 20 May 2021, ¶ 126.) The Panel further rejected Afilias’ demand that the Panel *not* remand those issues to the ICANN Board for its determination as required by the Bylaws.<sup>3</sup> Instead, the Panel directed that all remaining

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<sup>2</sup> The relevant correspondence and other documents evidencing the conduct of Afilias and other members of the .WEB contention set described herein are submitted as exhibits to this letter. In addition, the particulars regarding Afilias’ violations of the Blackout Period are set forth herein and previously have been described in detail in *Amici’s* briefs submitted in the IRP and in *Amici’s* October 2016 responses to ICANN’s Topics for Comment. *Amici* refer ICANN to those submissions for further information regarding Afilias’ Blackout Period violations.

<sup>3</sup> Afilias falsely argued -- an argument rejected by the Panel -- that the Panel should not “remand the matter to the very ICANN Board that sought to rubber-stamp Verisign’s acquisition of .WEB.” (Afilias’ 24 July 2020 Claimant’s Response to *Amicus Curiae* Briefs, ¶ 3). “Given ICANN’s conduct that led to these proceedings, and the positions that ICANN has adopted in these proceedings -- to say nothing of its conduct -- the only fair and final way for Afilias’ claims to be considered is for the Panel to resolve this Dispute.” (*Id.* ¶ 216.)

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objections by Afilias or NDC regarding the auction and/or Award be directed to the ICANN Board for decision. (*Id.* ¶ 319.)

Pursuant to the Final Decision, ICANN should determine NDC’s objection that Afilias violated the Blackout Period and should be disqualified from all proceedings related to the auction or any potential assignment of the .WEB Registry Agreement. ICANN already has acknowledged the importance of the Blackout violations to the relief sought by Afilias in the IRP. ICANN’s List of Issues for the IRP dated 12 October 2020 provides the following: “Are [Afilias’] remedies appropriate in light of all relevant circumstances, *including Afilias’ alleged violation of the Auction Rules and Bidder Agreement?*” (Emphasis added.) According to the Panel, ICANN should now consider these issues whether or not they have been raised through a formal accountability mechanism in order to preserve and promote the integrity of the New gTLD Program. (Final Decision, 20 May 2021, ¶ 319.)

The Panel further decided on the merits, and rejected, Afilias’ claim that the Auction Award to NDC, or a subsequent assignment of the .WEB Registry Agreement to Verisign, would be contrary to ICANN’s Bylaw commitments to promote competition. As explained in dispositive terms by the Panel: “ICANN does not have the power, authority, or expertise to act as a competition regulator by challenging or policing anticompetitive transactions or conduct.”<sup>4</sup>

## II. Afilias’ Violations of the Blackout Period

Afilias’ Blackout Period violations were part of a broader effort by Afilias and certain other members of the .WEB contention set to coerce NDC to agree to resolve the contention set in a rigged manner where pre-determined auction losers would be paid for their losing bids. While NDC instead pursued a public auction administered by ICANN—where the proceeds of the auction would be invested in the improvement of the Domain Name System—Afilias and others repeatedly sought to derail the public auction at any cost and by any means in order to coerce an agreement

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<sup>4</sup> Final Decision, 20 May 2021, ¶ 60. The Panel found ICANN’s evidence “compelling” that it fulfills its mission to promote competition through the expansion of the domain name space and facilitation of innovative approaches to the delivery of domain name registry services -- not by acting as an antitrust regulator. The Panel further quoted Afilias’ own statements to this effect, which were made outside of the IRP proceedings when Afilias had different interests it wished to pursue. Emphasizing Afilias’ contradictory positions, the Panel quoted Afilias’ earlier statement, placing emphasis on Afilias’ contradictory language outside the IRP:

While ICANN’s mission includes the promotion of competition, this role is best fulfilled through the measured expansion of the name space and the facilitation of innovative approaches to the delivery of domain name registry services. *Neither ICANN nor the GNSO have the authority or expertise to act as anti-trust regulators.* Fortunately, many governments around the world do have this expertise and authority, and do not hesitate to exercise it in appropriate circumstances. *Id.* ¶ 349 (emphasis in original).

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to a “private auction,” in which they could control the winner and share the auction proceeds. Afilias’ violation of the Blackout Period was part of its continuation of these efforts to settle .WEB and represents a serious and culpable breach of community ethics and ICANN policy.

**A. *Afilias’ Improper Attempt to Induce NDC to Abandon a Public Auction in Favor of a Private Auction***

Prior to the auction, Afilias, Donuts, and other members of the .WEB contention set agreed to settle the contention set via a private auction and undertook efforts to coerce NDC to join that agreement. Private resolution of contention sets is permitted under the New gTLD Program and may be perfectly acceptable, depending on the terms of the accompanying agreement. A private auction, however, cannot be used as a disguise for collusive behavior that violates ICANN’s rules or price fixing.<sup>5</sup> Indeed, ICANN’s Board has recognized, in connection with its ongoing review of the New gTLD Program rules for future new gTLD rounds, that private auctions increase the risks of “gaming” the system in a manner that may be inconsistent with ICANN’s Commitments and Core Values.<sup>6</sup>

On 27 April 2016, ICANN scheduled a public auction for the .WEB gTLD, notified all members of the contention set, and provided them with instructions and deadlines to participate in the auction. Thereafter, the members of the .WEB contention set other than NDC reached an agreement to resolve the contention set by private auction, and pressured NDC to join that agreement.<sup>7</sup> NDC declined.

On 6 June 2016, Donuts again asked NDC to agree to a private resolution of the contention set and to postpone the auction, scheduled for 27 July 2016, by two months. NDC declined again.<sup>8</sup>

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<sup>5</sup> Authorities cited at Section II. E., *infra*.

<sup>6</sup> See Ex. A (26 Sept. 2018 Letter from C. Chalaby, Chair, ICANN Board of Directors, to C. Langon-Orr and J. Neuman, Co-Chairs GNSO New gTLD Subsequent Procedures PDP Working Group re: New gTLD Subsequent Procedures PDP WG Initial Report (“[T]he Board believes that applications should not be submitted as a means to engage in private auctions, including for the purpose of using private auctions as a method of financing their other applications . . . [W]e are concerned about how gaming for the purpose of financing other applications, or with no intent to operate the gTLD as stated in the application, can be reconciled with ICANN’s Commitments and Core Values”); see also Ex. B (30 Sept. 2020 Letter from M. Botterman, Chair, ICANN Board of Directors, to C. Langon-Orr and J. Neuman, Co-Chairs GNSO New gTLD Subsequent Procedures PDP Working Group re: New gTLD Subsequent Procedures PDP WG Initial Report (“The Board encourages the PDP WG to provide a rationale why the resolution of contention sets should not be conducted in a way such that any net proceeds would benefit the global Internet community rather than other competing applicants.”)).

<sup>7</sup> Witness Statement of John L. Kane (“Kane Witness Statement”), <https://www.icann.org/en/system/files/files/irp-afilias-witness-statement-kane-redacted-26nov18-en.pdf>, ¶¶ 20-21.

<sup>8</sup> See Ex. C (6-7 June 2016 emails between Juan Calle of NDC and Jon Nevett of Donuts); see also Witness Statement of Jose Ignacio Rasco III, 1 June 2020 (“Rasco Witness Statement”), <https://www.icann.org/en/system/files/files/irp-afilias-witness-statement-rasco-iii-redacted-01jun20-en.pdf>, ¶ 6.

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The following day, 7 June 2016, Afilius asked NDC to reconsider, stating that *Afilius would “guarantee” that NDC would “score at least 16 mil if you go into the private auction and lose.”* NDC again declined, whereupon *Afilius offered to increase the payment to NDC to “\$17.02” million.* NDC again declined.<sup>9</sup>

When NDC refused Afilius’ latest offer, Afilius and other members of the contention set undertook concerted efforts to interfere with the scheduled auction.

**B. *False Claims of a Change in Management or Control of NDC -- Rejected by ICANN and the IRP Panel***

On 23 June 2016, in an effort to interfere with the upcoming auction, Donuts and its wholly-owned subsidiary Ruby Glen falsely represented to ICANN that NDC had changed its ownership and/or management structure, but had not reported that change to ICANN as required. Donuts and Ruby Glen moved ICANN to delay the public auction based on these misrepresentations.<sup>10</sup> On or about 30 June 2016, Donuts filed a complaint with ICANN’s Ombudsman repeating its false allegations against NDC.<sup>11</sup>

On 11 July 2016, Schlund Technologies GmbH (“Schlund”) and Radix FZC (“Radix”)—both members of the .WEB contention set—submitted separate yet identically worded letters to ICANN requesting postponement of the Auction to allow ICANN to investigate NDC and potentially disqualify it. Both Schlund and Radix misrepresented to ICANN: “We support a postponement of the .WEB auction to give ICANN and the other applicants time to investigate where there has been a change of leadership and/or control of another applicant, NU DOT CO LLC. To do otherwise would be unfair, as we do not have transparency into who leads and controls the applicant as the auction approaches.”<sup>12</sup>

Despite these concerted efforts, on 13 July 2016, ICANN properly denied the requests for a postponement of the .WEB public auction. ICANN found “no basis to initiate the application change request process or postpone the auction” based on any alleged change in NDC’s

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<sup>9</sup> See Ex. D (7 June 2016 text messages between Juan Calle of NDC and Steve Heflin of Afilius); see also Ex. E (Text messages between Jose Rasco of NDC and John Kane of Afilius).

<sup>10</sup> See Ex. F (23 June 2016 email from Jon Nevelt of Donuts to ICANN’s customer portal).

<sup>11</sup> Witness Statement of Christine A. Willett, 31 May 2019 (“Willett Witness Statement”), <https://www.icann.org/en/system/files/files/irp-afilius-witness-statement-willett-31may19-en.pdf>, ¶ 24.

<sup>12</sup> See Ex. G (11 July 2016 letter from Thomas Moarz of Schlund to Akram Attallah, Christine Willett and John Jeffrey of ICANN); Ex. H (11 July 2016 email from Brijesh Joshi of Radix to Akram Attallah, Christine Willett and John Jeffrey of ICANN).

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management.<sup>13</sup> NDC and Verisign understand that ICANN’s Ombudsman similarly determined that there were no grounds for a delay of the auction.

On 17 July 2016, Donuts and Radix jointly submitted a reconsideration request to ICANN, again seeking a delay of the public auction based on the same misrepresentations. ICANN properly rejected this request on 21 July 2016.<sup>14</sup>

Afilias repeated these false accusations regarding NDC in its IRP, alleging that ICANN violated its Bylaws by not properly investigating and deciding the claims. Contrary to Afilias’ claims, in its Final Decision, following a full hearing, the Panel found no fault with ICANN’s pre-auction investigation, and “reject[ed] the Claimant’s [Afilias] contention that the Respondent violated its Bylaws by the manner in which it investigated and resolved the pre-auction allegations of change of control within NDC.” (Final Decision, 20 May 2021, ¶ 295).

**C. *The Spurious Court Action to Stop the Public Auction -- Rejected by Both the District Court and Court of Appeals***

After the false claims of material changes in NDC’s ownership and/or control were rejected by ICANN three times, on 22 July 2016, Ruby Glen filed a civil action against ICANN in the United States District Court for the Central District of California (Case No. 16-5505) seeking a temporary restraining order (“TRO”) postponing the public auction. The civil action was based on the same meritless accusations that ICANN had repeatedly rejected.

The district court denied Ruby Glen’s TRO on 26 July 2016. In its Order, the court specifically noted “the weakness of Plaintiff’s efforts to enforce vague terms contained in the ICANN bylaws and Applicant Guidebook” and concluded that Ruby Glen had failed to “establish that it is likely to succeed on the merits” and failed to demonstrate that its allegations “raise[d] serious issues.”<sup>15</sup> Ruby Glen’s action subsequently was dismissed with prejudice, and its appeal of that dismissal was rejected by the Ninth Circuit Court of Appeals.<sup>16</sup> Nonetheless, Afilias repeated these false claims in the IRP. As explained above, Afilias’ claims were rejected by the Panel in its Final Decision.

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<sup>13</sup> See Ex. I (13 July 2016 Letter from Christine A. Willett, Vice President, GDD Operations of ICANN, to the .WEB contention set).

<sup>14</sup> Ex. J (21 July 2016 Determination of the Board Governance Committee (“BGC”) Reconsideration Request 16-9).

<sup>15</sup> See Ex. K (*Ruby Glen, LLC v. Internet Corporation for Assigned Names and Numbers*, United States District Court for the Central District of California, Case No. 2:16-cv-05505-PA-AS (“*Ruby Glen Action*”), Dkt. No. 21 (Order denying Ruby Glen’s Application for Temporary Restraining Order)).

<sup>16</sup> See Ex. L (*Ruby Glen Action*, Dkt. No. 53 (Order from the Court of Appeals for the Ninth Circuit affirming dismissal of Ruby Glen’s complaint)).

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**D. *The Schlund Private Auction Proposal***

Alongside the other efforts to interfere with the public auction, on 5 July 2016, Oliver Mauss of Schlund emailed NDC pushing a proposal for an “alternative private auction,” claiming its numerous advantages over a public auction. The so-called “benefits” of this alternative form of private auction, according to Mr. Mauss, included that the *winning participant would pay less for the gTLD* than it would in a competitive public auction. The agreement would include the following “principles”: “It divides the participants into groups of strong and weak”; “the weak *players are meant to lose and are compensated for this with a pre-defined sum*”; “the strong players bid for the asset”; “the losing strong players receive a higher return than in the Applicant Auction”; and “the losing weak players receive a lower return than in the Applicant Auction.”<sup>17</sup> (emphasis added). Through his proposal, Mr. Mauss contended, the “winning party” would pay “less for the asset in comparison to both” a public auction organized by ICANN and a private auction organized by the applicants themselves. *Id.* NDC did not respond to Mr. Mauss’ email. An agreement to the terms of the Schlund proposal, like the proposals made directly by Afiliast to “guarantee” NDC a specific amount to lose a private auction, could have involved NDC in a collusive scheme that may have raised issues under the antitrust laws.

**E. *Afiliast’s Reiteration of the Settlement Proposals During the Blackout Period in Order to Resolve .WEB***

Once the deposit deadline for an ICANN administered auction passes, both the Bidder Agreement and the Auction Rules for new gTLD auctions explicitly prohibit all applicants within a contention set from “cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other’s, or any other competing applicants’ bids or bidding strategies or discussing or negotiating settlement agreements...” until the auction has completed and full payment has been received from the winner. (Bidder Agreement, § 2.6; Auction Rules, Clause 68). Violation of this “Blackout Period” is a “serious violation” of ICANN’s rules under the Bidder Agreement and Auction Rules—so much so that applicants are expressly warned in writing that such violations may result in forfeiture of the violator’s application. (Bidder Agreement, § 2.10; Auction Rules, Clause 61).

Afiliast’s continuation of negotiations to resolve the contention set during the Blackout Period represents a clear and intentional violation of the Blackout Rules. Afiliast is a sophisticated applicant with full knowledge and awareness of the rules, including those pertaining to the Blackout Period. Moreover, Larry Ausubel of Power Auctions LLC (the administrator appointed by ICANN to conduct the Auction) sent every member of the .WEB contention set an email on 20

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<sup>17</sup> See Ex. M (5 July 2016 email from Oliver Mauss of Schlund to Juan Calle of NDC with attachment proposing an “Alternative Private Auction”).

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July 2016, expressly reminding them that “the Deposit Deadline for .WEB/.WEBS has passed and we are now in the Blackout Period.”<sup>18</sup>

Nonetheless, on 22 July 2016, five days before the Auction’s 27 July 2016 commencement date and after the deposit deadline for the auction had passed—plainly within the Blackout Period—Afilias continued to seek a settlement of .WEB in accordance with its earlier offers, thereby engaging in a discussion regarding bids, bidding strategies and settlement contrary to the Blackout Rules. Specifically, Afilias sent the following text message to NDC with reference to its earlier proposals seeking a settlement of the auction: “If ICANN delays the auction next week would you again consider a private auction? Y-N.”<sup>19</sup> This proposal to continue settlement discussions was an indisputable violation of the Blackout Rules. NDC did not respond to Afilias’ proposal.

The direct communication from Afilias to NDC on 22 July 2016 was in furtherance of Afilias’ earlier offers to settle the .WEB contention set by paying the proceeds of a private auction to the losing bidders in exchange for their losing the auction. Indeed, Afilias already had guaranteed NDC a payment of \$17.2 million for settling the contention set on Afilias’ terms.

NDC told Afilias and others on multiple occasions before the Blackout Period started that NDC was not interested in participating in a private settlement of the contention set. Despite these repeated rejections, Afilias chose to make a last ditch effort during the Blackout Period to salvage the potential windfall it and other members of the contention set sought to secure for themselves via the private settlement they were pushing.

Afilias’ plain violation of the Blackout Rules should result in its disqualification from the auction and all proceedings related to .WEB. The Blackout Period rules are specific and clear, and Afilias’ violation of the rules is express and in writing.

Further, Afilias’ Blackout Period violation is directly relevant to ICANN’s consideration of Afilias’ claims against ICANN, NDC and Verisign. By reason of its violations, Afilias should be disqualified and therefore lacks standing to pursue its objections against NDC’s application. In addition, based on its disqualification (among other reasons addressed in this IRP), Afilias cannot be awarded the .WEB gTLD, the relief it seeks on its claims against ICANN for alleged violations of the ICANN Bylaws.

Afilias has delayed the delegation of .WEB for 5 years, at a cost of tens of millions of dollars to the affected parties, based on convoluted and false claims of technical violations of the

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<sup>18</sup> See Ex. N (20 July 2016 email from Larry Ausubel of Power Auctions LLC to Jose Rasco of NDC regarding the commencement of the Blackout Period).

<sup>19</sup> See Ex. O (22 July 2016 Text messages from Jonathan Kane of Afilias to Jose Rasco of NDC).

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New gTLD Program Rules.<sup>20</sup> By contrast, Afilias' undeniable violation of the Program rules is clear and far more culpable than its manufactured claims of violations against NDC and Verisign.

During the IRP proceedings, Afilias offered no meaningful response to the evidence of its Blackout Period violation. On the contrary, during the IRP, Afilias actively took steps to prevent its witnesses from being questioned regarding the Blackout Period violation (among other issues). For example, Mr. Kane's written message to Mr. Rasco on 22 July 2016 was a violation of the Blackout Rules. Rather than ask Mr. Kane to testify to respond to the serious questions raised by his message, Afilias chose not to call him as a witness and, in fact, withdrew his witness statement so that others could not cross-examine him during the hearings. By contrast, Afilias offered only the baseless views of its counsel regarding Mr. Kane's conduct and intentions.<sup>21</sup> *See Graves v. United States*, 150 U.S. 118, 121 (1893) (“[I]f a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.”).

During the IRP, Afilias *admitted* that the Blackout Period was designed to prevent bid rigging. (Afilias' Response to the *Amicus Curiae* Briefs, ¶¶ 179–84). Yet that is precisely what Afilias attempted. Its Blackout Period conduct *was* an attempt at bid rigging. Under the auction format and explicit terms proposed by Afilias, Schlund and other members of the contention set, *see* Ex. M, the winner would be able to obtain .WEB for a lower price than in a public auction administered by ICANN by paying pre-determined amounts to its competitors in exchange for their losing the auction. Such a collusive auction is the type of agreement that the Blackout Period is designed to prevent. Furthermore, bid rigging and other forms of collusive price fixing are considered “*per se*” illegal. *See United States v. Joyce*, 895 F.3d 673, 679 (9th Cir. 2018) (holding bid rigging is a “*per se*” antitrust violation); Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 2005(b) (4th ed. 2013-2018) (“Bid-rigging schemes are commonly thought to be more harmful than ordinary price fixing because bid-rigging is much easier for cartel members to enforce...For this reason, bid-rigging has been treated with greater hostility than price fixing generally.”).

Afilias' conduct deserves the most serious sanctions, including a disqualification from all proceedings regarding .WEB. The sanctions should set an example of enforcement of the Program rules, and against gaming the system, for future gTLD rounds. As the ICANN Board has

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<sup>20</sup> All of Afilias' claims are contrary to the clear testimony of ICANN witnesses during the IRP that NDC's and Verisign's conduct was consistent with ICANN and industry practices. *See, e.g.*, Ms. Willett, Head of the New gTLD Program, IRP Transcript at 707:16–708:3 (“my general understanding based on Verisign's press release is that they had some future intention... to operate the TLD if ICANN approved of a TLD assignment. I also understood from the press release that they had committed funds that were put forward towards the auction. So to me that was akin to and consistent with the auction rules...”)

<sup>21</sup> *See* Afilias' Response to the *Amicus Curiae* Briefs, ¶¶ 179–84. *Amici* could not compel Mr. Kane's testimony.

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recognized, it is important to prevent gaming of the Program rules in future new gTLD rounds. (Fn. 6, *supra*.) That is especially true where the form of gaming ICANN's system may also be a violation of the antitrust laws, casting doubt on the fairness and legality of DNS activities.

Here, Afilias sought to game the Program rules through collusive activity. Its conduct went far beyond proposing a fair private auction of the kind that ICANN supports. Instead, the express terms of the proposals by Afilias and other contention set members were intended to limit competitive bidding in exchange for pre-auction guarantees of payments by competitors and potential pre-selection of winning and losing participants. Further, the effect of these proposals would be to deprive the Internet community of funds that otherwise could be invested in DNS security and reliability, instead diverting those funds to be split among the losing competitors solely for their own private benefit.

NDC and Verisign request that ICANN confirm that it will consider and reach a determination regarding Afilias' Blackout Period violation as part of its post-IRP process for .WEB. If ICANN would like this request to be endorsed in any other form, please advise us.

Respectfully submitted,

*/s/ Steven A. Marenberg*

Steven A. Marenberg  
PAUL HASTINGS LLP

cc: John Jeffrey, Esq.  
Jose I. Rasco  
Thomas Indelicarto, Esq.  
Ronald L. Johnston, Esq.

# Exhibit A

26 September, 2018

RE: New gTLD Subsequent Procedures PDP WG Initial Report

Cheryl Langdon-Orr, Co-Chair  
Jeff Neuman, Co-Chair  
GNSO New gTLD Subsequent Procedures PDP Working Group

Dear Ms. Langdon-Orr and Mr. Neuman,

I am writing in response to the request in your 10 July 2018 [letter](#) for the Board to provide feedback on the New gTLD Subsequent Procedures Policy Development Process (PDP) Working Group's Initial Report. The Board is impressed by the level of detail that the Working Group has gone to in analyzing the results of the current new gTLD round and the serious effort that is being made to reach consensus on the policies related to each of the issues. We understand that the policy recommendation for the Generic Names Supporting Organization (GNSO) will be built upon existing policies and the Application Guidebook (AGB) instructions unless, and except, for where they have been modified based on Subsequent Procedures PDP consensus. The Board also appreciates the efforts the GNSO and the PDP leadership have taken to include other stakeholders in the discussions on the various issues in the PDP working group and subgroups. Since there are a number of areas the PDP Working Group is still considering, the Board may have comments in the future as discussions advance.

There were a few issues that the Board would like to comment on:

- In regard to Global Public Interest, section 2.3.2, with the growing reliance on PICs as a method of resolving public interest issues within an application, the Board remains concerned with the lack of definition of the global public interest in the context of Public Interest Commitments (PIC) and the Public Interest Commitments Dispute Resolution Procedure (PICDRP). As discussed further below, the Board would like to see additional work fleshing out what is meant by the public interest in this context and additional recommendations concerning PIC enforceability.
- The Board appreciates the approach being taken to deal with the serious issue of Closed Generics, especially with the complex issues related to the public interest and public interest goals in the use or restriction of generic terms in any language. We are aware of the continuing conflicts among competing aspects of the public interest in this area and are concerned about the scalability of any proposed solution. This issue has been pending for some time. In 2015, the Board enacted a resolution on closed generics that provided as follows:

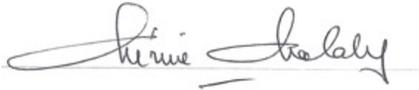
*“The NGPC is also requesting that the GNSO specifically include the issue of exclusive registry access for generic strings serving a public interest goal as part of the policy work it is planning to initiate on subsequent rounds of the New gTLD Program, and inform the Board on a regular basis with regards to the progress on the issue.”*

Because these difficult questions on how to define the public interest and public interest goals have been pending for several years, the Board re-emphasizes that it remains critical for the Subsequent Procedure group to further flesh out these concepts in all proposed options for addressing closed generics.

- Regarding question 2.7.4.e.2 on “gaming” or abuse of private auction, the Board believes that applications should not be submitted as a means to engage in private auctions, including for the purpose of using private auctions as a method of financing their other applications. This not only increases the workload on processing but puts undue financial pressure on other applicants who have business plans and financing based on their intention to execute the plan described in the application. In particular, we are concerned about how gaming for the purpose of financing other applications, or with no intent to operate the gTLD as stated in the application, can be reconciled with ICANN's Commitments and Core Values.
- Regarding Applicant reviews, section 2.7.7, the Board is interested in recommendations for a mechanism that can be used when there are issues that block an application moving forward.
- The Board is concerned about unanticipated issues that might arise and what mechanism should be used in such cases. The Board understands that the PDP Working Group is discussing a Predictability Framework that could potentially be used to address these types of issues. The Board looks forward to the outcomes of these discussions.
- Regarding timelines for future rounds, the Board requests that the PDP Working Group consider the issue of round closure and what criteria or mechanism could be used to close a round.
- The Board looks forward to further discussions in the PDP on Name Collisions, Applicant Support and the Predictability Framework as each of these may have significant operational impact. On Name Collisions there may be an opportunity to combine work being done by SSAC on the collision risk with the work being done in the PDP to achieve a consensus solution to this issue.

Again, the Board appreciates the efforts and time being devoted by the Subsequent Procedure Working Group and its leadership. We are available to respond to any specific questions the PDP WG might have for the Board.

Best regards,



Cherine Chalaby  
Chair, ICANN Board of Directors

# Exhibit B

30 September 2020

RE: New gTLD Subsequent Procedures PDP WG Draft Final Report

Cheryl Langdon-Orr, Co-Chair  
Jeff Neuman, Co-Chair  
GNSO New gTLD Subsequent Procedures PDP Working Group

Dear Ms. Langdon-Orr and Mr. Neuman,

I am writing in response to your [letter](#) from 20 August 2020, in which you informed the Board of the new gTLD Subsequent Procedures PDP Working Group's (PDP WG) publication of the draft Final Report for public comment. The Board recognizes the PDP WG's dedication and hard work, including the PDP WG's alignment of GNSO Policy with existing advice, such as on Reserved Names (Topic 21) and Name Collisions (Topic 29). The Board appreciates the PDP WG's affirmation of the importance of Universal Acceptance, as well as its encouragement of the ongoing efforts taking place through the Universal Acceptance Initiative and the Universal Acceptance Steering Group. The Board also appreciates the organization of the draft Final Report, in which the PDP WG recognizes existing policy and affirms the existing Applicant Guidebook (AGB) and New gTLD Program Committee (NGPC) implementation practices in absence of new consensus policy modifying or clarifying existing policy recommendations. Overall, the Board is impressed with the progress that has been made since the publication of the Initial Report. On behalf of my fellow Board members, I would like to congratulate you and the members of the PDP WG on achieving this important milestone.

In your letter you encouraged the Board to review the draft Final Report and provide feedback on the draft recommendations and implementation guidance. In addition, you sought input from the Board specifically on the topics of private resolution of contention sets and closed generics. We hope that our input on these and other topics will provide you with helpful feedback, contributing to the successful conclusion of the PDP WG. In this context, the Board notes that our comments provided in this letter do not preclude us from providing additional comment or input at a later stage.

Topic 2: Predictability (Pg. 15-19)

- A. The Board welcomes recommendations to support predictability in future new generic top-level domains (gTLDs), and is encouraged by the thoughtful discussion that has taken place on this subject within the PDP WG.
- B. The Board encourages the PDP WG to provide as much detail as possible to ensure clarity around the roles and responsibilities of the GNSO Council, ICANN org, applicants, objectors, other SO/ACs as well as the Board vis-a-vis the predictability framework. To inform implementation, the PDP WG may find it useful to provide case studies to illustrate roles and responsibilities of these different actors if and when changes to future application round processes are proposed and/or required.

- C. With regard to the proposed Standing Predictability Implementation Review Team (SPIRT), the Board encourages the PDP WG to consider whether there are established processes within the GNSO (or within ICANN's multistakeholder model) that might serve the intended role(s) of the SPIRT, rather than creating new ones.
- D. The Board encourages the PDP WG to consider whether recommendations are needed to avoid any unintended impact of the predictability framework on the necessary effectiveness and flexibility of ICANN org when implementing future new gTLD rounds. In this context, the Board notes Annex E that states "The SPIRT shall strive towards achieving Consensus on all advice and/or recommendations from the SPIRT. Even if consensus is not reached, the SPIRT can provide input on any particular issue received, as long as the level of consensus/support within the SPIRT is reported using the standard decision making methodology outlined in section 3.6 of the GNSO WG Guidelines." The Board believes it might be helpful to recommend a timeframe by which the SPIRT needs to reach a decision. (Pg. 16)
- E. It may also be useful for the PDP WG to consider the role of precedent in the Predictability Framework, e.g., can SPIRT recommendations form a body of decisions to guide handling of issues and increase efficiencies? (Pg. 16)
- F. The Board notes that the Predictability Framework cannot replace the ICANN Board or org's need to act in emergency situations, including taking actions in line with the Board or officers' fiduciary responsibilities.

Topic 6: Registry Service Provider Pre-Evaluation (Pg. 28-33)

The Board notes the affirmation of the revenue-neutral approach for future new gTLDs. (Pg. 31)

Topic 9: Registry Voluntary Commitments/Public Interest Commitments (PICs) (Pg. 36-48)

- A. The Board notes that as part of the restatement of ICANN's mission as reflected in the post-IANA Stewardship Transition Bylaws, the current form of the Registry Agreements were explicitly excluded from challenge on grounds that they exceeded ICANN's mission. See Bylaws, Section 1.1(d)(ii)(A)(1) and (2). This exclusion was brought about in large part by concerns from some in the community that some of the PICs within the Registry Agreements were outside of ICANN's technical mission. The community did not wish to invalidate those contracts through the revised mission statement. The language of the Bylaws, however, could preclude ICANN from entering into future registry agreements (that materially differ in form from the 2012 round version currently in force) that include PICs that reach outside of ICANN's technical mission as stated in the Bylaws. The language of the Bylaws specifically limits ICANN's negotiating and contracting power to PICs that are "in service of its Mission." The Board is concerned, therefore, that the current Bylaws language would create issues for ICANN to enter and enforce any content-related issue regarding PICs or Registry Voluntary Commitments (RVCs). Has the PDP WG considered this specific language in ICANN's Bylaws as part of its recommendations or implementation guidance on the continued use of PICs or the

future use of RVCs? Can the PDP WG provide guidance on how to utilize PICs and RVCs without the need for ICANN to assess and pass judgment on content?

- B. In its comment on the Initial Report, the Board asked the PDP WG to give more clarity on how to frame “public interest” in the context of a PIC and the PIC Dispute Resolution Procedure (PICDRP). We note that this has not yet been developed. We would like to reiterate our view that clear guidance on this issue will be valuable, and we encourage the PDP WG to work to that end. Specifically, we ask that the PDP WG provide clear and consistent implementation guidance on “public interest” in this context, to ensure that objective enforceability lies within ICANN’s mission. (See also our comment on Topic 24 below.)

#### Topic 15: Application Fees (Pg. 62-66)

The Board notes the PDP’s Recommendation 15.7: *“In managing funds for the New gTLD Program, ICANN must have a plan in place for managing any excess fees collected or budget shortfalls experienced. The plan for the management and disbursement of excess fees, if applicable, must be communicated in advance of accepting applications and collecting fees for subsequent procedures.”* The Board asks the PDP to more carefully examine the concept of “excess” or shortage of fees, especially in the light of the likely need for ICANN org, a not-for-profit organization, to increase resources for the application process and the continued support of the new gTLD program. The proposed principle of cost recovery of the next round, as for the 2012 round is understood as a clear mechanism to state to the public that the fee to be paid by applicants is designed to only cover for the cost of the program and not to support non-program operations of ICANN org. The proposed principle does not require a dollar-to-dollar return of any potential excess. The lack of a clear definition of “closure” and “round” for any new gTLD subsequent procedures future ‘round’ is also problematic in this context and the Board encourages the PDP WG to contemplate including such definition in its Final Report. (Pg. 63)

#### Topic 17: Applicant Support (Pg. 67-79)

- A. The Board notes that *“The Working Group recommends expanding the scope of financial support provided to Applicant Support Program beneficiaries beyond the application fee to also cover costs such as application writing fees and attorney fees related to the application process”* (Recommendation 17.2). The expansion of applicant support to affirmative payments of costs beyond application fees could raise fiduciary concerns for the Board. We encourage the PDP WG to ensure that applicant support is well scoped by preventing, to the extent possible, the possibility of inappropriate use of resources, e.g. inflated expenses, private benefit concerns, and other legal or regulatory concerns. (Pg. 68)
- B. Implementation Guidance 17.14 states that “ICANN org should seek funding partners to help financially support the Applicant Support Program, as appropriate.” The ICANN Board notes that this would change the role of ICANN, as ICANN is not a grant-seeking organization. Alternatively, ICANN org – through the Pro Bono Assistance Program –

could act as a facilitator in the introduction of industry players or potential funding partners to the prospective entrants.

#### Topic 18: Terms and Conditions

- A. The Board notes that the PDP WG recommends “[u]nless required by specific laws, ICANN Board members’ fiduciary duties, or the ICANN Bylaws, ICANN must only reject an application if done so in accordance with the provisions of the Applicant Guidebook. In the event an application is rejected, ICANN org must cite with specificity the reason in accordance with the Applicant Guidebook, or if applicable, the specific law and/or ICANN Bylaws for not allowing an application to proceed. This recommendation constitutes a revision to Section 3 of the Terms and Conditions from the 2012 round.” (Recommendation 18.1). The Board is concerned that this recommendation may limit the Board’s authority to act as needed. The Board would like to understand what problems the PDP WG identified with regard to Section 3 of the Terms and Conditions in the 2012 Application Guidebook “*Applicant acknowledges and agrees that ICANN has the right to determine not to proceed with any and all applications for new gTLDs, and that there is no assurance that any additional gTLDs will be created. The decision to review, consider and approve an application to establish one or more gTLDs and to delegate new gTLDs after such approval is entirely at ICANN’s discretion. ICANN reserves the right to reject any application that ICANN is prohibited from considering under applicable law or policy, in which case any fees submitted in connection with such application will be returned to the applicant.*” The revision, as proposed by the PDP WG in Recommendation 18, may bind the Board unless one of the specific conditions is met. Such limitations could lead to unforeseen challenges, and so we encourage the PDP WG to provide details on how the proposed text in Recommendation 18.1 addresses any identified problems in Section 3 and also provide guidance on how to avoid limitations on the Board’s authority to act in unanticipated circumstances. (Pg. 79)
- B. The Board notes Recommendation 18.3: “*In subsequent rounds, the Terms of Use must only contain a covenant not to sue if, and only if, the appeals/challenge mechanisms set forth under Topic 32 of this report are introduced into the program (in addition to the accountability mechanisms set forth in the current ICANN Bylaws).*” The Board understands the intent behind this recommendation, but is concerned that dissatisfied applicants or objectors might argue based on this policy recommendation that the covenant not to sue is not valid because they did not like the way the appeals/challenge mechanism was built or operated. Accordingly the Board asks the PDP WG to review this recommendation, as anything that could weaken the covenant not to sue might preclude the ability to offer the program due to an unreasonable risk of lawsuits. The Board also asks the PDP WG to provide guidance on who would make the determination that the conditions set forth in Recommendation 18.3 are met and how.

#### Topic 20: Application Change Request

The Board notes Recommendation 20.6: “The Working Group recommends allowing application changes to support the settling of contention sets through business combinations or other forms

of joint ventures. In the event of such a combination or joint venture, ICANN org may require that re-evaluation is needed to ensure that the new combined venture or entity still meets the requirements of the program. The applicant must be responsible for additional, material costs incurred by ICANN due to re-evaluation and the application could be subject to delays.” Also Recommendation 20.8: *“The Working Group recommends allowing .Brand TLDs to change the applied-for string as a result of a contention set where (a) the change adds descriptive word to the string, (b) the descriptive word is in the description of goods and services of the Trademark Registration, (c) such a change does not create a new contention set or expand an existing contention set, (d) the change triggers a new public comment period and opportunity for objection and, (e) the new string complies with all New gTLD Program requirements.”* The Board acknowledges that recommendations 20.6 and 20.8 may lead to more flexibility, permitting applicant changes while also increasing the complexity of future new gTLD procedures. We note that this increase in flexibility and complexity is likely to lead to higher costs beyond applicant fees and result in possible delays, thereby making subsequent rounds potentially less predictable.

## Topic 22: Registrant Protections

The Board notes the PDP WG’s recommendation that *“TLDs that have exemptions from the Code of Conduct (Specification 9), including .Brand TLDs qualified for Specification 13, must also receive an exemption from Continued Operations Instrument (COI) requirements or requirements for the successor to the COI.”* In the rationale provided for Recommendation 22.7, the PDP WG also states that an Emergency Back-end Registry Operator (EBERO) event would not be necessary because “there are no registrants in need of such protections in the event of a TLD failure.” The Board encourages the PDP WG to provide more details in its rationale and to ensure there are no hypothetical cases in which an EBERO might be appropriate. In addition, the Board encourages the PDP WG to consider the potential impact on end users and consumers in the event of a short-term or long-term technical or business failure of a .BRAND TLD.

## Topic 23: Closed Generics (also known as Exclusive Generics) (Pg. 96-102)

- A. As previously [noted](#) by the Board, we believe that *“[closed generics] require input from the GNSO through the bottom-up policy development process”* and we continue to appreciate the PDP WG’s work on this topic. As noted in our 2018 [letter](#), the questions on how to evaluate the public interest and public interest goals of an application have been pending for several years, and we continue to encourage the PDP WG to reach consensus<sup>1</sup> on one or more recommendations concerning closed generics, taking into account relevant public comment and advice from ICANN’s Advisory Committees.
- B. You quoted the language of a [2015 Board letter](#) in your communication that is based on a [2015 resolution](#) of the New gTLD Program Committee (NGPC), stating: *“Resolved (2015.06.21.NG02), to address the GAC’s Category 2.2 Safeguard Advice, the NGPC requests that the GNSO specifically include the issue of exclusive registry access for*

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<sup>1</sup> Consensus here is referred to as defined in the [GNSO Working Group Guidelines](#).

*generic strings serving a public interest goal as part of the policy work it is planning to initiate on subsequent rounds of the New gTLD Program, and inform the Board on a regular basis with regards to the progress on the issue.” You asked “whether this [resolution] meant that the ICANN Board resolved that all future closed generics must serve a public interest goal if they were to be allowed, or whether it was just attempting to understand the GNSO’s thoughts on closed generics in general.” While the NGPC requested a discussion on the issue of closed generics that serve a public goal, requesting a specific outcome of such a discussion lies outside the Board’s purview. Pursuant to the Bylaws, we will consider any consensus-based recommendation that is adopted by the GNSO Council and put before us and base our decision on whether we reasonably believe that the policy proposal is or is not in the best interests of the ICANN community and ICANN (Bylaws Annex A, Section 9 (a)).*

- C. The PDP WG also enquired about the [three recent proposals](#) on the future treatment of Closed Generics and “whether any of these proposals at a high level are heading in a direction in line with the Board’s views.” The Board read all three proposals with great interest. As stated above, the Board is not in a position to request policy outcomes. It is therefore not in the Board’s purview to indicate a preference. As stated above, we will base our decision on whether we reasonably believe that the policy proposal is or is not in the best interests of the ICANN community or ICANN (Bylaws Annex A, Section 9 (a)), if and when such a policy is recommended by the GNSO Council and put before us.

#### Topic 24: String Similarity Evaluations (Pg. 102-109)

- A. The Board notes the PDP WG’s strong reliance on the intended use of applied-for strings when it comes to similarity evaluations in Recommendation 24.3: “*Applications will not automatically be placed in the same contention set because they appear visually to be a single and plural of one another but have different intended uses.*” The Board asks the PDP WG to include recommendations and implementation guidance for objective evaluation criteria to determine “different intended uses” because we believe this will be invaluable to ensure consistent and transparent processes regarding this element in string similarity evaluations. (Pg. 103)
- B. The Board notes Recommendation 24.5: “*If two applications are submitted during the same application window for strings that create the probability of a user assuming that they are single and plural versions of the same word, but the applicants intend to use the strings in connection with two different meanings, the applications will only be able to proceed if the applicants agree to the inclusion of a mandatory Public Interest Commitment (PIC) in their Registry Agreement. The mandatory PIC must include a commitment by the registry to use the TLD in line with the intended use presented in the application, and must also include a commitment by the registry that it will require registrants to use domains under the TLD in line with the intended use stated in the application.*” As noted in our comment on Topic 9, the Board is concerned that the proposed reliance on PICs to restrict the use and potentially the content of names registered in delegated TLDs raises questions about compliance with ICANN’s Bylaws,

which state that ICANN will not restrict “services that use the Internet’s unique identifiers or the content that such services carry or provide [...]”.

#### Topic 25: Internationalized Domain Names (IDNs) (Pg. 109-113)

- A. The Board sees IDNs as a critical part of ICANN’s mission to support global access to the domain name system, and therefore appreciates the affirmation that IDNs are “*an integral part of the New gTLD Program.*”
- B. The Board appreciates that Root Zone Label Generation Rules (RZ-LGR), which have been developed by the efforts of the various script communities, have been integrated into the program to validate and determine the variant labels of the applied-for strings and that many of the [Recommendations for Implementing Variant TLDs \[icann.org\]](#) (Variant TLD Recommendations) have also been incorporated. (Pg. 109-110)
- C. The Board suggests that any applied-for string in a script not integrated in the RZ-LGR should not be processed until its validity and variant labels can be determined by RZ-LGR, following the [Recommendation 5 \[icann.org\]](#) of the RZ-LGR Study Group. (Pg. 110)
- D. The Board also suggests that [Recommendations 5 and 6 \[icann.org\]](#) of Variant TLDs Recommendations also be considered by the PDP WG for implementing variant TLDs.
- E. The Board notes that using RZ-LGR and adopting the Variant TLD Recommendations may have impact on other processes, including string similarity reviews, managing reserved labels, changes of control, and more, as also [analyzed \[icann.org\]](#) in the Variant TLD Recommendations, which are not currently addressed in the draft Final Report. (Pg. 110)
- F. In the context of the point above, the Board is concerned that additional recommendations (and implementation guidance) are needed for effectively processing gTLD applications along with their variant labels. Therefore, the Board asks that impact on these processes be assessed and finalized either by the PDP WG or by the GNSO’s further follow-up work in time for planning and implementation of the next gTLD application round.
- G. The Board notes that ICANN org is finding that some IDN tables previously approved for gTLD registries may have security or stability issues, based on more recent work by the technical and script-based communities. Taking such findings into consideration, the Board asks the PDP WG to clarify which IDN tables “pre-vetted by the community” could still be used to remove IDN table testing for the new gTLDs. The Board suggests that the PDP WG considers Reference IDN tables being published by ICANN org as the candidate pre-vetted IDN tables. (Pg. 178)

#### Topic 29: Name Collisions (Pg. 128-133)

The Board encourages the PDP WG to provide details on how future NCAP study results should be dealt with in future rounds. Would these need to initiate new policy processes and how would such processes affect ongoing rounds?

#### Topic 30: GAC Consensus Advice and GAC Early Warning (Pg. 133-139)

The Board is committed to working closely with the GAC to encourage the issuing of advice prior to the finalization of the Applicant Guidebook (AGB), with the goal of reducing, if not eliminating, the need for wide-ranging GAC advice.

#### Topic 31: Objections

The Board notes that the PDP WG affirms *“that the role of the Independent Objector (IO) should exist in subsequent procedures”* (Affirmation 31.8). As the PDP WG seems to be affirming the role and use of the IO (which was not part of the earlier policy recommendations). The Board encourages the PDP WG to identify the purpose of continuing the use of the IO role and the problems that the continued use of the IO is expected to solve. The Board also encourages the PDP WG to consider how the IO role was exercised in the 2012 round to help illustrate this work. (Pg. 142)

#### Topic 33: Dispute Resolution Procedure After Delegation (Pg. 156-157).

The Board notes Recommendation 33.2 that states: *“For the Public Interest Commitment Dispute Resolution Procedure (PICDRP) and the Registration Restrictions Dispute Resolution Procedure (RRDRP), clearer, more detailed, and better-defined guidance on the scope of the procedure, the role of all parties, and the adjudication process must be publicly available.”* The Board encourages the PDP WG to provide clear problem statements detailing any concrete deficiencies with the PICDRP and the Registration Restrictions Dispute Resolution Policy (RRDRP). Such statements may help the PDP WG provide details on what aspects of the guidance concerning the scope of the procedure, the role of all parties, and the adjudication process should be clearer, more detailed, and better-defined.

#### Topic 34: Community Applications (Pg. 157-162)

- A. The Board notes that the PDP WG recommended very few substantive changes related to the community application process, and more specifically to the Community Priority Evaluation (CPE) process. The PDP WG simply recommends that the *“Community Priority Evaluation (CPE) process must be efficient, transparent and predictable”* (Recommendation 34.2) and that *“ICANN org should examine ways to make the CPE process more efficient in terms of costs and timing”* (Recommendation 34.4). The Board is concerned that these are not sufficiently detailed recommendations to address the issues that arose during the 2012 round. The Board asks the PDP WG to raise specific concerns that the PDP WG sees with the CPE process, considering the fact that many of the CPE determinations were challenged in the 2012 round. The Board believes these clarifications are required in order for the Board to assess whether it is in the best interests of ICANN and the ICANN community to proceed with CPEs in the next round.
- B. In this context the Board also encourages the PDP WG to consider the mission-limitation that derives from the Bylaws, which state that ICANN will not restrict “services that use the Internet’s unique identifiers or the content that such services carry or provide”

(Section 1.1 (c)). The PDP WG may want to review the impact this provision might have on ICANN's ability to enforce the content of community TLDs post delegation.

Topic 35: Auctions: Mechanisms of Last Resort/Private Resolution of Contention Sets  
(Pg. 163-172)

- A. The Board notes Recommendation 35.2, which states “[...] *the Applicant Guidebook (AGB) must reflect that applicants will be permitted to creatively resolve contention sets in a multitude of manners, including but not limited to business combinations or other forms of joint ventures and private resolutions (including private auctions).*” The Board encourages the PDP WG to provide a rationale why the resolution of contention sets should not be conducted in a way such that any net proceeds would benefit the global Internet community rather than other competing applicants.
- B. The Board notes that if “private” resolutions will be allowed or encouraged in subsequent procedures, the PDP WG is requested to provide a rationale for why these private processes should only partially be brought into the program rather than be kept outside of the program or be brought into the program. The Board also encourages the PDP WG to provide guidance on the kinds of transparency requirements that it would like to see applied in practice around private resolutions of contention sets.
- C. Recommendation 35.3 states that “*Applications must be submitted with a bona fide (good faith) intention to operate the gTLD. Applicants must affirmatively attest to a bona fide intention to operate the gTLD clause for all applications that they submit.*” The Board is supportive of applications needing to be submitted with “bona fide” intentions to operate the gTLD. However, it is unclear from Recommendation 35.3 whether these are specific and enforceable promises or statements of current intent that can be changed at a later time.
- D. The Board acknowledges the “*potential non-exhaustive list of ‘factors’ that ICANN may consider in determining whether an application was submitted with a bona fide (good faith) intention to operate the gTLD.*” We note that this non-exhaustive list of “factors” may put ICANN org or the ICANN Board into the position of subjectively trying to determine the state of mind of applicants, and take decisions that are subject to possible challenges. The Board asks the PDP WG to consider providing a clear problem statement of what types of behavior or abuse the requirement of bona fide applications is meant to address. PDP WG members could then use such a statement to provide objective criteria for assessing the bona fide nature of an application. (Pg. 164)
- E. The Board notes that a statement of “bona fide” intentions would be expected for all applications, not only those involved in auctions, particularly since when an application is submitted the applicant likely will not know if it will be in contention. (Pg. 164)
- F. In this context, the Board suggests that the PDP WG consider the hypothetical scenario of an applicant intending to operate up to five gTLDs. To avoid contention sets the applicant might apply for 20 strings, with the expectation to drop 15 applications based on contention and their own preference. Would those 15 applications not be considered “bona fide,” and what would be the consequence for such an applicant? Similarly, a large number of applications could be submitted by separate corporations; would ICANN org be required to establish each applicant’s investor(s) and other controlling parties in

order to affirm bona fide intent? The Board believes it would be helpful for the PDP WG to address these questions and provide guidance on making objectively enforceable rules to establish what constitutes a bona fide intention to run a gTLD. (Pg. 164)

Topic 41: Contractual Compliance (Pg. 181-183)

- A. The Board is aware of the need for increased resources to ensure the enforcement of compliance on a significantly larger number of TLDs.
- B. The Board notes that much of the data reporting that is being recommended by the PDP WG is already being published, see [ICANN Contractual Compliance Dashboard](#). (Pg.182)

Again, the Board would like to thank the Subsequent Procedure PDP Working Group, its leadership, and the support team for its dedication and hard work. The Board remains available to respond to any specific questions or comments the PDP WG might have.

Best regards,



Maarten Botterman  
Chair, ICANN Board of Directors

# Exhibit C

Begin forwarded message:

**From:** Jon Nevett Contact Information Redacted  
**Subject:** Re: .web  
**Date:** June 8, 2016 at 12:33:31 PM EDT  
**To:** "Jose I. Rasco" Contact Information Redacted  
**Cc:** Juan Diego Calle Contact Information Redacted

Thanks Jose. Would this be the same decision for .inc and .llc?

Contact Information Redacted

On Jun 7, 2016, at 11:32 AM, Jose Ignacio Rasco wrote:

Jon,  
Thanks for the message, sorry for the delay. The three of us are still technically the managers of the LLC, but the decision goes beyond just us. Nicolai is at NSR full time and no longer involved with our TLD applications. I'm still running our program and Juan sits on the board with me and several others. Based on your request, I went back to check with all the powers that be and there was no change in the response and will not be seeking an extension. It pains me personally to stroke a check to ICANN like this, but that's what we're going to have to do just like others did on .app and .shop.  
Best,  
Jose

On Jun 6, 2016, at 1:08 PM, Jon Nevett Contact Information Redacted wrote:

Hi guys. Jose and I corresponded last week, but I wanted to take another run at the three of you. Not sure if you three are still the Board members of your applicant, but I wanted to reach out to discuss a couple of ideas. Until Monday, I believe that we have a right to ask for a 2 month delay of the ICANN auction with the agreement of all applicants. Would you be ok with an extension while we try to work this out cooperatively?

Please let me know.

Thanks.

jon

Jonathon Nevett  
Co-Founder & EVP, Donuts Inc.

Contact Information Redacted

# Exhibit D

**From:** Juan Diego Calle Contact Information Redacted  
**Subject:** Thread  
**Date:** June 7, 2016 at 4:36:40 PM EDT  
**To:** "Jose I. Rasco" Contact Information Redacted

Attached.

••• AT&T

4:35 PM



Messages (119)

Steve

Details

Wednesday 7:32 PM

Amigo...how's life?  
Got time to chat today?

Yesterday 12:53 PM

Hey bro, not sure if you got my message last week. Would appreciate a few mins today if you're free, thanks

Steve! Hope you are well. Sorry I was out last week with kids.

Ahhhhh I see. You free to talk sometime today or tomorrow?

I think I know why you're reaching out. Unfortunately all I can say is that we have to go to ICANN auction.

I understand...you gotta do what is best for you. still like to talk if you're amicable.



Take a picture

Send

Can't give up...how about I guarantee you score at least 16 mil if you go into the private auction and lose? \$\$\$

Today 2:52 PM

No. [Redacted]

Ok how about...17.02m?

No. ;)

Ok..np. I think Kane just got the deal with Jose anyway 😊



Today 4:22 PM

In all seriousness if it helps to delay the private auction a few days to get you back in, it's possible. Just throwing that out if it helps



Text Message

Send

Sent from my iPhone

# Exhibit E

Messages

Details

[Redacted]

[Redacted]

[Redacted]

Thursday 6:34 PM

Can you talk?

Today 2:48 PM

Heard Heflin offered Juan \$17M;  
I'll give you \$17.01M. 😏

Steve offered him \$16M. Are  
you guys bidding each other

# Exhibit F

## Case Detail

[Edit](#) [Clone](#) [SPAM](#)

### ▼ Case Information

Case Number	00225003 <a href="#">[View Hierarchy]</a>	Internal Status	<span style="color: orange;">●</span> Closed
Account Name	<a href="#">Ruby Glen, LLC</a>	Status	Closed
Contact Name	<a href="#">Daniel Schindler</a>	Case Close Reason	Response Provided
Contact Type		Urgency	Moderate
Application ID	1-1527-54849	Severity	Sev 3
Registry		Case Record Type	General Case <a href="#">[Change]</a>
Case Origin	Web	Category	Application Processing
Multiple Contacts Found	<input type="checkbox"/>	Sub Category	Initial Evaluation Process
Visible in Self-Service Portal	<input checked="" type="checkbox"/>	Case Owner	<a href="#">Jared Erwin</a> <a href="#">[Change]</a>
Suppress Notification	<input type="checkbox"/>	Assigned to	<a href="#">Jared Erwin</a>
Updates On Case	<input type="checkbox"/>	Parent Case	
SLA Resolution status	SLA Exceeded		
Phone			

### ▼ Additional Information

Subject	.WEB Auction Postponement – Required Applicant Update
Description	<p>ICANN,</p> <p>It has come to our attention that one of the applicants for .WEB has failed to properly update its application. Upon information and belief, there have been changes to the Board of Directors and potential control of Nu Dot Co LLC ("NDC") that has materially changed its application. To our knowledge, however, NDC has not filed the required application change request.</p> <p>As you know, Section 1.2.7 of the Applicant Guidebook specifically states, "[i]f at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, the applicant must promptly notify ICANN via submission of the appropriate forms. This includes applicant-specific information such as changes in the financial position and changes in ownership or control of the applicant... Failure to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading may result in denial of the application." As you also know, ICANN has been clear that such requirements are in full force and effect until the registry agreement is executed with the successful applicant.</p> <p>Failure by No Dot Co LLC to maintain the accuracy of its application is detrimental to the other competing applicants, especially in light of the pending ICANN auction, creating an unfair competitive advantage for NDC.</p> <p>We request that ICANN investigate the change in NDC's Board and potential control and that the ICANN auction scheduled for July 27 be immediately postponed. The auction should be rescheduled after the final investigation is complete and NDC's requisite change request is resolved.</p> <p>We do not make this request lightly and haven't done so in well over 100 other scheduled ICANN auctions.</p> <p>Thank you and best regards, Jonathon Nevett</p>

## Case Comments

[New](#)

[Case Comments Help](#) [?](#)

Action	Public	Comment
		<p>Created By: <a href="#">Jared Erwin</a> (6/27/2016 3:42 PM) Dear Daniel Schindler,</p> <p>Thank you for bringing this to our attention. We are reviewing the information provided, and we will work with the applicant directly should action be required. We note your request to postpone the auction for the .WEB/.WEBS contention set currently scheduled for 27 July 2016. Please continue to follow the standard auction process and monitor the Customer Portal for updates. If there are any changes to the auction date, we will notify you and all auction participants.</p>
<a href="#">Make Private</a>	<input checked="" type="checkbox"/>	<p>Thank you for your attention. I will now resolve this case, but please do not hesitate to reopen it should you have any questions.</p> <p>Best regards, Jared Erwin New gTLD Operations</p>
		<p>Created By: <a href="#">Susan Yao</a> (6/23/2016 10:17 AM) Dear Daniel Schindler,</p> <p>Thank you for your contacting ICANN Global Support on your request.</p>
<a href="#">Make Private</a>	<input checked="" type="checkbox"/>	<p>Your request has been forwarded to our gTLD Team for processing. Someone from the team will be contacting you.</p> <p>Please do not hesitate to contact us if you have any other questions or concerns.</p> <p>Best regards, Susan Yao Global Support Analyst II ICANN Global Support</p>

# Exhibit G



JUL 11 2016

Schlund Technologies GmbH | Maximilianstr. 6 | 93047 Regensburg | Germany

Internet Corporation for Assigned Names and Numbers  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536  
USA

To: Akram Atallah, Christine Willett, John Jeffrey  
Via e-mail and fax

July 11, 2016

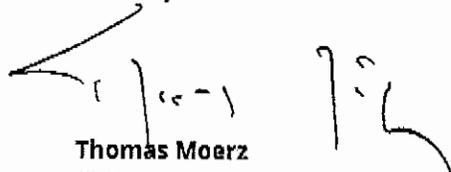
**RE: Postponement of ICANN Auction .WEB/.WEBS**

Dear Mr. Atallah, Ms. Willett, and Mr. Jeffrey,

Schlund Technologies GmbH is one of the applicants for .WEB with a scheduled ICANN Auction on July 27, 2016.

We support a postponement of the auction, to give ICANN and the other applicants time to investigate whether there has been a change of leadership and/or control of another applicant, NU DOT CO LLC. To do otherwise would be unfair, as we do not have transparency into who leads and controls that applicant as the auction approaches.

Sincerely,

  
**Thomas Moerz**  
CEO

Schlund Technologies GmbH  
Maximilianstr. 6  
93047 Regensburg  
Germany

Handelsregister B  
Regensburg 9620

Geschäftsführer/CEO  
RA Thomas Moerz

USt-IdNr. DE814286643

Commerzbank AG  
Konto-Nr. 589279900

BLZ 60040000

IBAN-Nr.:

DE54600400000589279900

SWIFT-Code:

COBADEFFXXX

# Exhibit H

**From:** Brijesh Joshi [REDACTED]  
**Date:** Monday, July 11, 2016 at 12:07 AM  
**To:** Akram Atallah [REDACTED], Christine Willett [REDACTED],  
John Jeffrey [REDACTED], [REDACTED]  
**Cc:** Sandeep Ramchandani [REDACTED]  
**Subject:** Postponement of the .WEB auction

Hi,

We support a postponement of the .WEB auction to give ICANN and the other applicants time to investigate whether there has been a change of leadership and/or control of another applicant, NU DOT CO LLC. To do otherwise would be unfair, as we do not have transparency into who leads and controls that applicant as the auction approaches.

Brijesh Joshi  
Director,  
Radix FZC, Dot Web, Inc.

# Exhibit I



The Internet Corporation for Assigned Names and Numbers

13 July 2016

Mr. Jose Ignacio Rasco, NU DOT CO LLC  
Ms. Sarah Falvey, Charleston Road Registry Inc.  
Mr. Robert Wiegand, Web.com Group, Inc  
Mr. Brijesh Joshi, DotWeb Inc.  
Mr. Daniel Schindler, Ruby Glen, LLC  
Mr. John Kane, Afilias Domains No. 3 Limited  
Mr. David Barron, Vistaprint Ltd  
Mr. Thomas Moerz, Schlund Technologies GmbH  
Mr. Jonathon Nevett, Ruby Glen, LLC

Re: .WEB/.WEBS Auction on 27 July 2016

Dear Members of the .WEB/.WEBS Contention Set,

We are writing in regards to inquiries we have received concerning potential changes of control of NU DOT CO LLC, an applicant in the .WEB/.WEBS contention set, and requests to postpone the auction to investigate the matter. We would like to provide some clarification regarding this issue and how it may or may not impact the .WEB/.WEBS auction scheduled for 27 July 2016.

Firstly, as a reminder, in regards to a request for postponement, Rule 10 of the Auction Rules for Indirect Contention states:

“...Postponement requests must be submitted by all members of the Contention Set by the due date specified within the ICANN Customer Portal, generally twenty eight (28) days after receipt of Intent to Auction notice from ICANN. If a postponement request is not submitted by the due date specified within the ICANN Customer Portal or is not accommodated by ICANN, an applicant may request an advancement/postponement request via submission of the Auction Date Advancement/Postponement Request Form. The form must be submitted at least 45 days prior to the scheduled Auction Date and ICANN must receive a request from each member of the contention set...” (<https://newgtlds.icann.org/en/applicants/auctions/rules-indirect-contention-24feb15-en.pdf>)

The date to submit the postponement form passed on 12 June 2016, and we did not receive consensus from the contention set. As such, no postponement was granted.

Secondly, in regards to potential changes of control of NU DOT CO LLC, we have investigated the matter, and to date we have found no basis to initiate the application change request process or postpone the auction.



The Internet Corporation for Assigned Names and Numbers

Finally, as you are aware, ICANN provided confirmation to all members of the .WEB/.WEBS contention set on 6 July 2016 that the auction will be proceeding as scheduled on 27 July 2016. Please follow all instructions provided to you by Power Auctions, the Auction Manager, regarding next steps, including mini and mock auctions as well as the deposit deadline.

Regarding the deposit deadline, Rule 28 of the Auction Rules for Indirect Contention states:

“All wires and all instructions associated with Deposits, including instructions regarding the allocation of funds among Contention Sets from wires and funds rolled over from previous Auctions, must be received no later than 16:00 UTC on the day that is seven (7) calendar days prior to the Commencement Date of the relevant Auction (the “Deposit Deadline”), unless this deadline is waived, at the Auction Manager’s sole discretion.”

As per Rule 28, the Deposit Deadline for the upcoming auction is 16:00 UTC on 20 July 2016.

While the auction is currently set to proceed as scheduled, applicants may continue to work toward self-resolution of the contention set. Applicants may withdraw their application up until the Deposit Deadline noted above. Once the Deposit Deadline is reached, there is a quiet period in which applicants are no longer allowed to withdraw their application until after conclusion of the auction.

I hope this information has been helpful to you. Please do not hesitate to respond with any additional questions or concerns. Should you have specific questions regarding next steps for the auction, you may submit a case to [globalsupport@icann.org](mailto:globalsupport@icann.org), and someone from my team will contact you promptly.

Sincerely,

Christine A. Willett  
Vice President, GDD Operations  
ICANN

# Exhibit J

**DETERMINATION  
OF THE BOARD GOVERNANCE COMMITTEE (BGC)  
RECONSIDERATION REQUEST 16-9**

**21 JULY 2016**

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The Requesters, Ruby Glen, LLC and Radix FZC, submitted a reconsideration request seeking urgent reconsideration of ICANN’s decision not to delay the .WEB/.WEBS auction (scheduled for 27 July 2016) following ICANN’s investigation into alleged material changes in Nu Dot Co LLC’s (Nu Dot’s) application for .WEB.

**I. Brief Summary.**

Seven applications for .WEB and one application for .WEBS are currently in a contention set (.WEB/.WEBS Contention Set) and scheduled to participate in an auction of last resort on 27 July 2016 (Auction). The Requesters and Nu Dot each submitted an application for .WEB and are Auction participants. The Requesters contacted ICANN staff on or about 23 June 2016 and submitted a complaint to the Ombudsman during ICANN56 in June 2016 alleging that Nu Dot had experienced changes in leadership and/or control without notifying ICANN, as it is obligated to do. The Requesters then submitted an urgent Reconsideration Request on 17 July 2016 (Request 16-9) claiming that: (a) the Auction should be postponed because there are pending accountability mechanisms (initiated by the Requesters); and (b) reconsideration is warranted because ICANN’s investigation of the alleged changes in Nu Dot’s application was insufficient and, in the Requesters’ view, comprises “a clear violation of the principles and procedures set forth in the ICANN Articles of Incorporation and Bylaws[,] and the ICANN gTLD Applicant Guidebook.”<sup>1</sup>

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<sup>1</sup> Request, Pg. 2.

The Requesters' claims do not warrant postponement of the Auction or reconsideration. First, the Requesters argue that their pending complaint with the Ombudsman and initiation of Request 16-9 require ICANN to postpone the Auction. However, there is no policy requiring ICANN to postpone the Auction here because these accountability mechanisms were not initiated before the .WEB/.WEBS Contention Set entered into the Auction process on 27 April 2016. Indeed, the timing parameters within the auction rules were established specifically so that auction participants could not game the system by filing last-minute accountability mechanisms. Second, reconsideration is not warranted because the Requesters do not identify any misapplication of policy or procedure by ICANN staff in its investigation of the allegations regarding Nu Dot's application.

Contrary to the Requesters' claims, ICANN diligently investigated the alleged potential changes to Nu Dot's application and found no basis to initiate the application change request process.<sup>2</sup> Because the Requesters have failed to show that ICANN staff acted in contravention of established policy or procedure, the BGC concludes that Request 16-9 be denied.

## **II. Facts.**

### **A. Background Facts.**

In June 2012, Ruby Glen, LLC, DotWeb Inc. (an affiliate of Radix FZC), Nu Dot, Charleston Road Registry, Inc., Web.com Group, Inc., Afilias Domains No. 3 Limited, and Schlund Technologies GmbH each submitted an application for .WEB; Vistaprint Limited filed two applications for .WEBS (one standard, and one community-based that was later withdrawn).

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<sup>2</sup> Furthermore, even if ICANN *had* determined that an applicant change request was necessary, ICANN has discretion to determine whether a change request warrants postponing an auction.

Nu Dot's application listed three officers/directors: Jose Ignacio Rasco II, CFO; Juan Diego Calle, CEO; and Nicolai Bezsonoff, COO.<sup>3</sup>

The seven applications for .WEB and the remaining application for .WEBS are in the .WEB/.WEBS Contention Set.<sup>4</sup>

On 27 April 2016, ICANN initiated the Auction process by notifying all active members of the .WEB/.WEBS Contention Set that the Auction had been scheduled and providing instructions and deadlines to participate in the Auction.

According to the Requesters, on or about 7 June 2016 they contacted Nu Dot and asked Nu Dot to reconsider its decision to forego private resolution of the .WEB/.WEBS Contention Set. The Requesters have indicated that Nu Dot's reply included the following statement: "Nicolai [Bezsonoff] is at NSR full-time and is no longer involved with our TLD applications. [Jose Ignacio Rasco II is] still running our program and Juan [Diego Calle] sits on the board with me and several others."<sup>5</sup> This communication apparently led the Requesters to believe that Nu Dot had experienced some change in ownership and/or leadership. Thereafter, on or about 23 June 2016, the Requesters contacted ICANN staff regarding their apparent belief that changes to Nu Dot's application were required. The Requesters also formally raised the issue with the ICANN Ombudsman during ICANN56 in June 2016.

After receiving the Requesters' notification that they believed Nu Dot's application needed to be changed, ICANN staff proceeded to investigate the claims. On 27 June 2016, ICANN sent Nu Dot's authorized primary contact a message to determine whether there had been any "changes to your application or the [Nu Dot] organization that need to be reported to

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<sup>3</sup> Nu Dot Application for .WEB, *available at* <https://gtldresult.icann.org/applicationstatus/applicationdetails/1053>.

<sup>4</sup> Contention Set for .WEB/.WEBS, *available at* <https://gtldresult.icann.org/applicationstatus/contentionsetdiagram/233>.

<sup>5</sup> Request, § 8, Pg. 9.

ICANN. This may include any information that is no longer true and accurate in the application, including changes that occur as part of regular business operations (e.g., changes to officers and directors, application contacts).” Jose Ignacio Rasco, CFO of Nu Dot, replied that same day to “confirm that there have been no changes to the [Nu Dot] organization that would need to be reported to ICANN.”

Subsequently, both ICANN staff and the Ombudsman reached out to Mr. Rasco to again inquire about the claims of potential changes in Nu Dot’s organization that the Requesters believed required notification to ICANN. Specifically, ICANN staff conducted a telephone conversation with Mr. Rasco on 8 July 2016 regarding the allegations. During that call, and later in a confirming email on 11 July 2016, Mr. Rasco stated that: “Neither the ownership nor the control of Nu Dotco, LLC has changed since we filed our application. The Managers designated pursuant to the company’s LLC operating agreement (the LLC equivalent of a corporate Board) have not changed. And there have been no changes to the membership of the LLC either.” Mr. Rasco also confirmed to ICANN that he provided this same information to the ICANN Ombudsman in responding to the Ombudsman’s investigation of the complaint lodged with him. According to Mr. Rasco, he informed the Ombudsman that there had been no changes to Nu Dot’s ownership, operating agreement, or LLC membership. After receiving information from Nu Dot and ICANN, the Ombudsman informed ICANN that, in his opinion, there was nothing to justify a postponement of the .WEB/.WEBS Auction based on unfairness to the other applicants.

On 11 July 2016, the Requesters sent an email to ICANN “support[ing] a postponement of the .WEB auction to give ICANN and the other applicants time to investigate whether there has been a change of leadership and/or control of another applicant, [Nu Dot,]” and stating that,

“[t]o do otherwise would be unfair, as we do not have transparency into who leads and controls that applicant as the auction approaches.”<sup>6</sup>

After completing its investigation of the allegations regarding Nu Dot’s application, ICANN sent a letter to the members of the .WEB/.WEBS Contention Set on 13 July 2016 stating, among other things, that “in regards to potential changes of control of [Nu Dot], we have investigated the matter, and to date we have found no basis to initiate the application change request process or postpone the auction.”<sup>7</sup>

On 17 July 2016, the Requesters filed Request 16-9, seeking postponement of the .WEB/.WEBS Auction and requesting a “thorough and transparent investigation into the apparent discrepancies and/or changes in [Nu Dot’s] .WEB/.WEBS application.”<sup>8</sup>

The .WEB/.WEBS Auction is scheduled to occur on 27 July 2016.<sup>9</sup>

**B. Relief Requested.**

The Requesters ask ICANN to:

1. “[D]elay the ICANN auction of last resort for the .WEB/.WEBS contention set *on an emergency basis*”, and;
2. “[C]onduct a thorough and transparent investigation into the apparent discrepancies and/or changes in [Nu Dot’s] .WEB/.WEBS application in accordance with ICANN’s Bylaws (including ICANN’s guiding principles to ensure transparency, openness and accountability), the Auction Rules, and the

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<sup>6</sup> Email from Brijesh Joshi to Akram Atallah, Christine Willett, and John Jeffrey, dated 11 July 2016, *available at* <https://www.icann.org/en/system/files/correspondence/joshi-to-atallah-et-al-11jul16-en.pdf>.

<sup>7</sup> Letter from Christine Willett to Members of the .WEB/.WEBS Contention Set, dated 13 July 2016, *available at* <https://newgtlds.icann.org/en/program-status/correspondence>.

<sup>8</sup> Request, § 9, Pg. 11. On 20 July 2016, ICANN received a letter of support from Donuts Inc. regarding Request 16-9. Donuts requested that the letter not be published.

<sup>9</sup> Auction Schedule, *available at* <https://newgtlds.icann.org/en/applicants/auctions>.

Applicant Guidebook.”<sup>10</sup>

### **III. The Relevant Standard For Reconsideration Requests.**

ICANN’s Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.<sup>11</sup> The Requesters challenge staff action. Dismissal of a request for reconsideration of staff action or inaction is appropriate only if the BGC concludes, and the Board agrees to the extent that the BGC deems that further consideration by the Board is necessary, that the requesting party does not have standing because the party failed to satisfy the reconsideration criteria set forth in the Bylaws.

### **IV. Analysis and Rationale.**

#### **A. No Established Policy Requires ICANN to Postpone the .WEB/.WEBS Auction.**

The Requesters argue that the Auction should be postponed because of the pending accountability mechanisms. Those accountability mechanisms, however, were not pending at the required time—namely, the time when the .WEB/.WEBS Contention Set entered into the Auction process—and do not warrant postponement of the Auction.

The Requesters argue that a stay is “mandated by ICANN’s own rules governing Auction Eligibility given the pendency of (a) [the Requesters’] complaint to the ICANN Ombudsman and (b) this Request.”<sup>12</sup> In particular, the Requesters assert that “[a]s plainly stated on ICANN’s ‘New gTLD Program Auctions’, a string contention set will be eligible to enter into a New gTLD

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<sup>10</sup> Request, § 9, Pg. 11 (emphasis in original).

<sup>11</sup> Bylaws, Art. IV, § 2. Article IV, § 2.2 of ICANN’s Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

(a) one or more staff actions or inactions that contradict established ICANN policy(ies); or  
(b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board’s consideration at the time of action or refusal to act; or  
(c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board’s reliance on false or inaccurate material information.

<sup>12</sup> Request, § 9, Pg. 12.

Program auction only where all active applications in the contention set have ‘no pending ICANN Accountability Mechanisms.’”<sup>13</sup>

Contrary to what the Requesters argue, there were no pending accountability mechanisms when the .WEB/.WEBS Contention Set entered into the Auction process. ICANN initiated the Auction process on 27 April 2016 by notifying all active members of the .WEB/.WEBS Contention Set that the Auction had been scheduled and providing instructions and deadlines to participate in the Auction. The Requesters did not lodge a complaint with the Ombudsman until two months later (and less than one month before the Auction) during ICANN56 in June 2016. Similarly, Request 16-9 was not filed until 17 July 2016. As such, there were no accountability mechanisms pending on the date that the .WEB/.WEBS Contention Set entered the Auction process. Indeed, the auction rules were designed to, among other things, prevent exactly this sort of last-minute attempt to delay. The Requesters have not identified any violation of process or procedure. The .WEB/.WEBS Auction will therefore proceed as scheduled on 27 July 2016.

**B. ICANN Staff Complied with Established Policy when Investigating the Requesters’ Allegations Regarding Nu Dot.**

The Requesters contend that ICANN’s investigation regarding Nu Dot “was taken without attention to, in contravention of, and with apparent disregard for its obligation to investigate the veracity of the representations made by [Nu Dot] and its potential changes of control, leadership, and/or ownership.”<sup>14</sup> However, there is no established policy or procedure requiring ICANN to undertake an investigation in the manner that the Requesters would prefer. Nevertheless, ICANN did diligently investigate the Requesters’ claims and found nothing to support them.

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<sup>13</sup> Request, § 9, Pg. 12 (quoting ICANN’s New gTLD Program Auctions page, *available at* <https://newgtlds.icann.org/en/applicants/auctions>).

<sup>14</sup> Request, § 10, Pg. 16.

The Requesters cite the “Top-Level Domain Application –Terms and Conditions” (Guidebook Terms and Conditions) in which gTLD applicants authorize ICANN to:

8. ... [C]onduct thorough background screening[s] ... [including] identifying information may be required to resolve questions of identity of individuals within the applicant organization investigations[; and]

10. (a) Contact any person, group, or entity to request, obtain, and discuss any documentation or other information that, *in ICANN’s sole judgment*, may be pertinent to the application; (b) Consult with persons of ICANN’s choosing regarding the information in the application or otherwise coming into ICANN’s possession, provided, however, that ICANN will use reasonable efforts to ensure that such persons maintain the confidentiality of information in the application that this Applicant Guidebook expressly states will be kept confidential.<sup>15</sup>

These provisions of the Guidebook Terms and Conditions do not support the Requesters’ argument. In the course of evaluating Nu Dot’s application, ICANN performed the above referenced background screening in accordance with the Applicant Guidebook and standard procedures, and the results were released with the Initial Evaluation Report on 7 June 2013.<sup>16</sup> Thus, there is no dispute that ICANN performed all necessary checks of the application.

Rather, just one month before the scheduled Auction, the Requesters seemingly are suggesting that ICANN should have conducted another in-depth investigation and background check of Nu Dot because, according to the Requesters, certain unknown changes *may* have occurred with respect to Nu Dot’s organization which *might* require changes to Nu Dot’s application. Specifically, the Requesters claim that ICANN was obligated to investigate Nu Dot because the Applicant Guidebook grants ICANN “broad authority to investigate all applicants who apply to participate in the New gTLD Auction Program.”<sup>17</sup> But the Requesters’ proposed level of investigation is not what is required at this stage of the process. While the Requesters

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<sup>15</sup> Guidebook, §§ 6.8, 6.10 (emphasis supplied).

<sup>16</sup> Nu Dot New gTLD Program Initial Evaluation Report, *available at* ICANN’s New gTLD Program Auctions page, available at <https://newgtlds.icann.org/en/applicants/auctions>.

<sup>17</sup> Request, § 10, Pg. 14.

are correct that the Applicant Guidebook gives ICANN the authority to conduct investigations, the Applicant Guidebook does not require ICANN to investigate the Requesters' claims regarding Nu Dot in the manner that the Requesters suggest. Furthermore, the Guidebook Terms and Conditions cited by the Requesters confirm that it is within "ICANN's sole judgment" to determine whether additional information may be pertinent to an application and, consequently, to determine whether any investigation is warranted.<sup>18</sup> Accordingly, the Requesters fail to identify any policy or procedure that would require ICANN to investigate their claims.

Nevertheless, in response to the Requesters' allegations, ICANN *did* diligently investigate the claims regarding potential changes to Nu Dot's leadership and/or ownership. Indeed, on several occasions, ICANN staff communicated with the primary contact for Nu Dot both through emails and a phone conversation to determine whether there had been any changes to the Nu Dot organization that would require an application change request. On each occasion, Nu Dot confirmed that no such changes had occurred, and ICANN is entitled to rely upon those representations. For example, on 27 June 2016, ICANN sent Nu Dot's authorized primary contact a message to determine whether there had been any "changes to your application or the [Nu Dot] organization that need to be reported to ICANN ... [including] changes to officers and directors, [or] application contacts." Jose Ignacio Rasco, CFO of Nu Dot, replied that same day to "confirm that there have been no changes to the [Nu Dot] organization that would need to be reported to ICANN." Shortly thereafter, both ICANN staff and the Ombudsman reached out to Mr. Rasco to again inquire about the claims of potential changes requiring notification to ICANN. Specifically, ICANN staff conducted a telephone conversation with Mr. Rasco on 8 July 2016 regarding the allegations. During that call, and later in a confirming email on 11 July 2016, Mr. Rasco stated that "[n]either the ownership nor the control of Nu Dotco, LLC has

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<sup>18</sup> Guidebook, §§ 6.8, 6.10.

changed since we filed our application. The Managers designated pursuant to the company's LLC operating agreement (the LLC equivalent of a corporate Board) have not changed. And there have been no changes to the membership of the LLC either." Mr. Rasco also confirmed that he had provided this same information to the ICANN Ombudsman in responding to the Ombudsman's investigation of the complaint lodged with him. After completing its investigation of the Requesters' allegations regarding Nu Dot's organization, ICANN informed the Requesters that "we have investigated the matter, and to date we have found no basis to initiate the application change request process or postpone the auction."<sup>19</sup>

**C. ICANN Staff Complied with Established Policy when Determining that No Changes Were Necessary to Nu Dot's Application.**

The Requesters also suggest that ICANN violated its established policy of non-discriminatory treatment by allowing Nu Dot's application to proceed without a change request.<sup>20</sup> Specifically, the Requesters claim that ICANN engaged in "disparate treatment in favor of Nu Dot" by allowing Nu Dot's application to proceed despite "clear statements from [Nu Dot] that representations made in its application are, at best, misleading."<sup>21</sup>

The Applicant Guidebook provides that, "[i]f at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, the applicant must promptly notify ICANN."<sup>22</sup> First, Nu Dot never notified ICANN that there were any changes to the information provided in the application. Second, as discussed above, after investigating the Requesters' allegations that there were changes in Nu Dot's organization requiring changes to the application, ICANN concluded that there was no evidence to suggest

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<sup>19</sup> Letter from Christine Willett to Members of the .WEB/.WEBS Contention Set, dated 13 July 2016, *available at* <https://newgtlds.icann.org/en/program-status/correspondence>.

<sup>20</sup> Bylaws, Article II, § 3 ("ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.")

<sup>21</sup> Request, § 10, Pg. 20.

<sup>22</sup> Guidebook, § 1.2.7.

that Nu Dot's application was no longer accurate. Thus, as ICANN explained to the Requesters, there was no need for Nu Dot to "initiate the application change request process."<sup>23</sup>

Finally, the Requesters' claims rest upon one email (provided in redacted form), purportedly received from Nu Dot, stating that: "Nicolai [Bezsonoff] is at NSR full-time and is no longer involved with our TLD applications. [Jose Ignacio Rasco II is] still running our program and Juan [Diego Calle] sits on the board with me and several others."<sup>24</sup> This email does not indicate that these persons have left the organization or that the organization has "resold, assigned or transferred its rights in the application."<sup>25</sup> Moreover, after investigating the Requesters' allegations, ICANN found no evidence to suggest that Nu Dot experienced a change of leadership and/or control, and in fact received explicit confirmation from the primary contact for Nu Dot, Jose Ignacio Rasco, that no such changes had occurred, which ICANN is entitled to rely upon. Thus, there appears to be no need for an application change request, and ICANN acted in accordance with established policy and procedure in reaching this conclusion.

#### **V. Determination.**

Based on the foregoing, the BGC concludes that the Requesters have not stated proper grounds for reconsideration, and therefore denies Request 16-9. If the Requesters believe that they have somehow been treated unfairly here, they are free to ask the Ombudsman to review this matter.

The Bylaws provide that the BGC is authorized to make a final determination for all Reconsideration Requests brought regarding staff action or inaction and that no Board consideration is required. As discussed above, Request 16-9 seeks reconsideration of a staff

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<sup>23</sup> Letter from Christine Willett to Members of the .WEB/.WEBS Contention Set, dated 13 July 2016, *available at* <https://newgtlds.icann.org/en/program-status/correspondence>.

<sup>24</sup> Request, § 8, Pg. 9.

<sup>25</sup> *Id* at 10.

action or inaction. As such, after consideration of Request 16-9, the BGC concludes that this determination is final and that no further consideration by the Board is warranted.

In terms of the timing, because the BGC agreed to consider the matter on an urgent basis, Section 2.19 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a reconsideration request within seven days, or as soon thereafter as feasible.<sup>26</sup> The Requesters submitted this Request on 17 July 2016. By issuing its Determination on 21 July 2016, the BGC has acted within the established time limit for urgent reconsideration requests.

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<sup>26</sup> Bylaws Article IV, Section 2.19.

# Exhibit K

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 16-5505 PA (ASx)	Date	July 26, 2016
Title	Ruby Glen, LLC v. Internet Corp. for Assigned Names & Numbers		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE		
Stephen Montes Kerr	None	N/A	
Deputy Clerk	Court Reporter	Tape No.	
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:		
None	None		

**Proceedings:** IN CHAMBERS — COURT ORDER

Before the Court is an Ex Parte Application for Temporary Restraining Order (“Application for TRO”) filed by plaintiff Ruby Glen, LLC (“Plaintiff”). Plaintiff seeks to temporarily enjoin defendant Internet Corporation for Assigned Names and Numbers (“ICANN”) from conducting an auction for the rights to operate the registry for the generic top level domain (“gTLD”) for .web. Currently, that auction is set for 6:00 a.m. on July 27, 2016. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument.

Plaintiff applied to ICANN in 2012 to operate the registry for the .web gTLD. Because other entities also applied to operate the .web gTLD, ICANN’s procedures require all of the applicants, what are referred to as “contention sets,” to first attempt to resolve their competing claims, but if they cannot do so, ICANN will conduct an auction and award the rights to operate the registry to the winning bidder. According to Plaintiff, one of the competing entities, Nu Dotco, LLC (“NDC”) is unwilling to informally resolve the competing claims and has instead insisted on proceeding to an auction. Plaintiff asserts that it learned on June 7, 2016, that NDC has experienced recent changes in its management and ownership since it initially submitted its application to ICANN but that NDC has not provided ICANN with updated information as required by ICANN’s application requirements. Specifically, the email from NDC’s Jose Ignacio Rasco stated:

The three of us are still technically the managers of the LLC, but the decision goes beyond just us. Nicolai [Bezsonoff]<sup>1/</sup> is at [Neustar, Inc.] full time and no longer involved with our TLD applications. I’m still running our program and Juan [Diego Calle] sits on the board with me and several others. Based on your request, I went back to check with all the powers that be and there was no change in the response and [we] will not be seeking an extension.

(Docket No. 8, Decl. of Jonathon Nevett, Ex. A.)

<sup>1/</sup> According to Plaintiff, Bezsonoff was identified on NDC’s ICANN application as NDC’s “secondary contact.”

UNITED STATES DISTRICT COURT  
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Case No.	CV 16-5505 PA (ASx)	Date	July 26, 2016
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Plaintiff alleges that it requested that ICANN conduct an investigation regarding the discrepancies in NDC’s application beginning on June 22, 2016 and requested a postponement of the auction. At least one other applicant seeking to operate the .web registry has also requested that ICANN postpone the auction and investigate NDC’s current management and ownership structure. ICANN denied the requests on July 13, 2016, and stated that “in regards to potential changes of control of Nu DOT CO LLC, we have investigated the matter and to date we have found no basis to initiate the application change request process or postpone the auction.” Plaintiff and another of the applicants then submitted a request for reconsideration to ICANN on July 17, 2016. ICANN denied the request for reconsideration on July 21, 2016.

Plaintiff, relying on the Court’s diversity jurisdiction, filed this action in this Court on July 22, 2016. According to the Complaint, Plaintiff “is a limited liability company, duly organized and existing under the laws of the State of Delaware and operated by an affiliate located in Bellevue, Washington.” (Compl. ¶ 4.) The Complaint alleges that ICANN “is a nonprofit corporation, organized and existing under the laws of the State of California, with its principal place of business in Los Angeles, California.” (Id. ¶ 5.) Plaintiff asserts claims for: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) negligence; (4) unfair competition pursuant to California Business and Professions Code section 17200; and (5) declaratory relief. Plaintiff filed its Application for TRO at the same time it filed its Complaint.

As an initial matter, the Court notes that the Application for TRO fails to satisfy the requirements for a valid Ex Parte Application. Specifically, under Local Rule 7-19.1, an attorney making an ex parte application has a duty to give notice by making reasonable good faith efforts to orally advise counsel for the other parties, if known, of the proposed ex parte application, and “to advise the Court in writing of efforts to contact other counsel and whether any other counsel, after such advice, opposes the application or has requested to be present when the application is presented to the Court.” Here, Plaintiff did not notify the Court in writing of its efforts to notify opposing counsel of the Application for TRO or if ICANN intended to file an Opposition. These violations of the Local Rules are themselves sufficient to deny Plaintiff’s Application for TRO. See Standing Order 6:5-7 (“Applications which fail to conform with Local Rules 7-19 and 7-19.1, including a statement of opposing counsel’s position, will not be considered.”). Additionally, Plaintiff did not submit a proposed order with the Application for TRO as required by Local Rule 7-20. See Local Rule 7-20 (“A separate proposed order shall be lodged with any motion or application requiring an order of the Court, pursuant to L.R. 52-4.1.”). Finally, the Application for TRO was not accompanied by a proof of service as required by Local Rule 5-3.1. Indeed, according to ICANN, as of July 25, 2016, Plaintiff had not served ICANN with the Complaint or Application for TRO. Had ICANN not filed its Notice of Intent to File Opposition, the Court would have denied the Application for TRO as a result of these procedural deficiencies and violations of the Local Rules. See, e.g., Reno Air Racing Ass’n, Inc. v. McCord, 452 F.3d 1126, 1131 (9th Cir. 2006) (“[C]ourts have recognized very few circumstances justifying the issuance of an ex parte TRO [without notice].”). Despite these violations of the Local Rules, the Court will address the merits of Plaintiff’s Application for TRO because ICANN filed an Opposition. Future violations of the Local Rules, this Court’s Orders, or the Federal Rules of Civil Procedure may result in the striking of the offending documents or the imposition of sanctions.

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
CIVIL MINUTES - GENERAL

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The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction. See Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co., 887 F. Supp. 1320, 1323 (N.D. Cal. 1995). “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” Winter v. Natural Resources Defense Council, 555 U.S. 7, 20, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008). “A preliminary injunction is an extraordinary remedy never awarded as of right.” Id. The Ninth Circuit employs a “sliding scale” approach to preliminary injunctions as part of this four-element test. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011). Under this “sliding scale,” a preliminary injunction may issue “when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff’s favor,” as long as the other two Winter factors have also been met. Id. (internal citations omitted). “[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.” Mazurek v. Armstrong, 520 U.S. 968, 972, 117 S. Ct. 1865, 1867, 138 L. Ed. 2d 162 (1997).

Plaintiff’s breach of contract, breach of the implied covenant of good faith and fair dealing, and negligence claims are all based on provisions in ICANN’s bylaws and the ICANN Applicant Guidebook stating, for instance, that ICANN will make “decisions by applying documented policies neutrally and objectively, with integrity and fairness,” that ICANN will remain “accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness,” and that no contention set will proceed to auction unless there is “no pending ICANN accountability mechanism.” Plaintiff’s unlawful business practices act and declaratory relief claims allege that a covenant not to sue contained in the ICANN Application Guidebook is invalid and unlawful under California law. That release states:

Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN’s or an ICANN Affiliated Party’s review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant’s gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION . . .

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
CIVIL MINUTES - GENERAL

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Even if, as Plaintiff contends, this release is not valid, and Plaintiff could therefore be considered likely to prevail on its unlawful business practices and declaratory relief claims, the potential invalidity of the release — an issue the Court does not reach — is a separate issue that is not related to the propriety of proceeding with the auction for the .web registry. As a result, those claims, and Plaintiff’s likelihood of success on them, are not relevant to Plaintiff’s Application for TRO and do not provide a basis for enjoining the .web auction.

In its Opposition to the Application for TRO, ICANN contends that Plaintiff has not established the requisite likelihood of success on the merits or irreparable harm to justify the issuance of the preliminary injunctive relief it seeks. Specifically, ICANN has provided evidence that it has conducted investigations into Plaintiff’s allegations concerning potential changes in NDC’s management and ownership structure at each level of Plaintiff’s appeals to ICANN for an investigation and postponement of the auction. During those investigations, NDC provided evidence to ICANN that it had made no material changes to its management and ownership structure. Additionally, ICANN’s Opposition is supported by the Declarations of Nicolai Bezsonoff and Jose Ignacio Rasco, who declare under penalty of perjury that there have been no changes to NDC’s management, membership, or ownership since NDC first filed its application with ICANN.

Based on the strength of ICANN’s evidence submitted in opposition to the Application for TRO, and the weakness of Plaintiff’s efforts to enforce vague terms contained in the ICANN bylaws and Applicant Guidebook, the Court concludes that Plaintiff has failed to establish that it is likely to succeed on the merits, raise serious issues, or show that the balance of hardships tips sharply in its favor on its breach of contract, breach of the implied covenant of good faith and fair dealing, and negligence claims. Moreover, because the results of the auction could be unwound, Plaintiff has not met its burden to establish that it will suffer irreparable harm in the absence of the preliminary injunctive relief it seeks. The Court additionally concludes that the public interest does not favor the postponement of the auction.

Finally, the Court notes that Plaintiff’s Complaint has not adequately alleged a basis for this Court’s jurisdiction. Jurisdiction may be based on complete diversity of citizenship, requiring all plaintiffs to have a different citizenship from all defendants and for the amount in controversy to exceed \$75,000.00. See 28 U.S.C. § 1332; Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373, 98 S. Ct. 2396, 2402, 57 L. Ed. 2d 274 (1978). To establish citizenship for diversity purposes, a natural person must be a citizen of the United States and be domiciled in a particular state. Kantor v. Wellesley Galleries, Ltd., 704 F.2d 1088, 1090 (9th Cir. 1983). Persons are domiciled in the places they reside with the intent to remain or to which they intend to return. See Kanter v. Warner-Lambert Co., 265 F.3d 853, 857 (9th Cir. 2001). “A person residing in a given state is not necessarily domiciled there, and thus is not necessarily a citizen of that state.” Id. A corporation is a citizen of both its state of incorporation and the state in which it has its principal place of business. 28 U.S.C. § 1332(c)(1); see also New Alaska Dev. Corp. v. Guetschow, 869 F.2d 1298, 1300-01 (9th Cir. 1989). Finally, the citizenship of a partnership or other unincorporated entity is the citizenship of its members. See Johnson v. Columbia Props. Anchorage, LP, 437 F.3d 894, 899 (9th Cir. 2006) (“[L]ike a partnership, an LLC is a citizen of every state of which its owners/members are citizens.”); Marseilles Hydro Power, LLC v. Marseilles Land & Water Co., 299 F.3d 643, 652 (7th Cir. 2002) (“the relevant citizenship [of an LLC] for

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
CIVIL MINUTES - GENERAL

Case No.	CV 16-5505 PA (ASx)	Date	July 26, 2016
Title	Ruby Glen, LLC v. Internet Corp. for Assigned Names & Numbers		

diversity purposes is that of the members, not of the company”); Handelsman v. Bedford Village Assocs., Ltd. P’ship, 213 F.3d 48, 51-52 (2d Cir. 2000) (“a limited liability company has the citizenship of its membership”); Cosgrove v. Bartolotta, 150 F.3d 729, 731 (7th Cir. 1998); TPS Utilicom Servs., Inc. v. AT & T Corp., 223 F. Supp. 2d 1089, 1101 (C.D. Cal. 2002) (“A limited liability company . . . is treated like a partnership for the purpose of establishing citizenship under diversity jurisdiction.”).

The Complaint fails to establish that the parties are completely diverse. Specifically, by failing to identify and allege the citizenship of its own members, Plaintiff, a limited liability company, has not properly alleged its own citizenship. Accordingly, the Court is unable to ascertain whether it may exercise subject matter jurisdiction over this action. Without Plaintiff having adequately alleged a proper jurisdictional basis, the Court would not grant Plaintiff’s Application for TRO even if Plaintiff had otherwise satisfied the requirements for injunctive relief.

Despite Plaintiff’s failure to properly allege the Court’s subject matter jurisdiction, a district court may, and should, grant leave to amend when it appears that subject matter jurisdiction may exist, even though the complaint inadequately alleges jurisdiction. See 28 U.S.C. § 1653; Trentacosta v. Frontier Pacific Aircraft Industries, Inc., 813 F.2d 1553, 1555 (9th Cir. 1987). Therefore, the Court grants Plaintiff leave to amend the Complaint to attempt to establish federal subject matter jurisdiction. Plaintiff’s First Amended Complaint, if any, is to be filed by August 8, 2016. The failure to file a First Amended Complaint by that date or to adequately allege the Court’s jurisdiction may result in the dismissal of this action without prejudice.

For all of the foregoing reasons, the Court concludes that Plaintiff is not entitled to the injunctive relief it seeks. The Court therefore denies the Application for TRO.

IT IS SO ORDERED.

# Exhibit L

**NOT FOR PUBLICATION**

**FILED**

UNITED STATES COURT OF APPEALS

OCT 15 2018

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

RUBY GLEN, LLC,

Plaintiff-Appellant,

v.

INTERNET CORPORATION FOR  
ASSIGNED NAMES AND NUMBERS and  
DOES, 1-10,

Defendants-Appellees.

No. 16-56890

D.C. No.  
2:16-cv-05505-PA-AS

MEMORANDUM\*

Appeal from the United States District Court  
for the Central District of California  
Percy Anderson, District Judge, Presiding

Argued and Submitted October 9, 2018  
Pasadena, California

Before: SCHROEDER, M. SMITH, and NGUYEN, Circuit Judges.

Ruby Glen, LLC (“Ruby Glen”) appeals the district court’s dismissal of its First Amended Complaint (“FAC”) against Internet Corporation for Assigned Names and Numbers (“ICANN”). We have jurisdiction under 28 U.S.C. § 1291. “We review de novo dismissals for failure to state a claim under Rule 12(b)(6).”

\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

*McKesson HBOC, Inc. v. N.Y. State Common Ret. Fund, Inc.*, 339 F.3d 1087, 1090 (9th Cir. 2003). We affirm.

The district court properly dismissed the FAC on the ground that Ruby Glen’s claims are barred by the covenant not to sue contained in the Applicant Guidebook. As the district court found, the covenant not to sue is not void under California Civil Code section 1668. Ruby Glen is not without recourse—it can challenge ICANN’s actions through the Independent Review Process, which Ruby Glen concedes “is effectively an arbitration, operated by the International Centre for Dispute Resolution of the American Arbitration Association, comprised of an independent panel of arbitrators.” Thus, the covenant not to sue does not exempt ICANN from liability, but instead is akin to an alternative dispute resolution agreement falling outside the scope of section 1668. *See* Cal. Civ. Code. § 1668 (“All contracts which have for their object . . . to exempt anyone from responsibility for his own fraud, or willful injury . . . , or violation of law . . . are against the policy of the law.” (emphasis added)); *see also Cont’l Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1527 (9th Cir. 1987) (holding that an “exculpatory clause” does not violate California Civil Code section 1668 where the clause bars suit, but “[o]ther sanctions remain in place”); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (“By agreeing to

arbitrate . . . , a party does not forgo [its] substantive rights . . . ; it only submits to their resolution in an arbitral, rather than a judicial, forum.”).

The district court also properly rejected Ruby Glen’s argument that the covenant not to sue is unconscionable. Even assuming that the adhesive nature of the Guidebook renders the covenant not to sue procedurally unconscionable, it is not substantively unconscionable. *See Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899, 910 (2015) (explaining that procedural and substantive unconscionability “must *both* be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability” (emphasis in original) (internal quotation marks omitted)); *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, 232 Cal. App. 4th 1332, 1347–48 (2015) (holding that procedural unconscionability “may be established by showing the contract is one of adhesion”). Because Ruby Glen may pursue its claims through the Independent Review Process, the covenant not to sue is not “so one-sided as to shock the conscience.” *See Walnut Producers of Cal. v. Diamond Foods, Inc.*, 187 Cal. App. 4th 634, 647–48 (2010) (internal quotation marks omitted).

Finally, the district court did not abuse its discretion in denying Ruby Glen leave to amend because any amendment would have been futile. *See Carrico v. City & Cty. of San Francisco*, 656 F.3d 1002, 1008 (9th Cir. 2011).<sup>1</sup>

**AFFIRMED.**

<sup>1</sup> Ruby Glen raises several additional arguments that it failed to raise below. We decline to consider those arguments because they were raised for the first time on appeal. *See Dream Palace v. Cty. of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004).

# Exhibit M

From: Oliver Mauss .Contact Information Redacted

Date: July 5, 2016 at 9:27:07 AM EDT

To: Contact Information Redacted

Subject: proposal

Juan,

it has been a while since we last spoke, I hope things are well on your side.

I understand that you have decided against joining the Applicant Auction for .web. I have no insight into your motivation for this decision, but perhaps you might be interested in a different approach to resolving the string contention.

We have designed an Alternative Private Auction that comes with some advantages against the Application Auction and also the ICANN auction. Here are the basic principles:

- It divides the participants into groups of strong and weak
- the weak players are meant to lose and are compensated for this with a pre-defined sum
- the strong players bid for the asset
- the highest bid wins, but the winner pays a price lower than the 2nd highest bid

In result, there are a number of advantages versus both ICANN and Applicant Auction:

- the winning party pays less for the asset in comparison to both ICANN and Applicant Auction
- the losing strong players receive a higher return than in the Applicant Auction
- the losing weak players receive a lower return than in the Applicant Auction

So essentially, the benefit for the strong bidders comes from a lower share of proceeds for the weak bidders than in the Applicant Auction.

I have attached a deck that describes the principles in detail and also gives some examples. It has been developed by Takon, a consultancy specialized in auctions.

I have already discussed this with other parties in the contention set and have received only positive feedback so far. I would appreciate if you could review as well and give me your view. Perhaps this approach achieves a better fit with your goals than the Applicant Auction.

I look forward to hearing from you.

Best

Oliver

Oliver Mauss  
CEO

United Internet Ventures AG | Ernst-Frey-Strasse 9 | 76135 Karlsruhe | Germany

Phone: +49 721 91374-3400

E-Mail: Contact Information Redacted | Web: [www.united-internet.de](http://www.united-internet.de)

# Surplus Sharing Negotiation (SSN)

Ex ante agreement process for TLD *.web*  
instead of the ICANN Last Resort Auction (IA)

June 2016

# Surplus Sharing Negotiation (SSN)

## Procedure and main advantages

- The SSN is a procedure to resolve the contention between the applicants for a TLD and is conducted instead of the ICANN Last Resort Auction (IA).
- The SSN generates higher surpluses for all applicants than the ICANN Auction (IA) in the case that the SSN-Auction (SSNA) is conducted.

# SSN Procedure

## How does the SSN work?

- The SSN consist of two stages:
  - (1) Participation Decision (SSNP)
  - (2) Auction (SSNA)
- In the SSNP, the applicants decide on their participation in the SSNA.
- If not more than three applicants decide to participate in the SSNA, the SSNA is conducted, otherwise, the SSN is terminated and instead the IA will take place.

# SSN Procedure

## How does the SSN-Participation-Decision (SSNP) work?

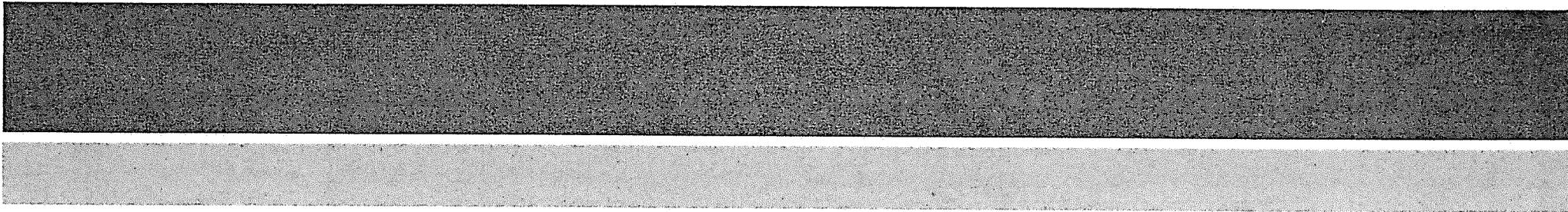
- The applicants simultaneously decide whether they want to participate in the SSN-Auction (SSNA) or not.
- If only one applicant decide to participate in the SSNA, this applicant immediately wins the TLD at price  $p$  (see below).
- If two or three applicants decide to participate in the SSNA, the SSNA will be conducted.
- If more than three applicants decide to participate, the SSN is terminated and the IA will take place.

# SSN Procedure

## How does the SSN-Auction (SSNA) work?

- Two or three SSNA-participants simultaneously submit their bid (one-shot sealed-bid mechanism).
- The SSNA-participants with the highest bid (SSNA-winner) wins the TLD.
- The group of the applicants that do not participate in the SSNA receives a predetermined payment  $p$ .
- The SSNA-losers receive from the SSNA-winner a compensation payment, which depends on the bids in the SSNA and the payment  $p$ .

**Note: The SSNA makes only sense for two or three participants.**



# Rules and Properties of the Surplus Sharing Negotiation Auction (SSNA)

# Surplus Sharing Negotiation Auction (SSNA)

## Variables and notation

SSN	Surplus Sharing Negotiation Process
SSNA	Surplus Sharing Negotiation Auction
IA	ICANN Last Resort Auction
$n$	Number of applicants for <i>.web</i>
$v_i$	Applicant <i>i</i> 's value (willingness to pay) for <i>.web</i> , $i = 1, \dots, n$
$\pi_i$	Applicant <i>i</i> 's surplus (profit), $i = 1, \dots, n$
$p$	Payment for the non-participating applicants
$\varphi(b_1, b_2, p)$	Compensation payment for the SSNA-losers

# Properties of the SSNA

The SSNA is a simple and an incentive compatible mechanism

- **One-shot sealed-bid auction:** Two or three strong applicants participate in the SSNA where they simultaneously submit their bids.
- **No sophisticated bidding strategy required:** The SSNA is designed that if the SSNA-participants consider themselves equally strong (i.e. equally likely to be weaker or stronger than each of the other SA-participants,
  - they have an incentive to bid their willingness to pay for the TLD in the SSNA (i.e. truthful bidding),
  - their optimal bid does not depend on the payments to the other applicants that do not participate in the SSNA.
- **Truthful bidding:** optimal bidding strategy in the SSNA.
- **Efficient outcome:** SSNA-participant with the highest valuation for the TLD wins the SSNA and thus the TLD.

# SSNA Concept

## Rules

- The two (three) applicants 1, 2 (and 3), that participate in the SSNA, simultaneously submit their  $b_1, b_2$  (and  $b_3$ ), we assume  $b_1 > b_2 (> b_3)$
- The reservation price is determined by the compensation payment to the other applicants  $p$ , i.e.  $b_1, b_2, b_3 \geq p$
- The SSNA-participant 1 with  $b_1$  (highest bid) is called the SSNA-winner and the SSNA-participants 2 (and 3) are called SSNA-losers.
- The SSNA-winner wins the TLD.
- The group of non-participating applicants receives from the SSNA-winner the predetermined compensation payment  $p$ .
- Each of the SSNA-losers receives from the SSNA-winner the compensation payment  $\varphi(b_1, b_2, p)$ .

# SSNA with two bidders

## Compensation payments

The group of non-participating applicants receive from the SSN-winner the predetermined payment  $p$ .

The SSNA-loser receives from the SSNA-winner the payment  $\varphi(b_1, b_2, p)$ :

$$(1) \quad \varphi(b_1, b_2, p) = \frac{\frac{b_1+b_2}{2} - p}{2} = \frac{b_1+b_2-2p}{4} \quad \text{if } b_2 > \frac{b_1+2p}{3} \Leftrightarrow b_1 - b_2 < 2(b_2 - p)$$

The SSNA-loser receives half of the difference  $\frac{b_1+b_2}{2} - p$  from the SSNA-winner if the difference between  $b_1$  and  $b_2$  is smaller than twice the difference between the SSNA-loser's bid  $b_2$  and the compensation payment  $p$  to the other bidders.

**This is considered to be the very probable case!**

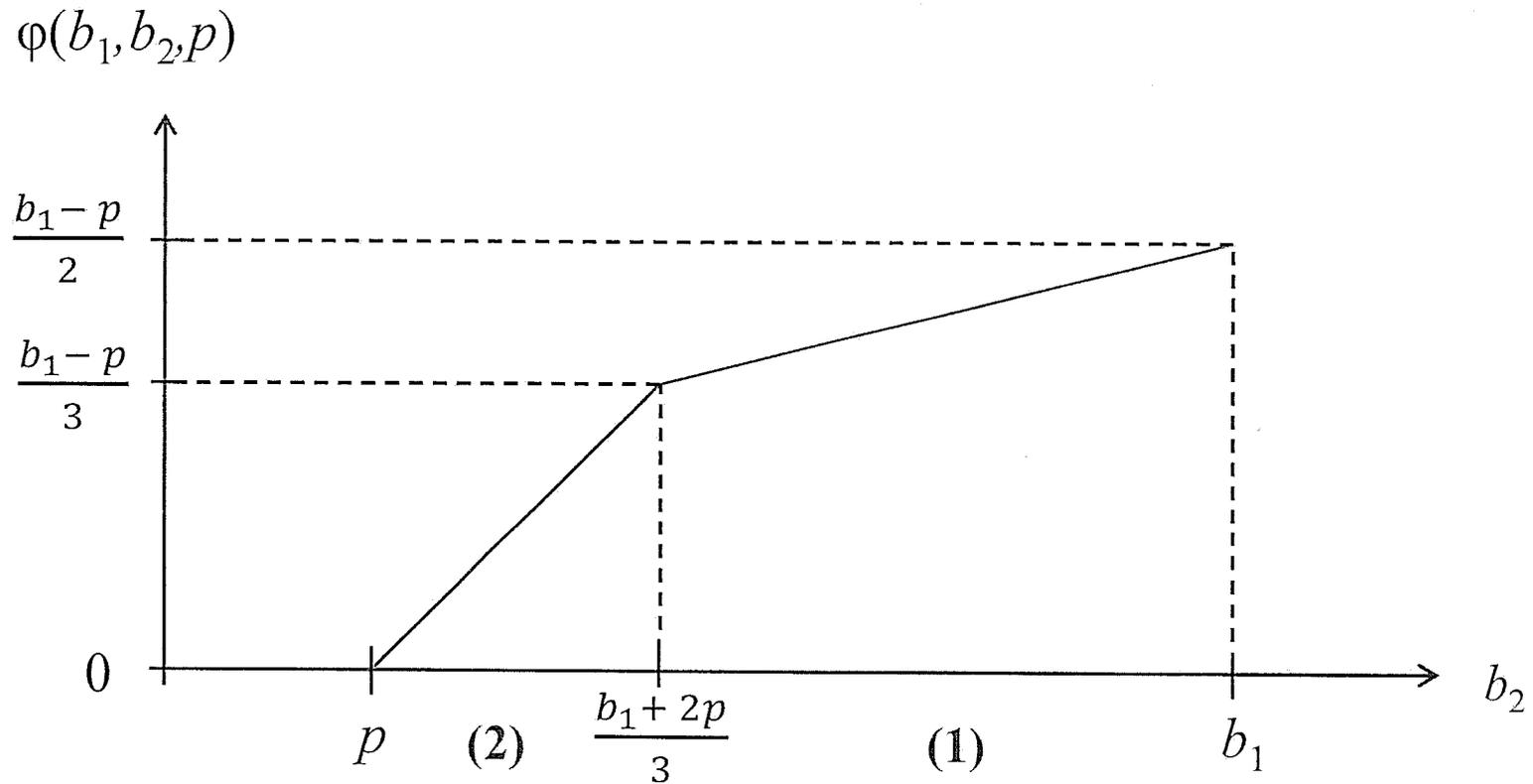
$$(2) \quad \varphi(b_1, b_2, p) = b_2 - p \quad \text{if } p < b_2 \leq \frac{b_1+2p}{3} \Rightarrow b_1 - b_2 \geq 2(b_2 - p)$$

The SSNA-loser receives the difference between its SSNA-bid  $b_2$  and  $p$  if the difference between  $b_1$  and  $b_2$  is larger than twice the difference between  $b_2$  and  $p$ .

This rule assures that the SSNA-winner is not worse off than in the IA.

# SSNA with two bidders

## Compensation payment for the SSNA-loser (illustration)



# SSNA with two bidders

## SSNA-participants' surpluses $\pi_1$ and $\pi_2$

### ➤ SNNA-winner

$$(1) \quad \pi_1 = v_1 - p - \frac{b_1 + b_2 - 2p}{4} \quad \text{if} \quad b_2 > \frac{b_1 + 2p}{3}$$

$$(2) \quad \pi_1 = v_1 - b_2 \quad \text{if} \quad p < b_2 \leq \frac{b_1 + 2p}{3}$$

### ➤ SNNA-loser

$$(1) \quad \pi_2 = \frac{b_1 + b_2 - 2p}{4} \quad \text{if} \quad b_2 > \frac{b_1 + 2p}{3}$$

$$(2) \quad \pi_2 = b_2 - p \quad \text{if} \quad p < b_2 \leq \frac{b_1 + 2p}{3}$$

$v_1$  and  $v_2$  denote the two strong applicants' values (willingness to pay) for the nTLD *.web* and  $\pi_1$  and  $\pi_2$  denote their surpluses.

## Example 1.1 (two SSNA-bidders)

Case (1):  $v_2 > (v_1 + p)/3$

- $v_1 = 100, v_2 = 80, p = 20$
- Truthful bidding:  $b_1 = v_1 = 100, b_2 = v_2 = 80$
- SSN
  - Applicant 1 wins the SSNA and thus the TLD
  - Applicant 1 pays  $\varphi(b_1, b_2, p) = \frac{b_1 + b_2 - 2p}{4} = 35$  to Applicant 2 and  $p = 20$  to the others
  - Applicant 1's surplus:  $\pi_1(\text{SSN}) = v_1 - p - \varphi(b_1, b_2, p) = 100 - 35 - 20 = 45$
  - Applicant 2's surplus:  $\pi_2(\text{SSN}) = \varphi(b_1, b_2, p) = 35$
  - Surplus of each of the  $n - 2$  other applicants :  $\pi_j(\text{SSN}) = 20/(n - 2)$
- ICANN Auction (IA)
  - Applicant 1 wins the IA at  $b_2 = 80$
  - Applicant 1's surplus:  $\pi_1(\text{IA}) = v_1 - b_2 = 100 - 80 = 20$
  - Applicant 2's surplus:  $\pi_2(\text{IA}) = 0$
  - Surplus of each of the  $n - 2$  other applicants :  $\pi_j(\text{IA}) = 0$

## Example 1.2 (two SSNA-bidders)

Case (2):  $v_2 \leq (v_1 + 2p)/3$

- $v_1 = 100, v_2 = 40, p = 20$
- Truthful bidding:  $b_1 = v_1 = 100, b_2 = v_2 = 40$
- SSN
  - Applicant 1 wins the SSNA and thus the TLD
  - Applicant 1 pays  $\varphi(b_1, b_2, p) = b_2 - p = 20$  to Applicant 2 and  $p = 20$  to the others
  - Applicant 1's surplus:  $\pi_1(\text{SSN}) = v_1 - p - \varphi(b_1, b_2, p) = 100 - 20 - 20 = 60$
  - Applicant 2's surplus:  $\pi_2(\text{SSN}) = \varphi(b_1, b_2, p) = 20$
  - Surplus of each of the  $n - 2$  other applicants :  $\pi_j(\text{SSN}) = 20/(n - 2)$
- ICANN Auction (IA)
  - Applicant 1 wins the IA at  $b_2 = 40$
  - Applicant 1's surplus:  $\pi_1(\text{IA}) = v_1 - b_2 = 100 - 40 = 60$
  - Applicant 2's surplus:  $\pi_2(\text{IA}) = 0$
  - Surplus of each of the  $n - 2$  other applicants :  $\pi_j(\text{IA}) = 0$

# Examples 1 (two SSNA-bidders)

## Comparison

Case	$b_1 = v_1$	$b_2 = v_2$	$p$	$\varphi(b_1, b_2, p)$	$\pi_1(\text{SSN})$	$\pi_2(\text{SSN})$	$\pi_1(\text{IA})$	$\pi_2(\text{IA})$
(1)	100	80	20	35	45	35	20	0
(2)	100	40	20	20	60	10	60	0

For both SSNA-participants 1 and 2, the SSN is never worse than the IA.  
For Applicant 1 the SSN is better in Case (1) and for Applicant 2 the SSN is better in Case (1) and Case (2).

For all other applicants that do participate in the SSNA, the SSN is better than the ICANN Auction (IA).

# SSNA with three bidders

## Compensation payments

The group of non-participating applicants receive from the SSNA-winner the predetermined payment  $p$ .

Each of the two SSNA-losers receives from the SSNA-winner the same compensation payment  $\varphi(b_1, b_2, p)$ :

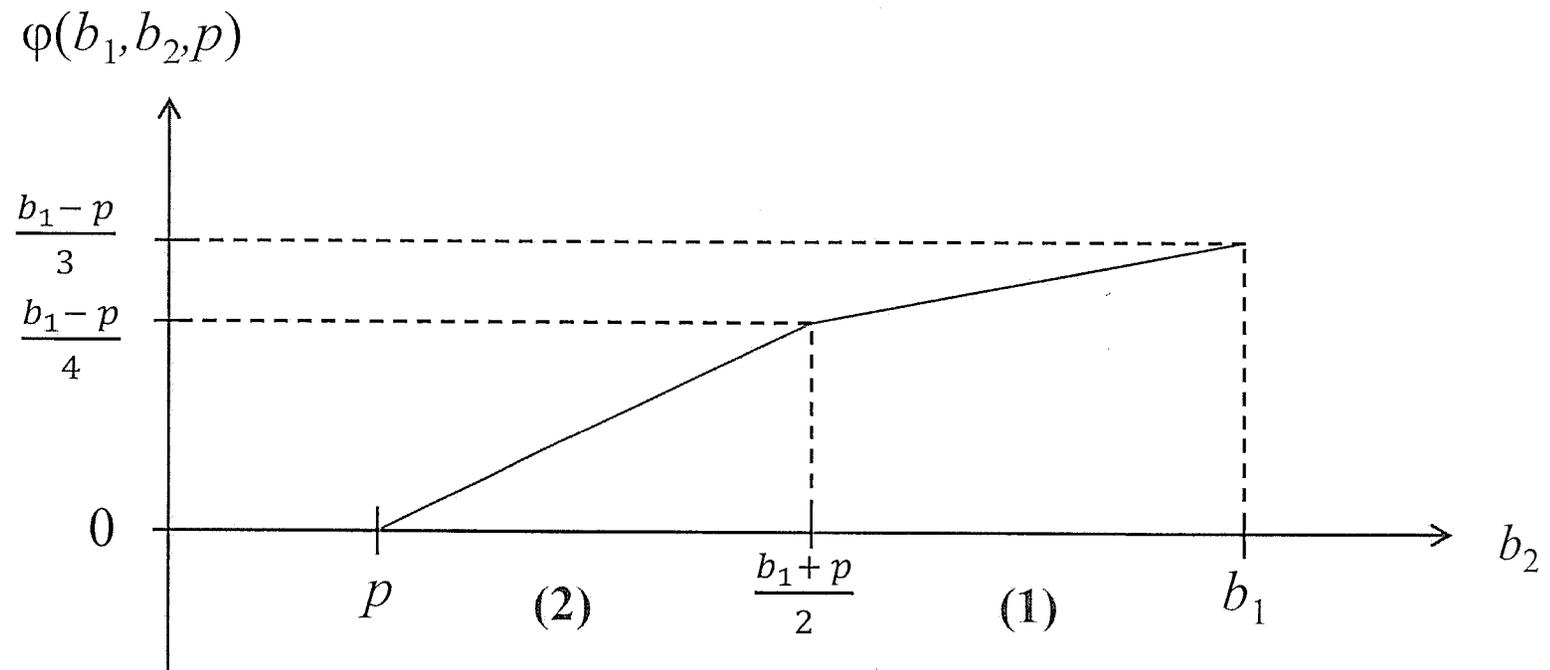
$$(1) \varphi(b_1, b_2, p) = \frac{\frac{b_1 + b_2}{2} - p}{3} = \frac{b_1 + b_2 - 2p}{6} \quad \text{if } b_2 > \frac{b_1 + p}{2}$$

**This is considered to be the very probable case!**

$$(2) \varphi(b_1, b_2, p) = \frac{b_2 - p}{2} \quad \text{if } p < b_2 \leq \frac{b_1 + p}{2}$$

# SSNA with three bidders

## Compensation payment for the SSNA-losers (illustration)



# SSNA with three bidders

SSNA-participants' surpluses  $\pi_1$ ,  $\pi_2$ , and  $\pi_3$

## ➤ Applicant 1 (SNNA-winner)

$$(1) \quad \pi_1 = v_1 - p - \frac{b_1 + b_2 - 2p}{3} = v_1 - \frac{b_1 + b_2 + p}{3} \quad \text{if} \quad b_2 > \frac{b_1 + p}{2}$$

$$(2) \quad \pi_1 = v_1 - b_2 \quad \text{if} \quad p < b_2 \leq \frac{b_1 + p}{2}$$

## ➤ Applicant 2/3 (SNNA-losers)

$$(1) \quad \pi_{2/3} = \frac{b_1 + b_2 - 2p}{6} \quad \text{if} \quad b_2 > \frac{b_1 + p}{2}$$

$$(2) \quad \pi_{2/3} = \frac{b_2 - p}{2} \quad \text{if} \quad p < b_2 \leq \frac{b_1 + p}{2}$$

$v_1$  and  $v_2$  denote the two strong applicants' values (willingness to pay) for the nTLD *.web* and  $\pi_1$  the surplus on the winner and  $\pi_{2/3}$  the surplus of each loser.

## Example 2.1 (three SSNA-bidders)

Case (1):  $v_2 > (v_1 + p)/2$

- $v_1 = 100, v_2 = 84, v_3 = 70, p = 20$
- Truthful bidding:  $b_1 = v_1 = 100, b_2 = v_2 = 84, b_3 = v_3 = 70$
- SSN
  - Applicant 1 wins the SSN and thus the TLD
  - Applicant 1 pays  $\varphi_{2/3}(b_1, b_2, p) = \frac{b_1 + b_2 - 2p}{6} = 24$  to Applicant 2 and 3 and  $p = 16$  to the others
  - Applicant 1's surplus:  $\pi_1(\text{SSN}) = v_1 - p - 2 \cdot \varphi_{2/3}(b_1, b_2, p) = 100 - 48 - 20 = 32$
  - Applicant 2's surplus:  $\pi_2(\text{SSN}) = \varphi_2(b_1, b_2, p) = 24$
  - Applicant 3's surplus:  $\pi_3(\text{SSN}) = \varphi_3(b_1, b_2, p) = 24$
  - Surplus of each of the  $n - 3$  other applicants :  $\pi_j(\text{SSN}) = 20/(n - 3)$
- ICANN Auction (IA)
  - Applicant 1 wins the IA at  $p = b_2 = 80$
  - Applicant 1's surplus:  $\pi_1(\text{IA}) = v_1 - p = 100 - 84 = 16$
  - Applicant 2's surplus:  $\pi_2(\text{IA}) = 0$
  - Applicant 3's surplus:  $\pi_3(\text{IA}) = 0$
  - Surplus of each of the  $n - 3$  other applicants :  $\pi_j(\text{SSN}) = 0$

## Example 2.2 (three SSNA-bidders)

Case (2):  $v_2 \leq (v_1 + p)/2$

- $v_1 = 100, v_2 = 40, v_3 = 30, p = 20$
- Truthful bidding:  $b_1 = v_1 = 100, b_2 = v_2 = 40, b_3 = v_3 = 30$
- SSN
  - Applicant 1 wins the SSNA and thus the TLD
  - Applicant 1 pays  $\varphi(b_1, b_2, p) = \frac{b_2 - p}{2} = 10$  to Applicant 2 and 3 and  $p = 20$  to the others
  - Applicant 1's surplus:  $\pi_1(\text{SSN}) = v_1 - p - 2 \cdot \varphi(b_1, b_2, p) = 100 - 20 - 20 = 60$
  - Applicant 2's surplus:  $\pi_2(\text{SSN}) = \varphi(b_1, b_2, p) = 10$
  - Applicant 3's surplus:  $\pi_3(\text{SSN}) = \varphi(b_1, b_2, p) = 10$
  - Surplus of each of the  $n - 3$  other applicants :  $\pi_j(\text{SSN}) = 20/(n - 3)$
- ICANN Auction (IA)
  - Applicant 1 wins the IA at  $b_2 = 60$
  - Applicant 1's surplus:  $\pi_1(\text{IA}) = v_1 - p = 100 - 40 = 60$
  - Applicant 2's surplus:  $\pi_2(\text{IA}) = 0$
  - Applicant 3's surplus:  $\pi_3(\text{IA}) = 0$
  - Surplus of each of the  $n - 3$  other applicants :  $\pi_j(\text{SSN}) = 0$

# Examples (three SSNA-bidders)

## Comparison

Case	$b_1 = v_1$	$b_2 = v_2$	$p$	$\Phi_{2/3}(b_1, b_2, p)$	$\pi_1(\text{SSN})$	$\Pi_{2/3}(\text{SSN})$	$\pi_1(\text{IA})$	$\pi_{2/3}(\text{IA})$
(1)	100	82	16	25	34	25	18	0
(2)	100	40	16	12	60	12	60	0

For the three SSNA-participants 1, 2, and 3, the SSN is never worse than the IA. For Applicant 1 the SSN is better in Case (1) and for Applicant 2 and 3 it is better in Case (1) and Case (2).

For all other applicants that do participate in the SSNA, the SSN is better than the ICANN Auction (IA).

# Exhibit N

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**From:** Ausubel, Lawrence M. Contact Information Redacted  
**Sent:** Wednesday, July 20, 2016 10:59 AM  
**To:** Contact Information Redacted  
**Cc:** Contact Information Redacted  
**Subject:** Reminders

Dear Jose Ignacio Rasco,

You are reminded that the Deposit Deadline for .WEB/.WEBS has passed and we are now in the Blackout Period. During the Blackout Period, all applicants for Contention Strings in the Auction are prohibited from cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other's, or any other competing applicants' bids or bidding strategies, or discussing or negotiating settlement agreements or post-Auction ownership transfer arrangements, with respect to any Contention Strings in the Auction.

You are also reminded of the following upcoming events in relation to the Auction:

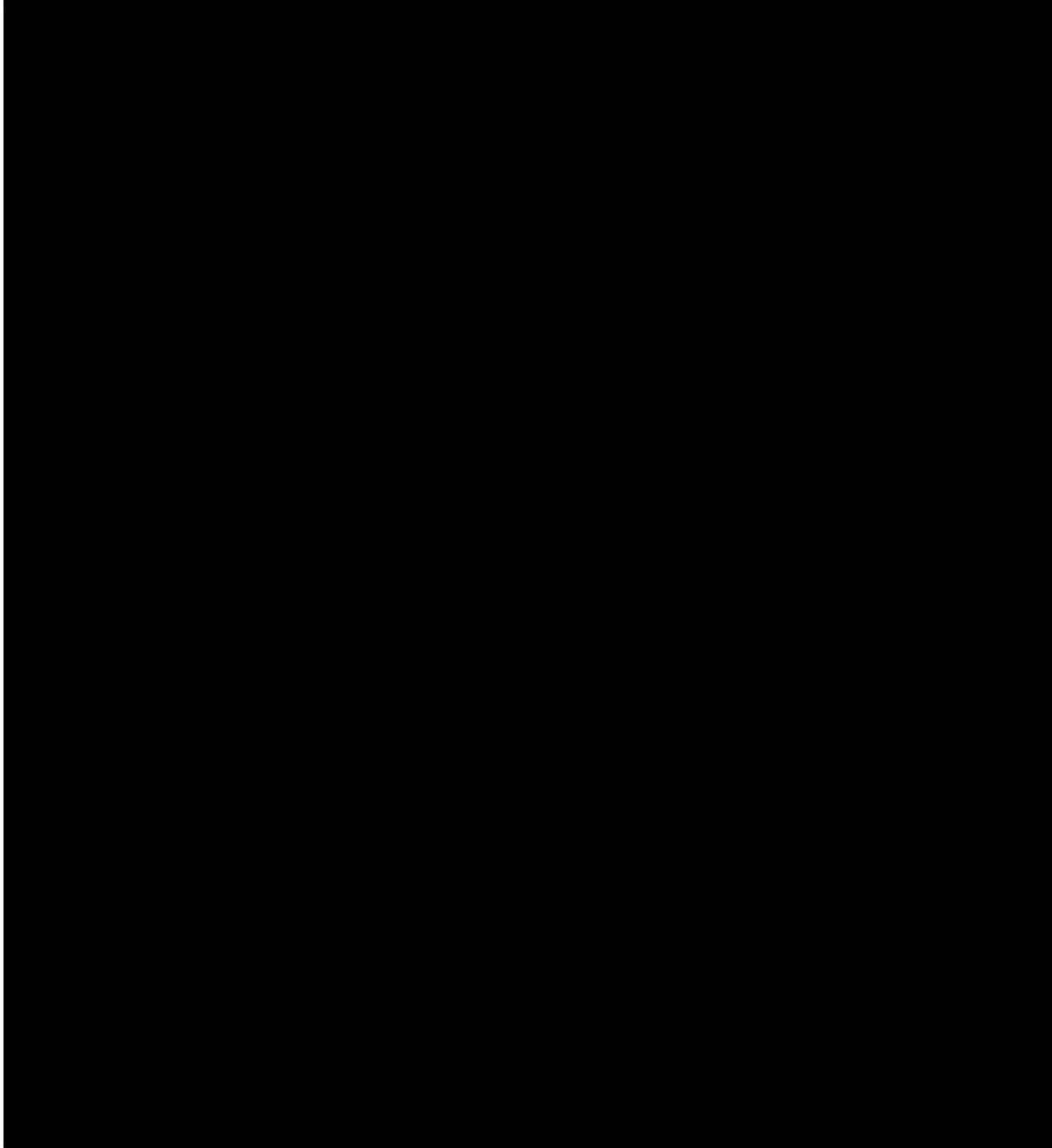
- Connectivity Test: 21 July 2016 at 13:00 UTC (9:00 am New York time).
- Mock Auction: 26 July 2016 at 13:00 UTC (9:00 am New York time).
- Auction: 27 July 2016 at 13:00 UTC (9:00 am New York time).

Please feel free to contact us if you have any questions.

Kind regards,

Larry Ausubel  
Power Auctions LLC

# Exhibit O



Yesterday 1:54 PM

Talk?

Today 10:24 AM

IF ICANN delays the auction  
next week would you again  
consider a private auction? Y-N



iMessage



## Attachment D to Board Reference Materials

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3 November 2021

**VIA EMAIL THROUGH COUNSEL**

Mr. Maarten Botterman  
Chair, Board of Directors  
Internet Corporation for Assigned Names and Numbers  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536

**Re: Response to Nu DotCo, LLC’s 23 July 2021 Letter to the ICANN Board**

Dear Mr. Botterman and Members of the ICANN Board:

We write on behalf of Altanovo Domains Limited f/k/a Afilias Domains No. 3 Limited<sup>1</sup> (“**Afilias**”) regarding Nu DotCo, LLC’s (“**NDC**”) 23 July 2021 letter to the ICANN Board (“**NDC Letter**”). ICANN publicly posted the NDC Letter on 14 September 2021, almost two months after ICANN received it. The NDC Letter is rife with inaccuracies and rhetoric designed to mislead and distract the Board from the real issues at hand concerning the delegation of the .WEB gTLD, namely, whether NDC’s agreement with VeriSign, Inc. (“**Verisign**”) the August 25, 2015 Domain Acquisition Agreement (“**DAA**”), “complied with the New gTLD Program Rules” and “whether by reason of any violation of the [gTLD Applicant Guidebook (“**AGB**”)] and [Auction Rules for New gTLDs: Indirect Contention Edition (“**Auction Rules**”)], NDC’s application for .WEB should be rejected and its bids at the [ICANN] auction disqualified.”<sup>2</sup>

By this letter, we make three requests:

**First**, ICANN has repeatedly maintained that it will not take “any material action with respect to the [.WEB] application or contention set while the Accountability Mechanism is pending.”<sup>3</sup> Accordingly, we understand and expect that the ICANN Board will not take

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<sup>1</sup> For ease of reference, we will use the term “Afilias” in this letter to refer to the Claimant in the IRP.

<sup>2</sup> **Exhibit 1**, *Afilias v. ICANN*, ICDR Case No. 01-18-0004-2702, Final Decision (20 May 2021, as corrected 15 July 2021) (“**IRP Decision**”), ¶ 413(5).

<sup>3</sup> **Exhibit 2**, *Afilias v. ICANN*, ICDR Case No. 01-18-0004-2702, ICANN’s Rejoinder Memorial in Response to Afilias’ Amended Request for Independent Review (1 June 2020), ¶ 26; **Exhibit 3**, *Afilias*

any action regarding the .WEB matter while the *Afilias v. ICANN* Independent Review Process (“IRP”), or any follow-on litigation regarding the IRP Decision, are pending. We request immediate confirmation in this regard.

**Second**, notwithstanding the foregoing, should the Board nevertheless proceed to consider the .WEB matter before the conclusion of the *Afilias v. ICANN* IRP (including any follow-on litigation related to the Panel’s decision, as it may eventually be amended or supplemented), we ask that it carefully consider the contents of this letter, which (i) corrects the misstatements in the NDC Letter (**Section I**); (ii) sets out the various ways in which NDC’s and Verisign’s entry into and performance of the DAA violated critical provisions of the “**New gTLD Program Rules**”<sup>4</sup> based on what we learned in the IRP (**Section II**); and (iii) addresses why NDC’s conduct should cause ICANN, pursuant to its obligations under the ICANN Articles and Bylaws, to declare NDC ineligible to enter into a registry agreement for .WEB (**Section III**).<sup>5</sup>

**Third**, we request that ICANN comply with its transparency obligations and (i) post the full text of the DAA, which will allow the Internet Community to decide for itself whether Verisign’s and NDC’s conduct violates the letter and spirit of the New gTLD Program Rules; and (ii) post the full merits hearing transcript for the *Afilias v. ICANN* IRP, as ICANN’s counsel committed to do in **June 2021**.<sup>6</sup> ICANN’s efforts to shield NDC and Verisign, and indeed ICANN’s own conduct, from criticism by not posting documents that ICANN is required to publish, does nothing more than exacerbate the dispute over .WEB and constitutes a continuing violation of the Articles and Bylaws (**Section IV**).

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v. *ICANN*, ICDR Case No. 01-18-0004-2702, Witness Statement of Christopher Disspain (1 June 2020), available at <https://www.icann.org/en/system/files/files/irp-afili-as-witness-statement-disspain-01jun20-en.pdf>, ¶ 11 (“ICANN’s Accountability Mechanisms are fundamental safeguards in ensuring that ICANN’s model remains effective, and it did not seem prudent for the Board to interfere with or preempt issues that were the subject of Accountability Mechanisms regarding .WEB that were pending at that time ... that might require the Board to take action.”).

<sup>4</sup> The New gTLD Program Rules include the gTLD Applicant Guidebook (4 June 2012) (“**AGB**”) and the Auction Rules for New gTLDs: Indirect Contention Edition (24 Feb. 2015) (“**Auction Rules**”), attached as **Exhibit 4** and **Exhibit 5** respectively.

<sup>5</sup> We reserve our rights to further respond to the NDC Letter, and any other allegation brought by NDC or Verisign, once the *Afilias v. ICANN* IRP and any additional related proceedings conclude, and the .WEB matter is properly before the ICANN Board.

<sup>6</sup> **Exhibit 6**, *Afilias v. ICANN*, ICDR Case No. 01-18-0004-2702, Email from E. Enson (Counsel for ICANN) to Afilias and Amici (11 June 2021).

## I. NDC’S CLAIMS REGARDING AFILIAS’ ALLEGED VIOLATIONS OF THE BLACKOUT PERIOD ARE FRIVOLOUS

The NDC Letter contains various unsubstantiated charges regarding Afilias’ conduct in the weeks leading up to the 2016 ICANN-administered auction for .WEB (the “**ICANN Auction**”). It does so plainly to advance NDC’s and Verisign’s strategy to distract the Board from NDC’s (and indeed Verisign’s) own blatant violations of the New gTLD Program Rules. As detailed herein—and as is well-known to ICANN—NDC (a) impermissibly transferred many of its rights as an applicant for .WEB to Verisign by entering into the DAA, (b) purposefully misled ICANN Staff, which was investigating allegations that NDC had effectively transferred control over its application to a third party in violation of the New gTLD Program Rules, and (c) submitted bids on Verisign’s behalf and pursuant to Verisign’s specific instructions during the ICANN Auction. None of these facts are in dispute—they are crystal clear on the face of the DAA; an agreement that NDC and Verisign executed in August 2015 and which they purposefully kept secret from ICANN for over a year and until after the ICANN Auction had taken place. We address NDC’s and Verisign’s conduct in greater detail below, but first we set the record straight regarding the multiple factual inaccuracies contained in the NDC Letter pertaining to the Blackout Period, which NDC and Verisign claim Afilias violated.

### A. NDC Wrongly Attributes the Conduct of Third Parties to Afilias

Much of the NDC Letter is devoted to describing conduct by parties other than Afilias. For example, although Section II of the NDC Letter is entitled “Afilias’ Violation of the Blackout Period,” subsection B is devoted entirely to complaints about NDC’s conduct and requests to delay the .WEB auction that were made by Ruby Glen, LLC (“**Ruby Glen**”); Schlund Technologies GmbH; and Radix FZC (“**Radix**”) to ICANN during June and July 2016. Similarly, subsection C is entirely devoted to describing a litigation prosecuted by Ruby Glen in federal court against ICANN, seeking to enjoin ICANN from conducting the .WEB Auction, and subsection D is entirely devoted to describing a proposal that Schlund made to NDC concerning a private auction.

NDC does not—and cannot—allege that Afilias joined in any of these efforts. NDC’s lengthy recitation of actions taken by other members of the .WEB Contention Set are utterly irrelevant and are included in its letter simply to mask the absence of any evidence of wrongdoing by Afilias. As for its actual complaints against Afilias, NDC complains about texts that Afilias sent to NDC on June 7, 2016 (before the Blackout Period started) and a single text it sent on July 22, 2016 (a couple of days after the Blackout Period had commenced). As discussed below, none of these amounts to a violation of the Blackout Period Rules.

**B. NDC Wrongly Asserts that the June 7, 2016 Texts Violate a Blackout Period that Started on June 20, 2016**

NDC relies on certain texts that Steve Heflin (of Afiliias) sent to Juan Diego Calle (of NDC) on June 7, 2016. But these texts were sent approximately *six weeks before the start of the Blackout Period*. NDC does not—and cannot—explain how these texts constitute a violation of the Blackout Period. Simply put: *they do not*. Frankly, insofar as Mr. Heflin’s texts are concerned, any consideration of NDC’s allegations should end there.

However, for the avoidance of doubt, the Board should rest assured that there is no substance to NDC’s allegations that Mr. Heflin’s texts constitute bid rigging. Bid rigging requires an agreement between two independent parties to, in essence, fix the result of an auction. There was no such agreement here—NDC rejected Mr. Heflin’s proposal.

Contrary to NDC’s assertions, ICANN expressly encouraged contention set members to “resolve string contention among themselves” and “expected that most cases of contention [would] be resolved ... through voluntary agreement among the involved applicants.”<sup>7</sup> The AGB makes clear that resolution of string contention by a public ICANN auction was a “Mechanism of Last Resort.”<sup>8</sup> ICANN both knew and encouraged resolution of string contention by private auction. This is precisely what Mr. Heflin and others were trying to do. As the Board is well aware, in a private auction, the losing bidders divide amongst themselves the proceeds paid by the winning bidder. There is no requirement that these proceeds be divided equally and, in fact, many private auctions in the New gTLD Program have adopted formulas that divide the proceeds unequally. The reason for this is that the AGB requires that all contention set members agree to a private auction; and under such a system a contention set member can hold out for a better share of the proceeds. This, in fact, is what Afiliias assumed NDC was doing when it abruptly announced in June 2016 that it would not participate in the long-planned private auction for .WEB. Mr. Heflin’s proposal concerned the allocation of auction proceeds, in the event NDC consented to a private auction and then lost. NDC’s attempt to cast this legitimate offer as an invitation to purposely lose the private auction and an attempt at bid-rigging is fundamentally illogical and plainly incorrect.

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<sup>7</sup> **Exhibit 4**, AGB, Secs. 4.1.3, 4.3.

<sup>8</sup> *Id.*, Sec. 4.3.

C. **Mr. Kane's July 22, 2016 Text to NDC Does Not Violate the Blackout Period**

NDC's allegations regarding a single text sent by John Kane (of Afilius) on July 22, 2016 to Jose Ignacio Rasco III (of NDC) two days after the start of the Blackout Period are equally exaggerated and nonsensical. The full text of Mr. Kane's text reads:

IF ICANN delays the auction next week would you again consider a private auction? Y-N<sup>9</sup>

The context in which Mr. Kane sent this text is important. A few days before Mr. Kane sent his text (20 July 2016), reports were circulating in industry press that Ruby Glen had filed a Reconsideration Request demanding that ICANN delay the ICANN Auction in order to allow ICANN sufficient time to investigate claims that NDC had breached its obligations under the AGB.<sup>10</sup> Given that there was a reasonable possibility that ICANN would delay the auction in light of the prevailing circumstances, and some uncertainty as to what might be the outcome of ICANN's investigations, Mr. Kane simply sought to ascertain whether NDC would again consider participating in a private auction. Mr. Rasco did not respond to Mr. Kane's text and Mr. Kane made no further attempts to communicate with NDC, as ICANN denied the Reconsideration Request later that same day (22 July 2016), thus ending any speculation about whether the ICANN Auction would proceed as planned.

Mr. Kane's brief text did not violate the Blackout Period Rules. The Blackout Period is designed to prevent members of a contention set from colluding on the administration of a public ICANN auction. This anti-collusion rule is narrowly tailored to this specific purpose; the rule does not prohibit all contact among contention set members during this period. Accordingly, it is important to focus on what the Blackout Period rule prohibits and what it does not. The text of the Blackout Period rule is clear: Applicants are prohibited from discussing (a) "*bids*," (b) "*bidding strategies*," or (c) "*settlement agreements or post-Auction ownership transfer arrangements*."<sup>11</sup> ICANN itself has had cause to interpret the Blackout Period rule in a contemporaneous filing with a U.S. federal court. According to ICANN, the blackout period "is a period of time called for in the

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<sup>9</sup> **Exhibit 7**, Text Message (from cell phone belonging to J. Rasco) (21 July 2016).

<sup>10</sup> **Exhibit 8**, Kevin Murphy, "Donuts joins fight to delay .web gTLD auction with emergency appeal," *Domain Incite* (20 July 2016, 10:49 (UTC)), available at <http://domainincite.com/20768-donuts-joins-fight-to-delay-web-gtld-auction-with-emergency-appeal>.

<sup>11</sup> **Exhibit 9**, ICANN, New gTLD Auctions Bidder Agreement (3 Apr. 2014) (excerpt), Sec. 2.6.

Auction Rules during which auction participants are prohibited from communicating, or cooperating, with one another *in terms of the auction.*”<sup>12</sup>

Mr. Kane’s text clearly did not disclose Afilias’ planned bids or bidding strategies, nor did the text propose a settlement agreement or a transfer agreement. Indeed, Mr. Kane’s text *did not concern the ICANN Auction at all*—Mr. Kane’s request was expressly limited to the scenario in which “ICANN delays [that] auction.”<sup>13</sup> Mr. Kane’s text asked a very innocuous question about NDC’s potential willingness to participate in a private auction assuming that ICANN was not proceeding with the public auction (i.e., “[i]f ICANN delays the auction”<sup>14</sup>), which was a very real possibility at the time given ICANN’s investigation of Ruby Glenn’s complaints. He solicited a simple yes or no answer, and made no commitments or promises regarding either a possible private auction or the ICANN Auction. Nothing in Mr. Kane’s text can be legitimately taken to suggest that he was asking NDC to “communicat[e], or cooperat[e], with [Afilias] in terms of the *[ICANN] auction.*”<sup>15</sup> There was, in short, nothing concrete and no attempt at collusion.<sup>16</sup>

NDC and Verisign’s charges against Afilias should be shown for what they are—a shameless effort to distract the Board’s attention from NDC and Verisign’s conduct, a matter to which we now turn.

## II. BY COMPLYING WITH THE DAA, NDC REPEATEDLY VIOLATED THE NEW GTLD PROGRAM RULES

It is critical that the Board have an accurate appreciation of how NDC and Verisign’s conduct violated the New gTLD Program Rules; why Staff’s decision to ignore NDC’s and Verisign’s actions violated the Articles and Bylaws; and why the Board must disqualify NDC’s application for .WEB, reject its auction bids, deem NDC ineligible to enter in to a registry agreement for .WEB, and offer .WEB to Afilias as the next highest bidder. We address these points below.

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<sup>12</sup> **Exhibit 10**, Weinstein Decl., ¶ 7 (emphasis added).

<sup>13</sup> **Exhibit 7**, Text Message (from cell phone belonging to J. Rasco) (21 July 2016).

<sup>14</sup> **Exhibit 7**, Text Message (from cell phone belonging to J. Rasco) (21 July 2016).

<sup>15</sup> **Exhibit 10**, Weinstein Decl., ¶ 7 (emphasis added).

<sup>16</sup> *Id.* (emphasis added).

**A. Overview of the DAA’s Critical Terms**

As an initial matter, it is fundamental that the Board understand the scope and purpose of NDC and Verisign’s agreement as set out in the DAA. In essence, the DAA allowed Verisign to secretly and Redacted - Third Party Designated Confidential Information

in exchange

Redacted - Third Party Designated Confidential Information.<sup>18</sup> The quoted language is from the DAA itself. From the moment the DAA was signed, Verisign took control over key rights and obligations of NDC, the nominal applicant for the .WEB gTLD—including, Redacted - Third Party Designated Confidential Information

By entering into the DAA, NDC undertook to act Redacted - Third Party Designated Confidential Information<sup>19</sup> Specifically, the DAA provides that:<sup>20</sup>

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<sup>17</sup> **Exhibit 11**, Domain Acquisition Agreement between VeriSign, Inc. and Nu Dotco LLC (25 Aug. 2015) (“DAA”), Sec. 10(a).

<sup>18</sup> Redacted - Third Party Designated Confidential Information

*Id.*, Sec. 1 and Ex. A, Secs. 4(b), 4(d).

<sup>19</sup> Redacted - Third Party Designated Confidential Information

*Id.*, Ex. A, Sec. 10.

<sup>20</sup> Various provisions of the DAA illustrate Verisign’s complete control over NDC’s actions in regards to the .WEB gTLD. The provisions listed here serve as the most relevant examples.

<sup>21</sup> **Exhibit 11**, DAA, Sec. 10(a) (emphasis added).

<sup>22</sup> *Id.*, Sec. 4(f).

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<sup>23</sup> *Id.*, Sec. 4(j) (emphasis added).

<sup>24</sup> *Id.*, Ex. A, Sec. 1 (emphasis added).

<sup>25</sup> *Id.*, Ex. A, Sec. 1(i) (emphasis added). *See id.* Redacted - Third Party Designated Confidential Information

<sup>26</sup> *Id.*, Ex. A, Sec. 1(i) (emphasis added).

<sup>27</sup> *Id.*, Ex. A, Sec. 8 (emphasis added).

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Simply based on the foregoing extracts from the DAA, it should be evident to the Board, as it should have been evident to ICANN Staff after they reviewed the DAA, that the agreement violates the letter and spirit of the New gTLD Program Rules. Staff, however, determined to proceed with delegating the TLD to NDC, knowing full well that NDC was bound to transfer it to Verisign and that NDC was nothing more than a vehicle for Verisign's improper participation in the .WEB Contention Set.

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<sup>28</sup> *Id.*, Ex. A, Sec. 1(h) (emphasis added).

<sup>29</sup> *Id.*, Ex. A, Sec. 2(e) (emphasis added). *See id.*, Ex. A, Sec. 1(f) Redacted - Third Party Designated Confidential Information

<sup>30</sup> *Id.*, Ex. A, Sec. 1(f) (emphasis added).

<sup>31</sup> *Id.*, Ex. A, Sec. 3(g) (emphasis added).

## B. The DAA Is an “Unprecedented” Agreement.

### 1. The DAA Does Not Reflect Any Known “Market Practice”

In 2014, more than two years after the new gTLD application deadline had passed, Verisign decided to pursue the .WEB gTLD.<sup>32</sup> As Verisign’s Mr. Paul Livesay revealed in his testimony in the IRP, this decision was driven by <sup>Redacted - Third Party Designated Confidential Information</sup>  
<sup>33</sup> Redacted - Third Party Designated Confidential Information

<sup>4</sup> Mr. Livesay testified that it was his understanding that TLDs could be acquired on what he described as the “secondary market.”<sup>35</sup> He claimed that he <sup>Redacted - Third Party Designated Confidential Information</sup>

<sup>57</sup> Although it may be true that “varying forms of transactions” were taking place, as NDC’s Jose Ignacio Rasco III testified in the IRP, the deal reflected in the DAA was, in fact, “unprecedented.”<sup>38</sup>

Indeed, reflecting Mr. Rasco’s assessment, the DAA does not remotely resemble the various transactions that NDC and Verisign have presented to the Board as examples of “common business practices” in the secondary market for gTLDs. We address NDC’s and

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<sup>32</sup> **Exhibit 12**, *Afilias v. ICANN*, ICDR Case No. 01-18-0004-2702, Merits Hearing, Tr. Day 7 (11 Aug. 2020) (“**Hr. Tr., Day 7**”), 1125:25 – 1126:2 (Livesay Cross-Examination) (“Q: Who gave you this assignment? A: My boss at the time, Tom Indelicarto, and Jim Bidzos, the CEO.”). In 2014, Messrs. Bidzos and Indelicarto gave Mr. Livesay the assignment to pursue the acquisition of .WEB. *Id.*, 1125:17 – 1126:7. Mr. Livesay testified that he reported to Messrs. Bidzos and Indelicarto on a regular basis—“probably weekly or biweekly”—as he pursued the project. *Id.*, 1126:23 – 1127:4.

<sup>33</sup> **Exhibit 13**, *Afilias v. ICANN*, ICDR Case No. 01-18-0004-2702, Witness Statement of Paul Livesay In Support Of ICANN’s Rejoinder and Amici’s Briefs (1 June 2020) (“**Livesay WS**”), ¶ 4  
<sup>Redacted - Third Party Designated Confidential Information</sup>

<sup>34</sup> **Exhibit 13**, Livesay WS, ¶ 5.

<sup>35</sup> **Exhibit 12**, Hr. Tr., Day 7, 1170:1-7.

<sup>36</sup> **Exhibit 13**, Livesay WS, ¶ 8; **Exhibit 12**, Hr. Tr., Day 7, 1170:1-7.

<sup>37</sup> **Exhibit 13**, Livesay WS, ¶ 8.

<sup>38</sup> **Exhibit 14**, *Afilias v. ICANN*, ICDR Case No. 01-18-0004-2702, Merits Hearing, Tr. Day 5 (7 Aug. 2020) (“**Hr. Tr., Day 5**”), 842:7-8 (Rasco Cross-Examination).

Verisign’s arguments below, and support our refutation of their arguments with testimony elicited from Mr. Livesay during his cross-examination in the IRP.

- **First**, NDC and Verisign point to transactions executed by Donuts, Inc. (“**Donuts**”) and Demand Media, Inc. (“**Demand Media**”) as precedents for the DAA.<sup>39</sup> But none of these transactions resemble the DAA. Unlike the Verisign-NDC deal, the Donuts/Demand Media deal was publicly disclosed **during the period for public comment and evaluation by ICANN**. Mr. Livesay accepted that this was in fact the case during his examination before the IRP Panel. He also conceded that the DAA was structured Redacted - Third Party Designated Confidential Information<sup>40</sup> Specifically, Mr. Livesay admitted that Donuts’ applications had disclosed Donuts’ partnership with Demand Media on backend registry services.<sup>41</sup> He acknowledged that Donuts executives were identified as the relevant contacts in each of these applications. For these reasons, it was clear to everyone during the Evaluation Period provided for by the New gTLD Applicant Guidebook that Donuts and Demand Media were partners in each of the applications.

Unlike the public disclosure of the Donuts/Demand Media partnership, NDC kept its deal with Verisign secret, Redacted - Third Party Designated Confidential Information

. As a result, neither the existence nor terms of the DAA were disclosed to ICANN for a year. ICANN only obtained a copy of the DAA when it was informally requested on a friendly basis by ICANN’s outside litigation counsel at Jones Day from Verisign’s (as opposed to NDC’s) litigation counsel, following Afiliias’ formal post-auction complaints. The DAA was not provided to Afiliias for more than two years, and then only after an independent arbitrator ordered ICANN to produce the document. The global Internet Community to-date has not been able to review the DAA to see how Verisign struck a secret deal Redacted - Third Party Designated Confidential Information

<sup>39</sup> **Exhibit 15**, *Afiliias v. ICANN*, ICDR Case No. 01-18-0004-2702, Merits Hearing, Tr. Day 1 (3 Aug. 2020) (“**Hr. Tr., Day 1**”), 190:23 – 191:21 (Verisign Opening Presentation); **Exhibit 13**, Livesay WS, ¶¶ 8-9; **Exhibit 16**, Rasco WS, ¶ 43; **Exhibit 17**, *Afiliias v. ICANN*, ICDR Case No. 01-18-0004-2702, Verisign, Inc.’s Pre-Hearing Brief (Phase II) (26 June 2020) (“**Verisign Br.**”), ¶ 41; **Exhibit 18**, *Afiliias v. ICANN*, ICDR Case No. 01-18-0004-2702, *Amicus Curiae* Brief of Nu Dotco, LLC (26 June 2020) (“**NDC Br.**”), ¶¶ 33-35.

<sup>40</sup> **Exhibit 12**, Hr. Tr., Day 7, 1175:6-14 (Livesay Cross-Examination).

<sup>41</sup> *Id.*, 1179:16-19 (Livesay Cross-Examination) (“Q: In Paragraph 23 of the .CITY application, Demand Media is identified as a partner for Donuts to provide back-end registry services, correct? A: Correct.”).

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- **Third,** Redacted - Third Party Designated Confidential Information

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<sup>42</sup> *Id.*, 1197:5-11 (Livesay Cross-Examination) (“Q: Mr. Livesay, when we were talking about the change request criteria, you noted that you had received draft agreements and these were, in your view, precedents for the DAA. Do you recall that testimony, sir? A. Right. These were some examples of that, yeah.”); **Exhibit 13**, Livesay WS, ¶ 14; **Exhibit 16**, Rasco WS, ¶ 44; **Exhibit 17**, Verisign Br., ¶ 42; **Exhibit 18**, NDC Br., ¶ 37; **Exhibit 15**, Hr. Tr., Day 1, 192:25 – 193:14 (Verisign Opening Presentation).

<sup>43</sup> Mr. Livesay testified that he did not review the agreement “in depth really at the time.” **Exhibit 12**, Hr. Tr., Day 7, 1195:4-8 (Livesay Cross-Examination).

<sup>44</sup> *Id.*, 1197:20-21 (Livesay Cross-Examination).

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- **Fourth**, NDC and Verisign repeatedly argued during the IRP that Afilias itself has engaged in transactions that were analogous to Verisign’s deal with NDC.<sup>47</sup> Yet Mr. Livesay was unable to testify about the details of those agreements or about how they were analogous to the DAA.<sup>48</sup> Indeed, the uncontroverted evidence adduced during the course of the IRP was that each of Afilias’ deals were agreed to only **after the relevant registry agreement had been fully executed with ICANN**. Accordingly, none of these transactions was governed by the terms of the Guidebook—they were subject to the terms of the applicable registry agreements, which specifically allow for post-delegation transfers of rights, on the premise that the proposed transferor of the those rights had obtained them legitimately.
- **Fifth**, NDC and Verisign assert that Automatic’s acquisition of the .BLOG gTLD from Primer Nivel mirrors the DAA. Automatic’s .BLOG deal could not have served as a precedent for the DAA, or otherwise informed Mr. Livesay’s understanding of market conditions when he negotiated the DAA, since this transaction post-dates the DAA.<sup>49</sup> Moreover, the terms of Automatic’s deal are unknown—there is no evidence to suggest that

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<sup>45</sup> *Id.*, 1187:3-9 (Livesay Cross-Examination); **Exhibit 13**, Livesay WS, ¶ 13.

<sup>46</sup> **Exhibit 12**, Hr. Tr., Day 7, 1190:6-9 (Livesay Cross-Examination).  
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(*id.*, 1187:3-9).

<sup>47</sup> **Exhibit 15**, Hr. Tr., Day 1, 193:16-21 (Verisign Opening Presentation); *id.*, 243:19–244:12 (NDC Opening Presentation); **Exhibit 17**, Verisign Br., ¶ 38; **Exhibit 18**, NDC Br., ¶¶ 38-39. NDC and Verisign cite deals concerning gTLDs .MEET, .PROMO, .ARCHI and .SKI specifically.

<sup>48</sup> **Exhibit 12**, Hr. Tr., Day 7, 1210:10-17 (Livesay Cross-Examination).

<sup>49</sup> *Id.*, 1208:1-6 (Livesay Cross-Examination) (“Q: So it’s fair to say that you did not discover information concerning the Automatic-Primer Nivel transaction as part of your research prior to the execution of the DAA, correct? A: That would seem to be the case, yeah.”).

Automattic acquired the same rights as Verisign did in the DAA.<sup>50</sup> Even assuming that Automattic's deal was identical to the DAA, Primer Nivel's conduct does not excuse NDC's violations of the Guidebook: One possible example hardly constitutes industry practice. Moreover, if the terms of such transactions are concealed from the public (as with the DAA), how can they possible be considered industry practice? ICANN itself would probably never have learned of the terms of the DAA had it not been for Afiliias' complaints.

In short, there is absolutely no substance to NDC's and Verisign's position that the DAA reflected at the time or reflects current market practice. It is, as Mr. Rasco put it, "unprecedented."

## 2. The DAA Is Not A "Financing Agreement"

In addition to arguing that the DAA reflected market practice (which, as shown above, is not true), NDC and Verisign have argued that the DAA was merely a financing arrangement. This argument, which was presented by NDC and Verisign's counsel in the IRP, was shot down by Mr. Livesay.<sup>51</sup> Mr. Livesay testified on cross-examination that the DAA lacks any hallmarks of a financing agreement, such as terms defining the principal amount to be financed, the interest to be paid, the collateral received, or the obligation of the borrower to repay the principal and interest.<sup>52</sup> He further testified that

Redacted - Third Party Designated Confidential Information<sup>53</sup> that the DAA did not operate like either a bank loan<sup>54</sup> or  
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<sup>50</sup> *Id.*, 1209:19-22 (Livesay Cross-Examination) ("Q: And you don't know any of the details about how the Automattic and Primer Nivel deal was structured, do you? A: No, I don't have any window into that.").

<sup>51</sup> **Exhibit 12**, Hr. Tr., Day 7, 1215:16-17 (Livesay Cross-Examination) ("I did not say this [was] a financing.").

<sup>52</sup> *Id.*, 1215:16 – 1216:13 (Livesay Cross-Examination).

<sup>53</sup> *Id.*, 1212:23-25 (Livesay Cross-Examination) Redacted - Third Party Designated Confidential Information

<sup>54</sup> *Id.*, 1227:8-9 (Livesay Cross-Examination) ("I think comparing this to a mortgage is totally inappropriate.").

<sup>55</sup> *Id.*, 1231:3-4 (Livesay Cross-Examination) Redacted - Third Party Designated Confidential Information

<sup>56</sup> *Id.*, 1231:25 – 1232:11 (Livesay Cross-Examination) Redacted - Third Party Designated Confidential Information

To the contrary, and unlike any financing deal, the evidence adduced during the hearing demonstrated that if Redacted - Third Party Designated Confidential Information

Mr. Livesay testified that Redacted - Third Party Designated Confidential Information

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Mr. Livesay went on to testify that Verisign  
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<sup>57</sup> *Id.*, 1217:14 – 1218:6 (Livesay Cross-Examination).

<sup>58</sup> *Id.*, 1229:23 – 1230:2 (Livesay Cross-Examination) Redacted - Third Party Designated Confidential Information

<sup>59</sup> *Id.*, 1229:12-16 (Livesay Cross-Examination) (admitting that if Redacted - Third Party Designated Confidential Information

<sup>60</sup> *Id.*, 1229:4-8 (Livesay Cross-Examination) (admitting that in Redacted - Third Party Designated Confidential Information

<sup>61</sup> *Id.*, 1229:4-8 (Livesay Cross-Examination).

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In sum, the DAA was truly as “unprecedented” as Mr. Rasco admitted during the IRP. Verisign negotiated terms Redacted - Third Party Designated Confidential Information

And despite discovering a “robust secondary market for TLDs,” NDC and Verisign remain unable to cite to a single transaction that comes close to replicating the unique control rights Verisign acquired in the DAA—the very control rights that, as demonstrated below, violate the New gTLD Program Rules.

### C. The Terms of the DAA Violate the New gTLD Program Rules.

As the Board is aware, the New gTLD Program Rules are “the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs.”<sup>63</sup> Accordingly, the Rules must be interpreted and applied “in a manner that complies with and reflects [ICANN’s] Commitments and respects [ICANN’s] Core Values[.]”<sup>64</sup> This means that the New gTLD Program Rules must be applied in a consistent, neutral, objective, fair, non-discriminatory, and transparent manner that complies with relevant principles of international law, such as the principle of good faith.<sup>65</sup> For instance, the New gTLD Program Rules require transparency from both ICANN and the program applicants. Under the rules, applicants are required to provide significant details to ICANN about their business plan for the proposed gTLD; their financial, technical, and operational capabilities needed to operate a registry; and their management.<sup>66</sup> They are further required to maintain the accuracy and truthfulness of their applications at all times.<sup>67</sup> A secret agreement, especially one kept secret from ICANN and the Internet Community, contravenes this

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<sup>62</sup> *Id.*, 1230:5 – 1231:4 (Livesay Cross-Examination) (denying that Verisign and NDC entered into a “borrower-lender” relationship and then proposing and then rejecting analogy to venture capital, since Verisign did not have “an interest in the entity”).

<sup>63</sup> **Exhibit 19**, *Booking.com B.V. v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration (3 Mar. 2015), ¶ 54 (quoting with approval Booking.com’s Request, ¶ 13).

<sup>64</sup> **Exhibit 20**, Bylaws, Sec. 1.2.

<sup>65</sup> **Exhibit 21**, Articles, Art. 2(III).

<sup>66</sup> **Exhibit 4**, AGB, pp. 1-4, 1-25, 6-2, A-5 – A-46.

<sup>67</sup> *Id.*, pp. 1-30, 6-2.

foundational principle of the New gTLD Program Rules and the plain text of the rules themselves.

NDC, as a consequence of its entry into and compliance with the DAA, violated the New gTLD Program Rules by (i) omitting material information from and failing to correct material misleading information in its .WEB application (**Section III.C.1**); (ii) repeatedly making material misstatements regarding its application to ICANN and other .WEB applicants (**Section III.C.2**); (iii) selling, assigning, or transferring the rights and obligations in its .WEB application to Verisign (**Section III.C.3**); and, (iv) submitting bids on Verisign's behalf at the ICANN Auction (**Section III.C.4**).

### 1. NDC Failed to Amend its Application

NDC's failure to disclose the terms of the DAA was an omission of material information that violated the New gTLD Program Rules, as the obligations that NDC assumed under the DAA fundamentally changed the nature of its application. The AGB requires applicants to warrant that all of the statements in their applications are at all times true, accurate, and complete.<sup>68</sup> Applicants are also required to "promptly" notify ICANN if any "change in circumstances" rendered the application to be "false or misleading," whether by virtue of material information included in or omitted from the application.<sup>69</sup> As stated in Module 6 of the AGB,

*Applicant warrants that the statements and representations contained in the application* (including any documents submitted and oral statements made and confirmed in writing in connection with the application) *are true and accurate and complete in all material respects*, and that ICANN may rely on those statements and representations fully in evaluating this application. *Applicant acknowledges that any material misstatement or misrepresentation (or omission of material information) may cause ICANN and the evaluators to reject the application without a refund of any fees paid by Applicant. Applicant agrees to notify ICANN in writing of any change*

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<sup>68</sup> *Id.*, p. 6-2.

<sup>69</sup> *Id.*

*in circumstances that would render any information provided in the application false or misleading.*<sup>70</sup>

NDC ignored the AGB's rules and procedures for amending its application in favor of concealing the fact that Verisign had now become the real party-in-interest behind its application—after all, under the DAA, <sup>Redacted - Third Party Designated Confidential Information</sup>

NDC fundamentally deceived ICANN, other members of the .WEB Contention Set, and the entire Internet Community into believing that it was seeking to obtain .WEB for itself in order to compete against .COM (as stated in the Mission/Purpose statement of NDC's application).<sup>72</sup> However, NDC sold the rights in its .WEB application to Verisign, the .COM registry, rendering this representation entirely and irredeemably false.

In fact, once NDC entered into the DAA, NDC's application was no longer true, accurate, or complete in several respects. Specifically, the following provisions were rendered untrue, inaccurate, or incomplete as a result of the DAA:

- NDC represented that, if its Application prevailed, users of .WEB would “benefit from *the long-term commitment* of a *proven executive team* that has *a track-record of building and successfully marketing affinity TLD's*” such as .CO.<sup>73</sup>
- NDC represented that its “intention” was “for .WEB to be added to .CO's product portfolio, where it can benefit from economies of scale along with the firm's [i.e., NDC's] experience and expertise in marketing and branding TLD properties.”<sup>74</sup>

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<sup>70</sup> *Id.* (emphasis added); *see also id.*, p. 1-30 (“If at *any time* during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, the applicant must *promptly notify ICANN* via submission of the appropriate forms.”) (emphasis added).

<sup>71</sup> **Exhibit 11**, DAA, Sec. 10(a).

<sup>72</sup> **Exhibit 22**, New gTLD Application for .WEB Submitted to ICANN by NU DOT CO LLC, Application ID: 1-1296-36138 (13 June 2012) (“**NDC .WEB Application**”), *available at* <https://gtldresult.icann.org/applicationstatus/applicationdetails/1053>, p. 7 (“The experienced team behind this application initially launched and currently operates the .CO ccTLD. The intention is for .WEB to be added to .CO's product portfolio, where it can benefit from economies of scale along with the firm's experience and expertise in marketing and branding TLD properties.”).

<sup>73</sup> *Id.*, p. 6 (emphasis added).

<sup>74</sup> *Id.* p. 7.

- NDC represented that, under its stewardship, .CO had “differentiated itself from other existing TLDs by combining *innovative branding*” with, *inter alia*, “*unprecedented marketing campaigns*,” and that NDC “*plan[ned] to implement a very similar strategy for .WEB in its launch, operation, promotion and growth.*”<sup>75</sup>
- NDC represented that, if its Application prevailed: “*We [i.e., NDC] plan to target a similar [i.e., to .CO] community of entrepreneurs, startups, and progressive corporate entities* that are looking for an online presence with a suitable domain name[,]” and that NDC’s “*marketing strategy will utilize a 3 pillar framework, similar to that used with .CO.*”<sup>76</sup>
- NDC represented that, if its Application prevailed, NDC “plan[ned] to foster the community of users of .WEB via a combination [of] community engagement and outreach, use-case development and direct marketing to base.”<sup>77</sup>
- NDC justified its pursuit of .WEB on the basis, *inter alia*, that it was seeking to challenge the dominance of “older incumbent players” (*e.g.*, Verisign).<sup>78</sup>
- NDC continued to identify itself as the “applicant,” that is, the “entity that would enter into a Registry Agreement with ICANN.”<sup>79</sup>

Not only were all of these specific representations to ICANN and the Internet Community false and misleading after NDC entered into the DAA with Verisign, the entire premise underlying NDC’s application—*i.e.*, that NDC was applying for the .WEB gTLD rights on its own behalf and for the reasons stated in its application (rather than on behalf of an undisclosed, non-applicant)—became false and misleading. Through the DAA,  
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. The DAA therefore plainly constituted a “change of circumstances” that rendered “information provided in the application false or

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<sup>75</sup> *Id.* (emphasis added).

<sup>76</sup> *Id.* (emphasis added).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*, p. 6.

<sup>79</sup> **Exhibit 4**, AGB, p. A-5; *see* **Exhibit 22**, NDC .WEB Application, p. 1. The final section of the public portions of NDC’s application provide a “demonstration of technical and operational capability.” *Id.*, pp. 13-18. Virtually all of the information provided in this part of the application is based on information provided by a third party that, following the execution of the DAA, ceased to have any role regarding the operation of .WEB.

misleading.”<sup>80</sup> Following the execution of the DAA, the sole purpose of NDC’s application was to Redacted - Third Party Designated Confidential Information . Yet NDC did not, as required, notify ICANN about this change in circumstances.<sup>81</sup> Redacted - Third Party Designated Confidential Information

## 2. NDC’s Material Misstatements

Pursuant to the AGB, “documents submitted and oral statements made and confirmed in writing in connection with the application” also had to be “true and accurate and complete in all material respects.”<sup>82</sup> NDC violated this “binding” and “material” requirement of the New gTLD Program Rules by repeatedly concealing Verisign’s control over NDC’s application.

In fact, during the *Afilias v. ICANN* merits hearing, NDC admitted that Jose Ignacio Rasco III (Co-founder, Co-manager, and Chief Financial Officer of NDC) *lied* to other applicants and *to ICANN* about the existence of the DAA and the effect that its terms had on NDC’s application and autonomy as an applicant. Indeed, Mr. Rasco attempted to spin his mendacity during the IRP, testifying that he told “*a little white lie* in order to get [Ruby Glen] off my back.”<sup>83</sup> But it was Mr. Rasco’s “white lie” that lay at the foundation of ICANN’s pre-auction investigation of NDC. And, over the course of that investigation, Mr. Rasco engaged in additional “white lies” to ICANN Staff and the ICANN Ombudsman. Specifically,

- Mr. Rasco deliberately avoided answering ICANN Staff’s direct inquiry about whether there was “any information that is no longer true and accurate in [NDC’s] application”<sup>84</sup> despite the numerous provisions of the application that were no longer accurate following NDC’s execution of the DAA.

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<sup>80</sup> **Exhibit 4**, AGB, p. 1-30.

<sup>81</sup> In fact, NDC could not unilaterally comply with its disclosure obligations in connection with the .WEB application. The DAA prohibited NDC Redacted - Third Party Designated Confidential Information **xhibit 11**, DAA, Sec. 10(a).

<sup>82</sup> **Exhibit 4**, AGB, p. 6-2.

<sup>83</sup> **Exhibit 14**, Hr. Tr., Day 5, 860:17-25; **Exhibit 15**, Hr. Tr., Day 1, 225:18-24 (NDC Opening Presentation) (“It’s a white lie that Mr. Rasco is telling Mr. [Nevett] at the time in that conversation. They had been colleagues in the Internet industry, and Mr. Rasco says, when Mr. [Nevett] was pressing him on who was making this decision, I just wanted to deflect. It is a natural thing to do. And out of that comes the complaints to ICANN.”).

<sup>84</sup> **Exhibit 23**, Emails between J. Erwin (ICANN) and J. Rasco (NDC) (27 June 2016).

- Mr. Rasco informed the ICANN Ombudsman that “[t]here have been no changes to the [NDC] application. ... I take my duties very seriously and for major decisions, I confer with the Members (i.e., shareholders), which again for clarification, have never changed.”<sup>85</sup> However, at the time, neither Mr. Rasco nor NDC’s other managers were making any “major decisions” (or even minor ones) in connection with NDC’s .WEB application. Under the terms of the DAA, Verisign was making all such decisions.
- Mr. Rasco verbally assured Christine Willett (Vice President of gTLD Operations, Global Domains Division) that NDC’s “application materials were still true and accurate” and that NDC’s “decision to not resolve the contention privately ... was in fact his.”<sup>86</sup> This was not true: by the express terms of the DAA, Redacted - Third Party Designated Confidential Information

In no respects was the decision not to participate in the planned private auction taken by Mr. Rasco or anyone else at NDC.<sup>87</sup>

NDC plainly and blatantly breached its warranty to ICANN that “the statements and representations contained in the application (including any documents submitted and oral statements made and confirmed in writing in connection with the application) are true and accurate and complete in all material respects.”<sup>88</sup> Moreover, NDC breached its obligation “to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading.”<sup>89</sup> When expressly given the opportunity to notify ICANN that NDC’s application had in fact undergone a dramatic change in circumstances, Mr. Rasco responded by lying to and misleading ICANN. Mr. Rasco’s oral assertions—confirmed to ICANN in writing—that there had been no changes to NDC’s application and that he continued to make all “major decisions” in connection

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<sup>85</sup> **Exhibit 24**, Emails between C. LaHatte (Ombudsman) and J. Rasco (NDC) (7 July 2016).

<sup>86</sup> **Exhibit 25**, Emails between Chris LaHatte (ICANN) and Christine Willett (ICANN) (various dates), p. 2.

<sup>87</sup> Mr. Rasco’s attempts to downplay Verisign’s control over NDC’s actions during the merits hearing are, frankly, preposterous. He repeatedly claimed that “I made the decision that we [i.e., NDC] were going to an ICANN auction” because “I decided on entering the DAA.” **Exhibit 14**, Hr. Tr., Day 5, 855:14-18; *see id.*, 867:15-868:1, 872:1-9. Mr. Rasco ignores the undisputed fact that his decision to enter into the DAA was not a decision to forego a private auction for .WEB—it was a decision to give Verisign Redacted - Third Party Designated Confidential Information. **Exhibit 11**, DAA, Ex. A, Sec. 1(i).

<sup>88</sup> **Exhibit 4**, AGB, p. 6-2.

<sup>89</sup> *Id.*

with the .WEB application—were plainly and demonstrably misleading at best, outright false at worst. Either way, Mr. Rasco’s statements breached NDC’s duty to candor with ICANN as an applicant in the New gTLD Program.

### 3. The Resale, Transfer, or Assignment of NDC’s Application

In addition to its failure to disclose material information relevant to its application, NDC also breached the AGB’s prohibition against an applicant reselling, transferring, or assigning its application. The AGB states in unambiguous terms that an “[a]pplicant may not resell, assign, or transfer *any* of the applicant’s rights or obligations in connection with the application.”<sup>90</sup>

Contrary to the AGB’s anti-assignment clause,<sup>Redacted - Third Party Designated Confidential Information</sup> For instance,

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The AGB requires applicants “to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading.”<sup>91</sup> However,<sup>Redacted - Third Party Designated Confidential Information</sup>

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Pursuant to the AGB, applicants “are encouraged to reach a settlement or agreement among themselves that resolves the contention.”<sup>93</sup> An applicant therefore has the right to choose to “withdraw their application,” “combin[e] in a way that does not materially affect the remaining application,” or participate in a private auction.<sup>94</sup> However, NDC<sup>Redacted - Third Party Designated Confidential Information</sup> represented and warranted to Verisign that

<sup>95</sup> NDC further<sup>Redacted - Third Party Designated Confidential Information</sup>

<sup>90</sup> *Id.*, p. 6-6 (emphasis added).

<sup>91</sup> *Id.*, p. 6-2.

<sup>92</sup> **Exhibit 11**, DAA, Sec. 4(f) (emphasis added).

<sup>93</sup> **Exhibit 4**, AGB, p. 4-6.

<sup>94</sup> *Id.*

<sup>95</sup> **Exhibit 11**, DAA, Sec. 4(j).

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Verisign and NDC thereby duped ICANN, along with all of the *bona fide* applicants for .WEB.

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The AGB explicitly requires that the *applicant* engage in the transition to delegation process for a gTLD.<sup>98</sup> However, Verisign is admittedly “engaged in ICANN’s process to move the delegation of .web forward.”<sup>99</sup>

Thus, there can be no question that NDC breached the New gTLD Program Rules—specifically the AGB—through the sale, assignment, and/or transfer of its rights and obligations in its .WEB application to Verisign.

#### 4. Each of NDC’s Bids at the ICANN Auction Were Invalid Under the New gTLD Program Rules

Additionally, NDC did not comply with the Auction Rules governing the ICANN Auction. The AGB provides that “[o]nly bids that comply with *all aspects* of the auction rules will

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<sup>96</sup> *Id.*, Ex. A, Sec. 1(i) (emphasis added).

<sup>97</sup> *Id.*, p. 16 (emphasis added).

<sup>98</sup> See **Exhibit 4**, AGB, Module 5 (discussing the applicant’s obligations regarding the transition to delegation process).

<sup>99</sup> **Exhibit 26**, Verisign Inc., Edited Transcript of Earnings Conference Call or Presentation (8 Feb. 2018), p. 4.

be considered valid.”<sup>100</sup> Hence, NDC’s failure to comply with *any* of the Auction Rules renders its bids invalid. And NDC failed to comply with a significant number of Auction Rules, including the following:

- The Auction Rules provide that “[p]articipation in an Auction is limited to *Bidders*.”<sup>101</sup> It defines “Bidders” as either: (1) a “Qualified Applicant;” or (2) a “Designated Bidder” of a Qualified Applicant.<sup>102</sup> A Qualified Applicant is defined as “[a]n entity *that has submitted an Application for a new gTLD*, has *received all necessary approvals from ICANN*, and which *is included in a Contention Set* to be resolved by an Auction.”<sup>103</sup> Verisign did not submit an application for .WEB, did not receive any approvals from ICANN, was not part of the .WEB Contention Set, and was not designated by NDC as its Designated Bidder. Verisign was therefore not a Bidder under the Auction Rules; yet, Verisign nonetheless participated in the ICANN Auction through NDC by virtue of the DAA.
- The Auction Rules provide that a Bidder may only “bid on *its* behalf”<sup>104</sup> and that each “Bid must be placed *by a Bidder for its Application in an Open Contention Set*”<sup>105</sup> at an ICANN-administered auction. Although NDC was obligated under the auction rules to participate in the ICANN Auction “on its own behalf,”<sup>106</sup> NDC was contractually obligated to participate in the ICANN Auction Redacted - Third Party Designated Confidential Information
- The Auction Rules provide that all bids must reflect “a price[] which [the] *Bidder* is willing to pay to resolve string contention within a Contention Set in

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<sup>100</sup> **Exhibit 4**, AGB, p. 4-22 (emphasis added).

<sup>101</sup> **Exhibit 5**, Auction Rules, ¶ 12 (at p. 2) (emphasis added).

<sup>102</sup> *Id.*, p. 16.

<sup>103</sup> *Id.*, p. 19 (emphasis added).

<sup>104</sup> *Id.*, p. 3 (emphasis added).

<sup>105</sup> *Id.*, ¶ 40(b) (at p. 7) (emphasis added).

<sup>106</sup> **Exhibit 9**, ICANN, New gTLD Auctions Bidder Agreement (3 Apr. 2014) (excerpt), p. 1.

<sup>107</sup> **Exhibit 11**, DAA, Ex. A, Sec. 1.

favor of its Application.”<sup>108</sup> Although NDC was obligated to submit bids at the ICANN Auction that reflected the amount that *it* was willing to pay for .WEB, NDC was contractually obligated to Redacted - Third Party Designated Confidential Information

For these reasons, none of NDC’s bids complied with “all aspects of the auction rules.”<sup>110</sup>

The foregoing is simply an outline of NDC’s various breaches of the New gTLD Program Rules. Afilias reserves the right to present further evidence and additional information to the Board in this regard at the appropriate time.

### **III. THE ICANN BOARD MUST DISQUALIFY NDC PURSUANT TO THE NEW GTLD PROGRAM RULES**

In order to comply with its Bylaws-imposed obligation to enforce the New gTLD Program Rules,<sup>111</sup> the ICANN Board must disqualify NDC’s application for the .WEB gTLD (**Section III.A**) and NDC’s bids at the ICANN Auction (**Section III.B**). The New gTLD Program Rules further permit ICANN to deem NDC ineligible to enter into a registry agreement and to delegate the .WEB gTLD to Afilias (as the second-highest bidder at the ICANN Auction) (**Section III.C**).

#### **A. ICANN Must Disqualify NDC’s Application for .WEB**

The ICANN Board must disqualify NDC’s application in order to ensure that (1) the New gTLD Program embodies transparency, openness, and accountability; (2) enables competition and open entry in Internet-related markets; and (3) applies standards and documented policies consistently, neutrally, objectively, fairly, and in a non-discriminatory manner.

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<sup>108</sup> **Exhibit 5**, Auction Rules, p. 5 (emphasis added).

<sup>109</sup> **Exhibit 11**, DAA, Ex. A, Sec. 1(h).

<sup>110</sup> **Exhibit 4**, AGB, p. 4-22.

<sup>111</sup> **Exhibit 20**, Bylaws, Sec. 1.2(a)(v) (imposing on ICANN an obligation to make “decisions by applying documented policies consistently, neutrally, objectively, and fairly[.]”).

*First*, ICANN must exercise any discretion that it has consistent with its Articles and Bylaws. The AGB provides that each applicant “acknowledges that any material misstatement or misrepresentation (or omission of material information) may cause ICANN and the evaluators to reject the application without a refund of any fees paid by Applicant.”<sup>112</sup> NDC’s aforementioned breaches made a mockery of the most basic principles by which ICANN was required to implement the New gTLD program, including openness, transparency, fairness, equal treatment of the applicants, and “the participation of many stakeholder groups in a public discussion.”<sup>113</sup> Furthermore, by failing to disqualify NDC’s application for its material misstatements, misrepresentations, and omissions, the ICANN Board will allow NDC and Verisign to deceive not only ICANN, but the entire Internet Community—ranging from the other .WEB applicants who acted in good faith and followed the New gTLD Program Rules, to the consumers and users of Internet services who were falsely led to believe that they had the opportunity to review and comment on the applications of all applicants who were seeking the gTLD rights in .WEB.

*Second*, NDC must be prohibited from entering into a Registry Agreement because it cannot comply with the representations and warranties therein. ICANN’s standard form Registry Agreement, which is incorporated into the AGB, states:

Registry Operator represents and warrants to ICANN ... [that] ***all material information*** provided and statements made in the registry TLD application, and statements made in writing during the negotiation of this Agreement, were true and correct in all material respects at the time made, and ***such information or statements continue to be true and correct in all material respects*** as of the Effective Date except as otherwise previously disclosed in writing by Registry Operator to ICANN[.]<sup>114</sup>

NDC’s application remains untrue and inaccurate, as discussed above, and therefore NDC cannot comply with the above requirements of completeness, truthfulness, and accuracy.

*Third*, the ICANN’s Bylaws require that ICANN “enable competition” and “[i]ntroduc[e] and promot[e] competition in the registration of domain names where practicable and

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<sup>112</sup> **Exhibit 4**, AGB, p. 6-2.

<sup>113</sup> *Id.*, p. 1-5.

<sup>114</sup> *Id.*, New gTLD Agreement, Sec. 1.3(a)(i).

beneficial to the public interest[.]”<sup>115</sup> The ICANN Board launched the New gTLD Program “in fulfillment of a core part of ICANN’s Bylaws: [namely] the introduction of competition and consumer choice in the DNS.”<sup>116</sup> Indisputably, the .COM gTLD—run by Verisign—dominates that domain name space. The .WEB gTLD is widely seen as the best potential competitor to .COM from the New gTLD Program. As a result of NDC’s various breaches of the New gTLD Program Rules, Verisign, long the dominant player in the DNS, stands at the precipice of acquiring the next best alternative to its dominant .COM registry, despite not having applied for .WEB and not having informed ICANN or the global Internet Community of its intention to do so. Verisign’s secret “indirect participation” in the .WEB Contention Set through NDC was plainly an effort to mislead ICANN and the global Internet Community which rightly would be concerned about Verisign’s attempt to corner the market on “truly generic gTLDs.” The ICANN Board must uphold its mandate to “enable competition” and disqualify NDC’s .WEB application for its blatant violations of the New gTLD Program Rules. In doing so, the ICANN Board will protect and promote competition within the DNS—*i.e.*, one of the principal purposes of the New gTLD Program, and indeed, of ICANN.

**Fourth**, by allowing Verisign secretly to take over NDC’s application—to “indirectly participate” in the contention set and to seek to become the registry operator for .WEB under the cover of NDC’s application—ICANN wiped away the years of “‘carefully deliberated policy development work’ by the ICANN Community[.]” which had resulted in “an application and evaluation process for new gTLDs that is aligned with the policy recommendations” made by the Internet Community, and which were meant to advance ICANN’s Mission in a manner that is consistent with its Articles and Bylaws (*i.e.*, in a manner that applies standards and documented polices consistently, neutrally, objective, fairly, and in a non-discriminatory manner).<sup>117</sup> Other applicants in the .WEB Contention Set—who followed the “clear roadmap”<sup>118</sup> provided by the New gTLD Program Rules for reaching delegation of the .WEB domain—were plainly treated differently from Verisign, who was allowed by ICANN to participate “indirectly” in the .WEB Contention Set without ever having submitted an application, without being the subject to the public notice and comment and evaluation process, and without ever being required to disclose even its

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<sup>115</sup> **Exhibit 20**, Bylaws, Sec. 1.2(a), 1.2(b)(iv).

<sup>116</sup> **Exhibit 27**, ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (20 June 2011), *available at* <https://www.icann.org/en/system/files/bm/rationale-board-approval-new-gtld-program-launch-20jun11-en.pdf>, p. 7.

<sup>117</sup> *See, e.g., Exhibit 19, Booking.com B.V. v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration (3 Mar. 2015), ¶¶ 11, 14 (*quoting Exhibit 4, AGB, Preamble*).

<sup>118</sup> *See, e.g., id.*, ¶ 14 (*quoting Exhibit 4, AGB, Preamble*).

interest in the .WEB gTLD until *after* the contention set was resolved in favor of its agent, NDC.

### B. ICANN Must Disqualify NDC's Bids at the ICANN Auction

Independently, ICANN is further required to disqualify NDC's bids as invalid. For the reasons discussed above, each bid that NDC placed <sup>Redacted - Third Party Designated Confidential Informa</sup> was invalid under the New gTLD Program Rules because “[o]nly bids that comply with *all aspects* of the auction rules will be considered valid.”<sup>119</sup> As discussed at **Section II.C.4** above, each of NDC's bids at the ICANN Auction failed to fully comply with the auction rules. Specifically, each of NDC's bids were, as provided for in the DAA, submitted Redacted - Third Party Designated Confidential Information

Under the Auction Rules, an invalid bid *must* be treated as “an exit bid at the start-of-round price for the current auction round.”<sup>120</sup> In other words, each of NDC's bids was required to be treated as “an exit bid.” NDC should never have been allowed to move to the next bidding round because, once its subterfuge was discovered, all of its bids should have been declared in default—from its opening bid to its winning bid. As stated by the Auction Rules:

Once declared in default, any Winner is subject to immediate forfeiture of its position in the Auction and assessment of default penalties.

After a Winner is declared in default, the remaining Applications (that have not been withdrawn from the New gTLD Program) which are not in a Direct Contention relationship with any of the non-defaulting Winning Applications will receive offers to have their Applications accepted, one at a time, in descending order of and subject to payment of its respective final Exit Bid. *In this way, the next Bidder would be declared the winner subject to payment of its Exit Bid.*<sup>121</sup>

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<sup>119</sup> **Exhibit 4**, AGB, p. 4-22 (emphasis added).

<sup>120</sup> *Id.*, p. 4-23.

<sup>121</sup> **Exhibit 5**, Auction Rules, ¶¶ 58-59 (emphasis added); **Exhibit 4**, AGB, p. 4-26 (“Once declared in default, any winning bidder is subject to immediate forfeiture of its position in the auction and assessment of default penalties. After a winning bidder is declared in default, the remaining bidders will

There is nothing in the New gTLD Program Rules to suggest that ICANN has any discretion to do anything other than disqualify each of NDC's invalid bids. The ICANN Board is required to declare NDC's bids in default and offer .WEB to Afilias as the second highest bid after NDC's bid is disqualified.<sup>122</sup>

The Auction Rules—and ICANN's lack of discretion in enforcing them—are consistent with ICANN's governing principles of openness, fairness, accountability, good faith and non-discrimination. If the application or the bid of a "Winning Bidder" is disqualified by ICANN, then it is only fair that the "Qualified Applicant" with the next highest bid should be offered the opportunity to obtain the TLD rights subject to payment of its exit bid. That applicant (in this case, Afilias) will have gone through the expensive, arduous, and multi-year process of reaching the ICANN Auction phase, and will have submitted the highest valid bid to acquire the rights to the Domain.

### C. ICANN Must Declare NDC Ineligible to Enter into a Registry Agreement

ICANN is authorized to (and should) declare NDC ineligible to enter into a Registry Agreement as a consequence of NDC's repeated violations of the New gTLD Program Rules. ICANN requires that registries represent and warrant to ICANN that "***all material information*** provided and statements made in the registry TLD application ... were true and correct in all material respects at the time made, and ***such information or statements continue to be true and correct in all material respects***" in the Registry Agreement; NDC cannot validly make such as representation for the reasons stated above, and therefore cannot validly enter into a Registry Agreement with ICANN.<sup>123</sup>

Such relief is warranted. ICANN has expressly contemplated the possibility that the winning applicant of an ICANN-administered auction may later be declared ineligible to enter into a Registry Agreement. According to the Auction Rules,

If, ***at any time following the conclusion of an Auction***, the Winner is determined by ICANN to be ineligible to sign a Registry Agreement for the Contention String that was the subject of the Auction, the remaining Bidders ... ***will receive offers to have their Applications accepted, one at a time, in***

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receive an offer to have their applications accepted, one at a time, in descending order of their exit bids. In this way, the next bidder would be declared the winner subject to payment of its last bid price.").

<sup>122</sup> See **Exhibit 5**, Auction Rules, ¶¶ 58-59

<sup>123</sup> *Id.*, New gTLD Agreement, Sec. 1.3(a)(i).

***descending order of and subject payment of its respective Exit Bid. In this way, the next Bidder would be declared the Winner subject to payment of its Exit Bid.***<sup>124</sup>

ICANN should therefore declare that NDC ineligible to enter into a Registry Agreement with ICANN for the .WEB gTLD as a consequence of NDC's repeated violations of the New gTLD Program Rules. As a consequence of NDC's ineligibility, ICANN must then offer the .WEB gTLD to Afilias, the second-highest bidder at the ICANN Auction. The Auction Rules do not grant ICANN Staff or the ICANN Board discretion over the matter.<sup>125</sup>

#### IV. ICANN MUST COMPLY WITH ITS TRANSPARENCY OBLIGATIONS

The ICANN Bylaws require that ICANN hold itself to high standards of transparency and openness.<sup>126</sup> These standards require that ICANN (1) operate "through open and transparent processes";<sup>127</sup> (2) "[p]reserve and enhance the ... openness of the DNS and the Internet;"<sup>128</sup> (3) "employ[] open, transparent and bottom-up, multistakeholder policy development processes;"<sup>129</sup> and (4) "operate to the ***maximum extent feasible in an open and transparent manner*** and consistent with procedures designed to ensure fairness".<sup>130</sup> Complete transparency in regards to the .WEB gTLD is further underscored by the *Afilias v. ICANN* IRP Panel's determination that, in its treatment of Afilias' complaints about NDC's conduct, the Board violated its "commitment to operate 'in an open and transparent manner and consistent with procedures to ensure fairness.'"<sup>131</sup>

ICANN has failed to comply with this commitment to transparency in two significant ways, and must act quickly in order to rectify these failures.

***First***, ICANN has kept the DAA confidential. ICANN must disregard its self-imposed and unjustifiable obligation to keep the document confidential because ICANN's present position sends a message to all future New gTLD Program applicants that ICANN will

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<sup>124</sup> **Exhibit 5**, Auction Rules, ¶ 62 (emphasis added).

<sup>125</sup> **Exhibit 5**, Auction Rules, ¶ 62 (noting that the next applicant "will receive [an] offer[]").

<sup>126</sup> **Exhibit 20**, Bylaws, Secs. 1.2(a); 1.2(a)(i); 1.2(a)(iv); *id.*, Art. 3.

<sup>127</sup> **Exhibit 20**, Bylaws, Sec. 1.2(a).

<sup>128</sup> **Exhibit 20**, Bylaws, Sec. 1.2(a)(i).

<sup>129</sup> **Exhibit 20**, Bylaws, Sec. 1.2(a)(iv).

<sup>130</sup> **Exhibit 20**, Bylaws, Sec. 3.1 (emphasis added).

<sup>131</sup> **Exhibit 1**, IRP Decision, ¶ 332.

allow them to engage in subterfuge and keep secrets from ICANN and other applicants without reprimand or censure. The ICANN Board must not set this precedent, especially since disclosure not only is in line with ICANN’s transparency obligations but also sets strong precedent that ICANN will not tolerate attempts to undermine core ICANN principles, such as ensuring “open and transparent processes”<sup>132</sup> and “operat[ing] to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness”.<sup>133</sup>

**Second**, ICANN has not posted the *Afilias v. ICANN* hearing transcripts. The *Afilias v. ICANN* hearing occurred **over one year ago**, and still only the IRP participants have access to the transcripts. Such a delay is simply unacceptable, especially in light of ICANN’s obligation to operate “with **efficiency** and excellence”.<sup>134</sup> In fact, ICANN’s own counsel **agree** that the transcripts must be made public, as seen by Mr. Eric Enson’s assertion that “ICANN will be posting transcripts of the .WEB hearing” on **11 June 2021**.<sup>135</sup> Yet, over 14 months after the hearing and over four months after ICANN’s reassurance, the transcripts remain private. The ICANN Board cannot allow the continued concealment of these important IRP documents from the Internet community.

The ICANN Board, in order to comply compliance with the transparency obligations under the Bylaws, as interpreted by the *Afilias v. ICANN* IRP Panel, must adopt fairer and more transparent practices in regards to the .WEB gTLD—such as by ensuring that both the DAA and the *Afilias v. ICANN* hearing transcripts are hastily made available to the Internet community.

## V. CONCLUSION

When the question of NDC’s compliance with the New gTLD Program Rules is properly before the ICANN Board—i.e., after the *Afilias v. ICANN* IRP Panel issues its decision on Afilias’ Article 33 Application, and any follow-on litigation—the ICANN Board must apply the New gTLD Program Rules in a consistent, neutral, fair, and transparent manner that complies with international law. As shown above, the application of those rules in such a manner necessitates the disqualification of NDC’s .WEB application and the rejection of its bids at the auction. The rules also require that the Board deem NDC ineligible to enter into a registry agreement for .WEB and to offer the .WEB gTLD to one

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<sup>132</sup> **Exhibit 20**, Bylaws, Sec. 1.2(a).

<sup>133</sup> **Exhibit 20**, Bylaws, Sec. 3.1 (emphasis added).

<sup>134</sup> **Exhibit 20**, Bylaws, Sec. 1.2(b)(v).

<sup>135</sup> **Exhibit 6**, *Afilias v. ICANN*, ICDR Case No. 01-18-0004-2702, Email from E. Enson (Counsel for ICANN) to Afilias and *Amici* (11 June 2021).

of the remaining Bidders, “one at a time, in descending order of and subject payment of its respective Exit Bid. In this way, the next Bidder would be declared the Winner subject to payment of its Exit Bid.”<sup>136</sup> The Board simply cannot sanction the manner in which NDC and Verisign subverted the application process for .WEB and act consistently with its Articles, Bylaws, and Rules themselves. Were it to do so, it would have rendered the entire New gTLD Program system a nullity, while also making a mockery of the basic principles by which—according to ICANN’s Articles and Bylaws—ICANN *must* operate.

In order to facilitate the ICANN Board’s proper evaluation and application of the New gTLD Program Rules, at the appropriate time, Afilias requests permission to make an oral presentation to the ICANN Board on the .WEB matter.

Afilias further reserves all of its rights and remedies in all available fora whether within or outside of the United States of America in regards to this matter.

Sincerely,



Arif Hyder Ali  
*Counsel for Altanovo Domains Limited*

Enclosures (Exhibits 001-027)

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<sup>136</sup> Exhibit 5, Auction Rules, ¶¶ 58-59.

**LIST OF EXHIBITS**

No.	Description
Exhibit 1	<i>Afilias v. ICANN</i> , ICDR Case No. 01-18-0004-2702, Final Decision (20 May 2021, as corrected 15 July 2021)
Exhibit 2	<i>Afilias v. ICANN</i> , ICDR Case No. 01-18-0004-2702, ICANN's Rejoinder Memorial in Response to Afilias' Amended Request for Independent Review (1 June 2020)
Exhibit 3	<i>Afilias v. ICANN</i> , ICDR Case No. 01-18-0004-2702, Witness Statement of Christopher Disspain (1 June 2020), available at <a href="https://www.icann.org/en/system/files/files/irp-afili-as-witness-statement-disspain-01jun20-en.pdf">https://www.icann.org/en/system/files/files/irp-afili-as-witness-statement-disspain-01jun20-en.pdf</a>
Exhibit 4	ICANN, gTLD Applicant Guidebook (4 June 2012), available at <a href="https://newgtlds.icann.org/en/applicants/agb">https://newgtlds.icann.org/en/applicants/agb</a> (last accessed 25 Oct. 2021)
Exhibit 5	Power Auctions LLC, Auction Rules for New gTLDs: Indirect Contentions Edition (24 Feb. 2015)
Exhibit 6	<i>Afilias v. ICANN</i> , ICDR Case No. 01-18-0004-2702, Email from E. Enson (Counsel for ICANN) to Afilias and <i>Amici</i> (11 June 2021)
Exhibit 7	Text Message (from cell phone belonging to J. Rasco) (21 July 2016)
Exhibit 8	Kevin Murphy, "Donuts joins fight to delay .web gTLD auction with emergency appeal," <i>Domain Incite</i> (20 July 2016, 10:49 (UTC)), available at <a href="http://domainincite.com/20768-donuts-joins-fight-to-delay-web-gtld-auction-with-emergency-appeal">http://domainincite.com/20768-donuts-joins-fight-to-delay-web-gtld-auction-with-emergency-appeal</a>
Exhibit 9	ICANN, New gTLD Auctions Bidder Agreement (3 Apr. 2014) (excerpt)
Exhibit 10	<i>Ruby Glen, LLC v. ICANN</i> , C.D. Cal., Case No. 2:16-cv-5505, Declaration of Russ Weinstein In Support Of Defendant's Opposition To Plaintiff's Ex Parte Application For Temporary Restraining Order (25 July 2016), available at <a href="https://www.icann.org/en/system/files/files/litigation-ruby-glen-declaration-weinstein-25jul16-en.pdf">https://www.icann.org/en/system/files/files/litigation-ruby-glen-declaration-weinstein-25jul16-en.pdf</a>
Exhibit 11	Domain Acquisition Agreement between VeriSign, Inc. and Nu Dotco LLC (25 Aug. 2015)

No.	Description
Exhibit 12	<i>Afilias v. ICANN</i> , ICDR Case No. 01-18-0004-2702, Merits Hearing, Tr. Day 7 (11 Aug. 2020)
Exhibit 13	<i>Afilias v. ICANN</i> , ICDR Case No. 01-18-0004-2702, Witness Statement of Paul Livesay In Support Of ICANN's Rejoinder and Amici's Briefs (1 June 2020)
Exhibit 14	<i>Afilias v. ICANN</i> , ICDR Case No. 01-18-0004-2702, Merits Hearing, Tr. Day 5 (7 Aug. 2020)
Exhibit 15	<i>Afilias v. ICANN</i> , ICDR Case No. 01-18-0004-2702, Merits Hearing, Tr. Day 1 (3 Aug. 2020)
Exhibit 16	Witness Statement of Jose Ignacio Rasco III (1 June 2020)
Exhibit 17	<i>Afilias v. ICANN</i> , ICDR Case No. 01-18-0004-2702, Verisign, Inc.'s Pre-Hearing Brief (Phase II) (26 June 2020)
Exhibit 18	<i>Afilias v. ICANN</i> , ICDR Case No. 01-18-0004-2702, Amicus Curiae Brief of Nu Dotco, LLC (26 June 2020)
Exhibit 19	<i>Booking.com B.V. v. ICANN</i> , ICDR Case No. 50-20-1400-0247, Final Declaration (3 Mar. 2015)
Exhibit 20	ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 28 Nov. 2019), <i>available at</i> <a href="https://www.icann.org/resources/pages/governance/bylaws-en">https://www.icann.org/resources/pages/governance/bylaws-en</a> (last accessed 25 Oct. 2021)
Exhibit 21	ICANN, Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers (approved on 9 Aug. 2016), <i>available at</i> <a href="https://www.icann.org/resources/pages/governance/articles-en">https://www.icann.org/resources/pages/governance/articles-en</a> (last accessed on 25 Oct. 2021)
Exhibit 22	New gTLD Application for .WEB Submitted to ICANN by NU DOT CO LLC, Application ID: 1-1296-36138 (13 June 2012), <i>available at</i> <a href="https://gtdresult.icann.org/applicationstatus/applicationdetails/1053">https://gtdresult.icann.org/applicationstatus/applicationdetails/1053</a>
Exhibit 23	Emails between J. Erwin (ICANN) and J. Rasco (NDC) (27 June 2016)
Exhibit 24	Emails between C. LaHatte (Ombudsman) and J. Rasco (NDC) (7 July 2016)

No.	Description
Exhibit 25	Emails between Chris LaHatte (ICANN) and Christine Willett (ICANN) (various dates)
Exhibit 26	Verisign Inc., Edited Transcript of Earnings Conference Call or Presentation (8 Feb. 2018)
Exhibit 27	ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (20 June 2011), <i>available at</i> <a href="https://www.icann.org/en/system/files/bm/rationale-board-approval-new-gtld-program-launch-20jun11-en.pdf">https://www.icann.org/en/system/files/bm/rationale-board-approval-new-gtld-program-launch-20jun11-en.pdf</a>

## **Exhibit 1**

Afilias v. ICANN, ICDR Case No. 01-18-0004-2702, Final Decision (20 May 2021, as corrected 15 July 2021), available at

<https://www.icann.org/en/system/files/files/irp-afilias-corrected-final-declaration-redacted-15jul21-en.pdf>.

## **Exhibit 2**

Afilias v. ICANN, ICDR Case No. 01-18-0004-2702, ICANN's Rejoinder Memorial in Response to Afilias' Amended Request for Independent Review (1 June 2020), available at

<https://www.icann.org/en/system/files/files/irp-afilias-icann-response-amended-request-01jun20-en.pdf>.

### **Exhibit 3**

Afilias v. ICANN, ICDR Case No. 01-18-0004-2702,  
Witness Statement of Christopher Disspain (1 June 2020),  
available at

<https://www.icann.org/en/system/files/files/irp-afilias-witness-statement-disspain-01jun20-en.pdf>.

## **Exhibit 4**

ICANN New gTLD Applicant Guidebook (4 June 2012),  
available at

[https://newgtlds.icann.org/en/applicants/agb/guidebook  
-full-04jun12-en.pdf](https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf).

## **Exhibit 5**

Power Auctions LLC, Auction Rules for New gTLDs: Indirect Contentions Edition (24 Feb. 2015), available at <https://www.icann.org/en/system/files/files/irp-afilias-exhibits-c1-c58-redacted-26nov18-en.pdf>, Exhibit C-4.

## **Exhibit 6**

Afilias v. ICANN, ICDR Case No. 01-18-0004-2702, Email  
from E. Enson (Counsel for ICANN) to Afilias and Amici  
(11 June 2021)

**From:** [Enson, Eric P.](#)  
**To:** [Ali, Arif](#); [de Gramont, Alexandre](#); [EXT elitwin@constantinecannon.com](mailto:EXT.elitwin@constantinecannon.com); [Wong, Rosey](#); [Attanasio, David](#); [Losco, Michael](#); [Sarjveladze, Tamar](#); [Defriez, Henry](#); [Aviles Alfaro, Anna](#); [Ron Johnston](#); [Blackburn, James S.](#); [Chedid, Maria](#); [Steve Marenberg](#)  
**Cc:** [LeVee, Jeffrey A.](#); [Smith, Steven L.](#); [Wallach, David L.](#); [Ozurovich, Kelly M.](#)  
**Subject:** .WEB - Posting of Hearing Transcripts  
**Date:** Friday, June 11, 2021 5:51:48 PM  
**Attachments:** [Hearing Transcripts.zip](#)

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[EXTERNAL EMAIL]

Dear all,

ICANN will be posting transcripts of the .WEB hearing. Copies are attached. If you have any proposed redactions to the transcripts that you would like ICANN to consider before posting, please let us know by June 30. Thank you.

Eric

Eric P. Enson

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San Francisco +1.415.963.6994

Mobile Contact Information Redacted

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## **Exhibit 7**

Text Message (from cell phone belonging to J. Rasco) (21  
July 2016)

Thu, Jul 21, 1:54 PM

Talk?

Fri, Jul 22, 10:24 AM

IF ICANN delays the auction  
next week would you again  
consider a private auction? Y-N

## **Exhibit 8**

Kevin Murphy, “Donuts joins fight to delay .web gTLD auction with emergency appeal,” Domain Incite (20 July 2016), available at <http://www.domainincite.com/20768-donuts-joins-fight-to-delay-web-gtld-auction-with-emergency-appeal>.

## **Exhibit 9**

ICANN New gTLD Auctions Bidder Agreement (3 April 2014), available at

<https://www.icann.org/en/system/files/files/irp-afilias-exhibits-c1-c58-redacted-26nov18-en.pdf>, Exhibit C-5.

## **Exhibit 10**

Ruby Glen, LLC v. ICANN, C.D. Cal., Case No. 2:16-cv-5505, Declaration of Russ Weinstein In Support Of Defendant's Opposition To Plaintiff's Ex Parte Application For Temporary Restraining Order (25 July 2016), available at <https://www.icann.org/en/system/files/files/litigation-ruby-glen-declaration-weinstein-25jul16-en.pdf>.

## **Exhibit 11**

Domain Acquisition Agreement between VeriSign, Inc.  
and Nu Dotco LLC (25 Aug. 2015)

30-page Domain Acquisition Agreement Removed

Third Party Designated Confidential Information

## **Exhibit 12**

Afilias v. ICANN, ICDR Case No. 01-18-0004-2702, Merits  
Hearing, Transcript Day 7 (11 August 2020)

To Be Published at Afilias Domains No. 3 Limited (.WEB)  
IRP Page, available at

[https://www.icann.org/resources/pages/irp-afilias-v-  
icann-2018-11-30-en.](https://www.icann.org/resources/pages/irp-afilias-v-icann-2018-11-30-en)

## **Exhibit 13**

Afilias v. ICANN, ICDR Case No. 01-18-0004-2702,  
Witness Statement of Paul Livesay In Support Of ICANN's  
Rejoinder and Amici's Briefs (1 June 2020), available at  
<https://www.icann.org/en/system/files/files/irp-afilias-witness-statement-livesay-redacted-01jun20-en.pdf>.

## **Exhibit 14**

Afilias v. ICANN, ICDR Case No. 01-18-0004-2702, Merits  
Hearing, Transcript Day 5 (7 August 2020)

To Be Published at Afilias Domains No. 3 Limited (.WEB)  
IRP Page, available at

<https://www.icann.org/resources/pages/irp-afilias-v-icann-2018-11-30-en>.

## **Exhibit 15**

Afilias v. ICANN, ICDR Case No. 01-18-0004-2702, Merits  
Hearing, Transcript Day 1 (3 August 2020)

To Be Published at Afilias Domains No. 3 Limited (.WEB)  
IRP Page, available at

<https://www.icann.org/resources/pages/irp-afilias-v-icann-2018-11-30-en>.

## **Exhibit 16**

Witness Statement of Jose Ignacio Rasco III (1 June 2020), available at

<https://www.icann.org/en/system/files/files/irp-afilias-witness-statement-rasco-iii-redacted-01jun20-en.pdf>.

## **Exhibit 17**

Afilias v. ICANN, ICDR Case No. 01-18-0004-2702,  
Verisign, Inc.'s Pre-Hearing Brief (Phase II) (26 June  
2020), available at

<https://www.icann.org/en/system/files/files/irp-afiliias-amicus-curiae-brief-verisign-redacted-26jun20-en.pdf>.

## **Exhibit 18**

Afilias v. ICANN, ICDR Case No. 01-18-0004-2702, Amicus Curiae Brief of Nu Dotco, LLC (26 June 2020), available at <https://www.icann.org/en/system/files/files/irp-afilias-amicus-curiae-brief-nu-dotco-redacted-26jun20-en.pdf>.

## **Exhibit 19**

Booking.com B.V. v. ICANN, ICDR Case No. 50-20-1400-0247, Final Declaration (3 March 2015), available at <https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf>.

## **Exhibit 20**

Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 28 November 2019), available at <https://www.icann.org/resources/pages/governance/bylaws-en>.

## **Exhibit 21**

Amended and Restated Articles of Incorporation of  
Internet Corporation for Assigned Names and Numbers  
(approved on 9 August 2016), available at  
[https://www.icann.org/resources/pages/governance/arti  
cles-en](https://www.icann.org/resources/pages/governance/articles-en).

## **Exhibit 22**

New gTLD Application for .WEB Submitted to ICANN by  
NU DOT CO LLC, Application ID: 1-1296-36138 (posted 13  
June 2012), available at  
[https://gtdresult.icann.org/applicationstatus/application  
details:downloadapplication/1053?t:ac=1053](https://gtdresult.icann.org/applicationstatus/application<br/>details:downloadapplication/1053?t:ac=1053).

## **Exhibit 23**

Emails between J. Erwin (ICANN) and J. Rasco (NDC) (27 June 2016), available at

<https://www.icann.org/en/system/files/files/irp-afilias-exhibits-c-89-124-ca-15-26-redacted-04may20-en.pdf>,

Exhibit C-96.

## **Exhibit 24**

Emails between C. LaHatte (Ombudsman) and J. Rasco  
(NDC) (7 July 2016), available at

<https://www.icann.org/en/system/files/files/litigation-ruby-glen-declaration-willett-exhibits-a-h-25jul16-en.pdf>,

Exhibit E.

## **Exhibit 25**

Emails between Chris LaHatte (ICANN) and Christine Willett (ICANN) (various dates), available at <https://www.icann.org/en/system/files/files/litigation-ruby-glen-declaration-willett-exhibits-a-h-25jul16-en.pdf>,  
Exhibit D.

## **Exhibit 26**

Verisign Inc., Edited Transcript of Earnings Conference Call or Presentation (8 February 2018), available at <https://www.icann.org/en/system/files/files/irp-afilias-exhibits-c1-c58-redacted-26nov18-en.pdf>, Exhibit C-47.

## **Exhibit 27**

ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (20 June 2011), available at <https://www.icann.org/en/system/files/bm/rationale-board-approval-new-gtld-program-launch-20jun11-en.pdf>.

## Attachment E to Board Reference Materials

**ARIF HYDER ALI**

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+1 202 261 3079 Fax

11 February 2022  
(Corrected on 13 February 2022)

**VIA E-MAIL**

The ICANN Board of Directors  
c/o Mr. Maarten Botterman, Chair  
maarten.botterman@board.icann.org

The Accountability Mechanisms Committee of the ICANN Board (**BAMC**)  
c/o Ms. Becky Burr, Chair  
bburr@hwglaw.com

Internet Corporation for Assigned Names and Numbers  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**Re: ICANN Board Resolutions 2022.01.16.12 – 2022.01.16.15**

Dear Mr. Botterman, Ms. Burr, and Members of the ICANN Board:

We write on behalf of Altanovo Domains Limited (“Altanovo”), formerly known as Afilias Domains No. 3 Limited (“Afilias”).

Having reviewed the Resolutions and Rationale the Board adopted on 16 January 2022, we write to call your attention to a critical misstatement (**Section I**) and critical omissions (**Section II**) in the Rationale. Neither the BAMC nor the Board will be able properly to consider and evaluate the IRP Panel’s Final Decision unless it understands the significance of the misstatement and omissions, both of which we respectfully request be corrected immediately.

We also write to request disclosures by the Board members relating to their impartiality and independence to consider this matter (**Section III**).

## I. THE MISSTATEMENT

### A. ICANN's adoption of Verisign/NDC's mischaracterization of the Domain Acquisition Agreement

As the Board and BAMC are aware, Applicant Nu DotCo, LLC (“NDC”) and non-applicant VeriSign, Inc. (“Verisign”) entered into an agreement on 25 August 2015 relating to the .WEB gTLD, which they styled the **DOMAIN ACQUISITION AGREEMENT** (“DAA”).

They maintain that the DAA is an agreement pursuant to which Verisign merely provided the funds for NDC to bid for .WEB, in exchange for a future assignment of rights of the .WEB registry agreement to Verisign. *This characterization of the DAA is simply incorrect.* Nevertheless, in the Rationale ICANN has essentially adopted Verisign and NDC's characterization, and in so doing has effectively *pre-judged an issue* (amongst many others) that is hotly contested.<sup>1</sup>

The Rationale states that the IRP Panel concluded that ICANN violated its Articles and Bylaws when (among other things):

- (a) ICANN staff failed to decide whether the Domain Acquisition Agreement (DAA) between NDC and Verisign (*pursuant to which Verisign financially supported NDC's bidding in the .WEB auction*) violated the Guidebook and Auction Rules, and moved forward toward contracting with NDC in June 2018 without first having made that decision; and
- (b) the ICANN Board did not prevent staff from moving forward toward contracting in June 2018 or decide whether the DAA violated the Guidebook and Auction Rules ....

***But the above is not what the IRP Panel stated.*** In the above-quoted language, the Rationale paraphrases Paragraph 413(1) of the Final Decision—***except that there is no***

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<sup>1</sup> In the Final Decision, the IRP Panel stated that Altanovo “*rejects any analogy between the Domain Acquisition Agreement and a financing agreement.*” *Afilias v. ICANN*, ICDR Case No. 01-18-004-2702, Final Decision (20 May 2021), ¶ 191 (emphasis added). We observe that ICANN also adopted the Verisign/NDC mischaracterization of the DAA as a “funding arrangement” in its 16 September 2016 Questionnaire, apparently based on a “confidential” letter from Verisign/NDC's outside counsel dated 23 August 2016. The Panel concluded that ICANN's use of the Questionnaire with respect to Afilias—which at that point did not have access to the DAA (and which still has access to it on an “ATTORNEYS' EYES” only basis)—violated ICANN's commitment under the Bylaws “to operate in an open manner and consistent with procedures designed to ensure fairness.” *Id.*, ¶¶ 307- 316, 413(3).

***language there (or anywhere else in the Final Decision) that remotely describes the DAA as ICANN has described it in the Rationale.***

To the contrary, ICANN's mischaracterization of the DAA as an agreement to provide financial support comes directly from Verisign and NDC's submissions in the IRP. The drafters of the Rationale have inexplicably taken the Verisign/NDC mischaracterization of the DAA and inserted it into what ICANN inaccurately reports to the Internet Community as a key declaration by the IRP Panel. The effect is to give the false impression that Altanovo alleged that a mere funding agreement breaches the New gTLD Program Rules. That, of course, is *not* Altanovo's sole contention, which is evident from even a cursory review of our IRP submissions.

Redacted – Third Party Designated Confidential Information

Verisign and NDC entered into the DAA nearly a year before the ICANN auction for .WEB in July 2016, but actively hid their agreement from ICANN, the other applicants for .WEB, and the Internet Community. NDC's key witness in the IRP even admitted lying to conceal the existence of the DAA.

The DAA made NDC little more than Verisign's puppet, pursuing .WEB for Verisign's benefit, while at the same time concealing the identity of the puppet master from ICANN and everyone else. In addition to providing NDC the "funds" to secretly make bids on Verisign's behalf, Verisign paid NDC Redacted in "fees" to acquire such rights in NDC's application. ***No objective, independent, impartial person—who has reviewed the DAA—could reasonably characterize it simply as an agreement by which Verisign provided the financing for NDC's bids.***<sup>2</sup>

NDC and Verisign plainly violated the letter and spirit of the New gTLD Program Rules. Yet, even after obtaining the DAA, ICANN failed to disqualify NDC's application, reject its auction bids, and deem it ineligible to enter into a registry agreement for .WEB, as

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<sup>2</sup> We have repeatedly written to ICANN's outside counsel to ask for confirmation that the Final Decision, DAA, and other relevant materials have been provided to the Board in full and unredacted form. ICANN's outside counsel have not responded to our correspondence, nor have they responded to any of our other correspondence requesting information as to how and when the Board intends to proceed. We ask that the Board and BAMC confirm that they have reviewed the DAA and Final Decision in full and unredacted form.

required by the plain terms of the New gTLD Program Rules. Instead, ICANN Staff proceeded to delegate .WEB to NDC, and the ICANN Board did nothing to stop the delegation. The IRP Panel clearly found as much.<sup>3</sup>

Furthermore, if the DAA were simply an agreement “pursuant to which Verisign financially supported NDC’s bidding in the .WEB auction,” the IRP Panel would have had little reason to state that the specific questions raised by Altanovo concerning the DAA are “*legitimate, serious, and deserving of [ICANN’s] careful attention*”—when those questions go far beyond what would be asked about a funding agreement. In fact, the Panel repeated that language several times in its Final Decision, including in the following passage of the Final Decision:

The questions raised by [Altanovo] that are, in the opinion of the Panel, *serious and deserving of [ICANN’s] consideration*, include the following, *which the Panel merely cites as examples*:

- Whether, in entering into the DAA, NDC violated the Guidebook and, more particularly, the section providing that an “*Applicant may not resell, assign, or transfer any of applicant’s rights or obligations in connection with the application*”.
- Whether the execution of the DAA by NDC constituted a “*change in circumstances that [rendered] any information provided in the application false and misleading*”.
- Whether by entering into the DAA after the deadline for the submission of applications for new gTLD’s, and by agreeing with NDC provisions designed to keep the DAA strictly confidential, *Verisign impermissibly circumvented the “roadmap” provided for applicants under the New gTLD Program Rules, and in particular the public notice, comment and evaluation process contemplated by these Rules.*<sup>4</sup>

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<sup>3</sup> *Afilias v. ICANN*, ICDR Case No. 01-18-004-2702, Final Decision (20 May 2021), ¶¶ 333-48, 413(1).

<sup>4</sup> *Afilias v. ICANN*, ICDR Case No. 01-18-004-2702, Final Decision (20 May 2021), ¶ 320 (emphasis added).

Again, these are only “examples” of the questions that the ICANN Board must now consider to make its first-instance pronouncement under the IRP’s Final Decision. Neither the BAMC nor the Board can even begin to consider those questions objectively and impartially if the members are under the serious misapprehension that the DAA is merely a funding agreement.

**B. Request that ICANN issue an amended Rationale omitting the mischaracterization.**

ICANN’s adoption of Verisign/NDC’s mischaracterization of the DAA creates several serious problems.

*First*, the Rationale has misstated to the Internet Community the serious and legitimate issues presented by Altanovo in this matter. It gives the Internet Community the false impression that Altanovo is contending that a mere funding agreement violates the New gTLD Program—when that is *not* Altanovo’s sole contention.

*Second*, the misstatement exacerbates the *inherent unfairness* created by (a) ICANN’s *refusal (at the behest of Verisign/NDC) to disclose* any portion of the DAA and (b) ICANN’s redaction of every description of the DAA in the Final Decision and other IRP materials. ICANN has enabled Verisign to announce to the Internet Community that the DAA is merely a funding agreement—while preventing Altanovo from responding to that mischaracterization by pointing to the DAA’s actual terms.

*Third*, if the Board indeed intended to adopt Verisign/NDC’s position that the DAA is merely a funding agreement, then the ICANN Board has *erroneously and unfairly prejudged the issue*—and has already failed to consider the IRP Panel’s Final Decision. Moreover, it is impossible to understand how the Board could characterize the DAA as merely a funding agreement—*if* the members had actually reviewed the DAA in its full and unredacted form.

For the avoidance of doubt, we are attaching a separate annex (**Annex A**) that includes relevant portions of the DAA for your review, which demonstrate that ICANN cannot fairly or accurately characterize the DAA as a mere funding or financing agreement. (We ask that ICANN promptly post this letter in unredacted form, but without Annex A.<sup>5</sup>)

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<sup>5</sup> We are putting the relevant portions of the DAA in a separate annex because, as noted above, ICANN has designated the DAA as “Highly Confidential” in its entirety. Altanovo continues to object to ICANN’s refusal to post the DAA publicly—and to ICANN’s redaction of extensive portions of the

To be clear, the issues on which you have resolved to pronounce upon in the first instance require more than a review of these provisions of the DAA. You will need to review other portions of the record to make your first-instance pronouncement on whether (a) the DAA, and NDC's performance of its obligations under the DAA, constitute material violations of the New gTLD Program Rules, and (b) if so, whether ICANN must disqualify NDC and offer .WEB to Altanovo as the second-highest bidder. That is why (as stated below) we believe that the members of the BAMC and Board should receive submissions from both Altanovo and NDC on these questions.

In the meantime, if it was not the intention of the Board to adopt and promulgate Verisign/NDC's mischaracterization of the DAA, then for all the foregoing reasons, we respectfully request ICANN to amend the Rationale to omit the mischaracterization of the DAA as an agreement "pursuant to which Verisign financially supported NDC's bidding in the .WEB auction."

## II. THE OMISSIONS

*First*, although the Rationale states that the IRP Panel decided to defer to ICANN to "pronounce" "in the first instance" on the substantive questions Altanovo raised in the IRP, the Rationale omits the Panel's proviso concerning such "deference." The Panel stated:

[T]he Panel accepts that these questions, including the fundamental question of whether or not the DAA violates the Guidebook and the Auction Rules, are better left, in the first instance, to the consideration of [ICANN's] Staff and Board. *However, it needs to be emphasized that this deference is necessarily predicated on the assumption that [ICANN] will take ownership of these issues when they are raised and, subject to the ultimate independent review of an IRP Panel, will take a position as to whether the conduct complained of complies with the Guidebook and Auction Rules.*<sup>6</sup>

The Panel further stated that ICANN "is entrusted with responsibility for the implementation of the gTLD Program in accordance with the New gTLD Program Rules,

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Final Decision and other IRP materials that quote or even summarize the DAA's terms. However, we are not at present asking ICANN to publish Annex A.

<sup>6</sup> *Afilias v. ICANN*, ICDR Case No. 01-18-004-2702, Final Decision (20 May 2021), ¶ 299 (emphasis added).

*not only for the benefit of the direct participants in the Program but also for the benefit of the wider Internet community.”*<sup>7</sup>

We emphasize these statements by the IRP Panel, as they are not mentioned or referred to in the Rationale. We respectfully request that the Resolution and Rationale be amended to reflect the foregoing.

*Second*, we observe that the Rationale describes the fee award made against ICANN, on the one hand, and against Altanovo, on the other, in starkly different terms. The Panel made both fee awards under Section 4.3(r) of the Bylaws, which allows the Panel to shift fees to the other Party if it identifies a claim or defense “as frivolous or abusive.” Although the Panel explicitly found that ICANN’s conduct was “*abusive*” in ordering ICANN to pay Altanovo \$450,000 in fees, the Rationale blandly describes that fee award as “cost shifting for legal fees”—and avoids any mention of the Panel’s finding of “*abusive*” conduct by ICANN. By contrast, in describing the much smaller fee award (for \$236,884.30) made against Altanovo, the Rationale goes out its way to specifically quote the Panel’s finding that Altanovo’s conduct was “frivolous.”<sup>8</sup>

The Rationale thus avoids any mention of the Panel’s finding of “frivolous or abusive” conduct when the finding is made against ICANN—but emphasizes that finding when made against Altanovo. Unfortunately, this same blatant lack of evenhandedness has marred ICANN’s treatment of Altanovo both before and during the IRP. We hope that it will finally end now, and, accordingly, ask the Resolutions and Rationale to be amended. If ICANN specifically quotes the “frivolous or abuse” finding by the Panel when made against Altanovo, it most do the same when applied against ICANN.

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<sup>7</sup> *Afilias v. ICANN*, ICDR Case No. 01-18-004-2702, Final Decision (20 May 2021), ¶ 299 (emphasis added).

<sup>8</sup> Thus, with respect to the fee award *against ICANN*, the Rationale states: “The Panel denied the majority of Afilias’ request for cost shifting of legal fees, but did grant legal fees in connection with the Request for Emergency Interim Relief (related to whether the contention set would remain on hold during the pending of the IRP) in reduced amount of US\$450,000.” With respect to the \$236,884.39 fee award *against Altanovo*, the Rationale states: “[T]he Panel unanimously denied Afilias’ Request in its entirety, finding that the Request was ‘frivolous’ and awarding ICANN the legal fees it incurred in responding to the Request (in the amount of \$US236,884.39).”

### III. THE OBJECTIVE, NEUTRAL, AND IMPARTIAL REVIEW OF THESE ISSUES BY THE BAMC AND BOARD

We observe that in a recent earnings call, Verisign expressed no doubt as to how ICANN will resolve this matter. Verisign—again, *a non-applicant for .WEB*—told the investing public:

With the rejection of Afilias’ application and the reaffirmation of the panel’s final decision, those roadblocks are now out of the way, and ICANN looks to be moving forward with making the decision on the delegation of .web, and we will be monitoring their process. *As we have said before, we continue to look forward to becoming the .web registry operator and establishing [it] alongside .com and .net* as an additional operation for businesses and individual end users worldwide.<sup>9</sup>

These comments by Verisign’s CEO and Chairman Jim Bidzos suggest to us that he either has not read the IRP Panel’s Final Decision, or that he has information that we do not. We also observe that while Verisign may be in a position to “monitor[ ]” ICANN’s “process,” Altanovo is not. We have written to ICANN’s counsel, specifically to ask when and how the Board will be carrying out the process of making its “first instance” pronouncement, pursuant to the Final Decision. We have had no response.

We understand and appreciate that the members of the Board are busy people who maintain demanding positions outside of ICANN. However, we respectfully submit that the task before the Board is not difficult. Any objective, neutral, and impartial application of the New gTLD Program Rules to the terms of the DAA—and the conduct of NDC in performing the DAA—requires disqualification of NDC’s application and bids, and offering .WEB to Altanovo as the second-highest bidder. But to perform that task in an objective, neutral, and impartial manner, it is critically important that you have access to the full and unredacted record from the IRP. You should not allow others to “cherry-pick” the portions of the record that you will read. Nor should you allow others to characterize on your behalf documents that you have not read.

We also submit that the Board will not be taking “ownership of these issues” if it simply delegates the analysis to ICANN’s Staff and in-house and outside legal counsel (*i.e.*, Jones

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<sup>9</sup> Transcript of Verisign Q4 Earnings Call on 10 February 2022 (remarks of J. Bidzos), *available at* <https://www.fool.com/earnings/call-transcripts/2022/02/10/verisign-vrsn-q4-2021-earnings-call-transcript/> (last accessed on 11 Feb. 2022) (emphasis added).

Day), who have already taken aggressive positions on these issues adverse to Altanovo. As the IRP Panel observed in its Final Decision, ICANN failed not only to address “*the questions raised as to propriety of NDC’s and Verisign’s conduct,*” which “*are legitimate, serious, and deserving of [ICANN’s] careful attention*”; ICANN also “*adopted contradictory positions, including in these [IRP] proceedings, that at least in appearance undermine the impartiality of its processes.*”<sup>10</sup> Furthermore, the Board cannot act consistently with the Articles and Bylaws by delegating its analysis to Staff and legal counsel, and then claiming that its first-instance decision-making process is protected from disclosure based on assertions of legal privilege. We object to the involvement of any member of ICANN’s Staff, in-house counsel or outside counsel in the independent assessment that the BAMC and Board must undertake pursuant to the IRP Panel’s Final Decision.

Finally, we understand that one member of the BAMC has already recused himself from this matter, on the grounds that he was an employee of Afiliias many years ago. Consistent with that member’s decision, we request the Board’s confirmation that each member who reviews these matters for ICANN’s first-instance pronouncement is capable of doing so objectively, independently, and impartially. We further request that each member promptly disclose any facts or circumstances that could reasonably give rise to doubts as to the member’s objectivity, independence, and impartiality, including, without limitation, the disclosure of any business dealings with Verisign, NDC, or Altanovo outside the context of the member’s official ICANN responsibilities.

We remain available to answer any questions or provide any assistance to the BAMC and the rest of the Board as ICANN undertakes its first-instance consideration and pronouncement on these issues. We understand that the record from the IRP is voluminous, and that much of it is devoted to important procedural issues on which the Panel has already made declarations. We therefore believe it is important for the BAMC to invite both Altanovo and NDC to make written and oral submissions to you on the substantive issues on which you have now resolved to pronounce in the first instance, and hereby ask that such an invitation be issued. In their submissions, both Altanovo and NDC can point you to the portions of the record which they believe support their respective positions.

We also reiterate our request to be informed (along with Verisign and NDC) as to the timing and process by which the BAMC will make its recommendations to the Board and by which the Board will then make its first-instance pronouncement. And we reiterate our requests

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<sup>10</sup> *Afiliias v. ICANN*, ICDR Case No. 01-18-004-2702, Final Decision (20 May 2021), ¶ 300 (emphasis added).

that ICANN provide us with the information we have requested in prior correspondence and address our various requests.

We are copying outside counsel for Verisign, NDC, and ICANN on this letter, and request that all correspondence between (a) ICANN and (b) Verisign and/or NDC concerning .WEB be copied to us as counsel to Altanovo.

Altanovo further reserves all of its rights and remedies in all available fora whether within or outside of the United States of America in regards to this matter.

Sincerely,



Arif Hyder Ali

*Counsel for Altanovo Domains Limited  
f/k/a Afiliis Domains No. 3 Limited*

Cc: *Counsel for ICANN*  
Mr. John Jeffrey  
Ms. Amy Stathos  
ICANN General Counsel's Office

Mr. Jeffrey A. LeVee  
Mr. Steven L. Smith  
Mr. Eric P. Enson  
Ms. Kelly M. Ozurovich  
Jones Day LLP

*Counsel for Verisign*  
Mr. Ronald L. Johnston  
Mr. James S. Blackburn  
Ms. Maria Chedid  
Mr. Oscar Ramallo  
Mr. John Muse-Fisher  
Arnold & Porter Kaye Scholer LLP

*Counsel for NDC*  
Mr. Steven Marenberg  
Mr. Josh B. Gordon  
Ms. April H. Hua  
Paul Hastings LLP

*Without Prejudice*

**HIGHLY CONFIDENTIAL<sup>1</sup>**

**ANNEX A to Altanovo's Letter to the ICANN Board dated 11 February 2022**

Redacted – Third Party Designated Confidential Information

## Attachment F to Board Reference Materials

**ARIF HYDER ALI**

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+1 202 261 3079 Fax

18 February 2022

**VIA E-MAIL**

The ICANN Board of Directors  
c/o Mr. Maarten Botterman, Chair  
The Accountability Mechanisms Committee of the ICANN Board  
c/o Ms. Becky Burr

Internet Corporation for Assigned Names and Numbers  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094  
maarten.botterman@board.icann.org  
bburr@hwglaw.com

**Re: ICANN Board Resolutions 2022.01.16.12 – 2022.01.16.15**

Dear Mr. Botterman, Ms. Burr, and Members of the ICANN Board:

We write on behalf of Altanovo Domains Limited (**Altanovo**), f/k/a Afilias Domains No. 3 Limited (**Afilias**), to follow up on our letter to you dated 11 February 2022 (as corrected on 13 February 2022).

After seeing the transcript of VeriSign, Inc.’s (**Verisign**) Q4 Earnings Call on 10 February 2022 (quoted at page 8 of our 11 February letter), we reviewed Verisign’s Annual Report (i.e., its 10-K Statement submitted to the U.S. Securities and Exchange Commission (“**SEC**”)) dated 19 February 2021. We note that Verisign stated in connection with the *Afilias v. ICANN* IRP arbitration proceeding:

[T]he current arbitration proceeding against ICANN ***challenging the validity of ICANN’s award of the .web gTLD to us [i.e., Verisign]*** could adversely affect our ability to operate the .web gTLD.<sup>1</sup>

It is difficult to believe that Verisign—which, as you are well aware, did not submit an application for .WEB—would have made this statement in an SEC filing, without some factual foundation. In light of the foregoing statement, we request ICANN’s immediate confirmation as to whether at any time ICANN has awarded the .WEB gTLD to Verisign,

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<sup>1</sup> VeriSign, Inc., Annual Report (Form 10-K) (19 Feb. 2021), p. 16 (emphasis added), available at <https://investor.verisign.com/static-files/9f053f1f-a551-4abe-b817-bdb5d4ff874f>.

or has advised Verisign that it will award the .WEB gTLD to Verisign, and, if so, when such an award was made or when such advice was provided. If the above statement is incorrect, we request ICANN to confirm as much.

Altanovo reserves all of its rights and remedies in all available fora whether within or outside of the United States of America in regards to this matter.

Sincerely,



Arif Hyder Ali  
Counsel for Altanovo Domains Limited,  
f/k/a Afilias Domains No. 3 Limited

Cc: *Counsel for ICANN*  
Mr. John Jeffrey  
Ms. Amy Stathos  
ICANN General Counsel's Office

Mr. Jeffrey A. LeVee  
Mr. Steven L. Smith  
Mr. Eric P. Enson  
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Mr. Oscar Ramallo  
Mr. John Muse-Fisher  
Arnold & Porter Kaye Scholer LLP

*Counsel for NDC*  
Mr. Steven Marenberg  
Mr. Josh B. Gordon  
Ms. April H. Hua  
Paul Hastings LLP

## Attachment G to Board Reference Materials

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ALEXANDRE de GRAMONT

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+1 202 261 3082 Fax

23 February 2022

**VIA E-MAIL**

Eric P. Enson, Esq.  
JONES DAY LLP  
555 Flowers Street  
Los Angeles, CA 90071

**Re: Your communication dated 18 February 2022 invoking Rule 4.2 of the Model Rules of Professional Conduct**

Dear Eric:

We are in receipt of your email dated 18 February 2022, in which you “demand” that counsel for Altanovo Domains Limited (**Altanovo**), f/k/a Afilius Domains No. 3 Limited (**Afilius**), “immediately cease from communicating with ICANN regarding the .WEB matter.” In support of that demand, you cite Rule 4.2 of the American Bar Association’s Model Rules of Professional Responsibility.<sup>1</sup> We take our responsibilities under the Rules of Professional Conduct seriously—as we hope you do in invoking them. Rule 4.2 has no application to the present situation for numerous reasons, including (without limitation) the following.

- 1. Rule 4.2 has no application where, as here, the Board purports to act as a first-instance adjudicator of the rights and obligations of ICANN stakeholders.**

During the IRP, ICANN repeatedly argued that its Board must act as the first-instance adjudicator of alleged violations of the New gTLD Program Rules.<sup>2</sup>

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<sup>1</sup> The language of Model Rule 4.2 is similar to that of Rule 4.2(a) of the Rules of Professional Conduct of the District of Columbia (where most of the lawyers representing Altanovo in this matter are admitted to practice), as well as that of Rule 4.2(a) of the Rules of Professional Conduct of California (where, we understand, most of the lawyers representing ICANN are admitted to practice). For the sake of simplicity, we will refer simply to the obligations under “Rule 4.2”—recognizing that there may be differences as to how those obligations are interpreted under the respective Professional Conduct Rules in which they appear. Citations to Rule 4.2 in this letter are to the D.C. RULES OF PROFESSIONAL CONDUCT (1 Feb. 2007).

<sup>2</sup> See, e.g., *Afilius Domains No. 3 Limited v. ICANN*, ICDR Case No. 01-18-0004-2702 (“*Afilius v. ICANN*”), ICANN’s Response to Afilius’ Article 33 Application (6 Aug. 2021), ¶ 16 (“*ICANN is the first instance decision-maker for disputes under the New gTLD Program.*”) (emphasis added).

The IRP Panel agreed with ICANN on this issue—to the extent the Panel determined that the “serious” and “legitimate” questions raised by Altanovo are “better left, in the first instance,” to ICANN—“subject to the ultimate independent review of an IRP Panel[.]”<sup>3</sup>

Accordingly, in the *dispositif* of its Final Decision, the Panel ruled that ICANN’s “**Board**” must “consider” and “pronounce” on these questions in the first instance—after having “considered the opinion of the Panel in this Final Decision[.]”<sup>4</sup>

ICANN’s Board is not acting here as a “person” “represented by another lawyer in the matter.” Rather, the Board is—at ICANN’s insistence—acting as the adjudicative body that will *decide* this matter in the first instance. ICANN—having demanded that its Board be allowed independently to decide the rights and obligations of ICANN’s stakeholders in the first instance—cannot now seek to have its counsel block one of the stakeholders from communicating directly to the Board.

Rule 4.2 has no application to communications to the Board by counsel for stakeholders whose rights and obligations the Board is now determining as a first-instance decision maker.

**2. The invocation of Rule 4.2 is contrary to ICANN’s processes and practices.**

Our letters to the Board are expressly authorized by ICANN’s processes and practices, including ICANN’s “Correspondence Process.” According to the “Correspondence Process Handbook,” as published on ICANN’s website:

The Correspondence process was created *to support ICANN’s commitment to operate in an open and transparent manner in regard to written communications to the ICANN Board* and the ICANN organization. The process provides a centralized, standard and consistent manner in which to accept, process, and respond to letters received from external sources and track outgoing letters. *As part of our commitment to transparency, ICANN publishes*

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<sup>3</sup> *Afilias v. ICANN*, Final Decision (20 May 2021), ¶ 299.

<sup>4</sup> *Afilias v. ICANN*, Final Decision (20 May 2021), ¶ 413(5) (emphasis added).

*applicable written communications to the public Correspondence page ....*<sup>5</sup>

The Handbook further states: “A letter or piece of correspondence *can be received by any person ... within the ICANN organization or the ICANN Board*.”<sup>6</sup> There are no applicable exceptions here.

ICANN must therefore treat Altanovo in the same manner as any other ICANN stakeholder who is entitled to correspond directly to the Board—and must do so consistently.<sup>7</sup> For the reasons stated above, that is particularly so where the Board is purporting to act as the first-instance adjudicator of Altanovo’s rights and obligations under the New gTLD Program—and where (as discussed below) ICANN does not appear to have made any objection when counsel for Verisign and NDC recently corresponded directly to the Board concerning .WEB.

**3. ICANN is invoking Rule 4.2 in a manner that discriminates against Altanovo and in favor of Verisign/NDC.**

For the reasons stated above, Rule 4.2 has no application to Altanovo’s communications to the Board. Moreover, it is particularly troubling that ICANN’s counsel is invoking Rule 4.2 in connection with communications from Altanovo when it did not do so against Verisign and NDC, when they recently communicated directly to the ICANN Board about .WEB.

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<sup>5</sup> ICANN, Correspondence Process Handbook (6 Mar. 2018), p. 1, available at <https://www.icann.org/en/system/files/files/icann-correspondence-process-handbook-06mar18-en.pdf> (emphasis added) (last visited on 21 Feb. 2022).

<sup>6</sup> *Id.*, p. 2 (emphasis added).

<sup>7</sup> During the IRP, we wrote directly to the Board on behalf of Altanovo (then Afiliias) regarding the Interim Supplementary Procedures—without any complaint from ICANN or its counsel. ICANN posted that letter to its website. *See* Letter from A. Ali to ICANN Board of Directors (21 Dec. 2018), available at <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-21dec18-en.pdf> (last visited on 22 Feb. 2022). We wrote again directly to the ICANN Board on 15 March 2019 to request the Board to post and disclose transcripts and materials from an ICANN Board meeting. *See* Letter from A. Ali to the ICANN Board of Directors (15 Mar. 2019). Here, too, neither ICANN nor its counsel objected to that letter—because that letter (like our other letters to the Board) are specifically authorized by ICANN’s practices and processes. Moreover, during the IRP, we also served DIDP requests directly on ICANN (as authorized by ICANN’s DIDP procedure). And for the purposes of CEP, Jones Day specifically directed us to communicate directly with ICANN on these matters. That is consistent with the notion that ICANN is acting as the regulator (and here, the adjudicator) of the rights and obligations of stakeholders appearing before it.

As you will recall, Mr. Steven A. Marenberg—outside counsel for NDC—sent a letter dated 23 July 2021 directly to Mr. Maarten Botterman in his capacity as Chair of the ICANN Board.<sup>8</sup> Mr. Marenberg stated in the letter that he was sending it on behalf of both NDC and Verisign. On its face, the letter appears to have been emailed directly to Mr. Botterman. The letter restates the same bogus allegations of a “blackout” violation by Altanovo that Verisign and NDC asserted as “*Amicus curiae*” in the IRP proceedings (which Altanovo rebutted in those proceedings).

ICANN proceeded to publish Mr. Marenberg’s 23 July letter to Mr. Botterman on its website in full (i.e., with no redactions to the letter’s text) on 14 September 2021.<sup>9</sup> Until that date, no one at Altanovo (including its counsel) was aware of it, given that Mr. Marenberg did not copy us when he sent the letter to Mr. Botterman in July 2021. Nor are we aware of anyone invoking Rule 4.2 (or raising any other objection) on behalf of ICANN with respect to Mr. Marenberg’s letter to Mr. Botterman.

To respond to Mr. Marenberg’s 23 July letter, we prepared a letter to Mr. Botterman and the Board dated 3 November 2021.<sup>10</sup> We did not, however, send our letter directly to Mr. Botterman. Instead, we sent it to Jones Day and asked for the letter to be forwarded to Mr. Botterman as Chair of the Board. We sent it care of Jones Day not because we were required to do so, but in the interest of transparency and as a courtesy to you as counsel.

More than two months later, with no response from Jones Day, we emailed you on 6 December 2021, asking if you had provided the letter and its exhibits to Mr. Botterman and the Board. You did not respond to that question.

In the meantime, ICANN finally posted our 3 November letter on its website on 23 December 2021 in highly redacted form—making numerous pages impossible to read. We then asked Jones Day for confirmation that you had provided the letter to Mr. Botterman and the ICANN Board in unredacted form. You did not respond. As a result, even today, we have no idea whether the Board has access to our 3 November letter beyond what is posted (in highly redacted form) on the ICANN website. As you will also recall, on 28

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<sup>8</sup> See Letter from S. Marenberg to M. Botterman (23 July 2021), posted to ICANN website on 14 September 2021, available at <https://www.icann.org/en/system/files/correspondence/marenberg-to-botterman-23jul21-en.pdf> (last visited 21 Fe. 2022).

<sup>9</sup> Interestingly, on the same day that ICANN posted Mr. Marenberg’s letter to its website, Verisign published a “blog” on the Verisign website, written by an in-house lawyer at Verisign, making the same allegations and providing a link to Mr. Marenberg’s letter.

<sup>10</sup> See Letter from A. Ali to M. Botterman (23 July 2021), posted to ICANN website on 14 September 2021, available at <https://www.icann.org/en/system/files/correspondence/ali-to-botterman-03nov21-en.pdf> (last visited on 21 Feb. 2022).

May 2021, we wrote to Jones Day, specifically objecting to the numerous redactions made to the version of the IRP Panel’s Final Decision as posted on ICANN’s website.<sup>11</sup> We also never received a response to that letter.

In letters to Jones Day dated 20 December 2021 and 12 January 2022, we also asked for basic information as to how and when the Board intended to make its “first-instance” review and pronouncement on the questions raised by Altanovo concerning .WEB. You did not respond to those letters either. By our count, dating back to 28 May 2021, we have raised important issues concerning .WEB in correspondence to Jones Day in *five separate communications dating back over nine months*, including the letter that we sent to Mr. Botterman care of Jones Day. No one at Jones Day (or anyone else acting on behalf of ICANN) has responded to them.

Accordingly, with Jones Day having failed to respond to any of the communications set forth above—and still not knowing whether our 3 November letter has ever been provided to Mr. Botterman and the Board in unredacted form—we exercised our right under ICANN’s “Correspondence Process” to write directly to the Board in a letter dated 11 February 2022. Among other things, we asked the Board to correct misstatements and omissions in the Board’s Resolutions and Rationale dated 16 January 2022. Based on your failure to respond to any of our letters on similar issues over the past few months, we reasonably concluded that any letters addressed to you on these points would simply be ignored. Again, ICANN’s Correspondence Process specifically authorizes stakeholders to write directly to the Board, as Mr. Marenberg did in his 23 July 2021 letter to Mr. Botterman on behalf of Verisign and NDC.

Under the circumstances, your invocation of Rule 4.2 regarding our correspondence to the ICANN Board is not only unfounded; it further demonstrates the disparate treatment which Altanovo has consistently suffered at the hands of ICANN’s counsel and staff. That treatment dates back at least to the confidential communications between outside counsel for ICANN and Verisign in August 2016 (which we learned of only through discovery in the IRP) and the 16 September 2016 “Questionnaire” (which, as we also learned in the IRP, was drafted largely by ICANN counsel based on information provided by Verisign counsel in its confidential communications to you).<sup>12</sup>

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<sup>11</sup> Letter from A. Ali to J. LeVee (28 May 2021).

<sup>12</sup> See *Afilias v. ICANN*, Final Decision (20 May 2021), ¶¶ 8, 315, 413(3) (describing the confidential communications between outside counsel for ICANN and Verisign in August 2016 and the 16 September 2016 Questionnaire and concluding that ICANN’s conduct “violated [ICANN’s] commitment, under the Bylaws, to operate in an open and transparent matter and consistent with procedures designed to ensure fairness.”).

#### 4. The ICANN Board must make its first-instance decision independently.

Rule 4.2 provides in relevant part that “[d]uring the course of representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation *with a person known to be represented by another lawyer in the matter*[.]”<sup>13</sup> For the reasons stated above, Rule 4.2 is not applicable here.

Nonetheless, we are troubled by the premise of your 18 February email—which is that Jones Day is “representing” the ICANN Board in making its first-instance consideration and pronouncement on the questions raised by Altanovo concerning .WEB, and should therefore be able to act as a “gatekeeper” to the information provided to the Board as it makes its first-instance pronouncement.

We have great respect for you and your colleagues as disputes lawyers and advocates. But Jones Day—presumably at the direction and/or with the approval of ICANN’s in-house legal team—took vigorous positions adverse to Altanovo on the very issues on which the Board will now consider and pronounce upon in the first instance. The entire premise on which the IRP Panel remanded these questions to *the Board* is that the Board will undertake its first-instance review independently, objectively, and fairly—without being advised by those who publicly advocated that Altanovo’s concerns have no merit.

As the IRP Panel noted, ICANN asserted at the outset of the IRP that ICANN “ha[d] [already] evaluated [Altanovo’s] complaints” and that the “time ha[d] therefore come for the auction results to be finalized and for .WEB to be delegated so that it can be made available to consumers.”<sup>14</sup> In its Response to Altanovo’s Amended IRP Request, ICANN asserted:

As the party that made a significant financial investment in .WEB over two years ago, Verisign is determined to proceed pursuant to its agreement with NDC so that it can operate .WEB. *Afilias, on the other hand, is determined to use this proceeding to seize control of .WEB for itself – at a bid price set by this Panel – even though it did not prevail in the auction.*<sup>15</sup>

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<sup>13</sup> D.C. RULES OF PROFESSIONAL CONDUCT (1 Feb. 2007), Rule 4.2(a) (emphasis added).

<sup>14</sup> *Afilias v. ICANN*, Final Decision (20 May 2021), ¶ 346 (quoting ICANN’s Opposition to Afilias’ Request for Emergency Panelist and Interim Measures of Protection (17 Dec. 2018), ¶ 3).

<sup>15</sup> *Afilias v. ICANN*, ICANN’s Response to Amended IRP Request (31 May 2019), ¶ 10 (emphasis added).

Indeed, throughout the IRP, ICANN’s counsel consistently argued that Altanovo’s arguments concerning NDC’s violations of the New gTLD Program had no merit—even as the IRP Panel found that the questions raised by Altanovo were “legitimate, serious, and deserving of [ICANN’s] careful attention.”<sup>16</sup>

It is neither reasonable nor plausible to expect that the Board will conduct its first-instance review in an independent, fair, and neutral manner if it is advised by the same counsel and Staff who made these manifestly biased arguments against Altanovo in the IRP. Nor it is fair to expect that those counsel and Staff will now retract the arguments they zealously advocated on ICANN’s behalf in the IRP.

For all these reasons, we restate our objection to the involvement of any member of ICANN’s Staff, in-house counsel or outside counsel in the independent assessment that the BAMC and Board must undertake pursuant to the IRP Panel’s Final Decision.

And we reiterate our position that Rule 4.2 has no application to our communications to the Board as the first-instance adjudicator of Altanovo’s complaints.

Very truly yours,



Alexandre de Gramont  
Counsel for Altanovo Domains Limited,  
f/k/a Afilias Domains No. 3 Limited

cc: *Counsel for ICANN*  
Mr. John Jeffrey  
Ms. Amy Stathos  
ICANN General Counsel’s Office

Mr. Jeffrey A. LeVee  
Mr. Steven L. Smith  
Mr. Eric P. Enson  
Ms. Kelly M. Ozurovich  
Jones Day LLP

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<sup>16</sup> *Afilias v. ICANN*, Final Decision (20 May 2021), ¶ 300.

*Counsel for Verisign*

Mr. Ronald L. Johnston

Mr. James S. Blackburn

Ms. Maria Chedid

Mr. Oscar Ramallo

Mr. John Muse-Fisher

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*Counsel for NDC*

Mr. Steven Marenberg

Mr. Josh B. Gordon

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Paul Hastings LLP

## Attachment H to Board Reference Materials

# PAUL HASTINGS

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February 23, 2022

Via email: [jlevee@jonesday.com](mailto:jlevee@jonesday.com)  
[epenson@jonesday.com](mailto:epenson@jonesday.com)

Mr. Jeffrey A. LeVee  
Mr. Eric P. Enson  
Jones Day  
555 South Flower Street, 50<sup>th</sup> Floor  
Los Angeles, CA 90071-2300

Re: Altanovo's Letter dated February 11, 2022 and ICANN Board Resolutions 2022.01.16.12 - 2022.01.16.15

Dear Messrs. LeVee and Enson:

This letter is submitted on behalf of Nu Dotco, LLC (“NDC”), Awardee of the new .WEB gTLD, and VeriSign, Inc. (“Verisign”) with regard to the .WEB Independent Review Proceeding (“IRP”) initiated by Afilias Domains No. 3 Ltd., now named Altanovo, and the latter’s February 11, 2022 letter to the ICANN Board (“February 11 Letter”). NDC and Verisign address this letter to ICANN’s outside counsel in accordance with Mr. Enson’s February 18, 2022 email to Altanovo requesting that correspondence in this matter not be sent directly to ICANN. But NDC and Verisign request, in the interest of fairness and to counter repeated false and misleading statements by Altanovo, that this letter be made available to ICANN’s Board and the BAMC to the same extent as Altanovo’s correspondence. NDC and Verisign also request that ICANN’s Board and the BAMC be notified of Altanovo’s wrongful disclosure of confidential and trade secret information to them, as described below, and that appropriate precautions be taken to protect the information, including from any further disclosure.

By its Resolution (2022.01.16.15), “the Board asks the Board Accountability Mechanisms Committee (BAMC) to review, consider, and evaluate the IRP Panel’s Final Declaration and recommendation, and to provide the Board with its findings to consider and act upon before the organization takes any further action toward the processing of the .WEB application(s).” The Board directed the BAMC to undertake a thorough consideration of next steps in recognition of the importance of further proceedings on the Panel Order and as “within ICANN’s Mission and ... in the public interest.”

Altanovo’s letter is incompatible with the ICANN Board’s delegation to the BAMC of the task of fairly considering the IRP Panel’s Final Decision and making appropriate recommendations to the Board. Altanovo’s February 11 Letter expressly and preemptively attacks the integrity of the ICANN Board, BAMC, staff and counsel, in addition to NDC and Verisign, in an effort to undermine further proceedings by the Board and the BAMC. Fairly read, Altanovo’s February 11 Letter is plainly intended to prejudice the BAMC’s consideration of the issues delegated to it. It also is designed to intimidate the ICANN Board from ultimately rejecting Altanovo’s objections to the delegation of .WEB to NDC, containing, as it does, an explicit threat by Altanovo to commence yet another IRP against ICANN with respect to .WEB if

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decisions do not go its way. The thinly veiled message of Altanovo's letter: decide for us or face additional years of IRP's and other proceedings designed to delay the introduction of .WEB, which Altanovo has already delayed by almost 6 years. It is thus important to the parties to this proceeding, and to the ICANN community at large, that Altanovo's strategy be rejected and the proper process of the Board and BAMC, as set forth in the above-referenced Resolutions, move forward in a fair and orderly manner.

Independently, NDC and Verisign object to the February 11 Letter because it is replete with false statements regarding both ICANN's processes and conduct and the testimony and evidentiary record in the IRP; and because the letter wrongfully discloses confidential and trade secret information, in violation of the express provisions of a Protective Order, as explained in more detail below.

For all of the foregoing reasons, NDC and Verisign request that the February 11 Letter should be disregarded for all purposes and precautions taken so that its confidentiality is preserved.

**I. Altanovo's Letter Improperly Contends that the Board is Guilty of "Misstatements to the Internet Community" and "Pre-Judging" the Issues -- Thereby Attempting to Prejudice the Community Against Further Proceedings of the BAMC and the Board**

Rather than wait for or respect the BAMC's adoption of a fair process for considering these important issues as provided for in the Board's Resolution (2022.01.16.15), Altanovo seeks to preempt the BAMC's process by attacking ICANN, the Board, the BAMC, NDC and Verisign. Altanovo's unbridled and misleading attack spares no one. The pretext for its Letter, and its threats and demands, is a strained interpretation of a parenthetical reference in the Resolution to the Domain Acquisition Agreement between NDC and Verisign ("DAA"), a reference obviously not meant by the Board (as Altanovo contends) to "prejudge" the issues. Indeed, the Board specifically delegated to the BAMC the task of evaluating the IRP Panel's determinations and recommendations.

Nonetheless, predicated solely on its misrepresentation of the Board Resolutions and the IRP record, Altanovo attacks the integrity of ICANN and its Board, staff, and lawyers, as well as the BAMC process itself. For example, the February 11 Letter accuses the Board of making a "critical misstatement" and having "effectively pre-judged" the issues, questions whether the Board or BAMC "will be able properly to consider and evaluate the IRP Panel's Final Decision" or otherwise act with "impartiality and independence," and claims that the Board has "misstated to the Internet Community" the facts and, in so doing, has exacerbated "the inherent unfairness" already created by ICANN, including ICANN's supposed "blatant lack of evenhandedness."<sup>1</sup>

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<sup>1</sup> Altanovo further attempts to affect the internal processes of the BAMC by gratuitously objecting to the "involvement of *any member of ICANN's Staff, in-house counsel or outside counsel* in the independent assessment that the BAMC and Board must undertake pursuant to the IRP Panel's Final Decision." It also threatens ICANN with endless proceedings and their attendant expense by signaling, even prior to the beginning of the BAMC's consideration, that it intends to file another IRP in any event to further delay the launch of .WEB.

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Altanovo's attack on the very role of ICANN and its accountability mechanisms is an apparent attempt to cause the Board to overcompensate in favor of Altanovo and refuse to make a decision that would reject Altanovo's attempts to unwind the .WEB auction award or otherwise proceed with the delegation of .WEB to NDC. In so doing, Altanovo attempts to seed the record with misstatements to support future attacks on ICANN, as its letter openly threatens (fn. 1).

NDC and Verisign strongly object to Altanovo's improper efforts to prejudice the BAMC process and the Internet community against ICANN, NDC, and Verisign. Although we reserve a detailed response to the false assertions in the February 11 Letter pending further proceedings by the BAMC, the immediate point is that the BAMC must be allowed to establish and follow its process without unsolicited and incendiary rhetoric from Altanovo. If the BAMC's process includes submissions from the interested parties, as we anticipate, Altanovo, NDC, and Verisign will all have the opportunity to advocate in an orderly and judicious manner.

**II. NDC and Verisign Object to the Publication of Altanovo's Letter -- Including Because It Contains Confidential and Trade Secret Information of NDC and Verisign**

Altanovo compounds the impropriety of its submission by asking ICANN to publish its letter to the Internet community and thereby publicly disclose confidential and trade secret information of NDC and Verisign. NDC and Verisign request that ICANN reject Altanovo's request for the following reasons: (1) the letter is not publishable under ICANN's Document Information Disclosure Policy ("DIDP"), (2) the letter is a clear attempt to bias public opinion even before consideration of the Final Decision by the Board and BAMC has begun, and (3) critically, the information in the letter, as well as the Annex, is confidential and subject to a Protective Order entered by the IRP Panel and enforceable in a court of law. Altanovo stipulated to this order, which makes its failure even to advise the ICANN Board of these facts and its request that the letter be published all the more egregious.

First, under ICANN's established processes, correspondence from third parties such as Altanovo should not be published if the correspondence meets any of the "Other Defined Conditions for Nondisclosure" the DIDP. The February 11 Letter meets several of these and related conditions:

- Under the DIDP, it is well established that ICANN will not publish either confidential information of a party or information that "would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates." *See* <https://www.icann.org/resources/pages/didp-2012-02-25-en>. Altanovo's letter is an obvious attempt to do just that, as it makes repeated misrepresentations regarding ICANN, NDC and Verisign.
- ICANN's Correspondence Handbook additionally provides that ICANN can choose not to publish correspondence that is not "within scope," *See* Handbook, Section 2 (<https://www.icann.org/en/system/files/files/icann-correspondence-process-handbook->

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[06mar18-en.pdf](#)). Altanovo's letter is "out of scope" under the DIDP, as it relates to a defined ICANN process (Board consideration of an IRP decision) and is part of that record and limited by that record. It should not separately be published here.

Second, the February 11 Letter is an explicit attack on the integrity of the Board and BAMC processes and seeks to bias the Internet community's perception of further ICANN proceedings in a manner prejudicial to ICANN, NDC and Verisign. The letter expressly and falsely attacks ICANN as having made misrepresentations to the community, having prejudged issues, and as lacking impartiality.<sup>2</sup> Similarly, Altanovo's letter falsely asserts that NDC admitted to lying to conceal the existence of the DAA. There is no place for such misstatements in this discourse. If Altanovo wishes to tell lies and pollute the public consciousness with its misrepresentations, it must do so at its own risk without using and sheltering behind ICANN's publication mechanisms.

Third, the February 11 Letter constitutes an improper disclosure of NDC and Verisign's Confidential Information, including information protected under the Protective Order entered in the IRP. In particular, information regarding the DAA disclosed in Altanovo's letter was clearly designated "*Highly Confidential -- For Attorneys Eyes Only*" under the Protective Order (Sections 6.2, 6.3). Nonetheless, Altanovo discloses and urges further publication of information regarding the DAA, including making factual assertions and repeated arguments regarding the meaning of the DAA, disclosing the substance of the agreement in the process.<sup>3</sup> (*See, e.g.*, p. 3, second full paragraph). Further, Annex A to Altanovo's

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<sup>2</sup> Altanovo also falsely asserts that Verisign has secret access to ICANN denied to Altanovo. Altanovo bases the latter on a selective quote from an earnings call in which Verisign's CEO stated that the company would continue "monitoring [ICANN's] process." (Letter at p. 8.) Altanovo attempts to mislead the ICANN Board by failing to quote the answer to a follow-up question as to how Verisign would "monitor" ICANN's process -- in response to that question, Verisign's CEO explicitly states that Verisign would be reviewing "publicly available information. So what we'll be monitoring, you can certainly monitor yourself on ICANN's website as the Board proceeds." Similarly, on February 18, **2022**, Altanovo sent a second letter quoting a Verisign public filing from February 19, **2021** as a pretext to demand yet more information about .WEB's purported "award to Verisign" outside of the proper channels. Altanovo's February 18, 2022 letter adds to Altanovo's prior accusations of a secret agreement between ICANN and Verisign with regard to .WEB, in furtherance of its efforts to undermine and preempt the BAMC's processes. The reference in the **2021** filing was part of a standard litigation risk assessment of claims against the company. No honest reading of the statement in the litigation risk assessment would interpret it as saying that .WEB had been awarded to Verisign. Indeed, had Altanovo acted in good faith and read Verisign's February 18, 2022, 10-K -- filed the same day Altanovo sent its second, incendiary letter -- it would have seen that the risk factor for Verisign was removed, as the IRP was decided. Altanovo's assertion in its February 18 letter is yet another complete fabrication as part of its ongoing effort to falsify a record for further attacks on ICANN and Verisign.

<sup>3</sup> Section 2 of the Protective Order provides: "The protections conferred by this Order cover not only Protected Material (as defined above) but also (1) any information copied or extracted from Protected

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letter quotes extensively from the DAA, also an unauthorized disclosure of information designated “Highly Confidential -- Attorneys-Eyes Only” under the Protective Order.<sup>4</sup> That unauthorized and improper disclosure must not be exacerbated by the general publication of the February 11 Letter.

\* \* \*

For these reasons, NDC and Verisign respectfully request that (i) ICANN disregard for all purposes Altanovo’s February 11 Letter and (ii) refrain from publishing the letter on its website as requested by Altanovo or further disclosing NDC and Verisign’s confidential information. NDC and Verisign reserve the right to address the substance of the February 11 Letter pending advice by the BAMC.

Sincerely,



Steven A. Marenberg  
of PAUL HASTINGS LLP

SAM:kbj

cc: Arif Hyder Ali (by email: [arif.ali@dechert.com](mailto:arif.ali@dechert.com))  
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Material; (2) all copies, excerpts, summaries, or compilations of Protected Material; and (3) any testimony, conversations, or presentations by Parties or their Counsel that reveal Protected Material.”

<sup>4</sup> Under the Protective Order, ICANN’s Board is not an authorized recipient of Highly Confidential material. Section 6.3 of the Protective Order provides that disclosure of Highly Confidential Information may only be made to outside counsel, experts, the IRP Panel, or authors or recipients of the designated material. The ICANN Board obviously does not fall within any of these categories, notwithstanding Altanovo’s unilateral decision to disclose the information to the Board. We wish to be clear, however, that neither NDC nor Verisign object to the disclosure of the DAA to the ICANN Board or the BAMC (a) by ICANN’s counsel, (b) with advice to the Board of the confidentiality of the information, and (c) with proper protections in place. But we do object to the unilateral disclosure of our proprietary information by Altanovo and its counsel in violation of the Protective Order and our rights.