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**BEFORE THE**

**BOARD ACCOUNTABILITY MECHANISMS COMMITTEE**

**OF THE**

**INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS**

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| *IN RE* BOARD ACCOUNTABILITY MECHANISMS COMMITTEE'S REVIEW OF .WEB PURSUANT TO BOARD RESOLUTION 2022.03.10.06 | **INDEX OF EXHIBITS**<br><br>**FOR RESPONSE BY NU DOTCO, LLC AND VERISIGN, INC. TO BAMC'S REQUEST FOR BRIEFING PURSUANT TO BOARD RESOLUTION 2022.03.10.06** |

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| Exhibit No. | Description |
|---|---|
| AC-71 | Letter from S. Marenberg (Counsel to NDC) to M. Botterman (ICANN) (July 23, 2021)<br>*Confidential* |
| AC-72 | CircleID Article, "IRP Panel Dismisses Afilias' Claims to Reverse .WEB Auction and Award .WEB to Afilias" (May 26, 2021) |
| AC-73 | Profile "*Akram Atallah*, ICANN WIKI" |
| AC-74 | Letter from A. Ali (Counsel to Afilias) to M. Botterman  (ICANN) (Nov. 3, 2021)<br>*Confidential* |
| AC-75 | The Domain Name Industry Brief, Vol. 19, Issue 2 (June 2022) |
| AC-76 | Verisign, "Verisign as a Domain Registry" |
| AC-77 | PR Newswire Article ,"Donuts Acquires Afilias" (December 29, 2020) |
| AC-78 | Identity Digital Article, "Donuts Inc. and Afilias, Inc. Rebrand to Identity Digital" (June 22, 2022) |
| AC-79 | Update to Altanovo .WEB application, V.4 (Sept. 10, 2021) |
| AC-80 | Excerpts from IRP Hearing Transcript- Volume V (August 7, 2020)<br>*Confidential* |
| AC-81 | Witness Statement of Paul Livesay in support of ICANN's Rejoinder and *Amici's* Briefs (June 1, 2020)<br>*Highly Confidential - Attorneys' Eyes Only* |
| AC-82 | ICANN's New gTLD Application Status for Verisign |
| AC-83 | Excerpts from IRP Hearing Transcript- Volume VII (August 11, 2020)<br>*Confidential* |
| AC-84 | Domain Acquisition Agreement ("DAA") (Aug. 25, 2015)<br>(Livesay Ex. D)<br>*Highly Confidential - Attorneys' Eyes Only* |
| AC-85 | Witness Statement of Jose Ignacio Rasco III (June 1, 2020)<br>*Highly Confidential - Attorneys' Eyes Only* |

| Exhibit No. | Description |
|---|---|
| AC-86 | Confirmation of Understanding between Verisign and Nu Dotco, LLC ("DAA Supplement") (July 26, 2016)<br>(Livesay Ex. H)<br>***Highly Confidential - Attorneys' Eyes Only*** |
| AC-87 | Emails between J. Erwin (ICANN) and J. Rasco (NDC) (June 27, 2016)<br>(Rasco Ex. M)<br>***Confidential*** |
| AC-88 | Email from J. Rasco (NDC) to C. Willett (ICANN) (July 11, 2016)<br>(Rasco Ex. O)<br>***Confidential*** |
| AC-89 | Letter from C. Willett (ICANN) to .WEB Contention Set (July 13, 2016)<br>(Rasco Ex. P)<br>***Confidential*** |
| AC-90 | Text message from S. Heflin (Afilias) to J. Calle (NDC) (June 7, 2016)<br>(Rasco Ex. J)<br>***Confidential*** |
| AC-91 | Amended Request by Afilias Domains No. 3 Limited for Independent Review (Mar. 21, 2019)<br>***Confidential*** |
| AC-92 | Letter from Kent Brown, U.S. Department of Justice, Antitrust Division, to Thomas Indelicarto, Executive Vice President, Verisign, "Civil Investigative Demand No. 28931," (Jan. 18, 2017)<br>(*Amici* Ex. AC-31)<br>***Highly Confidential - Attorneys' Eyes Only*** |
| AC-93 | Expert Report by Kevin Murphy (May 30, 2020)<br>***Highly Confidential - Attorneys' Eyes Only*** |
| AC-94 | Corrected Version of the IRP's Final Decision (July 15, 2021)<br>***Confidential*** |
| AC-95 | Letter from J. Beckwith Burr to Altanovo Domains Limited, Nu Dotco, LLC and Verisign, Inc. (May 19, 2022) |
| AC-96 | Emails between J. Nevett (Donuts) and J. Rasco (NDC) (June 6 and 7, 2016))<br>(Rasco Ex. I)<br>***Confidential*** |

| Exhibit No. | Description |
|---|---|
| AC-97 | Text message from J. Kane (Afilias) to J. Rasco (NDC)) <br> (Rasco Ex. K) <br> *Confidential* |
| AC-98 | Email from O. Mauss (1 & 1 Internet/Schlund) to J. Calle (NDC) (July 5, 2016) <br> (Rasco Ex. C) <br> *Confidential* |
| AC-99 | Emails between C. LaHatte (ICANN) and J. Rasco (NDC) (July 6–7, 2016) <br> (Rasco Ex. N) <br> *Confidential* |
| AC-100 | Text message from J. Kane (Afilias) to J. Rasco (NDC) (July 22, 2016) <br> (Rasco Ex. R) <br> *Confidential* |
| AC-101 | Afilias C-102, Letter from R. Johnston (Counsel for Verisign) to E. Enson (Counsel for ICANN) (Aug. 23, 2016) |
| AC-102 | .ATTORNEY Assignment and Assumption Agreement, Victor North, LLC to United TLD Holdco, Ltd (May 7, 2014) |
| AC-103 | Victor North, LCC, New gTLD Application (.ATTORNEY) (June 13, 2012) |
| AC-104 | ICANN Initial Evaluation Report (Ruby Glen, LLC's .WEB Application) (July 19, 2013) |
| AC-105 | Verisign, Inc.'s Pre-Hearing Brief (Phase II) (June 26, 2020) <br> *Highly Confidential - Attorneys' Eyes Only* |
| AC-106 | Reply Memorial in Support of Amended Request by Afilias Domains No. 3 Limited for Independent Review (May 4, 2020) <br> *Confidential* |
| AC-107 | Application for Assignment -- Registry Agreement for .MEET <br> (ICANN Ex. RE-3) <br> *Highly Confidential - Attorneys' Eyes Only* |
| AC-108 | 17A C.J.S Contracts 420--Recitals in context of construction of contract |
| AC-109 | *Whetstone Candy Co. v. Kraft Foods, Inc.*, 351 F.3d 1067, 1074 (11th Cir. 2003) |

# EXHIBIT AC-71

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July 23, 2021

**VIA E-MAIL AND FEDEX**

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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.[1]

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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[1] 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.

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.[2]

## 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.[3] Instead, the Panel directed that all remaining

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[2] 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.

[3] 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.)

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."[4]

## 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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[4] 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).

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.[5] 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.[6]

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.[7] 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.[8]

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[5] Authorities cited at Section II. E., _infra_.

[6] _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.")).

[7] 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.

[8] _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.

The following day, 7 June 2016, Afilias asked NDC to reconsider, stating that *Afilias would "guarantee" that NDC would "score at least 16 mil if you go into the private auction and lose."* NDC again declined, whereupon *Afilias offered to increase the payment to NDC to "$17.02" million*.  NDC again declined.[9]

When NDC refused Afilias' latest offer, Afilias 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.[10]  On or about 30 June 2016, Donuts filed a complaint with ICANN's Ombudsman repeating its false allegations against NDC.[11]

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."[12]

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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[9] *See* Ex. D (7 June 2016 text messages between Juan Calle of NDC and Steve Heflin of Afilias); *see also* Ex. E (Text messages between Jose Rasco of NDC and John Kane of Afilias).

[10] *See* Ex. F (23 June 2016 email from Jon Nevett of Donuts to ICANN's customer portal).

[11] Witness Statement of Christine A. Willett, 31 May 2019 ("Willett Witness Statement"), https://www.icann.org/en/system/files/files/irp-afilias-witness-statement-willett-31may19-en.pdf, ¶ 24.

[12] *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).

management.[13]  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.[14]

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."[15]  Ruby Glen's action subsequently was dismissed with prejudice, and its appeal of that dismissal was rejected by the Ninth Circuit Court of Appeals.[16]  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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[13] *See* Ex. I (13 July 2016 Letter from Christine A. Willett, Vice President, GDD Operations of ICANN, to the .WEB contention set).

[14] Ex. J (21 July 2016 Determination of the Board Governance Committee ("BGC") Reconsideration Request 16-9).

[15] *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)).

[16] *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)).

### 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."[17] (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 Afilias 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.     *Afilias' 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).

Afilias' continuation of negotiations to resolve the contention set during the Blackout Period represents a clear and intentional violation of the Blackout Rules.  Afilias 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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[17] *See* Ex. M (5 July 2016 email from Oliver Mauss of Schlund to Juan Calle of NDC with attachment proposing an "Alternative Private Auction").

July 2016, expressly reminding them that "the Deposit Deadline for .WEB/.WEBS has passed and we are now in the Blackout Period."[18]

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."[19] 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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[18] *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).

[19] *See* Ex. O (22 July 2016 Text messages from Jonathan Kane of Afilias to Jose Rasco of NDC).

New gTLD Program Rules.[20]  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.[21]  *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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[20] 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…")

[21] *See* Afilias' Response to the *Amicus Curiae* Briefs, ¶¶ 179–84.  *Amici* could not compel Mr. Kane's testimony.

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:
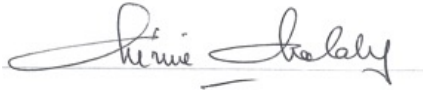
*"The NGPC is also requesting that the GNSO specifically include the issue of exclusive registry access for generic strings serving a public interest goal as part of the policy work it is planning to initiate on subsequent rounds of the New gTLD Program, and inform the Board on a regular basis with regards 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[1] 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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[1] 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 "I*CANN 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
**Subject: Re: .web**
**Date:** June 8, 2016 at 12:33:31 PM EDT
**To:** "Jose I. Rasco"
**Cc:** Juan Diego Calle

Thanks Jose.  Would this be the same decision for .inc and .llc?

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 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.

Exhibit D

**From:** Juan Diego Calle
**Subject: Thread**
**Date:** June 7, 2016 at 4:36:40 PM EDT
**To:** "Jose I. Rasco"

Attached.

●●●○○ AT&T 📶      4:35 PM      📶 ⚡ 🔋

‹ Messages (119)    **Steve**      Details

Wednesday 2:33 PM

Amigo...how's life?
Got time to chat today?

Yesterday 12:23 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.

Ahhhhhh 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.

📷               Send

1

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. ████████

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

25

[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

2

# Exhibit F

## Case Detail

Edit | Clone | SPAM

### ▼ Case Information

| | | | |
|---|---|---|---|
| **Case Number** | 00225003 [View Hierarchy] | **Internal Status** | Closed |
| **Account Name** | Ruby Glen, LLC | **Status** | Closed |
| **Contact Name** | Daniel Schindler | **Case Close Reason** | Response Provided |
| **Contact Type** | | **Urgency** | Moderate |
| **Application ID** | 1-1527-54849 | **Severity** | Sev 3 |
| **Registry** | | **Case Record Type** | General Case [Change] |
| **Case Origin** | Web | **Category** | Application Processing |
| **Multiple Contacts Found** | ☐ | **Sub Category** | Initial Evaluation Process |
| **Visible in Self-Service Portal** | ✓ | **Case Owner** | Jared Erwin [Change] |
| **Suppress Notification** | ☐ | **Assigned to** | Jared Erwin |
| **Updates On Case** | ☐ | **Parent Case** | |
| **SLA Resolution status** | SLA Exceeded | | |
| **Phone** | | | |

### ▼ Additional Information

**Subject**     .WEB Auction Postponement — Required Applicant Update

**Description**     ICANN,

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.

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.

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.

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.

We do not make this request lightly and haven't done so in well over 100 other scheduled ICANN auctions.

Thank you and best regards,
Jonathon Nevett

### Case Comments

New        Case Comments Help ?

| Action | Public | Comment |
|---|---|---|
| Make Private | ✓ | **Created By: Jared Erwin (6/27/2016 3:42 PM)**<br>Dear Daniel Schindler,<br><br>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.<br><br>Thank you for your attention. I will now resolve this case, but please do not hesitate to reopen it should you have any questions.<br><br>Best regards,<br><br>Jared Erwin<br>New gTLD Operations |
| Make Private | ✓ | **Created By: Susan Yao (6/23/2016 10:17 AM)**<br>Dear Daniel Schindler,<br><br>Thank you for your contacting ICANN Global Support on your request.<br><br>Your request has been forwarded to our gTLD Team for processing. Someone from the team will be contacting you.<br><br>Please do not hesitate to contact us if you have any other questions or concerns.<br><br>Best regards,<br>Susan Yao<br>Global Support Analyst II<br>ICANN Global Support |

# Exhibit G

**⠀⠀SchlundTech**

JUL 1 1 2016

Schlund Technologies GmbH | Maximilianstr. 6 | 93047 Regensburg | Germany

Schlund Technologies GmbH
Maximilianstr. 6
93047 Regensburg
Germany

Handelsregister B
Regensburg 9620

Geschäftsführer/CEO
RA Thomas Mörz

USt-IdNr. DE814286643

Commerzbank AG
Konto-Nr. 589279900
BLZ 50040000
IBAN-Nr.:
DE54500400000589279900
SWIFT-Code:
COBADEFFXXX

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
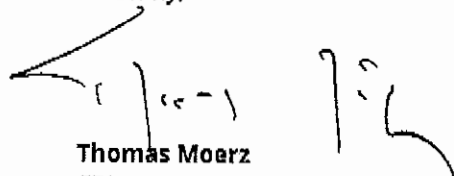Via e-mail and fax

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

# Exhibit H

**From:** Brijesh Joshi ██████████████████
**Date:** Monday, July 11, 2016 at 12:07 AM
**To:** Akram Atallah ████████████████████, Christine Willett █████████████████████,
John Jeffrey █████████████, █████████████████████████████████
**Cc:** Sandeep Ramchandani ████████████████
**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

**ICANN**

**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.

**Los Angeles** 12025 Waterfront Drive, Suite 300 Los Angeles, CA 90094 USA T +1 310 301 5800 F +1 310 823 8649
Offices: Beijing • Brussels • Geneva • Istanbul • Montevideo • Seoul • Singapore • Washington

http://icann.org

**The Internet Corporation for Assigned Names and Numbers**

# ICANN

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, and someone from my team will contact you promptly.

Sincerely,

Christine A. Willett
Vice President, GDD Operations
ICANN

**Los Angeles Offices:**   12025 Waterfront Drive, Suite 300   Los Angeles, CA 90094   **USA**   **T +1 310 301 5800**   **F +1 310 823 8649**
Beijing   •   Brussels   •   Geneva   •   Istanbul   •   Montevideo   •   Seoul   •   Singapore   •   Washington

**http://icann.org**

# Exhibit J

**DETERMINATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 16-9**

**21 JULY 2016**

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."[1]

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[1] Request, Pg. 2.

1

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.[2] 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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[2] 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.[3]

The seven applications for .WEB and the remaining application for .WEBS are in

the .WEB/.WEBS Contention Set.[4]

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."[5]  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

---

[3] Nu Dot Application for .WEB, *available at* https://gtldresult.icann.org/applicationstatus/applicationdetails/1053.
[4] Contention Set for .WEB/.WEBS, *available at*
https://gtldresult.icann.org/applicationstatus/contentionsetdiagram/233.
[5] 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,

4

4

"[t]o do otherwise would be unfair, as we do not have transparency into who leads and controls that applicant as the auction approaches."[6]

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."[7]

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."[8]

The .WEB/.WEBS Auction is scheduled to occur on 27 July 2016.[9]

**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

---

[6] 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.

[7] 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.

[8] 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.

[9] Auction Schedule, *available at* https://newgtlds.icann.org/en/applicants/auctions.

Applicant Guidebook."[10]

## 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.[11]  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."[12]  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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[10] Request, § 9, Pg. 11 (emphasis in original).
[11]  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.
[12] Request, § 9, Pg. 12.

6

6

Program auction only where all active applications in the contention set have 'no pending ICANN Accountability Mechanisms.'"[13]

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."[14] 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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[13] Request, § 9, Pg. 12 (quoting ICANN's New gTLD Program Auctions page, *available at* https://newgtlds.icann.org/en/applicants/auctions).
[14] 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.[15]

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.[16] 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."[17]  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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[15] Guidebook, §§ 6.8, 6.10 (emphasis supplied).
[16] 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.
[17] Request, § 10, Pg. 14.

8

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.[18]  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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[18] Guidebook, §§ 6.8, 6.10.

9

9

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."[19]

> **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.[20]  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."[21]

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."[22]  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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[19] 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.
[20] 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.")
[21] Request, § 10, Pg. 20.
[22] 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."[23]

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."[24]  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."[25]  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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[23] 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.
[24] Request, § 8, Pg. 9.
[25] *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.[26]  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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[26] Bylaws Article IV, Section 2.19.

12

# 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][1/] 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.)

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[1/]          According to Plaintiff, Bezsonoff was identified on NDC's ICANN application as NDC's "secondary contact."

2

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**CIVIL MINUTES - GENERAL**

| 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**

| Case No. | CV 16-5505 PA (ASx) | Date | July 26, 2016 |
|---|---|---|---|
| Title | Ruby Glen, LLC v. Internet Corp. for Assigned Names & Numbers | | |

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**

| Case No. | CV 16-5505 PA (ASx) | Date | July 26, 2016 |
|---|---|---|---|
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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 |
|---|---|---|---|
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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<sup>*</sup>

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)."

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    <sup>*</sup>    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

3

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).

4

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).[1]

**AFFIRMED.**

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[1] 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

# 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

➢ 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.

➤ 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.

➢ 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)

Takon

## Variables and notation

| | |
|---|---|
| SSN | Surplus Sharing Negotiation Process |
| SSNA | Surplus Sharing Negotiation Auction |
| IA | ICANN Last Resort Auction |
| | |
| $n$ | Number of applicants for *.web* |
| $v_i$ | Applicant $i$'s value (willingness to pay) for *.web*, $i = 1, \ldots, n$ |
| $\pi_i$ | Applicant $i$'s surplus (profit), $i = 1, \ldots, n$ |
| $p$ | 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 $\varphi(b_1, b_2, p)$.

## 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) $\varphi(b_1, b_2, p) = \dfrac{\frac{b_1 + b_2}{2} - p}{2} = \dfrac{b_1 + b_2 - 2p}{4}$    if $b_2 > \dfrac{b_1 + 2p}{3} \Leftrightarrow b_1 - b_2 < 2(b_2 - p)$

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) $\varphi(b_1, b_2, p) = b_2 - p$    if $p < b_2 \leq \dfrac{b_1 + 2p}{3} \Rightarrow b_1 - b_2 \geq 2(b_2 - p)$

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.
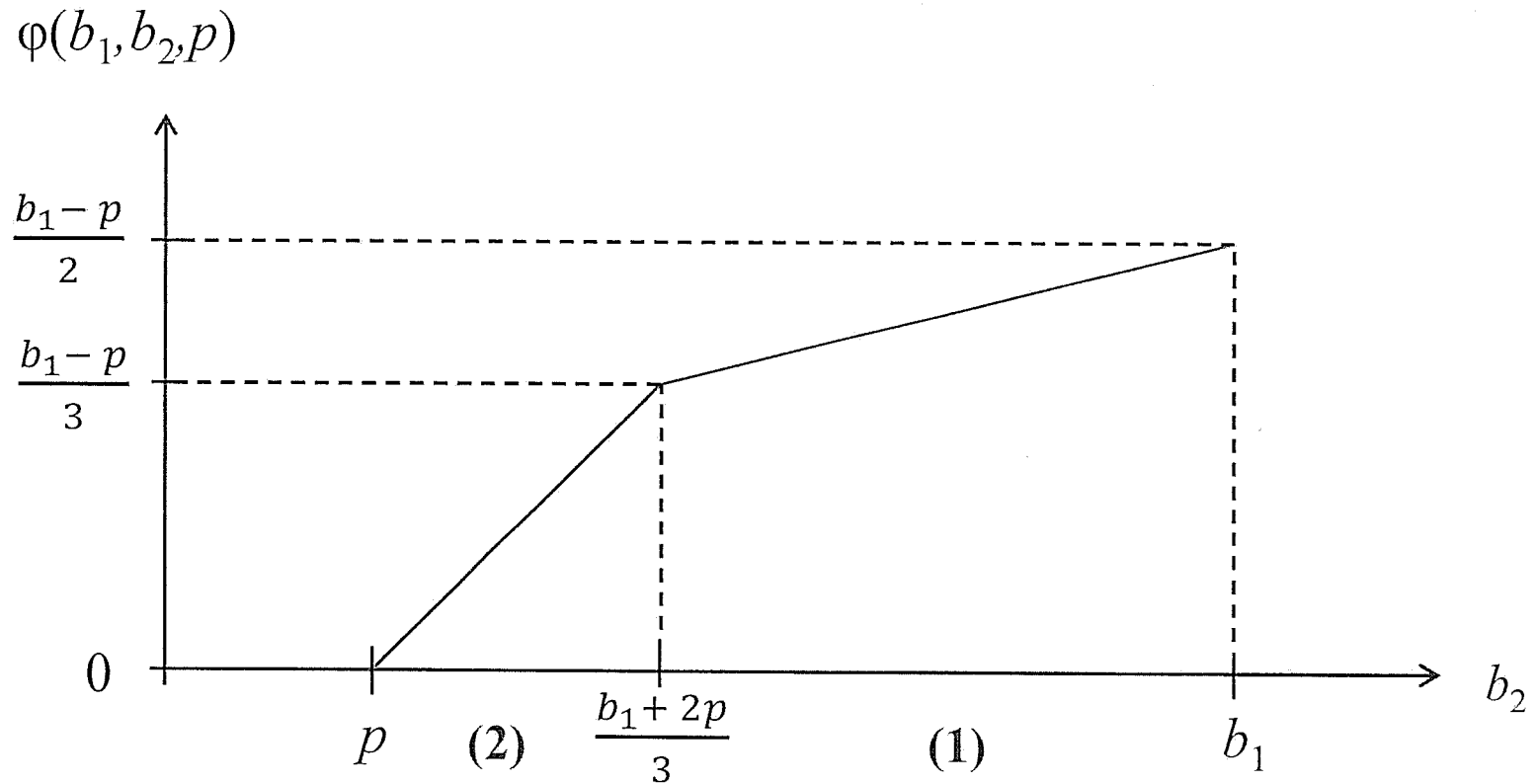
➤ SNNA-winner

$$(1) \quad \pi_1 = v_1 - p - \frac{b_1 + b_2 - 2p}{4} \qquad \text{if} \qquad b_2 > \frac{b_1 + 2p}{3}$$

$$(2) \quad \pi_1 = v_1 - b_2 \qquad \text{if} \qquad p < b_2 \leq \frac{b_1 + 2p}{3}$$

➤ SNNA-loser

$$(1) \quad \pi_2 = \frac{b_1 + b_2 - 2p}{4} \qquad \text{if} \qquad b_2 > \frac{b_1 + 2p}{3}$$

$$(2) \quad \pi_2 = b_2 - p \qquad \text{if} \qquad p < b_2 \leq \frac{b_1 + 2p}{3}$$

$v_1$ 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 : $\pi_j(\text{IA}) = 0$

## Comparison

| Case | $b_1 = v_1$ | $b_2 = v_2$ | $p$ | $\varphi(b_1, b_2, p)$ | $\pi_1 (SSN)$ | $\pi_2 (SSN)$ | $\pi_1 (IA)$ | $\pi_2 (IA)$ |
|------|-------------|-------------|-----|------------------------|---------------|---------------|--------------|--------------|
| (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).

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 $\varphi(b_1, b_2, p)$:

$$(1) \quad \varphi(b_1, b_2, p) = \frac{\frac{b_1+b_2}{2} - p}{3} = \frac{b_1+b_2-2p}{6} \qquad \text{if} \quad b_2 > \frac{b_1+p}{2}$$

**This is considered to be the very probable case!**

$$(2) \quad \varphi(b_1, b_2, p) = \frac{b_2-p}{2} \qquad\qquad \text{if} \quad p < b_2 \leq \frac{b_1+p}{2}$$
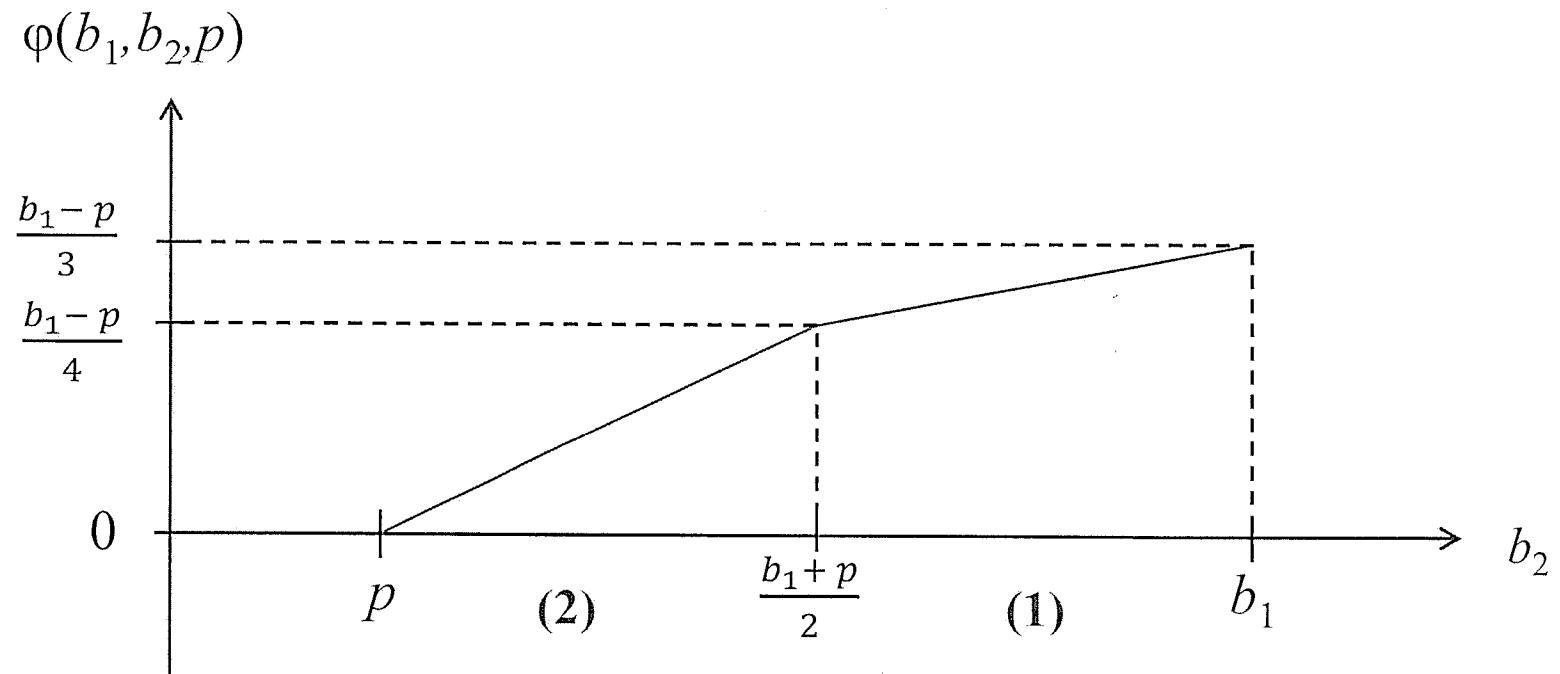
## SSNA-participants' surpluses $\pi_1$, $\pi_2$, and $\pi_3$

➢ **Applicant 1 (SNNA-winner)**

$$(1) \quad \pi_1 = v_1 - p - \frac{b_1 + b_2 - 2p}{3} = v_1 - \frac{b_1 + b_2 + p}{3} \quad \text{if} \quad b_2 > \frac{b_1 + p}{2}$$

$$(2) \quad \pi_1 = v_1 - b_2 \qquad \qquad \qquad \qquad \text{if} \quad p < b_2 \leq \frac{b_1 + p}{2}$$

➢ **Applicant 2/3 (SNNA-losers)**

$$(1) \quad \pi_{2/3} = \frac{b_1 + b_2 - 2p}{6} \qquad \qquad \qquad \text{if} \quad b_2 > \frac{b_1 + p}{2}$$

$$(2) \quad \pi_{2/3} = \frac{b_2 - p}{2} \qquad \qquad \qquad \qquad \text{if} \quad p < b_2 \leq \frac{b_1 + p}{2}$$

$v_1$ 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 $\varphi(b_1,b_2,p) = \dfrac{b_2-p}{2} = 10$ 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 : $\pi_j(\text{SSN}) = 0$

| 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

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.

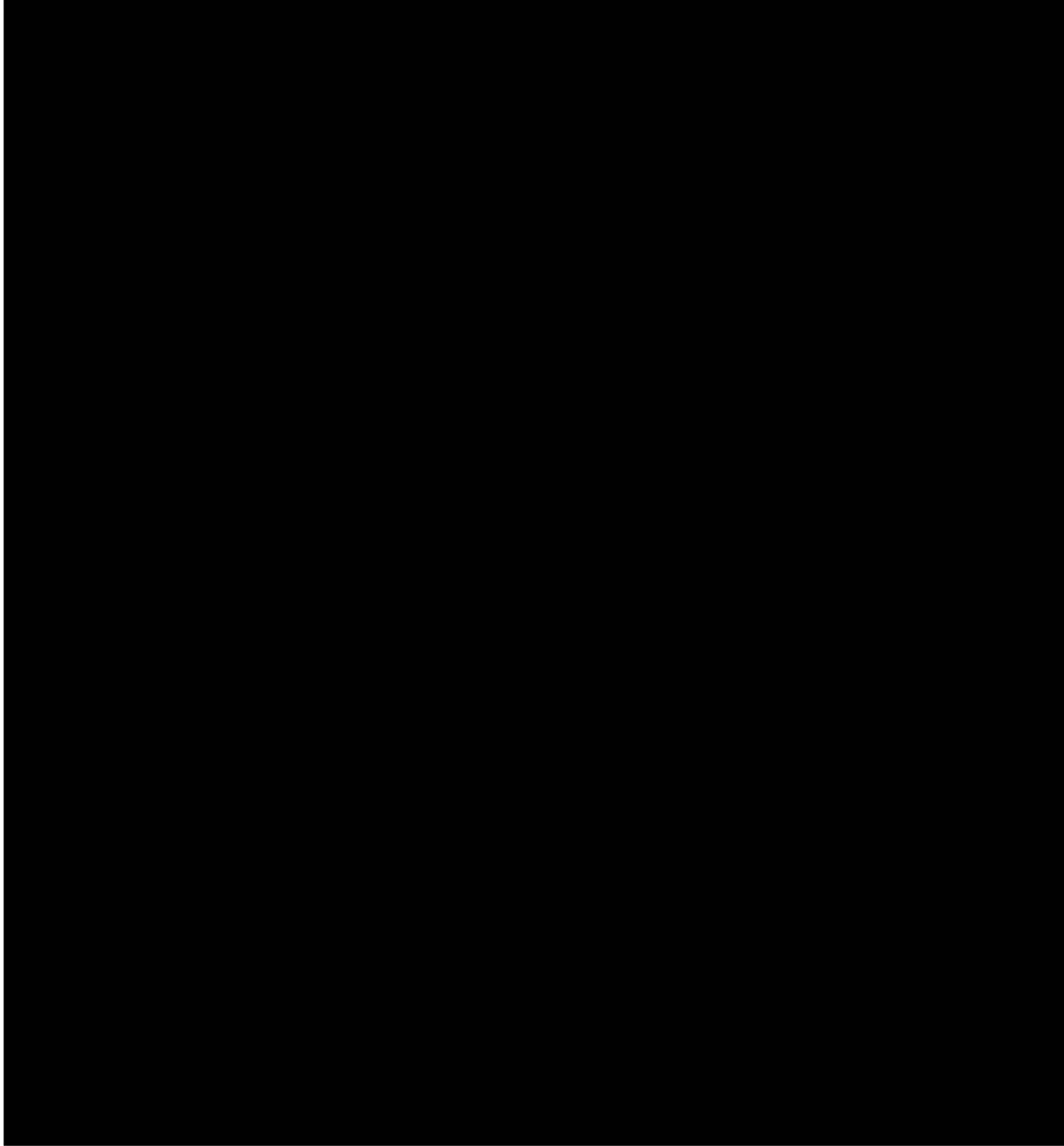You are also reminded of the following upcoming events in relation to the Auction:

• 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

Talk?

IF ICANN delays the auction next week would you again consider a private auction? Y-N

iMessage

# EXHIBIT AC-72

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# IRP Panel Dismisses Afilias' Claims to Reverse .WEB Auction and Award .WEB to Afilias

By **Kirk Salzmann**
Sr. Director & Sr. Corporate Counsel, Litigation and Employment at Verisign

May 26, 2021  |  Views: 16,961  |  **Comments: 2**

On Thursday, May 20, a final decision was issued in the Independent Review Process (IRP) brought by Afilias against the Internet Corporation for Assigned Names and Numbers (ICANN), rejecting Afilias' petition to nullify the results of the July 27, 2016 public auction for the .WEB new generic top level domain (gTLD) and to award .WEB to Afilias at a substantially lower, non-competitive price. Nu Dotco, LLC (NDC) submitted the highest bid at the auction and was declared the winner, over Afilias' lower, losing bid. Despite Afilias' repeated objections to participation by NDC or Verisign in the IRP, the Panel ordered that NDC and Verisign could participate in the IRP in a limited way each as *amicus curiae*.

Consistent with NDC, Verisign and ICANN's position in the IRP, the Order dismisses "the Claimant's [Afilias'] request that Respondent [ICANN] 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." Contrary to Afilias' position, all objections to the auction are referred to ICANN for determination. This includes Afilias' objections as well as objections by NDC that Afilias violated the auction rules by engaging in secret discussions during the Blackout Period under the Program Rules.

## The Order Dismisses All of Afilias' Claims of Violations by NDC or Verisign

Afilias' claims for relief were based on its allegation that NDC violated the New gTLD Program Rules by entering into an agreement with Verisign, under which Verisign provided funds for NDC's participation in the .WEB auction in exchange for NDC's commitment, if it prevailed at the auction and entered into a registry agreement with ICANN, to assign its .WEB registry agreement to Verisign upon

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ICANN's consent to the assignment. As the Panel determined, the relief requested by Afilias far exceeded the scope of proper IRP relief provided for in ICANN's Bylaws, which limit an IRP to a determination whether or not ICANN has exceeded its mission or otherwise failed to comply with its Articles of Incorporation and Bylaws.

Issued two and a half years after Afilias initiated its IRP, the Panel's decision unequivocally rejects Afilias' attempt to misuse the IRP to rule on claims of NDC or Verisign misconduct or obtain the .WEB gTLD for itself despite its losing bid. The Panel held that it is for ICANN, which has the requisite knowledge, expertise, and experience, to determine whether NDC's contract with Verisign violated ICANN's Program Rules. The Panel further determined that it would be improper for the Panel to dictate what should be the consequences of an alleged violation of the rules contained in the gTLD Applicant Guidebook, if any took place. The Panel therefore denied Afilias' requests for a binding declaration that ICANN must disqualify NDC's bid for violating the Guidebook rules and award .WEB to Afilias.

Despite pursuing its claims in the IRP for over two years—at a cost of millions of dollars—Afilias failed to offer any evidence to support its allegations that NDC improperly failed to update its application and/or assigned its application to Verisign. Instead, the evidence was to the contrary. Indeed, Afilias failed to offer testimony from a single Afilias witness during the hearing on the merits, including witnesses with direct knowledge of relevant events and industry practices. It is apparent that Afilias failed to call as witnesses any of its own officers or employees because, testifying under penalty of perjury, they would have been forced to contradict the false allegations advanced by Afilias during the IRP. By contrast, ICANN, NDC and Verisign each supported their respective positions appropriately by calling witnesses to testify and be subject to cross-examination by the three-arbitrator panel and Afilias, under oath, with respect to the facts refuting Afilias' claims.

Afilias also argued in the IRP that ICANN is a competition regulator and that ICANN's commitment, contained in its Bylaws, to promote competition required ICANN to disqualify NDC's bid for the .WEB gTLD because NDC's contract with Verisign may lead to Verisign's operation of .WEB. The Panel rejected Afilias' claim, agreeing with ICANN and Verisign that "ICANN does not have the power, authority, or expertise to act as a competition regulator by challenging or policing anticompetitive transactions or conduct." 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 quoted Afilias' own statements to this effect, which were made outside of the IRP proceedings when Afilias had different interests.

Although the Panel rejected Afilias' Guidebook and competition claims, it did find that the manner in which ICANN addressed complaints about the .WEB matter did not meet all of the commitments in its Bylaws. But even so, Afilias was awarded only a small portion of the legal fees it hoped to recover from ICANN.

## Moving Forward with .WEB

It is now up to ICANN to move forward expeditiously to determine, consistent with its Bylaws, the validity of any objections under the New gTLD Program Rules in connection with the .WEB auction, including NDC and Verisign's position that Afilias should be disqualified from making any further objections to NDC's application.

As Verisign and NDC pointed out in 2016, the evidence during the IRP establishes that collusive conduct by Afilias in connection with the auction violated the Guidebook. The Guidebook and Auction Rules both prohibit applicants within a contention set from discussing "bidding strategies" or "settlement" during a designated Blackout Period in advance of an auction. Violation of the Blackout Period is a "serious violation" of ICANN's rules and may result in forfeiture of an applicant's application. The evidence adduced in the IRP proves that Afilias committed such violations and should be disqualified. On July 22, just four days before the public ICANN auction for .WEB, Afilias contacted NDC, following Afilias' discussions with other applicants, to try to negotiate a private auction if ICANN would delay the public auction. Afilias knew the Blackout Period was in effect, but nonetheless violated it in an attempt to persuade NDC to participate in a private auction. Under the settlement Afilias proposed, Afilias would make millions of dollars even if it lost the auction, rather than auction proceeds being used for the internet community through the investment of such proceeds by ICANN as determined by the community.

All of the issues raised during the IRP were the subject of extensive briefing, evidentiary submissions and live testimony during the hearing on the merits, providing ICANN with a substantial record on which to render a determination with respect to .WEB and proceed forward with delegation of the new gTLD. Verisign stands ready to assist ICANN in any way we can to quickly resolve this matter so that domain names within the .WEB gTLD can finally be made available to businesses and consumers.

As a final observation: Afilias no longer operates a registry business, and has neither the platform, organization, nor necessary consents from ICANN, to support one. Inconsistent with Afilias' claims in the IRP, Afilias transferred its entire registry business to Donuts during the pendency of the IRP. Although long in the works, the sale was not disclosed by Afilias either before or during the IRP hearings, nor, remarkably, did Afilias produce any company witness for examination who might have disclosed the sale to the panel of arbitrators or

others. Based on a necessary public disclosure of the Donuts sale after the hearings and before entry of the Panel's Order, the Panel included in its final Order a determination that it is for ICANN to determine whether the Afilias' sale is itself a basis for a denial of Afilias' claims with respect to .WEB.

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By **Kirk Salzmann**, **Sr. Director & Sr. Corporate Counsel, Litigation and Employment at Verisign**

*He is responsible for all aspects of litigation affecting Verisign, and for supporting the company's Human Resources department. Kirk has more than 20 years of litigation experience in the internet infrastructure, wireless and wireline telecommunications industries.*

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**COMMENTS**

### 'Oh what a tangled WEB ...'

**John Poole** – May 26, 2021 5:35 PM

Thank you Kirk, for your informative posting and analysis, and thanks to Verisign for being the first to publicly announce that a ruling had been issued. I have yet to fully digest the Final Decision (pdf), belatedly now posted on the ICANN website. Nonetheless, this ruling should be very troubling for the global internet community, as the panel found (at ¶8.) **ICANN "violated" its own Articles of Incorporation and Bylaws** , the panel further ruling at ¶363. "The Panel has already determined that the Claimant [Afilias] is entitled to be designated as the prevailing party in relation to the liability portion of its core

claims." As you have noted, Afilias is but a mere shadow of its former self, and while NDC & Verisign may be the ultimate victors, ICANN comes off looking as incompetent, corrupt, and captured, as ever.

Reply | Link | Report Problems                                          # 1

**IOD**

**Karl Auerbach** – Jun 1, 2021 7:46 PM

I still hold a fully paid, and continuously operated cavebear.web registration that I acquired from IOD, a legitimate California entity circa year 2000.

So far neither ICANN nor any of the contenders for a .web contract under ICANN have yet explained how they can deploy a conflicting business name in California.

I would submit that any operator of .web in California will have to deal with the fact that there are pre-existing business rights in the state else face the possibility that the new operator will have to refrain from operating or selling within the state of California.

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# EXHIBIT AC-73

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Formerly a member of the ICANN Staff

**Akram Atallah** is the CEO for Donuts. On October 9, 2018, Atallah announced his leaving ICANN to take the position with Donuts.[1][2]

Atallah previously served as the President of ICANN's Global Domains Division (GDD) from its creation in June 2013 until October 2019.[3][4] Prior to his role in the GDD, Atallah served as ICANN's COO, where he played a critical role in the evolution and maturation of ICANN.[5]

Atallah has served twice as interim CEO for ICANN during the transitional periods preceding both Fadi Chehadé's and Göran Marby's tenures as CEO.

## Career History

Atallah has over twenty years of experience in engineering development and management, communications technology management, product marketing, and large business restructuring management. He spent over ten years at Conexant Systems and was COO of CoreObjects Software.[6][7]

## Education

Atallah has an MBA and holds Master's and Bachelor's degrees in Electrical Engineering and Computer Science. He is a trilingual speaker of English, Arabic, and French.[6]

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5. Atallah's LinkedIn Profile (https://www.linkedin.com/in/akram-atallah/)

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# EXHIBIT AC-74

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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[1] ("**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."[2]

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."[3]  Accordingly, we understand and expect that the ICANN Board will not take

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[1]    For ease of reference, we will use the term "Afilias" in this letter to refer to the Claimant in the IRP.

[2]    **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).

[3]    **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*

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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**"[4] 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**).[5]

*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*.[6] 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-afilias-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.").

4   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.

5   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.

6   **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.

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**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 Afilias) 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."[7] The AGB makes clear that resolution of string contention by a public ICANN auction was a "Mechanism of Last Resort."[8] 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 Afilias 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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[7] **Exhibit 4**, AGB, Secs. 4.1.3, 4.3.

[8] *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 Afilias) 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[9]

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.[10]  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***."[11]  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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[9]     **Exhibit 7**, Text Message (from cell phone belonging to J. Rasco) (21 July 2016).

[10]    **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.

[11]    **Exhibit 9**, ICANN, New gTLD Auctions Bidder Agreement (3 Apr. 2014) (excerpt), Sec. 2.6.

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Auction Rules during which auction participants are prohibited from communicating, or cooperating, with one another *in terms of the auction*."[12]

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."[13] 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., "*[if]* ICANN delays the auction"[14]), 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*."[15] There was, in short, nothing concrete and no attempt at collusion.[16]

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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[12]  **Exhibit 10**, Weinstein Decl., ¶ 7 (emphasis added).

[13]  **Exhibit 7**, Text Message (from cell phone belonging to J. Rasco) (21 July 2016).

[14]  **Exhibit 7**, Text Message (from cell phone belonging to J. Rasco) (21 July 2016).

[15]  **Exhibit 10**, Weinstein Decl., ¶ 7 (emphasis added).

[16]  *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 .[18] 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 [19] Specifically, the DAA provides that:[20]

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[17]  **Exhibit 11**, Domain Acquisition Agreement between VeriSign, Inc. and Nu Dotco LLC (25 Aug. 2015) ("**DAA**"), Sec. 10(a).

[18]                    Redacted - Third Party Designated Confidential Information

   *Id.*, Sec. 1 and Ex. A, Secs. 4(b), 4(d).

[19]                    Redacted - Third Party Designated Confidential Information
                    *Id.*, Ex. A, Sec. 10.

[20]  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.

[21]  **Exhibit 11**, DAA, Sec. 10(a) (emphasis added).

[22]  *Id.*, Sec. 4(f).

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[23]    *Id.*, Sec. 4(j) (emphasis added).

[24]    *Id.*, Ex. A, Sec. 1 (emphasis added).

[25]    *Id.*, Ex. A, Sec. 1(i) (emphasis added). *See id.*   Redacted - Third Party Designated Confidential Information

[26]    *Id.*, Ex. A, Sec. 1(i) (emphasis added).

[27]    *Id.*, Ex. A, Sec. 8 (emphasis added).

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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[28]    *Id.*, Ex. A, Sec. 1(h) (emphasis added).

[29]    *Id.*, Ex. A, Sec. 2(e) (emphasis added). *See id.*, Ex. A, Sec. 1(f)

[30]    *Id.*, Ex. A, Sec. 1(f) (emphasis added).

[31]    *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.[32]  As Verisign's Mr. Paul Livesay revealed in his testimony in the IRP, this decision was driven by Redacted - Third Party Designated Confidential Information
[33]  Redacted - Third Party Designated Confidential Information


[4]  Mr. Livesay testified that it was his understanding that TLDs could be acquired on what he described as the "secondary market."[35]  He claimed that he Redacted - Third Party Designated Confidential Information


[37]  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."[38]

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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32   **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.

33   **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 Redacted - Third Party Designated Confidential Information

34   **Exhibit 13**, Livesay WS, ¶ 5.

35   **Exhibit 12**, Hr. Tr., Day 7, 1170:1-7.

36   **Exhibit 13**, Livesay WS, ¶ 8; **Exhibit 12**, Hr. Tr., Day 7, 1170:1-7.

37   **Exhibit 13**, Livesay WS, ¶ 8.

38   **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.[39] 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 [40] Specifically, Mr. Livesay admitted that Donuts' applications had disclosed Donuts' partnership with Demand Media on backend registry services.[41] 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 Afilias' formal post-auction complaints. The DAA was not provided to Afilias 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

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[39] **Exhibit 15**, *Afilias 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**, *Afilias 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**, *Afilias v. ICANN*, ICDR Case No. 01-18-0004-2702, *Amicus Curiae* Brief of Nu Dotco, LLC (26 June 2020) ("**NDC Br.**"), ¶¶ 33-35.

[40] **Exhibit 12**, Hr. Tr., Day 7, 1175:6-14 (Livesay Cross-Examination).

[41] *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.").

- ***Second***,          Redacted - Third Party Designated Confidential Information

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- ***Third***,          Redacted - Third Party Designated Confidential Information

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[42]   *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).

[43]   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).

[44]   *Id.*, 1197:20-21 (Livesay Cross-Examination).

- *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.[47] Yet Mr. Livesay was unable to testify about the details of those agreements or about how they were analogous to the DAA.[48] 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 Automattic's acquisition of the .BLOG gTLD from Primer Nivel mirrors the DAA. Automattic'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.[49] Moreover, the terms of Automattic's deal are unknown—there is no evidence to suggest that

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[45]   *Id.*, 1187:3-9 (Livesay Cross-Examination); **Exhibit 13**, Livesay WS, ¶ 13.

[46]   **Exhibit 12**, Hr. Tr., Day 7, 1190:6-9 (Livesay Cross-Examination).
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                                                              (*id.*, 1187:3-9).

[47]   **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.

[48]   **Exhibit 12**, Hr. Tr., Day 7, 1210:10-17 (Livesay Cross-Examination).

[49]   *Id.*, 1208:1-6 (Livesay Cross-Examination) ("Q: So it's fair to say that you did not discover information concerning the Automattic-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.[50] 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 Afilias' 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.[51] 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.[52] He further testified that Redacted - Third Party Designated Confidential Information [53] that the DAA did not operate like either a bank loan[54] or

Redacted - Third Party Designated Confidential Information    [56]

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[50]    *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.").

[51]    **Exhibit 12**, Hr. Tr., Day 7, 1215:16-17 (Livesay Cross-Examination) ("I did not say this [was] a financing.").

[52]    *Id.*, 1215:16 – 1216:13 (Livesay Cross-Examination).

[53]    *Id.*, 1212:23-25 (Livesay Cross-Examination) Redacted - Third Party Designated Confidential Information

[54]    *Id.*, 1227:8-9 (Livesay Cross-Examination) ("I think comparing this to a mortgage is totally inappropriate.").

[55]    *Id.*, 1231:3-4 (Livesay Cross-Examination) Redacted - Third Party Designated Confidential Information

[56]    *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 <sup>Redacted - Third Party Designated Confidential Information</sup>

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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
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<sup>59</sup>   *Id.*, 1229:12-16 (Livesay Cross-Examination) (admitting that if Redacted - Third Party Designated
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<sup>60</sup>   *Id.*, 1229:4-8 (Livesay Cross-Examination) (admitting that in  Redacted - Third Party Designated
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<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."[63]  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[.]"[64]  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.[65]  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.[66]  They are further required to maintain the accuracy and truthfulness of their applications at all times.[67]  A secret agreement, especially one kept secret from ICANN and the Internet Community, contravenes this

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[62]  *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").

[63]  **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).

[64]  **Exhibit 20**, Bylaws, Sec. 1.2.

[65]  **Exhibit 21**, Articles, Art. 2(III).

[66]  **Exhibit 4**, AGB , pp. 1-4, 1-25, 6-2, A-5 – A-46.

[67]  *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.[68]  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.[69]  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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[68]     *Id.*, p. 6-2.

[69]     *Id.*

> *in circumstances that would render any information provided in the application false or misleading*.[70]

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, Redacted - Third Party Designated Confidential Information

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).[72] 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.[73]

- 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."[74]

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[70] *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).

[71] **Exhibit 11**, DAA, Sec. 10(a).

[72] **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.").

[73] *Id*., p. 6 (emphasis added).

[74] *Id*. p. 7.

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- 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***."[75]

- 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***."[76]

- 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."[77]

- 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).[78]

- NDC continued to identify itself as the "applicant," that is, the "entity that would enter into a Registry Agreement with ICANN."[79]

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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[75] *Id.* (emphasis added).

[76] *Id.* (emphasis added).

[77] *Id.*

[78] *Id.*, p. 6.

[79] **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."[80]  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.[81]     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."[82]  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."[83]  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"[84] despite the numerous provisions of the application that
  were no longer accurate following NDC's execution of the DAA.

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[80]  **Exhibit 4**, AGB, p. 1-30.

[81]  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).

[82]  **Exhibit 4**, AGB, p. 6-2.

[83]  **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.").

[84]  **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."[85]  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."[86]  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.[87]

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."[88]  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."[89]  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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[85]  **Exhibit 24**, Emails between C. LaHatte (Ombudsman) and J. Rasco (NDC) (7 July 2016).

[86]  **Exhibit 25**, Emails between Chris LaHatte (ICANN) and Christine Willett (ICANN) (various dates), p. 2.

[87]  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).

[88]  **Exhibit 4**, AGB, p. 6-2.

[89]  *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."[90]

Contrary to the AGB's anti-assignment clause, Redacted - Third Party Designated Confidential Information

For instance,

- Redacted - Third Party Designated Confidential Information
  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."[91] However, Redacted - Third Party Designated Confidential Information

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  Pursuant to the AGB, applicants "are encouraged to reach a settlement or agreement among themselves that resolves the contention."[93] 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.[94] However, NDC represented and warranted to Verisign that Redacted - Third Party Designated Confidential Information

    [95] NDC further Redacted - Third Party Designated Confidential Information

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90    *Id.*, p. 6-6 (emphasis added).

91    *Id.*, p. 6-2.

92    **Exhibit 11**, DAA, Sec. 4(f) (emphasis added).

93    **Exhibit 4**, AGB, p. 4-6.

94    *Id.*

95    **Exhibit 11**, DAA, Sec. 4(j).

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[96]

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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.[98]  However, Verisign is admittedly "engaged in ICANN's process to move the delegation of .web forward."[99]

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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[96]      *Id.*, Ex. A, Sec. 1(i) (emphasis added).

[97]      *Id.*, p. 16 (emphasis added).

[98]      *See* **Exhibit 4**, AGB, Module 5 (discussing the applicant's obligations regarding the transition to delegation process).

[99]      **Exhibit 26**, Verisign Inc., Edited Transcript of Earnings Conference Call or Presentation (8 Feb. 2018), p. 4.

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be considered valid." [100]  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***."[101]  It defines "Bidders" as either: (1) a "Qualified Applicant;" or (2) a "Designated Bidder" of a Qualified Applicant.[102]  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."[103]  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"[104] and that each "Bid must be placed ***by a Bidder for its Application in an Open Contention Set***"[105] at an ICANN-administered auction.  Although NDC was obligated under the auction rules to participate in the ICANN Auction "on its own behalf,"[106] 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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[100]  **Exhibit 4**, AGB, p. 4-22 (emphasis added).

[101]  **Exhibit 5**, Auction Rules, ¶ 12 (at p. 2) (emphasis added).

[102]  *Id.*, p. 16.

[103]  *Id.*, p. 19 (emphasis added).

[104]  *Id.*, p. 3 (emphasis added).

[105]  *Id.*, ¶ 40(b) (at p. 7) (emphasis added).

[106]  **Exhibit 9**, ICANN, New gTLD Auctions Bidder Agreement (3 Apr. 2014) (excerpt), p. 1.

[107]  **Exhibit 11**, DAA, Ex. A, Sec. 1.

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favor of its Application."[108]  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."[110]

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,[111] 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 polices consistently, neutrally, objective, fairly, and in a non-discriminatory manner.

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[108]  **Exhibit 5**, Auction Rules, p. 5 (emphasis added).

[109]  **Exhibit 11**, DAA, Ex. A, Sec. 1(h).

[110]  **Exhibit 4**, AGB, p. 4-22.

[111]  **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."[112] 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."[113] 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[.][114]

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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[112] **Exhibit 4**, AGB, p. 6-2.

[113] *Id.*, p. 1-5.

[114] *Id.*, New gTLD Agreement, Sec. 1.3(a)(i).

beneficial to the public interest[.]"[115] 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."[116] 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).[117] Other applicants in the .WEB Contention Set—who followed the "clear roadmap"[118] 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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[115] **Exhibit 20**, Bylaws, Sec. 1.2(a), 1.2(b)(iv).

[116] **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.

[117] *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*).

[118] *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 style="font-size:6px">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."[119] 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."[120] 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***.[121]

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[119]  **Exhibit 4**, AGB, p. 4-22 (emphasis added).

[120]  *Id.*, p. 4-23.

[121]  **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 forefeiture 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.[122]

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.[123]

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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recieve an offter to have their applications accepted, one at at 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.").

[122]    *See* **Exhibit 5**, Auction Rules, ¶¶ 58-59

[123]    *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*.[124]

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.[125]

## IV.    ICANN MUST COMPLY WITH ITS TRANSPARENCY OBLIGATIONS

The ICANN Bylaws require that ICANN hold itself to high standards of transparency and openness.[126] These standards require that ICANN (1) operate "through open and transparent processes";[127] (2) "[p]reserve and enhance the … openness of the DNS and the Internet;"[128] (3) "employ[] open, transparent and bottom-up, multistakeholder policy development processes;"[129] and (4) "operate to the *maximum extent feasible in an open and transparent manner* and consistent with procedures designed to ensure fairness".[130] 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.'"[131]

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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[124]    **Exhibit 5**, Auction Rules, ¶ 62 (emphasis added).

[125]    **Exhibit 5**, Auction Rules, ¶ 62 (noting that the next applicant "will receive [an] offer[]").

[126]    **Exhibit 20**, Bylaws, Secs. 1.2(a); 1.2(a)(i); 1.2(a)(iv); *id.*, Art. 3.

[127]    **Exhibit 20**, Bylaws, Sec. 1.2(a).

[128]    **Exhibit 20**, Bylaws, Sec. 1.2(a)(i).

[129]    **Exhibit 20**, Bylaws, Sec. 1.2(a)(iv).

[130]    **Exhibit 20**, Bylaws, Sec. 3.1 (emphasis added).

[131]    **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"[132] and "operat[ing] to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness".[133]

***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".[134] 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**.[135] 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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[132]   **Exhibit 20**, Bylaws, Sec. 1.2(a).

[133]   **Exhibit 20**, Bylaws, Sec. 3.1 (emphasis added).

[134]   **Exhibit 20**, Bylaws, Sec. 1.2(b)(v).

[135]   **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."[136]  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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[136]   **Exhibit 5**, Auction Rules, ¶¶ 58-59.

**Dechert**
LLP

## LIST OF EXHIBITS

| No. | Description |
|---|---|
| Exhibit 1 | *Afilias v. ICANN*, ICDR Case No. 01-18-0004-2702, Final Decision (20 May 2021, as corrected 15 July 2021) |
| 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) |
| 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, gTLD Applicant Guidebook (4 June 2012), *available at* https://newgtlds.icann.org/en/applicants/agb (last accessed 25 Oct. 2021) |
| Exhibit 5 | Power Auctions LLC, Auction Rules for New gTLDs: Indirect Contentions Edition (24 Feb. 2015) |
| 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) |
| 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," *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 |
| Exhibit 9 | ICANN, New gTLD Auctions Bidder Agreement (3 Apr. 2014) (excerpt) |
| 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) |

| No. | Description |
|---|---|
| Exhibit 12 | *Afilias v. ICANN*, ICDR Case No. 01-18-0004-2702, Merits Hearing, Tr. Day 7 (11 Aug. 2020) |
| 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) |
| Exhibit 14 | *Afilias v. ICANN*, ICDR Case No. 01-18-0004-2702, Merits Hearing, Tr. Day 5 (7 Aug. 2020) |
| Exhibit 15 | *Afilias v. ICANN*, 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 | *Afilias v. ICANN*, ICDR Case No. 01-18-0004-2702, Verisign, Inc.'s Pre-Hearing Brief (Phase II) (26 June 2020) |
| Exhibit 18 | *Afilias v. ICANN*, ICDR Case No. 01-18-0004-2702, Amicus Curiae Brief of Nu Dotco, LLC (26 June 2020) |
| Exhibit 19 | *Booking.com B.V. v. ICANN*, 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), *available at* https://www.icann.org/resources/pages/governance/bylaws-en (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), *available at* https://www.icann.org/resources/pages/governance/articles-en (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), *available at* https://gtldresult.icann.org/applicationstatus/applicationdetails/1053 |
| 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), *available at* https://www.icann.org/en/system/files/bm/rationale-board-approval-new-gtld-program-launch-20jun11-en.pdf |

# EXHIBIT AC-75

# THE
# DOMAIN NAME INDUSTRY BRIEF

**VERISIGN**®

# THE DOMAIN NAME INDUSTRY BRIEF

As a global provider of domain name registry services and internet infrastructure, Verisign reviews the state of the domain name industry each quarter through a variety of statistical and analytical research, as well as relevant industry insight. Verisign provides this brief to highlight important trends in domain name registrations, including key performance indicators and growth opportunities, to industry analysts, media and businesses.

## EXECUTIVE SUMMARY

The first quarter of 2022 closed with 350.5 million domain name registrations across all top-level domains, an increase of 8.8 million domain name registrations, or 2.6%, compared to the fourth quarter of 2021.[1,2] Domain name registrations have increased by 13.2 million, or 3.9%, year over year.[1,2]

The .com and .net TLDs had a combined total of 174.7 million domain name registrations in the domain name base[3] at the end of the first quarter of 2022, an increase of 1.2 million domain name registrations, or 0.7%, compared to the fourth quarter of 2021. The .com and .net TLDs had a combined increase of 6.7 million domain name registrations, or 4.0%, year over year. As of March 31, 2022, the .com domain name base totaled 161.3 million domain name registrations, and the .net domain name base totaled 13.4 million domain name registrations.
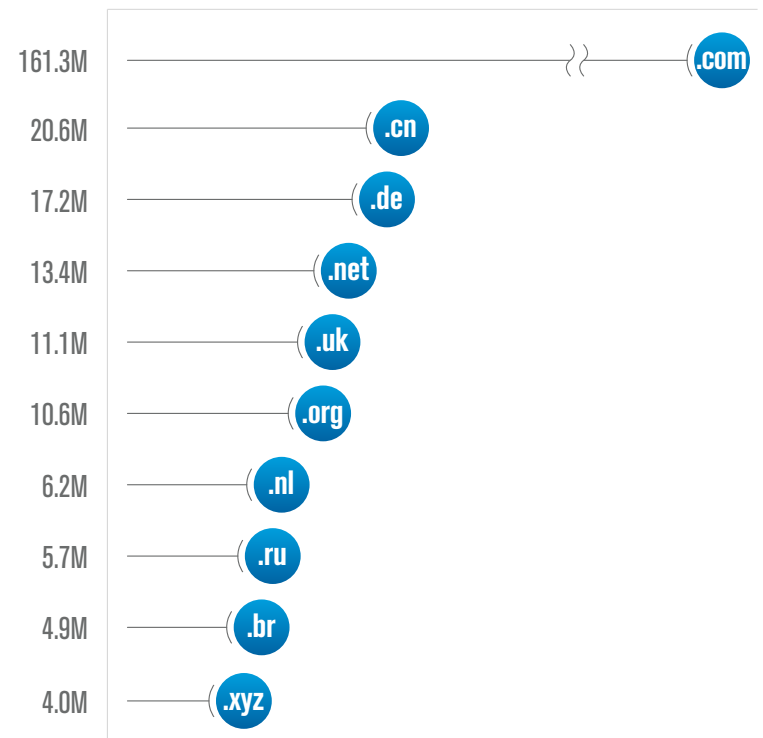
New .com and .net domain name registrations totaled 10.2 million at the end of the first quarter of 2022, compared to 11.6 million domain name registrations at the end of the first quarter of 2021.

Total country-code TLD domain name registrations were 133.4 million at the end of the first quarter of 2022, an increase of 6.0 million domain name registrations, or 4.7%, compared to the fourth quarter of 2021.[1,2] ccTLDs increased by 3.1 million domain name registrations, or 2.4%, year-over-year.[1,2]

Total new-generic TLD domain name registrations were 26.3 million at the end of the first quarter of 2022, an increase of 1.6 million domain name registrations, or 6.6%, compared to the fourth quarter of 2021. ngTLDs increased by 3.5 million domain name registrations, or 15.3%, year over year.

## TOP 10 LARGEST TLDs BY NUMBER OF REPORTED DOMAIN NAMES

Source: ZookNIC, Q1 2022; Verisign, Q1 2022; Centralized Zone Data Service, Q1 2022

| | |
|---|---|
| 161.3M | .com |
| 20.6M | .cn |
| 17.2M | .de |
| 13.4M | .net |
| 11.1M | .uk |
| 10.6M | .org |
| 6.2M | .nl |
| 5.7M | .ru |
| 4.9M | .br |
| 4.0M | .xyz |

As of March 31, 2022, the 10 largest TLDs by number of reported domain names were .com, .cn, .de, .net, .uk, .org, .nl, .ru, .br and .xyz.[1,2,4]
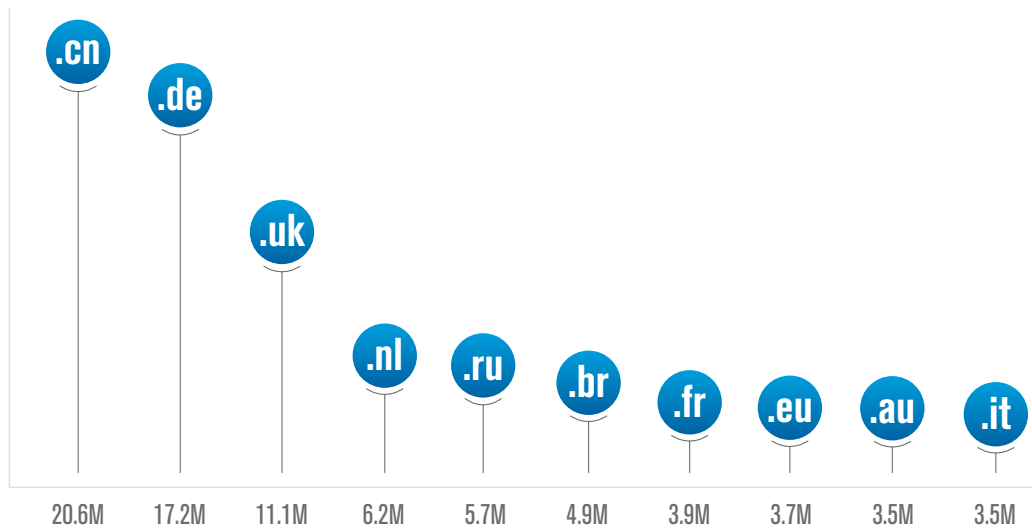
# TOP 10 LARGEST ccTLDs BY NUMBER OF REPORTED DOMAIN NAMES

Source: ZookNIC, Q1 2022
For further information on *The Domain Name Industry Brief* methodology, please refer to the last page of this brief.
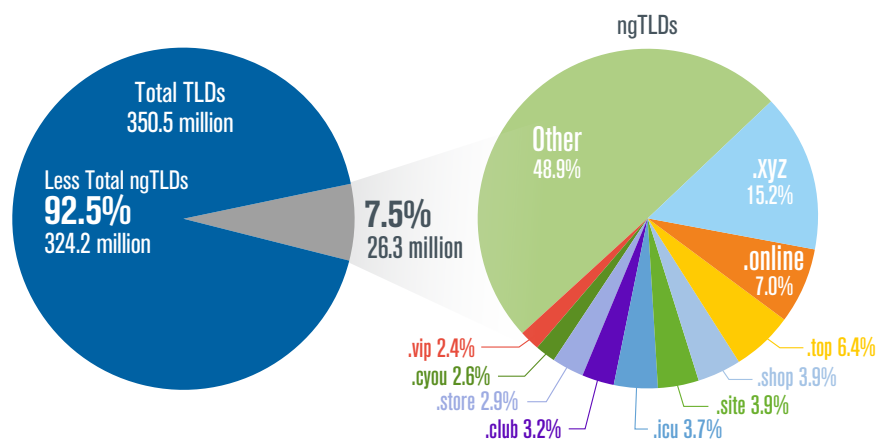
The top 10 ccTLDs, as of March 31, 2022, were .cn, .de, .uk, .nl, .ru, .br, .fr, .eu, .au and .it.[1,2] As of March 31, 2022, there were 308 global ccTLD extensions delegated in the root zone, including internationalized domain names, with the top 10 ccTLDs comprising 60.3% of all ccTLD domain name registrations.[1,2]

| .cn | .de | .uk | .nl | .ru | .br | .fr | .eu | .au | .it |
|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| 20.6M | 17.2M | 11.1M | 6.2M | 5.7M | 4.9M | 3.9M | 3.7M | 3.5M | 3.5M |

## ngTLDs AS PERCENTAGE OF TOTAL TLDs

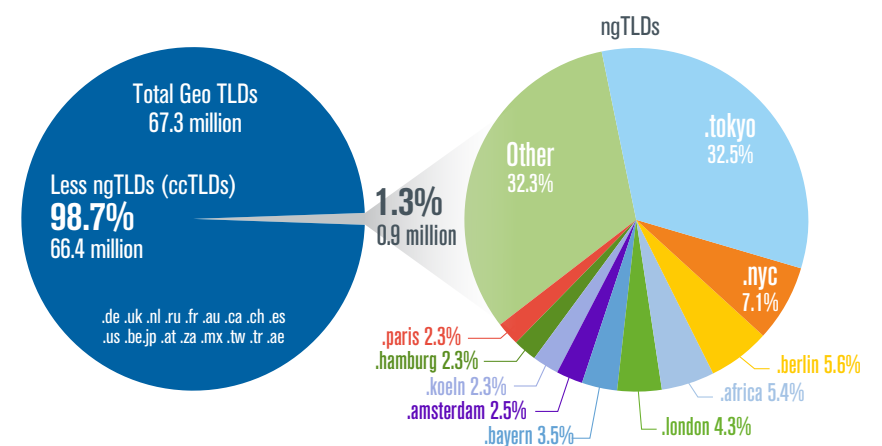Source: ZookNIC, Q1 2022; Verisign, Q1 2022; and Centralized Zone Data Service, Q1 2022

The top 10 ngTLDs represented 51.1% of all ngTLD domain name registrations. The following chart shows ngTLD domain name registrations as a percentage of overall TLD domain name registrations, of which they represent 7.5%. In addition, the chart on the right highlights the top 10 ngTLDs as a percentage of all ngTLD domain name registrations for the first quarter of 2022.

ngTLDs

Total TLDs
350.5 million

Less Total ngTLDs
**92.5%**
324.2 million

**7.5%**
26.3 million

Other 48.9%
.xyz 15.2%
.online 7.0%
.top 6.4%
.shop 3.9%
.site 3.9%
.icu 3.7%
.club 3.2%
.store 2.9%
.cyou 2.6%
.vip 2.4%

## GEOGRAPHICAL ngTLDs AS PERCENTAGE OF TOTAL CORRESPONDING GEOGRAPHICAL TLDs

Source: ZookNIC, Q1 2022 and Centralized Zone Data Service, Q1 2022

As of March 31, 2022, there were 50 ngTLDs delegated that met the following criteria: 1) had a geographical focus and 2) had more than 1,000 domain name registrations since entering general availability. The chart on the left summarizes the domain name registrations as of March 31, 2022, for the listed ccTLDs and the corresponding geographical ngTLDs within the same geographic region. In addition, the chart on the right highlights the top 10 geographical ngTLDs as a percentage of the total geographical TLDs.

ngTLDs

Total Geo TLDs
67.3 million

Less ngTLDs (ccTLDs)
**98.7%**
66.4 million

**1.3%**
0.9 million

.de .uk .nl .ru .fr .au .ca .ch .es
.us .be .jp .at .za .mx .tw .tr .ae

Other 32.3%
.tokyo 32.5%
.nyc 7.1%
.berlin 5.6%
.africa 5.4%
.london 4.3%
.bayern 3.5%
.amsterdam 2.5%
.koeln 2.3%
.hamburg 2.3%
.paris 2.3%

# NEW ON THE VERISIGN BLOG / January – March 2022

## ROUTING WITHOUT RUMOR: SECURING THE INTERNET'S ROUTING SYSTEM

The increasingly critical role of the internet and the evolving cyberthreat landscape require a better approach for protecting routing information and preventing route leaks and route hijacks. Just as ensuring that DNS is secure, stable and resilient is a priority for Verisign, so is making sure that the routing system has these characteristics.

## OBSERVATIONS ON RESOLVER BEHAVIOR DURING DNS OUTAGES

When an outage affects a component of the internet infrastructure, there can often be downstream ripple effects affecting other components or services. We would like to share our observations of this impact in the case of two recent such outages, measured at various levels of the DNS hierarchy, and discuss the resultant increase in query volume due to the behavior of recursive resolvers.

## ABOUT VERISIGN

Verisign, a global provider of domain name registry services and internet infrastructure, enables internet navigation for many of the world's most recognized domain names. Verisign enables the security, stability, and resiliency of key internet infrastructure and services, including providing root zone maintainer services, operating two of the 13 global internet root servers and providing registration services and authoritative resolution for the .com and .net top-level domains, which support the majority of global e-commerce. To learn more about what it means to be Powered by Verisign, please visit verisign.com.

## LEARN MORE

To access the archives for *The Domain Name Industry Brief*, please go to verisign.com/dnibarchives. Email your comments or questions to domainbrief@verisign.com.

## METHODOLOGY

The data presented in this brief, including quarter-over-quarter and year-over-year metrics, reflects information available to Verisign at the time of this brief and may incorporate changes and adjustments to previously reported periods based on additional information received since the date of such prior reports, so as to more accurately reflect the growth rate of domain name registrations. In addition, the data available for this brief may not include data for all of the 308 ccTLD extensions that are delegated to the root zone, and includes only the data available at the time of the preparation of this brief. Beginning with Vol 19, Issue 1 of The Domain Name Industry Brief, the .tk, .cf, .ga, .gq and .ml ccTLDs have been excluded from all applicable calculations. The historical data has been adjusted from Vol 19, Issue 1 forward.

For generic TLD and ccTLD data cited with ZookNIC as a source, the ZookNIC analysis uses a comparison of domain name root zone file changes supplemented with other authoritative data sources and independent approximations. For more information, see zooknic.com.

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1 Per the Editor's Note in Vol 19, Issue 1 of The Domain Name Industry Brief, all figure(s) exclude domain names in the .tk, .cf, .ga, .gq and .ml ccTLDs operated by Freenom. Quarterly and year-over-year trends have been calculated relative to historical figures that have also been adjusted to exclude these five ccTLDs.

2 The generic TLD, ngTLD and ccTLD data cited in this brief: (i) includes ccTLD internationalized domain names, (ii) is an estimate as of the time this brief was developed and (iii) is subject to change as more complete data is received. Some numbers in this brief may reflect standard rounding.

3 The domain name base is the active zone plus the number of domain names that are registered but not configured for use in the respective TLD zone file plus the number of domain names that are in a client or server hold status. The .com and .net domain name registration figures are as reported in Verisign's most recent SEC filings.

4 Line break indicates that the .com line has been shortened for display considerations.

## Verisign.com

# EXHIBIT AC-76

SUPPORT

**VERISIGN**

ISCUVER DUMAIN NAMES                    CHANNEL RESOURCES                    ABOUT VERISIGN

HOME            DOMAIN NAMES                    VERISIGN AS A DOMAIN REGISTRY

DOMAIN NAMES

# Verisign as a Domain Registry

Powers the domain names that define the internet

Verisign operates the authoritative registry of .com, .net, .name, .cc, and .tv domain names, and offers domain registry services for a range of additional domain names, including Local Language Domain Names and new generic top-level domains (TLDs).



.edu  .tv  .net  •com  .cc  .name  .gov

The domains that define the Internet are powered by **VERISIGN**

# One of the Industry's Most Scalable, Reliable Resolution and Registration

Contact                                        Share                                    Find a Domain

Every day, billions of consumers and businesses worldwide rely on Verisign for access to e-commerce and communications.

# Trusted provider of internet infrastructure services for the networked world

Verisign has maintained 100 percent operational accuracy and stability of the .com and .net DNS for more than 25 years, and has the reputation of being one of the most reliable and trusted networks in the world.

# Delivering unmatched performance in domain name system (DNS) services

We provide the routing support for approximately 174.7 million domain names ending with .com and .net, as well as other TLDs ending in .tv, .name, .cc, .edu and .gov—processing more than approximately 226.5 billion DNS queries a day.

More than half of the world's DNS hosts rely on the Verisign .com and .net infrastructure.

We manage relationships with approximately 2,000 ICANN-accredited registrars who generally submit more than 100 million domain name transactions daily.

We are committed to investing in our DNS infrastructure to meet ever growing demand, as access to the internet expands worldwide.

We continuously monitor DNS queries to identify growing and emerging markets that require expanded infrastructure services to enhance reliability and responsiveness.

# Striving to enable the full potential of the internet

Our commitment to research and development of critical internet infrastructure helps enable the internet to keep pace with the world's

Contact                                         Share                              Find a Domain

increasing reliance on web-based applications and internet-connected devices.

We have developed complementary services and tools to help registrars find and register more domain names that their customers value. Our global support team is available 24/7 to assist in numerous languages.

We share our expertise in evolving trends by making data about the .com and .net zones publicly available, and actively contribute to community policy and internet standards development.

We are committed to enable companies and consumers to expand their online presence and engage in communications and e-commerce on the internet.

## Build Your Online Presence

Establish your Web presence with Verisign's reliable and secure domain names.

## Find a Domain Name

Get online with a domain name powered by Verisign.

## Find a Registrar

Ready to Register a Domain Name? Choose a Verisign accredited domain name registrar to register or renew your domain name.

| DOMAIN NAMES | ABOUT VERISIGN | SUPPORT |
| --- | --- | --- |
| .COM | EXECUTIVE TEAM | CONTACT US |
| .NET | INVESTOR RELATIONS | BLOG |
| FIND YOUR DOMAIN NAME | NEWSROOM | FOLLOW US |
| FIND A REGISTRAR | TECHNOLOGY EVENTS | |
| WHOIS | CAREERS | |
| ZONE FILE INFORMATION | REPORT A SECURITY VULNERABILITY | LANGUAGE: |

ENGLISH                    CHINESE (SIMPLIFIED)

Contact                          Share                          Find a Domain

LEGAL NOTICES          PRIVACY          CCPA NOTICE AT COLLECTION          REPOSITORY          SITE MAP          COOKIE SETTINGS

Contact                                    Share                                    Find a Domain

# EXHIBIT AC-77

# Donuts Acquires Afilias

Acquisition announced on November 19 closed on December 29, 2020

BELLEVUE, Wash., Dec. 29, 2020 /PRNewswire/ -- Donuts Inc., the global leader in next generation top-level domains (TLDs) and digital identity, today announced that it has completed its acquisition of Afilias, Inc., a leading TLD registry operator and provider. Now under one corporate structure, the two companies will continue to operate securely and reliably with no significant changes for either registrars or registry services clients.

"We are very excited about completing this acquisition and bringing Afilias and Donuts together. Our combined teams can now begin developing an integration plan, with a goal of minimizing disruption to those we serve," said Akram Atallah, Donuts' CEO. "We expect no changes in the short term, and ample notice on any changes that are decided. Security, stability and reliability continue to be our top priorities," he continued.

"We congratulate Donuts and are proud to join the team," said Ram Mohan, Afilias' Chief Operating Officer. "Together we look forward to delivering promising new technologies and best practices to our registry clients, registrars, employees and the entire domain community."

Afilias was advised by Moelis & Company LLC and Sidley Austin LLP while Donuts was advised by Kirkland & Ellis LLP.  The acquisition price remains undisclosed.

Key Employee Contact:

Mina Neuberg

Chief Marketing Officer, Donuts Inc.

mina@donuts.email

Related Links

http://www.afilias.info

# EXHIBIT AC-78

# Donuts Inc. and Afilias, Inc. Rebrand to Identity Digital

*Fresh Rebrand Unveils New Name and Logo Reflecting Commitment to Digital Identity, Not Just Domains*

BELLEVUE, Wash., June 22, 2022 /PRNewswire/ -- Donuts Inc. and Afilias, Inc. have a fresh new look after major rebranding efforts, uniting them under a new company name and single brand. Identity Digital™ was chosen to reflect better the commitment to helping customers find, grow and protect their authentic digital identities. A new corporate name, logo, visual identity, voice/tone and website (identity.digital) are all critical elements in bringing the rebrand to life. This rebrand coincides with helping customers understand that they no longer have to compromise when they get their domain name. As the heart of their digital identity, they can use both sides of the dot to express what their company is and why it matters.

Donuts Inc. was founded in 2010 and acquired Afilias, a leading top-level domain (TLD) registry operator and service provider, in 2020. United under one brand, Identity Digital cements its status as a leader in connecting the online world with domain names and related technologies that allow people to build, market, and own their authentic digital identities. The company is behind nearly 300 top-level domain (TLD) extensions (more than any other registry), previously branded under TrueName Domains.

"This brand refresh is an exciting moment for our company and stakeholders," said Akram J. Atallah, CEO, Identity Digital. "Identity Digital reflects a stronger platform for expressing the core values we have had all along – to provide a secure, authentic digital identity. The new name lets us more precisely define to customers who we are and what we can do for them. The internet is expanding, and businesses must have a digital presence to survive and be successful, so the timing was critical."

Many forward-thinking companies are moving towards industry-specific, short, memorable descriptive domain extensions to help define an authentic digital identity and positively impact SEO. Descriptive domains also allow businesses to creatively use both the left and right side of the dot to tell the world who they are and what they do and stand out from competitors. For instance, the domains builders.studio, armoire.style, and xbox.games are not only striking and concise, but they clearly express what these companies are about.

"This rebrand is a major milestone for the company. It is about much more than a new name or new look," Atallah reinforced. "It's about the business culture that resonates with customers, partners, and employees. Identity Digital is designed to become synonymous with people's authentic digital identity. This new brand and evolving positioning perfectly illustrate our growing presence and importance in this market."

**About Identity Digital**
Identity Digital Inc. simplifies and connects the online world with domain names and related technologies to empower people to build, market, and own their authentic digital identities. With the world's largest portfolio of nearly 300 TLDS such as .live, .technology, and .restaurant, Identity Digital operates around 25 million domains on its innovative registry services platform. In addition, they enable customers to discover, register, support and use high-quality domain names with its registrar, Name.com. Headquartered in Bellevue, WA, Identity Digital is a global company with approximately 300 employees. For more information, please visit identity.digital

**Contact**

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SOURCE Identity Digital

# EXHIBIT AC-79

# New gTLD Application Submitted to ICANN by: Altanovo Domains Limited

Application Downloaded On: 10 Sep 2021

String: WEB

Application ID: 1-1013-6638

## Applicant Information

1. Full legal name

Altanovo Domains Limited

2. Address of the principal place of business

Contact Information Redacted

3. Phone number

Contact Information Redacted

4. Fax number

5. If applicable, website or URL

## Primary Contact

6(a). Name

Liz Herssens

6(b). Title

Project Manager

6(c). Address

6(d). Phone Number

Contact Information Redacted

6(e). Fax Number


6(f). Email Address
Contact Information Redacted


## Secondary Contact

7(a). Name
John Kane


7(b). Title
Vice President, Corporate Services


7(c). Address


7(d). Phone Number
Contact Information Redacted


7(e). Fax Number


7(f). Email Address
Contact Information Redacted


## Proof of Legal Establishment

8(a). Legal form of the Applicant


8(b). State the specific national or other jurisdiction that defines the type of entity identified in 8(a).


8(c). Attach evidence of the applicant's establishment.
Attachments are not displayed on this form.

9(a). If applying company is publicly traded, provide the exchange and symbol.


9(b). If the applying entity is a subsidiary, provide the parent company.


9(c). If the applying entity is a joint venture, list all joint venture partners.
not a joint venture

## Applicant Background

11(a). Name(s) and position(s) of all directors

| Name | Position |
|---|---|
| M. Scott Hemphill | Director |
| Roman Cremin | Director |

11(b). Name(s) and position(s) of all officers and partners

11(c). Name(s) and position(s) of all shareholders holding at least 15% of shares

| Name | Position |
|---|---|
| Applicant is a wholly-owned subsidiary of Altanovo Limited, which is a wholly-owned subsidiary of Altanovo, Inc | |

11(d). For an applying entity that does not have directors, officers, partners, or shareholders: Name(s) and position(s) of all individuals having legal or executive responsibility

## Applied-for gTLD string

13. Provide the applied-for gTLD string. If an IDN, provide the U-label.
   WEB

14A. If applying for an IDN, provide the A-label (beginning with "xn--").

14B. If an IDN, provide the meaning, or restatement of the string in English, that is, a description of the literal meaning of the string in the opinion of the applicant.

14C1. If an IDN, provide the language of the label (in English).

14C2. If an IDN, provide the language of the label (as referenced by ISO-639-1).

14D1. If an IDN, provide the script of the label (in English).

14D2. If an IDN, provide the script of the label (as referenced by ISO 15924).

14E. If an IDN, list all code points contained in the U-label according to Unicode form.

15A. If an IDN, upload IDN tables for the proposed registry.  An IDN table must include:

1. the applied-for gTLD string relevant to the tables,
2. the script or language designator (as defined in BCP 47),
3. table version number,
4. effective date (DD Month YYYY), and
5. contact name, email address, and phone number.
   Submission of IDN tables in a standards-based format is encouraged.

15B. Describe the process used for development of the IDN tables submitted, including consultations and sources used.

15C. List any variants to the applied-for gTLD string according to the relevant IDN tables.

16. Describe the applicant's efforts to ensure that there are no known operational or rendering problems concerning the applied-for gTLD string. If such issues are known, describe steps that will be taken to mitigate these issues in software and other applications.

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The Applicant anticipates the introduction of this TLD without operational or rendering problems.
Based on a decade of experience launching and operating new TLDs, Afilias, the back-end provider
of registry services for this TLD, is confident the launch and operation of this TLD presents no
known challenges. The rationale for this opinion includes:
• The string is not complex and is represented in standard ASCII characters and follows relevant
technical, operational and policy standards;
• The string length is within lengths currently supported in the root and by ubiquitous Internet
programs such as web browsers and mail applications;
• There are no new standards required for the introduction of this TLD;
• No onerous requirements are being made on registrars, registrants or Internet users, and;
• The existing secure, stable and reliable Afilias SRS, DNS, WHOIS and supporting systems and
staff are amply provisioned and prepared to meet the needs of this TLD.
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17. OPTIONAL.
Provide a representation of the label according to the International Phonetic Alphabet

(http://www.langsci.ucl.ac.uk/ipa/).

## 18A. Describe the mission/purpose of your proposed gTLD.

On 29 December 2020, Afilias, Inc. consummated a merger transaction with Donuts,Inc. whereby Afilias,Inc. became a wholly-owned subsidiary of Donuts,Inc. (the "Merger"). As part of that transaction, certain subsidiaries of Afilias, Inc. were spun out from the Afilias group immediately prior to the Merger, and became subsidiaries of a new Delaware corporation named Altanovo, Inc. formed for the purposes of the spin-out.  Included in the companies spun out to Altanovo was Afilias Domains No.3 Limited, the Applicant for the .WEB top-level domain, which was renamed Altanovo Domains Limited as a consequence of the Merger.  Accordingly, the Applicant is now a wholly-owned subsidiary of Altanovo Limited, an Irish holding company that is a wholly-owned subsidiary of Altanovo, Inc.  The shareholders of Altanovo, Inc. are comprised of a sub-set of the shareholders of Afilias, Inc. immediately prior to the Merger.  Holders of 71.4% of the shares of Afilias, Inc. opted into purchasing shares of Altanovo, Inc. at the Closing of the Merger, and that group constitutes the shareholder base of Altanovo, Inc.

Subsequent to the Merger, Altanovo Domains Limited entered into a registry services agreement with Afilias Limited which provides that Afilias will provide comprehensive back-end registry services to the Applicant in the event that the Applicant becomes the registry operator for the .WEB TLD. This is consistent with the original application submitted by the Applicant, because although the Applicant and Afilias Limited were members of the same corporate group at the time of the submission of the application, the role of Afilias Limited in delivering registry services on behalf of the Applicant was described as the back-end provider of registry services in support of the Applicant.  Therefore, the only change with respect to the description of the registry services associated with the Application is that now the Applicant and Afilias Limited are no longer part of the same corporate group, but parties to a registry services agreement.  All references to "Afilias" in the application are intended to refer to Afilias Limited in its role as back-end registry service provider.

Mission and purpose

The goal of the .WEB TLD is to help users of the Internet establish meaningful and relevant identities while promoting themselves or their groups, companies or organizations at the same time. This TLD will open up new opportunities for individuals, businesses and organizations to garner a unique piece of the Internet in a space where they can secure the domain name they want but can't have currently.

Businesses and organizations will want to acquire a domain in the .WEB TLD:
• A professional web presence is desired to support merchandising, retailing efforts and business goals.
• Retailers may wish to obtain a .WEB domain to create websites to support or announce planned business offerings and marketing efforts in the "web" arena.
• The web is an indispensible part of virtually every individual's and business' life today.

"As of 2011, more than 2.2 billion people – nearly a third of Earth's population – uses the services of the Internet." (source: Internet World Stats, updated 31 March 2011). Considering that many of this population have heretofore been unable to get the domain name they desired because it was already taken or reserved in a .com or .net environment, the need for a new TLD with a well-established name in the industry is obvious. And nothing is as synonymous with "Internet" or "net" as the word, "web".

18B. How do you expect that your proposed gTLD will benefit registrants, Internet users, and others?

The .WEB TLD will be positioned to become one the most-used, professional Internet spaces available.

i. General goals

.WEB will be an open TLD, generally available to all registrants (except in the Sunrise period as described below). The domains can be used for any purpose, including for business use, for personal use and by organizations. There are no content or use restrictions for this TLD.

The Applicant will design and position the .WEB TLD to be one of the most popular TLDs on the Internet. The company will market, brand, provide outreach, and offer marketing support to registrars with the goal of gaining public support for the .WEB TLD. This can only be accomplished by creating a user friendly, easy to use, interesting, professionally relevant and entertaining TLD.

ii. How .WEB adds to the current space

On today's Internet, there are hundreds of thousands of companies around the world vying for the attention of potential users and customers. For this precise reason, the .WEB TLD provides an excellent opportunity for companies who elect to participate in the domain to separate themselves from the rest of the .com and .net pack.

The .WEB TLD opens up a tremendous number of options for those companies involved with applications who wish to create a targeted identity on the Internet. In addition, it gives those companies the opportunity to build off the name recognition associated with their brand and name. Any company would be very receptive to being able to associate its own products or services with other quality products and services through the .WEB TLD.

iii. User experience goals

As is the goal of all new gTLDs, this TLD intends to create a space where registrants who desire to participate in the .WEB can create identities where potential users and clients can find the kinds of information they want and need. For example, if you are an organization or company whose business is built around use of the Internet, by belonging to this space you will be able to join forces or share information with other organizations or companies with similar interests and common goals. If an entity or group belongs to the .WEB TLD group, they can be assured they are establishing a presence on the Internet which will:
a) closely align them with similar brands,
b) ensure they can keep their own names/brands rather than having to "fit in" to the short list of current TLDs available,
c) facilitate ease of discovery when searched for by potential customers and users, and
d) foster confidence of users seeking any information whatsoever regarding applications because this person belongs to the .WEB.

iv. Registry policies

.WEB will be an open TLD, generally available to all registrants except during the Sunrise period.

.WEB domains will be offered for one to ten years as a general rule with a maximum period of no more than ten years. During the Sunrise period, initial registrations will likely have a minimum requirement for number of years. A requirement may be put in place during Sunrise, for example, that all names must be registered for at least five years.

The roll-out of our TLD is anticipated to feature the following phases:
• Reservation of reserved names and premium names, which will be distributed through special mechanisms (detailed below).
• Sunrise — the required period for trademark owners to secure their domains before availability

to the general public. This phase will feature applications for domain strings, verification of trademarks via Trademark Clearinghouse and a trademark verification agent, auctions between qualified parties who wish to secure the same string, and a Trademark Claims Service.
• Land rush — this period provides an opportunity for potential registrations to apply for names prior to the General availability period.
• General Availability period — real-time registrations, made on a first-come first-served basis. Trademark Claims Service will be in use at least for the first 60 days after General Availability applications open.

The registration of domain names in the .WEB TLD will follow the standard practices, procedures and policies Afilias, the back-end provider of registry services, currently has in place. This includes the following:
• Domain registration policies (for example, grace periods, transfer policies, etc.) are defined in response #27.
• Abuse prevention tools and policies, for example, measures to promote WHOIS accuracy and efforts to reduce phishing and pharming, are discussed in detail in our response #28.
• Rights protection mechanisms and dispute resolution mechanism policies (for example, UDRP, URS) are detailed in #29.

Other detailed policies for this domain include policies for reserved names.


Reserved names

Registry reserved names
We will reserve the following classes of domain names, which will not be made generally available to registrants via the Sunrise or subsequent periods:
• All of the reserved names required in Specification 5 of the new gTLD Registry Agreement;
• The geographic names required in Specification 5 of the new gTLD Registry Agreement, and may be released to the extent that Registry Operator reaches agreement with the government and country-code manager;
• The registry operator's own name and variations thereof, and registry operations names (such as registry.tld, and www.tld), for internal use;
• Names related to ICANN and Internet standards bodies (iana.tld, ietf.tld, w3c.tld, etc.), and may be released to the extent that Registry Operator reaches agreement with ICANN.

The list of reserved names will be published publicly before the Sunrise period begins, so that registrars and potential registrants will know which names have been set aside.


Premium names

The registry will also designate a set of premium domain names, set aside for distribution via special mechanisms. The list of premium names will be published publicly before the Sunrise period begins, so that registrars and potential registrants will know that these names are not available. Premium names may be distributed via mechanisms such as requests for proposals, contests, direct sales, and auctions.

For the auctioning of premium names, we intend to contract with an established auction provider that has successfully conducted domain auctions. This will ensure that there is a tested, trustworthy technical platform for the auctions, auditable records, and reliable collection mechanisms. With our chosen auction provider, we will create and post policies and procedures that ensure clear, fair, and ethical auctions. As an example of such a policy, all employees of the registry operator and its contractors will be strictly prohibited from bidding in auctions for domains in the TLD. We expect a comprehensive and robust set of auction rules to cover possible scenarios, such as how domains will be awarded if the winning bidder does not make payment.

v. Privacy and confidential information protection
As per the New gTLD Registry Agreement, we will make domain contact data (and other fields) freely and publicly available via a Web-based WHOIS server. This default set of fields includes the mandatory publication of registrant data. Our Registry-Registrar Agreement will require that registrants consent to this publication.

We shall notify each of our registrars regarding the purposes for which data about any identified or identifiable natural person ("Personal Data") submitted to the Registry Operator by such

registrar is collected and used, and the intended recipients (or categories of recipients) of such Personal Data (the data in question is essentially the registrant and contact data required to be published in the WHOIS). We will require each registrar to obtain the consent of each registrant in the TLD for the collection and use of such Personal Data. The policies will be posted publicly on our TLD web site. As the registry operator, we shall not use or authorize the use of Personal Data in any way that is incompatible with the notice provided to registrars.

Our privacy and data use policies are as follows:
• As registry operator, we do not plan on selling bulk WHOIS data. We will not sell contact data in any way. We will not allow, enable, or otherwise support the transmission by e-mail, telephone, or facsimile of mass unsolicited, commercial advertising or solicitations.
• We may use registration data in the aggregate for marketing purposes.
• DNS query data will never be sold in a way that is personally identifiable.
• We may from time to time use the demographic data collected for statistical analysis, provided that this analysis will not disclose individual Personal Data and provided that such use is compatible with the notice provided to registrars regarding the purpose and procedures for such use.

As the registry operator we shall take significant steps to protect Personal Data collected from registrars from loss, misuse, unauthorized disclosure, alteration, or destruction. In our responses to Question 30 ("Security Policy") and Question 38 ("Escrow") we detail the security policies and procedures we will use to protect the registry system and the data contained therein from unauthorized access and loss.

Please see our response to Question 26 ("WHOIS") regarding "searchable WHOIS" and rate-limiting. That section contains details about how we will limit the mining of WHOIS data by spammers and other parties who abuse access to the WHOIS.

In order to acquire and maintain accreditation for our TLD, we will require registrars to adhere to certain information technology policies designed to help protect registrant data. These will include standards for access to the registry system and password management protocols. Our response to Question 30, "Security Policy" provides details of implementation.

We will allow the use of proxy and privacy services, which can protect the personal data of registrants from spammers and other parties that mine zone files and WHOIS data. We are aware that there are parties who may use privacy services to protect their free speech rights, or to avoid religious or political persecution.

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18C. What operating rules will you adopt to eliminate or minimize social costs (e.g., time or financial resource costs, as well as various types of consumer vulnerabilities)? What other steps will you take to minimize negative consequences/costs imposed upon consumers?

The Applicant has adopted the above-mentioned and other policies to ensure fair and equitable access and cost structures to the Internet community, including:
• no new burdens placed on the Internet community to resolve name disputes
• utilization of standard registration practices and policies (as detailed in responses to questions #27, #28, #29)
• protection of trademarks at launch and on-going operations (as detailed in the response to question #29)
• fair and reasonable wholesale prices
• fair and equitable treatment of registrars

As per the ICANN Registry Agreement, we will use only ICANN-accredited registrars, and will provide non-discriminatory access to registry services to those registrars.

Pricing Policies and Commitments

Pricing for domain names at General Availability will be based upon market analysis at the time of launch of the TLD, but not less than $8 per domain year for the first year. Applicant reserves the right to offer discounts for promotional purposes in a manner available to all accredited

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registrars. Registry Operator will provide notice to the registrars of any price changes per the
terms of the Registry Agreement.
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19. Is the application for a community-based TLD?

No

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20A. Provide the name and full description of the community that the applicant is committing to serve. In the event that this application is included in a community priority evaluation, it will be scored based on the community identified in response to this question. The name of the community does not have to be formally adopted for the application to be designated as community-based.

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20B. Explain the applicant's relationship to the community identified in 20(a).

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20C. Provide a description of the community-based purpose of the applied-for gTLD.

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20D. Explain the relationship between the applied- for gTLD string and the community identified in 20(a).

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20E. Provide a complete description of the applicant's intended registration policies in support of the community-based purpose of the applied-for gTLD. Policies and enforcement mechanisms are expected to constitute a coherent set.

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20F. Attach any written endorsements for the application from established institutions representative of the community identified in 20(a). An applicant may submit written endorsements by multiple institutions, if relevant to the community.

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21A. Is the application for a geographic name?

No

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22. Describe proposed measures for protection of geographic names at the second and other levels in the applied-for gTLD. This should include any applicable rules and procedures for reservation and/or release of such names.

We will protect names with national or geographic significance by reserving the country and territory names at the second level and at all other levels within the TLD, as per the requirements in the New TLD Registry Agreement (Specification 5, paragraph 5).

We will employ a series of rules to translate the geographical names required to be reserved by Specification 5, paragraph 5 to a form consistent with the "host names" format used in domain names.

Considering the Governmental Advisory Committee (GAC) advice "Principles regarding new gTLDs", these domains will be blocked, at no cost to governments, public authorities, or IGOs, before the TLD is introduced (Sunrise), so that no parties may apply for them. We will publish a list of these names before Sunrise, so our registrars and their prospective applicants can be aware that these names are reserved.
We will define a procedure so that governments can request the above reserved domain(s) if they would like to take possession of them.  This procedure will be based on existing methodology developed for the release of country names in the .INFO TLD. For example, we will require a written request from the country's GAC representative, or a written request from the country's relevant Ministry or Department. We will allow the designated beneficiary (the Registrant) to register the name, with an accredited Afilias Registrar, possibly using an authorization number transmitted directly to the designated beneficiary in the country concerned.

As defined by Specification 5, paragraph 5, such geographic domains may be released to the extent that Registry Operator reaches agreement with the applicable government(s).  Registry operator will work with respective GAC representatives of the country's relevant Ministry of Department to obtain their release of the names to the Registry Operator.

If internationalized domains names (IDNs) are introduced in the TLD in the future, we will also reserve the IDN versions of the country names in the relevant script(s) before IDNs become available to the public.  If we find it advisable and practical, we will confer with relevant language authorities so that we can reserve the IDN domains properly along with their variants.

Regarding GAC advice regarding second-level domains not specified via Specification 5, paragraph 5:  All domains awarded to registrants are subject to the Uniform Domain Name Dispute Resolution Policy (UDRP), and to any properly-situated court proceeding. We will ensure appropriate procedures to allow governments, public authorities or IGO's to challenge abuses of names with national or geographic significance at the second level. In its registry-registrar agreement, and flowing down to registrar-registrant agreements, the registry operator will institute a provision to suspend domains names in the event of a dispute.  We may exercise that right in the case of a dispute over a geographic name.

23. Provide name and full description of all the Registry Services to be provided.  Descriptions should include both technical and business components of each proposed service, and address any potential security or stability concerns.
The following registry services are customary services offered by a registry operator:

    A. Receipt of data from registrars concerning registration of domain names and name servers.

    B. Dissemination of TLD zone files.

    C. Dissemination of contact or other information concerning domain name registrations (e.g., port-43 WHOIS, Web- based Whois, RESTful Whois service).

    D. Internationalized Domain Names, where offered.

E. DNS Security Extensions (DNSSEC). The applicant must describe whether any of these registry services are intended to be offered in a manner unique to the TLD.

Additional proposed registry services that are unique to the registry must also be described.

The Applicant, is a wholly-owned subsidiary of Altanovo Limited, which is a wholly-owned subsidiary of Altanovo, Inc. All references to "Afilias" throughout this application are intended to refered to Afilias Limited in its role as back-end registry services provider for simplicity of review by ICANN.

Afilias has more experience successfully applying to ICANN and launching new TLDs than any other provider. Afilias is the ICANN-contracted registry operator of the .INFO and .MOBI TLDs, and Afilias is the back-end registry services provider for other ICANN TLDs including .ORG, .ASIA, .AERO, and .XXX.

Registry services for this TLD will be performed by Afilias in the same responsible manner used to support 16 top level domains today. Afilias supports more ICANN-contracted TLDs (6) than any other provider currently. Afilias' primary corporate mission is to deliver secure, stable and reliable registry services. This TLD will utilize an existing, proven team and platform for registry services with:
• A stable and secure, state-of-the-art, EPP-based SRS with ample storage capacity, data security provisions and scalability that is proven with registrars who account for over 95% of all gTLD domain name registration activity (over 375 registrars);
• A reliable, 100% available DNS service (zone file generation, publication and dissemination) tested to withstand severe DDoS attacks and dramatic growth in Internet use;
• A WHOIS service that is flexible and standards compliant, with search capabilities to address both registrar and end-user needs; includes consideration for evolving standards, such as RESTful, or draft-kucherawy-wierds;
• Experience introducing IDNs in the following languages: German (DE), Spanish (ES), Polish (PL), Swedish (SV), Danish (DA), Hungarian (HU), Icelandic (IS), Latvian (LV), Lithuanian (LT), Korean (KO), Simplified and Traditional Chinese (CN), Devanagari (HI-DEVA), Russian (RU), Belarusian (BE), Ukrainian (UK), Bosnian (BS), Serbian (SR), Macedonian (MK) and Bulgarian (BG) across the TLDs it serves;
• A registry platform that is both IPv6 and DNSSEC enabled;
• An experienced, respected team of professionals active in standards development of innovative services such as DNSSEC and IDN support;
• Methods to limit domain abuse, remove outdated and inaccurate data, and ensure the integrity of the SRS, and;
• Customer support and reporting capabilities to meet financial and administrative needs, e.g., 24x7 call center support, integration support, billing, and daily, weekly, and monthly reporting.

Afilias will support this TLD as the registry operator, leveraging a proven registry infrastructure that is fully operational, staffed with professionals, massively provisioned, and immediately ready to launch and maintain this TLD.

The below response includes a description of the registry services to be provided for this TLD, additional services provided to support registry operations, and an overview of Afilias' approach to registry management.


Registry services to be provided

To support this TLD, Afilias will offer the following registry services, all in accordance with relevant technical standards and policies:
• Receipt of data from registrars concerning registration for domain names and nameservers, and provision to registrars of status information relating to the EPP-based domain services for registration, queries, updates, transfers, renewals, and other domain management functions. Please see our responses to questions #24, #25, and #27 for full details, which we request be incorporated here by reference.
• Operation of the registry DNS servers: The Afilias DNS system, run and managed by Afilias, is a massively provisioned DNS infrastructure that utilizes among the most sophisticated DNS architecture, hardware, software and redundant design created. Afilias' industry-leading system works in a seamless way to incorporate nameservers from any number of other secondary DNS service

vendors. Please see our response to question #35 for full details, which we request be incorporated here by reference.
• Dissemination of TLD zone files: Afilias' distinctive architecture allows for real-time updates and maximum stability for zone file generation, publication and dissemination. Please see our response to question #34 for full details, which we request be incorporated here by reference.
• Dissemination of contact or other information concerning domain registrations: A port 43 WHOIS service with basic and expanded search capabilities with requisite measures to prevent abuse. Please see our response to question #26 for full details, which we request be incorporated here by reference.
• Internationalized Domain Names (IDNs): Ability to support all protocol valid Unicode characters at every level of the TLD, including alphabetic, ideographic and right-to-left scripts, in conformance with the ICANN IDN Guidelines. Please see our response to question #44 for full details, which we request be incorporated here by reference.
• DNS Security Extensions (DNSSEC): A fully DNSSEC-enabled registry, with a stable and efficient means of signing and managing zones. This includes the ability to safeguard keys and manage keys completely. Please see our response to question #43 for full details, which we request be incorporated here by reference.

Each service will meet or exceed the contract service level agreement. All registry services for this TLD will be provided in a standards-compliant manner.

Security
Afilias addresses security in every significant aspect–physical, data and network as well as process. Afilias' approach to security permeates every aspect of the registry services provided. A dedicated security function exists within the company to continually identify existing and potential threats, and to put in place comprehensive mitigation plans for each identified threat. In addition, a rapid security response plan exists to respond comprehensively to unknown or unidentified threats. The specific threats and Afilias mitigation plans are defined in our response to question #30(b); please see that response for complete information. In short, Afilias is committed to ensuring the confidentiality, integrity, and availability of all information.

New registry services

No new registry services are planned for the launch of this TLD.

Additional services to support registry operation

Numerous supporting services and functions facilitate effective management of the TLD. These support services are also supported by Afilias, including:
• Customer support: 24x7 live phone and e-mail support for customers to address any access, update or other issues they may encounter. This includes assisting the customer identification of the problem as well as solving it. Customers include registrars and the registry operator, but not registrants except in unusual circumstances. Customers have access to a web-based portal for a rapid and transparent view of the status of pending issues.
• Financial services: billing and account reconciliation for all registry services according to pricing established in respective agreements.

Reporting is an important component of supporting registry operations. Afilias will provide reporting to the registry operator and registrars, and financial reporting.

Reporting provided to registry operator
Afilias reporting provides an extensive suite of reports, including daily, weekly and monthly reports with data at the transaction level that enable us to track and reconcile at whatever level of detail preferred. Afilias provides the exact data required by ICANN in the required format to enable the registry operator to meet its technical reporting requirements to ICANN.

In addition, Afilias offers access to a data warehouse capability that will enable near real-time data to be available 24x7. Afilias' data warehouse capability enables drill-down analytics all the way to the transaction level.

Reporting available to registrars
Afilias provides an extensive suite of reporting to registrars and has been doing so in an exemplary manner for more than ten years. Specifically, Afilias provides daily, weekly and monthly

reports with detail at the transaction level to enable registrars to track and reconcile at whatever level of detail they prefer.

Reports are provided in standard formats, facilitating import for use by virtually any registrar analytical tool. Registrar reports are available for download via a secure administrative interface. A given registrar will only have access to its own reports. These include the following:
• Daily Reports: Transaction Report, Billable Transactions Report, and Transfer Reports;
• Weekly: Domain Status and Nameserver Report, Weekly Nameserver Report, Domains Hosted by Nameserver Weekly Report, and;
• Monthly: Billing Report and Monthly Expiring Domains Report.

Weekly registrar reports are maintained for each registrar for four weeks. Weekly reports older than four weeks will be archived for a period of six months, after which they will be deleted.

Financial reporting
Registrar account balances are updated real-time when payments and withdrawals are posted to the registrars' accounts. In addition, the registrar account balances are updated as and when they perform billable transactions at the registry level.

Afilias provides Deposit/Withdrawal Reports that are updated periodically to reflect payments received or credits and withdrawals posted to the registrar accounts.

The following reports are also available: a) Daily Billable Transaction Report, containing details of all the billable transactions performed by all the registrars in the SRS, b) daily e-mail reports containing the number of domains in the registry and a summary of the number and types of billable transactions performed by the registrars, and c) registry operator versions of most registrar reports (for example, a daily Transfer Report that details all transfer activity between all of the registrars in the SRS).


Afilias approach to registry support

Afilias is dedicated to managing the technical operations and support of this TLD in a secure, stable and reliable manner. Afilias has reviewed specific needs and objectives of this TLD. The resulting comprehensive plans are illustrated in technical responses #24-44. Afilias has provided financial responses for this application which demonstrate cost and technology consistent with the size and objectives of this TLD.

Afilias is the registry services provider for this and several other TLD applications. Over the past 11 years of providing services for gTLD and ccTLDs, Afilias has accumulated experience about resourcing levels necessary to provide high quality services with conformance to strict service requirements. Afilias currently supports over 20 million domain names, spread across 16 TLDs, with over 400 accredited registrars.

Since its founding, Afilias is focused on delivering secure, stable and reliable registry services. Several essential management and staff who designed and launched the Afilias registry in 2001 and expanded the number of TLDs supported, all while maintaining strict service levels over the past decade, are still in place today. This experiential continuity will endure for the implementation and on-going maintenance of this TLD. Afilias operates in a matrix structure, which allows its staff to be allocated to various critical functions in both a dedicated and a shared manner. With a team of specialists and generalists, the Afilias project management methodology allows efficient and effective use of our staff in a focused way.

With over a decade of registry experience, Afilias has the depth and breadth of experience that ensure existing and new needs are addressed, all while meeting or exceeding service level requirements and customer expectations. This is evident in Afilias' participation in business, policy and technical organizations supporting registry and Internet technology within ICANN and related organizations. This allows Afilias to be at the forefront of security initiatives such as: DNSSEC, wherein Afilias worked with Public Interest Registry (PIR) to make the .ORG registry the first DNSSEC enabled gTLD and the largest TLD enabled at the time; in enhancing the Internet experience for users across the globe by leading development of IDNs; in pioneering the use of open-source technologies by its usage of PostgreSQL, and; being the first to offer near-real-time dissemination of DNS zone data.

The ability to observe tightening resources for critical functions and the capacity to add extra resources ahead of a threshold event are factors that Afilias is well versed in. Afilias' human resources team, along with well-established relationships with external organizations, enables it to fill both long-term and short-term resource needs expediently.

Afilias' growth from a few domains to serving 20 million domain names across 16 TLDs and 400 accredited registrars indicates that the relationship between the number of people required and the volume of domains supported is not linear. In other words, servicing 100 TLDs does not automatically require 6 times more staff than servicing 16 TLDs. Similarly, an increase in the number of domains under management does not require in a linear increase in resources. Afilias carefully tracks the relationship between resources deployed and domains to be serviced, and pro-actively reviews this metric in order to retain a safe margin of error. This enables Afilias to add, train and prepare new staff well in advance of the need, allowing consistent delivery of high quality services.

24. Shared Registration System (SRS) Performance:
describe

- the plan for operation of a robust and reliable SRS. SRS is a critical registry function for enabling multiple registrars to provide domain name registration services in the TLD. SRS must include
the EPP interface to the registry, as well as any other interfaces intended to be provided, if they are critical to the functioning of the registry. Please refer to
the requirements in Specification 6 (section 1.2) and Specification 10 (SLA Matrix) attached to the Registry Agreement; and
• resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel
roles allocated to this area).
A complete answer should include, but is not limited to:
- A high-level SRS system description;
- Representative network diagram(s);
- Number of servers;
- Description of interconnectivity with other registry systems;
- Frequency of synchronization between servers; and
- Synchronization scheme (e.g., hot standby, cold standby).

THE RESPONSE FOR THIS QUESTION USES ANGLE BRACKETS (THE " 〈" and "〉 " CHARACTERS), WHICH ICANN INFORMS AFILIAS (CASE ID 11027) CANNOT BE PROPERLY RENDERED IN TAS DUE TO SECURITY CONCERNS. HENCE, THE FULL ANSWER TO THIS QUESTION IS ATTACHED AS A PDF FILE.

Afilias operates a state-of-the-art EPP-based Shared Registration System (SRS) that is secure, stable and reliable. The SRS is a critical component of registry operations that must balance the business requirements for the registry and its customers, such as numerous domain acquisition and management functions. The SRS meets or exceeds all ICANN requirements given that Afilias:
• Operates a secure, stable and reliable SRS which updates in real-time and in full compliance with Specification 6 of the new gTLD Registry Agreement;
• Is committed to continuously enhancing our SRS to meet existing and future needs;
• Currently exceeds contractual requirements and will perform in compliance with Specification 10 of the new gTLD Registry Agreement;
• Provides SRS functionality and staff, financial, and other resources to more than adequately meet the technical needs of this TLD, and;
• Manages the SRS with a team of experienced technical professionals who can seamlessly integrate

this TLD into the Afilias registry platform and support the TLD in a secure, stable and reliable manner.


Description of operation of the SRS, including diagrams

Afilias' SRS provides the same advanced functionality as that used in the .INFO and .ORG registries, as well as the fourteen other TLDs currently supported by Afilias. The Afilias registry system is standards-compliant and utilizes proven technology, ensuring global familiarity for registrars, and it is protected by our massively provisioned infrastructure that mitigates the risk of disaster.

EPP functionality is described fully in our response to question #25; please consider those answers incorporated here by reference. An abbreviated list of Afilias SRS functionality includes:
• Domain registration: Afilias provides registration of names in the TLD, in both ASCII and IDN forms, to accredited registrars via EPP and a web-based administration tool.
• Domain renewal: Afilias provides services that allow registrars the ability to renew domains under sponsorship at any time. Further, the registry performs the automated renewal of all domain names at the expiration of their term, and allows registrars to rescind automatic renewals within a specified number of days after the transaction for a full refund.
• Transfer: Afilias provides efficient and automated procedures to facilitate the transfer of sponsorship of a domain name between accredited registrars. Further, the registry enables bulk transfers of domains under the provisions of the Registry-Registrar Agreement.
• RGP and restoring deleted domain registrations: Afilias provides support for the Redemption Grace Period (RGP) as needed, enabling the restoration of deleted registrations.
• Other grace periods and conformance with ICANN guidelines: Afilias provides support for other grace periods that are evolving as standard practice inside the ICANN community. In addition, the Afilias registry system supports the evolving ICANN guidelines on IDNs.

Afilias also supports the basic check, delete, and modify commands.

As required for all new gTLDs, Afilias provides "thick" registry system functionality. In this model, all key contact details for each domain are stored in the registry. This allows better access to domain data and provides uniformity in storing the information.

Afilias' SRS complies today and will continue to comply with global best practices including relevant RFCs, ICANN requirements, and this TLD's respective domain policies. With over a decade of experience, Afilias has fully documented and tested policies and procedures, and our highly skilled team members are active participants of the major relevant technology and standards organizations, so ICANN can be assured that SRS performance and compliance are met.  Full details regarding the SRS system and network architecture are provided in responses to questions #31 and #32; please consider those answers incorporated here by reference.

        SRS servers and software
All applications and databases for this TLD will run in a virtual environment currently hosted by a cluster of servers equipped with the latest Intel Westmere multi-core processors. (It is possible that by the time this application is evaluated and systems deployed, Westmere processors may no longer be the "latest"; the Afilias policy is to use the most advanced, stable technology available at the time of deployment.) The data for the registry will be stored on storage arrays of solid state drives shared over a fast storage area network. The virtual environment allows the infrastructure to easily scale both vertically and horizontally to cater to changing demand. It also facilitates effective utilization of system resources, thus reducing energy consumption and carbon footprint.

The network firewalls, routers and switches support all applications and servers. Hardware traffic shapers are used to enforce an equitable access policy for connections coming from registrars. The registry system accommodates both IPv4 and IPv6 addresses. Hardware load balancers accelerate TLS/SSL handshaking and distribute load among a pool of application servers.

Each of the servers and network devices are equipped with redundant, hot-swappable components and multiple connections to ancillary systems. Additionally, 24x7 support agreements with a four-hour response time at all our data centers guarantee replacement of failed parts in the shortest time possible.

Examples of current system and network devices used are:

- Servers: Cisco UCS B230 blade servers
- SAN storage arrays: IBM Storwize V7000 with Solid State Drives
- SAN switches: Brocade 5100
- Firewalls:  Cisco ASA 5585-X
- Load balancers: F5 Big-IP 6900
- Traffic shapers: Procera PacketLogic PL8720
- Routers: Juniper MX40 3D
- Network switches: Cisco Nexus 7010, Nexus 5548, Nexus 2232

These system components are upgraded and updated as required, and have usage and performance thresholds which trigger upgrade review points. In each data center, there is a minimum of two of each network component, a minimum of 25 servers, and a minimum of two storage arrays.

Technical components of the SRS include the following items, continually checked and upgraded as needed: SRS, WHOIS, web admin tool, DNS, DNS distributor, reporting, invoicing tools, and deferred revenue system (as needed).

All hardware is massively provisioned to ensure stability under all forecast volumes from launch through "normal" operations of average daily and peak capacities. Each and every system application, server, storage and network device is continuously monitored by the Afilias Network Operations Center for performance and availability. The data gathered is used by dynamic predictive analysis tools in real-time to raise alerts for unusual resource demands. Should any volumes exceed established thresholds, a capacity planning review is instituted which will address the need for additions well in advance of their actual need.


SRS diagram and interconnectivity description

As with all core registry services, the SRS is run from a global cluster of registry system data centers, located in geographic centers with high Internet bandwidth, power, redundancy and availability. All of the registry systems will be run in a  setup, with a primary data center and a secondary data center. For detailed site information, please see our responses to questions #32 and #35. Registrars access the SRS in real-time using EPP.

A sample of the Afilias SRS technical and operational capabilities (displayed in Figure 24-a) include:
- Geographically diverse redundant registry systems;
- Load balancing implemented for all registry services (e.g. EPP, WHOIS, web admin) ensuring equal experience for all customers and easy horizontal scalability;
- Disaster Recovery Point objective for the registry is within one minute of the loss of the primary system;
- Detailed and tested contingency plan, in case of primary site failure, and;
- Daily reports, with secure access for confidentiality protection.

As evidenced in Figure 24-a, the SRS contains several components of the registry system. The interconnectivity ensures near-real-time distribution of the data throughout the registry infrastructure, timely backups, and up-to-date billing information.

The WHOIS servers are directly connected to the registry database and provide real-time responses to queries using the most up-to-date information present in the registry.

Committed DNS-related EPP objects in the database are made available to the DNS Distributor via a dedicated set of connections. The DNS Distributor extracts committed DNS-related EPP objects in real time and immediately inserts them into the zone for dissemination.

The Afilias system is architected such that read-only database connections are executed on database replicas and connections to the database master (where write-access is executed) are carefully protected to ensure high availability.

This interconnectivity is monitored, as is the entire registry system, according to the plans detailed in our response to question #42.


Synchronization scheme

Registry databases are synchronized both within the same data center and in the backup data center using a database application called Slony. For further details, please see the responses to questions #33 and #37. Slony replication of transactions from the publisher (master) database to its subscribers (replicas) works continuously to ensure the publisher and its subscribers remain synchronized. When the publisher database completes a transaction the Slony replication system ensures that each replica also processes the transaction. When there are no transactions to process, Slony "sleeps" until a transaction arrives or for one minute, whichever comes first. Slony "wakes up" each minute to confirm with the publisher that there has not been a transaction and thus ensures subscribers are synchronized and the replication time lag is minimized. The typical replication time lag between the publisher and subscribers depends on the topology of the replication cluster, specifically the location of the subscribers relative to the publisher. Subscribers located in the same data center as the publisher are typically updated within a couple of seconds, and subscribers located in a secondary data center are typically updated in less than ten seconds. This ensures real-time or near-real-time synchronization between all databases, and in the case where the secondary data center needs to be activated, it can be done with minimal disruption to registrars.


SRS SLA performance compliance

Afilias has a ten-year record of delivering on the demanding ICANN SLAs, and will continue to provide secure, stable and reliable service in compliance with SLA requirements as specified in the new gTLD Registry Agreement, Specification 10, as presented in Figure 24-b.

The Afilias SRS currently handles over 200 million EPP transactions per month for just .INFO and .ORG. Overall, the Afilias SRS manages over 700 million EPP transactions per month for all TLDs under management.

Given this robust functionality, and more than a decade of experience supporting a thick TLD registry with a strong performance history, Afilias will meet or exceed the performance metrics in Specification 10 of the new gTLD Registry Agreement. The Afilias services and infrastructure are designed to scale both vertically and horizontally without any downtime to provide consistent performance as this TLD grows. The Afilias architecture is also massively provisioned to meet seasonal demands and marketing campaigns. Afilias' experience also gives high confidence in the ability to scale and grow registry operations for this TLD in a secure, stable and reliable manner.


SRS resourcing plans

Since its founding, Afilias is focused on delivering secure, stable and reliable registry services. Several essential management and staff who designed and launched the Afilias registry in 2001 and expanded the number of TLDs supported, all while maintaining strict service levels over the past decade, are still in place today. This experiential continuity will endure for the implementation and on-going maintenance of this TLD. Afilias operates in a matrix structure, which allows its staff to be allocated to various critical functions in both a dedicated and a shared manner. With a team of specialists and generalists, the Afilias project management methodology allows efficient and effective use of our staff in a focused way.

Over 100 Afilias team members contribute to the management of the SRS code and network that will support this TLD. The SRS team is composed of Software Engineers, Quality Assurance Analysts, Application Administrators, System Administrators, Storage Administrators, Network Administrators, Database Administrators, and Security Analysts located at three geographically separate Afilias facilities. The systems and services set up and administered by these team members are monitored 24x7 by skilled analysts at two NOCs located in Toronto, Ontario (Canada) and Horsham, Pennsylvania (USA). In addition to these team members, Afilias also utilizes trained project management staff to maintain various calendars, work breakdown schedules, utilization and resource schedules and other tools to support the technical and management staff. It is this team who will both deploy this TLD on the Afilias infrastructure, and maintain it. Together, the Afilias team has managed 11 registry transitions and six new TLD launches, which illustrate its ability to securely and reliably deliver regularly scheduled updates as well as a secure, stable and reliable SRS service for this TLD.

25. Extensible Provisioning Protocol (EPP): provide a detailed description of the interface with registrars, including how the applicant will comply with EPP in RFCs 3735 (if applicable), and 5730-5734.

If intending to provide proprietary EPP extensions, provide documentation consistent with RFC 3735, including the EPP templates and schemas that will be used.

Describe resourcing plans (number and description of personnel roles allocated to this area).

A complete answer is expected to be no more than 5 pages. If there are proprietary EPP extensions, a complete answer is also expected to be no more than 5 pages per EPP extension.

THE RESPONSE FOR THIS QUESTION USES ANGLE BRACKETS (THE " ⟨" and "⟩ " CHARACTERS), WHICH ICANN INFORMS AFILIAS (CASE ID 11027) CANNOT BE PROPERLY RENDERED IN TAS DUE TO SECURITY CONCERNS. HENCE, THE FULL ANSWER TO THIS QUESTION IS ATTACHED AS A PDF FILE.

Afilias has been a pioneer and innovator in the use of EPP. .INFO was the first EPP-based gTLD registry and launched on EPP version $^{02}/_{00}$. Afilias has a track record of supporting TLDs on standards-compliant versions of EPP. Afilias will operate the EPP registrar interface as well as a web-based interface for this TLD in accordance with RFCs and global best practices. In addition, Afilias will maintain a proper OT&E (Operational Testing and Evaluation) environment to facilitate registrar system development and testing.

Afilias' EPP technical performance meets or exceeds all ICANN requirements as demonstrated by:
• A completely functional, state-of-the-art, EPP-based SRS that currently meets the needs of various gTLDs and will meet this new TLD's needs;
• A track record of success in developing extensions to meet client and registrar business requirements such as multi-script support for IDNs;
• Supporting six ICANN gTLDs on EPP: .INFO, .ORG, .MOBI, .AERO, .ASIA and .XXX
• EPP software that is operating today and has been fully tested to be standards-compliant;
• Proven interoperability of existing EPP software with ICANN-accredited registrars, and;
• An SRS that currently processes over 200 million EPP transactions per month for both .INFO and .ORG. Overall, Afilias processes over 700 million EPP transactions per month for all 16 TLDs under management.

The EPP service is offered in accordance with the performance specifications defined in the new gTLD Registry Agreement, Specification 10.

EPP Standards

The Afilias registry system complies with the following revised versions of the RFCs and operates multiple ICANN TLDs on these standards, including .INFO, .ORG, .MOBI, .ASIA and .XXX. The systems have been tested by our Quality Assurance ("QA") team for RFC compliance, and have been used by registrars for an extended period of time:
• 3735 - Guidelines for Extending EPP
• 3915 - Domain Registry Grace Period Mapping
• 5730 - Extensible Provisioning Protocol (EPP)
• 5731 - Domain Name Mapping
• 5732 - Host Mapping
• 5733 - Contact Mapping
• 5734 - Transport Over TCP
• 5910 - Domain Name System (DNS) Security Extensions Mapping for the Extensible Provisioning Protocol (EPP)

This TLD will support all valid EPP commands. The following EPP commands are in operation today and will be made available for this TLD. See attachment #25a for the base set of EPP commands and copies of Afilias XSD schema files, which define all the rules of valid, RFC compliant EPP commands and responses that Afilias supports. Any customized EPP extensions, if necessary, will also conform to relevant RFCs.

Afilias staff members actively participated in the Internet Engineering Task Force (IETF) process

that finalized the new standards for EPP. Afilias will continue to actively participate in the IETF and will stay abreast of any updates to the EPP standards.

EPP software interface and functionality

Afilias will provide all registrars with a free open-source EPP toolkit.  Afilias provides this software for use with both Microsoft Windows and Unix/Linux operating systems. This software, which includes all relevant templates and schema defined in the RFCs, is available on sourceforge.net and will be available through the registry operator's website.

Afilias' SRS EPP software complies with all relevant RFCs and includes the following functionality:
• EPP Greeting: A response to a successful connection returns a greeting to the client. Information exchanged can include: name of server, server date and time in UTC, server features, e.g., protocol versions supported, languages for the text response supported, and one or more elements which identify the objects that the server is capable of managing;
• Session management controls:  to establish a connection with a server, and  to end a session;
• EPP Objects: Domain, Host and Contact for respective mapping functions;
• EPP Object Query Commands: Info, Check, and Transfer (query) commands to retrieve object information, and;
• EPP Object Transform Commands: five commands to transform objects:  to create an instance of an object,  to remove an instance of an object,  to extend the validity period of an object,  to change information associated with an object, and  to manage changes in client sponsorship of a known object.

Currently, 100% of the top domain name registrars in the world have software that has already been tested and certified to be compatible with the Afilias SRS registry. In total, over 375 registrars, representing over 95% of all registration volume worldwide, operate software that has been certified compatible with the Afilias SRS registry. Afilias' EPP Registrar Acceptance Criteria are available in attachment #25b, EPP OT&E Criteria.

        Free EPP software support
Afilias analyzes and diagnoses registrar EPP activity log files as needed and is available to assist registrars who may require technical guidance regarding how to fix repetitive errors or exceptions caused by misconfigured client software.

Registrars are responsible for acquiring a TLS/SSL certificate from an approved certificate authority, as the registry-registrar communication channel requires mutual authentication; Afilias will acquire and maintain the server-side TLS/SSL certificate. The registrar is responsible for developing support for TLS/SSL in their client application. Afilias will provide free guidance for registrars unfamiliar with this requirement.

Registrar data synchronization

There are two methods available for registrars to synchronize their data with the registry:
• Automated synchronization: Registrars can, at any time, use the EPP  command to obtain definitive data from the registry for a known object, including domains, hosts (nameservers) and contacts.
• Personalized synchronization: A registrar may contact technical support and request a data file containing all domains (and associated host (nameserver) and contact information) registered by that registrar, within a specified time interval. The data will be formatted as a comma separated values (CSV) file and made available for download using a secure server.

EPP modifications

There are no unique EPP modifications planned for this TLD.

All ICANN TLDs must offer a Sunrise as part of a rights protection program. Afilias uses EPP extensions that allow registrars to submit trademark and other intellectual property rights (IPR) data to the registry. These extensions are:
• An  element that indicates the name of Registered Mark.
• An  element that indicates the registration number of the IPR.

- An element that indicates the origin for which the IPR is established (a national or international trademark registry).
- An element that indicates whether the applicant holds the trademark as the original "OWNER", "CO-OWNER" or "ASSIGNEE".
- An element that indicates the date the Registered Mark was applied for.
- An element that indicates the date the Registered Mark was issued and registered.
- An element that indicates the class of the registered mark.
- An element that indicates the Sunrise phase the application applies for.

Note that some of these extensions might be subject to change based on ICANN-developed requirements for the Trademark Clearinghouse.


EPP resourcing plans

Since its founding, Afilias is focused on delivering secure, stable and reliable registry services. Several essential management and staff who designed and launched the Afilias registry in 2001 and expanded the number of TLDs supported, all while maintaining strict service levels over the past decade, are still in place today. This experiential continuity will endure for the implementation and on-going maintenance of this TLD. Afilias operates in a matrix structure, which allows its staff to be allocated to various critical functions in both a dedicated and a shared manner. With a team of specialists and generalists, the Afilias project management methodology allows efficient and effective use of our staff in a focused way.

108 Afilias team members directly contribute to the management and development of the EPP based registry systems. As previously noted, Afilias is an active member of IETF and has a long documented history developing and enhancing EPP. These contributors include 11 developers and 14 QA engineers focused on maintaining and enhancing EPP server side software. These engineers work directly with business staff to timely address existing needs and forecast registry/registrar needs to ensure the Afilias EPP software is effective today and into the future. A team of eight data analysts work with the EPP software system to ensure that the data flowing through EPP is securely and reliably stored in replicated database systems. In addition to the EPP developers, QA engineers, and data analysts, other EPP contributors at Afilias include: Technical Analysts, the Network Operations Center and Data Services team members.

26. Whois: describe

- how the applicant will comply with Whois specifications for data objects, bulk access, and lookups as defined in Specifications 4 and 10 to the Registry Agreement;
- how the Applicant's Whois service will comply with RFC 3912; and
- resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area).

A complete answer should include, but is not limited to:

- A high-level Whois system description;
- Relevant network diagram(s);
- IT and infrastructure resources (e.g., servers, switches, routers and other components);
- Description of interconnectivity with other registry systems; and

Frequency of synchronization between servers.
To be eligible for a score of 2, answers must also include:

- Provision for Searchable Whois capabilities; and

- A description of potential forms of abuse of this feature, how these risks will be mitigated, and the basis for these descriptions

A complete answer is expected to be no more than 5 pages.

Afilias operates the WHOIS (registration data directory service) infrastructure in accordance with RFCs and global best practices, as it does for the 16 TLDs it currently supports. Designed to be robust and scalable, Afilias' WHOIS service has exceeded all contractual requirements for over a decade. It has extended search capabilities, and methods of limiting abuse.

The WHOIS service operated by Afilias meets and exceeds ICANN's requirements. Specifically, Afilias will:
• Offer a WHOIS service made available on port 43 that is flexible and standards- compliant;
• Comply with all ICANN policies, and meeting or exceeding WHOIS performance requirements in Specification 10 of the new gTLD Registry Agreement;
• Enable a Searchable WHOIS with extensive search capabilities that offers ease of use while enforcing measures to mitigate access abuse, and;
• Employ a team with significant experience managing a compliant WHOIS service.

Such extensive knowledge and experience managing a WHOIS service enables Afilias to offer a comprehensive plan for this TLD that meets the needs of constituents of the domain name industry and Internet users. The service has been tested by our QA team for RFC compliance, and has been used by registrars and many other parties for an extended period of time. Afilias' WHOIS service currently serves almost 500 million WHOIS queries per month, with the capacity already built in to handle an order of magnitude increase in WHOIS queries, and the ability to smoothly scale should greater growth be needed.


WHOIS system description and diagram

The Afilias WHOIS system, depicted in figure 26-a, is designed with robustness, availability, compliance, and performance in mind. Additionally, the system has provisions for detecting abusive usage (e.g., excessive numbers of queries from one source). The WHOIS system is generally intended as a publicly available single object lookup system. Afilias uses an advanced, persistent caching system to ensure extremely fast query response times.

Afilias will develop restricted WHOIS functions based on specific domain policy and regulatory requirements as needed for operating the business (as long as they are standards compliant). It will also be possible for contact and registrant information to be returned according to regulatory requirements. The WHOIS database supports multiple string and field searching through a reliable, free, secure web-based interface.

        Data objects, interfaces, access and lookups
Registrars can provide an input form on their public websites through which a visitor is able to perform WHOIS queries. The registry operator can also provide a Web-based search on its site.  The input form must accept the string to query, along with the necessary input elements to select the object type and interpretation controls. This input form sends its data to the Afilias port 43 WHOIS server. The results from the WHOIS query are returned by the server and displayed in the visitor's Web browser. The sole purpose of the Web interface is to provide a user-friendly interface for WHOIS queries.

Afilias will provide WHOIS output as per Specification 4 of the new gTLD Registry Agreement. The output for domain records generally consists of the following elements:
• The name of the domain registered and the sponsoring registrar;
• The names of the primary and secondary nameserver(s) for the registered domain name;
• The creation date, registration status and expiration date of the registration;
• The name, postal address, e-mail address, and telephone and fax numbers of the domain name holder;
• The name, postal address, e-mail address, and telephone and fax numbers of the technical contact for the domain name holder;
• The name, postal address, e-mail address, and telephone and fax numbers of the administrative contact for the domain name holder, and;
• The name, postal address, e-mail address, and telephone and fax numbers of the billing contact

for the domain name holder.
The following additional features are also present in Afilias' WHOIS service:
• Support for IDNs, including the language tag and the Punycode representation of the IDN in
addition to Unicode Hex and Unicode HTML formats;
• Enhanced support for privacy protection relative to the display of confidential information.

Afilias will also provide sophisticated WHOIS search functionality that includes the ability to
conduct multiple string and field searches.

        Query controls
For all WHOIS queries, a user is required to enter the character string representing the
information for which they want to search. The object type and interpretation control parameters
to limit the search may also be specified. If object type or interpretation control parameter is
not specified, WHOIS will search for the character string in the Name field of the Domain object.

WHOIS queries are required to be either an "exact search" or a "partial search," both of which are
insensitive to the case of the input string.

An exact search specifies the full string to search for in the database field. An exact match
between the input string and the field value is required.

A partial search specifies the start of the string to search for in the database field. Every
record with a search field that starts with the input string is considered a match. By default, if
multiple matches are found for a query, then a summary containing up to 50 matching results is
presented. A second query is required to retrieve the specific details of one of the matching
records.

If only a single match is found, then full details will be provided. Full detail consists of the
data in the matching object as well as the data in any associated objects. For example: a query
that results in a domain object includes the data from the associated host and contact objects.

WHOIS query controls fall into two categories: those that specify the type of field, and those
that modify the interpretation of the input or determine the level of output to provide. Each is
described below.

The following keywords restrict a search to a specific object type:
• Domain: Searches only domain objects. The input string is searched in the Name field.
• Host: Searches only nameserver objects. The input string is searched in the Name field and the
IP Address field.
• Contact: Searches only contact objects. The input string is searched in the ID field.
• Registrar: Searches only registrar objects. The input string is searched in the Name field.
By default, if no object type control is specified, then the Name field of the Domain object is
searched.

In addition, Afilias WHOIS systems can perform and respond to WHOIS searches by registrant name,
postal address and contact names. Deployment of these features is provided as an option to the
registry operator, based upon registry policy and business decision-making.

Figure 26-b presents the keywords that modify the interpretation of the input or determine the
level of output to provide.

By default, if no interpretation control keywords are used, the output will include full details
if a single match is found and a summary if multiple matches are found.

        Unique TLD requirements
There are no unique WHOIS requirements for this TLD.

        Sunrise WHOIS processes
All ICANN TLDs must offer a Sunrise as part of a rights protection program. Afilias uses EPP
extensions that allow registrars to submit trademark and other intellectual property rights (IPR)
data to the registry. The following corresponding data will be displayed in WHOIS for relevant
domains:
• Trademark Name: element that indicates the name of the Registered Mark.
• Trademark Number: element that indicates the registration number of the IPR.
• Trademark Locality: element that indicates the origin for which the IPR is established (a

national or international trademark registry).
• Trademark Entitlement: element that indicates whether the applicant holds the trademark as the original "OWNER", "CO-OWNER" or "ASSIGNEE".
 • Trademark Application Date: element that indicates the date the Registered Mark was applied for.
• Trademark Registration Date: element that indicates the date the Registered Mark was issued and registered.
• Trademark Class: element that indicates the class of the Registered Mark.
• IPR Type: element that indicates the Sunrise phase the application applies for.


IT and infrastructure resources

All the applications and databases for this TLD will run in a virtual environment hosted by a cluster of servers equipped with the latest Intel Westmere multi-core processors (or a more advanced, stable technology available at the time of deployment). The registry data will be stored on storage arrays of solid-state drives shared over a fast storage area network. The virtual environment allows the infrastructure to easily scale both vertically and horizontally to cater to changing demand. It also facilitates effective utilization of system resources thus reducing energy consumption and carbon footprint.

The applications and servers are supported by network firewalls, routers and switches. The WHOIS system accommodates both IPv4 and IPv6 addresses.

Each of the servers and network devices are equipped with redundant hot-swappable components and multiple connections to ancillary systems. Additionally, 24x7 support agreements with our hardware vendor with a 4-hour response time at all our data centers guarantees replacement of failed parts in the shortest time possible.

Models of system and network devices used are:
• Servers: Cisco UCS B230 blade servers
• SAN storage arrays: IBM Storwize V7000 with Solid State Drives
• Firewalls:  Cisco ASA 5585-X
• Load balancers: F5 Big-IP 6900
• Traffic shapers: Procera PacketLogic PL8720
• Routers: Juniper MX40 3D
• Network switches: Cisco Nexus 7010, Nexus 5548, Nexus 2232

There will be at least four virtual machines (VMs) offering WHOIS service. Each VM will run at least two WHOIS server instances - one for registrars and one for the public.  All instances of the WHOIS service is made available to registrars and the public are rate limited to mitigate abusive behavior.


Frequency of synchronization between servers

Registration data records from the EPP publisher database will be replicated to the WHOIS system database on a near-real-time basis whenever an update occurs.


Specifications 4 and 10 compliance

The WHOIS service for this TLD will meet or exceed the performance requirements in the new gTLD Registry Agreement, Specification 10. Figure 26-c provides the exact measurements and commitments. Afilias has a 10 year track record of exceeding WHOIS performance and a skilled team to ensure this continues for all TLDs under management.

The WHOIS service for this TLD will meet or exceed the requirements in the new gTLD Registry Agreement, Specification 4.


RFC 3912 compliance

Afilias will operate the WHOIS infrastructure in compliance with RFCs and global best practices, as it does with the 16 TLDs Afilias currently supports.

Afilias maintains a registry-level centralized WHOIS database that contains information for every registered domain and for all host and contact objects. The WHOIS service will be available on the Internet standard WHOIS port (port 43) in compliance with RFC 3912. The WHOIS service contains data submitted by registrars during the registration process. Changes made to the data by a registrant are submitted to Afilias by the registrar and are reflected in the WHOIS database and service in near-real-time, by the instance running at the primary data center, and in under ten seconds by the instance running at the secondary data center, thus providing all interested parties with up-to-date information for every domain. This service is compliant with the new gTLD Registry Agreement, Specification 4.

The WHOIS service maintained by Afilias will be authoritative and complete, as this will be a "thick" registry (detailed domain contact WHOIS is all held at the registry); users do not have to query different registrars for WHOIS information, as there is one central WHOIS system. Additionally, visibility of different types of data is configurable to meet the registry operator's needs.


Searchable WHOIS

Afilias offers a searchable WHOIS on a web-based Directory Service. Partial match capabilities are offered on the following fields: domain name, registrar ID, and IP address. In addition, Afilias WHOIS systems can perform and respond to WHOIS searches by registrant name, postal address and contact names.

Providing the ability to search important and high-value fields such as registrant name, address and contact names increases the probability of abusive behavior. An abusive user could script a set of queries to the WHOIS service and access contact data in order to create or sell a list of names and addresses of registrants in this TLD. Making the WHOIS machine readable, while preventing harvesting and mining of WHOIS data, is a key requirement integrated into the Afilias WHOIS systems. For instance, Afilias limits search returns to 50 records at a time. If bulk queries were ever necessary (e.g., to comply with any applicable laws, government rules or requirements, requests of law enforcement, or any dispute resolution process), Afilias makes such query responses available to carefully screened and limited staff members at the registry operator (and customer support staff) via an internal data warehouse. The Afilias WHOIS system accommodates anonymous access as well as pre-identified and profile-defined uses, with full audit and log capabilities.

The WHOIS service has the ability to tag query responses with labels such as "Do not redistribute" or "Special access granted". This may allow for tiered response and reply scenarios.  Further, the WHOIS service is configurable in parameters and fields returned, which allow for flexibility in compliance with various jurisdictions, regulations or laws.

Afilias offers exact-match capabilities on the following fields: registrar ID, nameserver name, and nameserver's IP address (only applies to IP addresses stored by the registry, i.e., glue records). Search capabilities are fully available, and results include domain names matching the search criteria (including IDN variants). Afilias manages abuse prevention through rate limiting and CAPTCHA (described below). Queries do not require specialized transformations of internationalized domain names or internationalized data fields

Please see "Query Controls" above for details about search options and capabilities.


Deterring WHOIS abuse

Afilias has adopted two best practices to prevent abuse of the WHOIS service: rate limiting and CAPTCHA.

Abuse of WHOIS services on port 43 and via the Web is subject to an automated rate-limiting system. This ensures that uniformity of service to users is unaffected by a few parties whose activities abuse or otherwise might threaten to overload the WHOIS system.

Abuse of web-based public WHOIS services is subject to the use of CAPTCHA (Completely Automated Public Turing test to tell Computers and Humans Apart) technology.  The use of CAPTCHA ensures that uniformity of service to users is unaffected by a few parties whose activities abuse or

otherwise might threaten to overload the WHOIS system. Afilias will adopt a CAPTCHA on its Web-based WHOIS.

Data mining of any sort on the WHOIS system is strictly prohibited, and this prohibition is published in WHOIS output and in terms of service.

For rate limiting on IPv4, there are configurable limits per IP and subnet. For IPv6, the traditional limitations do not apply. Whenever a unique IPv6 IP address exceeds the limit of WHOIS queries per minute, the same rate-limit for the given 64 bits of network prefix that the offending IPv6 IP address falls into will be applied. At the same time, a timer will start and rate-limit validation logic will identify if there are any other IPv6 address within the original 80-bit(/48) prefix. If another offending IPv6 address does fall into the /48 prefix then rate-limit validation logic will penalize any other IPv6 addresses that fall into that given 80-bit (/48) network. As a security precaution, Afilias will not disclose these limits.

Pre-identified and profile-driven role access allows greater granularity and configurability in both access to the WHOIS service, and in volume/frequency of responses returned for queries.

Afilias staff are key participants in the ICANN Security & Stability Advisory Committee's deliberations and outputs on WHOIS, including SAC003, SAC027, SAC033, SAC037, SAC040, and SAC051. Afilias staff are active participants in both technical and policy decision making in ICANN, aimed at restricting abusive behavior.


WHOIS staff resourcing plans

Since its founding, Afilias is focused on delivering secure, stable and reliable registry services. Several essential management and staff who designed and launched the Afilias registry in 2001 and expanded the number of TLDs supported, all while maintaining strict service levels over the past decade, are still in place today. This experiential continuity will endure for the implementation and on-going maintenance of this TLD. Afilias operates in a matrix structure, which allows its staff to be allocated to various critical functions in both a dedicated and a shared manner. With a team of specialists and generalists, the Afilias project management methodology allows efficient and effective use of our staff in a focused way.

Within Afilias, there are 11 staff members who develop and maintain the compliant WHOIS systems. They keep pace with access requirements, thwart abuse, and continually develop software. Of these resources, approximately two staffers are typically required for WHOIS-related code customization. Other resources provide quality assurance, and operations personnel maintain the WHOIS system itself. This team will be responsible for the implementation and on-going maintenance of the new TLD WHOIS service.

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27. Registration Life Cycle: provide a detailed description of the proposed registration lifecycle for domain names in the proposed gTLD. The description must:

- explain the various registration states as well as the criteria and procedures that are used to change state;
- describe the typical registration lifecycle of create/update/delete and all intervening steps such as pending, locked, expired, and transferred that may apply;
- clearly explain any time elements that are involved - for instance details of add-grace or redemption grace periods, or notice periods for renewals or transfers; and
- describe resourcing plans for this aspect of the criteria (number and description of personnel roles allocated to this area).

The description of the registration lifecycle should be supplemented by the inclusion of a state diagram, which captures definitions, explanations of trigger points, and transitions from state to state.

If applicable, provide definitions for aspects of the registration lifecycle that are not covered by standard EPP RFCs.

A complete answer is expected to be no more than 5 pages.

THE RESPONSE FOR THIS QUESTION USES ANGLE BRACKETS (THE " ⟨" and "⟩ " CHARACTERS), WHICH ICANN
INFORMS AFILIAS (CASE ID 11027) CANNOT BE PROPERLY RENDERED IN TAS DUE TO SECURITY CONCERNS.
HENCE, THE FULL ANSWER TO THIS QUESTION IS ATTACHED AS A PDF FILE.

Afilias has been managing registrations for over a decade. Afilias has had experience managing
registrations for over a decade and supports comprehensive registration lifecycle services
including the registration states, all standard grace periods, and can address any modifications
required with the introduction of any new ICANN policies.

This TLD will follow the ICANN standard domain lifecycle, as is currently implemented in TLDs such
as .ORG and .INFO. The below response includes: a diagram and description of the lifecycle of a
domain name in this TLD, including domain creation, transfer protocols, grace period
implementation and the respective time frames for each; and the existing resources to support the
complete lifecycle of a domain.

As depicted in Figure 27-a, prior to the beginning of the Trademark Claims Service or Sunrise IP
protection program[s], Afilias will support the reservation of names in accordance with the new
gTLD Registry Agreement, Specification 5. After the quiet period for Sunrise closes, there will be
a land rush period providing applicants the opportunity to register their domain prior to general
availability; this will be followed by a 30 day quiet period.


Registration period

After the IP protection programs, the landrush and the general launch, eligible registrants may
choose an accredited registrar to register a domain name. The registrar will check availability on
the requested domain name and if available, will collect specific objects such as, the required
contact and host information from the registrant. The registrar will then provision the
information into the registry system using standard Extensible Provisioning Protocol ("EPP")
commands through a secure connection to the registry backend service provider.

When the domain is created, the standard five day Add Grace Period begins, the domain and contact
information are available in WHOIS, and normal operating EPP domain statuses will apply. Other
specifics regarding registration rules for an active domain include:
• The domain must be unique;
• Restricted or reserved domains cannot be registered;
• The domain can be registered from 1-10 years;
• The domain can be renewed at any time for 1-10 years, but cannot exceed 10 years;
• The domain can be explicitly deleted at any time;
• The domain can be transferred from one registrar to another except during the first 60 days
following a successful registration or within 60 days following a transfer; and,
Contacts and hosts can be modified at any time.

The following describe the domain status values recognized in WHOIS when using the EPP protocol
following RFC 5731.
• OK or Active: This is the normal status for a domain that has no pending operations or
restrictions.
• Inactive: The domain has no delegated name servers.
• Locked: No action can be taken on the domain. The domain cannot be renewed, transferred,
updated, or deleted. No objects such as contacts or hosts can be associated to, or disassociated
from the domain. This status includes: Delete Prohibited / Server Delete Prohibited, Update
Prohibited / Server Update Prohibited, Transfer Prohibited, Server Transfer Prohibited, Renew
Prohibited, Server Renew Prohibited.
• Hold: The domain will not be included in the zone. This status includes: Client Hold, Server
Hold.
• Transfer Prohibited: The domain cannot be transferred away from the sponsoring registrar. This
status includes: Client Transfer Prohibited, Server Transfer Prohibited.

The following describe the registration operations that apply to the domain name during the

registration period.

a. Domain modifications: This operation allows for modifications or updates to the domain attributes to include:
i. Registrant Contact
ii. Admin Contact
iii. Technical Contact
iv. Billing Contact
v. Host or nameservers
vi. Authorization information
vii. Associated status values

A domain with the EPP status of Client Update Prohibited or Server Update Prohibited may not be modified until the status is removed.

b. Domain renewals: This operation extends the registration period of a domain by changing the expiration date. The following rules apply:
i. A domain can be renewed at any time during its registration term,
ii. The registration term cannot exceed a total of 10 years.

A domain with the EPP status of Client Renew Prohibited or Server Renew Prohibited cannot be renewed.

c. Domain deletions: This operation deletes the domain from the Shared Registry Services (SRS). The following rules apply:
i. A domain can be deleted at any time during its registration term, f the domain is deleted during the Add Grace Period or the Renew/Extend Grace Period, the sponsoring registrar will receive a credit,
ii. A domain cannot be deleted if it has "child" nameservers that are associated to other domains.

A domain with the EPP status of Client Delete Prohibited or Server Delete Prohibited cannot be deleted.

d. Domain transfers: A transfer of the domain from one registrar to another is conducted by following the steps below.
i. The registrant must obtain the applicable  code from the sponsoring (losing) registrar.
• Every domain name has an authInfo code as per EPP RFC 5731. The authInfo code is a six- to 16-character code assigned by the registrar at the time the name was created. Its purpose is to aid identification of the domain owner so proper authority can be established (it is the "password" to the domain).
• Under the Registry-Registrar Agreement, registrars will be required to provide a copy of the authInfo code to the domain registrant upon his or her request.
ii. The registrant must provide the authInfo code to the new (gaining) registrar, who will then initiate a domain transfer request. A transfer cannot be initiated without the authInfo code.
• Every EPP  command must contain the authInfo code or the request will fail. The authInfo code represents authority to the registry to initiate a transfer.
iii. Upon receipt of a valid transfer request, the registry automatically asks the sponsoring (losing) registrar to approve the request within five calendar days.
• When a registry receives a transfer request the domain cannot be modified, renewed or deleted until the request has been processed. This status must not be combined with either Client Transfer Prohibited or Server Transfer Prohibited status.
• If the sponsoring (losing) registrar rejects the transfer within five days, the transfer request is cancelled. A new domain transfer request will be required to reinitiate the process.
• If the sponsoring (losing) registrar does not approve or reject the transfer within five days, the registry automatically approves the request.
iv. After a successful transfer, it is strongly recommended that registrars change the authInfo code, so that the prior registrar or registrant cannot use it anymore.
v. Registrars must retain all transaction identifiers and codes associated with successful domain object transfers and protect them from disclosure.
vi. Once a domain is successfully transferred the status of TRANSFERPERIOD is added to the domain for a period of five days.
vii. Successful transfers will result in a one year term extension (resulting in a maximum total of 10 years), which will be charged to the gaining registrar.

e. Bulk transfer: Afilias supports bulk transfer functionality within the SRS for situations where

ICANN may request the registry to perform a transfer of some or all registered objects (includes domain, contact and host objects) from one registrar to another registrar. Once a bulk transfer has been executed, expiry dates for all domain objects remain the same, and all relevant states of each object type are preserved. In some cases the gaining and the losing registrar as well as the registry must approved bulk transfers. A detailed log is captured for each bulk transfer process and is archived for audit purposes.

Afilias will support ICANN's Transfer Dispute Resolution Process. Afilias will also respond to Requests for Enforcement (law enforcement or court orders) and will follow that process.

1. Auto-renew grace period
The Auto-Renew Grace Period displays as AUTORENEWPERIOD in WHOIS. An auto-renew must be requested by the registrant through the sponsoring registrar and occurs if a domain name registration is not explicitly renewed or deleted by the expiration date and is set to a maximum of 45 calendar days. In this circumstance the registration will be automatically renewed by the registry system the first day after the expiration date. If a Delete, Extend, or Transfer occurs within the AUTORENEWPERIOD the following rules apply:
i. Delete. If a domain is deleted the sponsoring registrar at the time of the deletion receives a credit for the auto-renew fee. The domain then moves into the Redemption Grace Period with a status of PENDING DELETE RESTORABLE.
ii. Renew/Extend. A domain can be renewed as long as the total term does not exceed 10 years. The account of the sponsoring registrar at the time of the extension will be charged for the additional number of years the registration is renewed.
iii. Transfer (other than ICANN-approved bulk transfer). If a domain is transferred, the losing registrar is credited for the auto-renew fee, and the year added by the operation is cancelled. As a result of the transfer, the expiration date of the domain is extended by minimum of one year as long as the total term does not exceed 10 years. The gaining registrar is charged for the additional transfer year(s) even in cases where a full year is not added because of the maximum 10 year registration restriction.

2. Redemption grace period
During this period, a domain name is placed in the PENDING DELETE RESTORABLE status when a registrar requests the deletion of a domain that is not within the Add Grace Period. A domain can remain in this state for up to 30 days and will not be included in the zone file. The only action a registrar can take on a domain is to request that it be restored. Any other registrar requests to modify or otherwise update the domain will be rejected. If the domain is restored it moves into PENDING RESTORE and then OK. After 30 days if the domain is not restored it moves into PENDING DELETE SCHEDULED FOR RELEASE before the domain is released back into the pool of available domains.

3. Pending delete
During this period, a domain name is placed in PENDING DELETE SCHEDULED FOR RELEASE status for five days, and all Internet services associated with the domain will remain disabled and domain cannot be restored. After five days the domain is released back into the pool of available domains.


Other grace periods

All ICANN required grace periods will be implemented in the registry backend service provider's system including the Add Grace Period (AGP), Renew/Extend Grace Period (EGP), Transfer Grace Period (TGP), Auto-Renew Grace Period (ARGP), and Redemption Grace Period (RGP). The lengths of grace periods are configurable in the registry system. At this time, the grace periods will be implemented following other gTLDs such as .ORG. More than one of these grace periods may be in effect at any one time. The following are accompanying grace periods to the registration lifecycle.

        Add grace period
The Add Grace Period displays as ADDPERIOD in WHOIS and is set to five calendar days following the initial registration of a domain. If the domain is deleted by the registrar during this period, the registry provides a credit to the registrar for the cost of the registration. If a Delete, Renew/Extend, or Transfer operation occurs within the five calendar days, the following rules apply.
i. Delete. If a domain is deleted within this period the sponsoring registrar at the time of the deletion is credited for the amount of the registration. The domain is deleted from the registry

backend service provider's database and is released back into the pool of available domains.
ii. Renew/Extend. If the domain is renewed within this period and then deleted, the sponsoring
registrar will receive a credit for both the registration and the extended amounts. The account of
the sponsoring registrar at the time of the renewal will be charged for the initial registration
plus the number of years the registration is extended. The expiration date of the domain
registration is extended by that number of years as long as the total term does not exceed 10
years.
iii. Transfer (other than ICANN-approved bulk transfer). Transfers under Part A of the ICANN
Policy on Transfer of Registrations between registrars may not occur during the ADDPERIOD or at
any other time within the first 60 days after the initial registration. Enforcement is the
responsibility of the registrar sponsoring the domain name registration and is enforced by the
SRS.

#### Renew / extend grace period

The Renew / Extend Grace Period displays as RENEWPERIOD in WHOIS and is set to five calendar days
following an explicit renewal on the domain by the registrar. If a Delete, Extend, or Transfer
occurs within the five calendar days, the following rules apply:
i. Delete. If a domain is deleted within this period the sponsoring registrar at the time of the
deletion receives a credit for the renewal fee. The domain then moves into the Redemption Grace
Period with a status of PENDING DELETE RESTORABLE.
ii. Renew/Extend. A domain registration can be renewed within this period as long as the total
term does not exceed 10 years. The account of the sponsoring registrar at the time of the
extension will be charged for the additional number of years the registration is renewed.
iii. Transfer (other than ICANN-approved bulk transfer). If a domain is transferred within the
Renew/Extend Grace Period, there is no credit to the losing registrar for the renewal fee. As a
result of the transfer, the expiration date of the domain registration is extended by a minimum of
one year as long as the total term for the domain does not exceed 10 years.
If a domain is auto-renewed, then extended, and then deleted within the Renew/Extend Grace Period,
the registrar will be credited for any auto-renew fee charged and the number of years for the
extension. The years that were added to the domain's expiration as a result of the auto-renewal
and extension are removed. The deleted domain is moved to the Redemption Grace Period with a
status of PENDING DELETE RESTORABLE.

#### Transfer Grace Period

The Transfer Grace period displays as TRANSFERPERIOD in WHOIS and is set to five calendar days
after the successful transfer of domain name registration from one registrar to another registrar.
Transfers under Part A of the ICANN Policy on Transfer of Registrations between registrars may not
occur during the TRANSFERPERIOD or within the first 60 days after the transfer. If a Delete or
Renew/Extend occurs within that five calendar days, the following rules apply:
i. Delete. If the domain is deleted by the new sponsoring registrar during this period, the
registry provides a credit to the registrar for the cost of the transfer. The domain then moves
into the Redemption Grace Period with a status of PENDING DELETE RESTORABLE.
ii. Renew/Extend. If a domain registration is renewed within the Transfer Grace Period, there is
no credit for the transfer. The registrar's account will be charged for the number of years the
registration is renewed. The expiration date of the domain registration is extended by the renewal
years as long as the total term does not exceed 10 years.


Registration lifecycle resources

Since its founding, Afilias is focused on delivering secure, stable and reliable registry
services. Several essential management and staff who designed and launched the Afilias registry in
2001 and expanded the number of TLDs supported, all while maintaining strict service levels over
the past decade, are still in place today. This experiential continuity will endure for the
implementation and on-going maintenance of this TLD. Afilias operates in a matrix structure, which
allows its staff to be allocated to various critical functions in both a dedicated and a shared
manner. With a team of specialists and generalists, the Afilias project management methodology
allows efficient and effective use of our staff in a focused way. Virtually all Afilias resource
are involved in the registration lifecycle of domains.

There are a few areas where registry staff devote resources to registration lifecycle issues:
a. Supporting Registrar Transfer Disputes. The registry operator will have a compliance staffer
handle these disputes as they arise; they are very rare in the existing gTLDs.
b. Afilias has its development and quality assurance departments on hand to modify the grace
period functionality as needed, if ICANN issues new Consensus Policies or the RFCs change.

Afilias has more than 30 staff members in these departments.

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28. Abuse Prevention and Mitigation:  Applicants should describe the proposed policies and procedures to minimize abusive registrations and other activities that have a negative impact on Internet users. A complete answer should include, but is not limited to:

- An implementation plan to establish and publish on its website a single abuse point of contact responsible for addressing matters requiring expedited attention and providing a timely response to abuse complaints concerning all names registered in the TLD through all registrars of record, including those involving a reseller;
- Policies for handling complaints regarding abuse;
- Proposed measures for removal of orphan glue records for names removed from the zone when provided with evidence in written form that the glue is present in connection with malicious conduct (see Specification 6); and
- Resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area).

To be eligible for a score of 2, answers must include measures to promote Whois accuracy as well as measures from one other area as described below.

- Measures to promote Whois accuracy (can be undertaken by the registry directly or by registrars via requirements in the Registry-Registrar Agreement (RRA)) may include, but are not limited to:
    - Authentication of registrant information as complete and accurate at time of registration. Measures to accomplish this could include performing background checks, verifying all contact information of principals mentioned in registration data, reviewing proof of establishment documentation, and other means
    - Regular monitoring of registration data for accuracy and completeness, employing authentication methods, and establishing policies and procedures to address domain names with inaccurate or incomplete Whois data; and
    - If relying on registrars to enforce measures, establishing policies and procedures to ensure compliance, which may include audits, financial incentives, penalties, or other means. Note that the requirements of the RAA will continue to apply to all ICANN-accredited registrars.
- A description of policies and procedures that define malicious or abusive behavior, capture metrics, and establish Service Level Requirements for resolution, including service levels for responding to law enforcement requests. This may include rapid takedown or suspension systems and sharing information regarding malicious or abusive behavior with industry partners;
- Adequate controls to ensure proper access to domain functions (can be undertaken by the registry directly or by registrars via requirements in the Registry-Registrar Agreement (RRA)) may include, but are not limited to:
    - Requiring multi-factor authentication (i.e., strong passwords, tokens, one-time passwords) from registrants to process update, transfers, and deletion requests;

- Requiring multiple, unique points of contact to request and/or approve update, transfer, and deletion requests; and
- Requiring the notification of multiple, unique points of contact when a domain has been updated, transferred, or deleted.

A complete answer is expected to be no more than 20 pages.

Afilias will take the requisite operational and technical steps to promote WHOIS data accuracy, limit domain abuse, remove outdated and inaccurate data, and other security measures to ensure the integrity of the TLD. The specific measures include, but are not limited to:
• Posting a TLD Anti-Abuse Policy that clearly defines abuse, and provide point-of-contact information for reporting suspected abuse;
• Committing to rapid identification and resolution of abuse, including suspensions;
• Ensuring completeness of WHOIS information at the time of registration;
• Publishing and maintaining procedures for removing orphan glue records for names removed from the zone, and;
• Establishing measures to deter WHOIS abuse, including rate-limiting, determining data syntax validity, and implementing and enforcing requirements from the Registry-Registrar Agreement.


Abuse policy

The Anti-Abuse Policy stated below will be enacted under the contractual authority of the registry operator through the Registry-Registrar Agreement, and the obligations will be passed on to and made binding upon registrants. This policy will be posted on the TLD web site along with contact information for registrants or users to report suspected abuse.

The policy is designed to address the malicious use of domain names. The registry operator and its registrars will make reasonable attempts to limit significant harm to Internet users. This policy is not intended to take the place of the Uniform Domain Name Dispute Resolution Policy (UDRP) or the Uniform Rapid Suspension System (URS), and it is not to be used as an alternate form of dispute resolution or as a brand protection mechanism. Its intent is not to burden law-abiding or innocent registrants and domain users; rather, the intent is to deter those who use domain names maliciously by engaging in illegal or fraudulent activity.

Repeat violations of the abuse policy will result in a case-by-case review of the abuser(s), and the registry operator reserves the right to escalate the issue, with the intent of levying sanctions that are allowed under the TLD anti-abuse policy.

The below policy is a recent version of the policy that has been used by the .INFO registry since 2008, and the .ORG registry since 2009. It has proven to be an effective and flexible tool.

      .WEB Anti-Abuse Policy
The following Anti-Abuse Policy is effective upon launch of the TLD. Malicious use of domain names will not be tolerated. The nature of such abuses creates security and stability issues for the registry, registrars, and registrants, as well as for users of the Internet in general. The registry operator definition of abusive use of a domain includes, without limitation, the following:
• Illegal or fraudulent actions;
• Spam: The use of electronic messaging systems to send unsolicited bulk messages. The term applies to email spam and similar abuses such as instant messaging spam, mobile messaging spam, and the spamming of web sites and Internet forums;
• Phishing: The use of counterfeit web pages that are designed to trick recipients into divulging sensitive data such as personally identifying information, usernames, passwords, or financial data;
• Pharming: The redirecting of unknowing users to fraudulent sites or services, typically through, but not limited to, DNS hijacking or poisoning;
• Willful distribution of malware: The dissemination of software designed to infiltrate or damage a computer system without the owner's informed consent. Examples include, without limitation, computer viruses, worms, keyloggers, and Trojan horses.
• Malicious fast-flux hosting: Use of fast-flux techniques with a botnet to disguise the location of web sites or other Internet services, or to avoid detection and mitigation efforts, or to host

illegal activities.
• Botnet command and control: Services run on a domain name that are used to control a collection of compromised computers or "zombies," or to direct distributed denial-of-service attacks (DDoS attacks);
• Illegal Access to Other Computers or Networks: Illegally accessing computers, accounts, or networks belonging to another party, or attempting to penetrate security measures of another individual's system (often known as "hacking"). Also, any activity that might be used as a precursor to an attempted system penetration (e.g., port scan, stealth scan, or other information gathering activity).

Pursuant to the Registry-Registrar Agreement, registry operator reserves the right at its sole discretion to deny, cancel, or transfer any registration or transaction, or place any domain name(s) on registry lock, hold, or similar status, that it deems necessary: (1) to protect the integrity and stability of the registry; (2) to comply with any applicable laws, government rules or requirements, requests of law enforcement, or any dispute resolution process; (3) to avoid any liability, civil or criminal, on the part of registry operator, as well as its affiliates, subsidiaries, officers, directors, and employees; (4) per the terms of the registration agreement and this Anti-Abuse Policy, or (5) to correct mistakes made by registry operator or any registrar in connection with a domain name registration. Registry operator also reserves the right to place upon registry lock, hold, or similar status a domain name during resolution of a dispute.

The policy stated above will be accompanied by notes about how to submit a report to the registry operator's abuse point of contact, and how to report an orphan glue record suspected of being used in connection with malicious conduct (see below).


Abuse point of contact and procedures for handling abuse complaints

The registry operator will establish an abuse point of contact.  This contact will be a role-based e-mail address of the form "abuse@registry.WEB". This e-mail address will allow multiple staff members to monitor abuse reports on a 24x7 basis, and then work toward closure of cases as each situation calls for. For tracking purposes, the registry operator will have a ticketing system with which all complaints will be tracked internally. The reporter will be provided with the ticket reference identifier for potential follow-up. Afilias will integrate its existing ticketing system to ensure uniform tracking and handling of the complaint. This role-based approach has been used successfully by ISPs, e-mail service providers, and registrars for many years, and is considered a global best practice.

The registry operator's designated abuse handlers will then evaluate complaints received via the abuse system address. They will decide whether a particular issue is of concern, and decide what action, if any, is appropriate.

In general, the registry operator will find itself receiving abuse reports from a wide variety of parties, including security researchers and Internet security companies, financial institutions such as banks, Internet users, and law enforcement agencies among others. Some of these parties may provide good forensic data or supporting evidence of the malicious behavior. In other cases, the party reporting an issue may not be familiar with how to provide such data or proof of malicious behavior. It is expected that a percentage of abuse reports to the registry operator will not be actionable, because there will not be enough evidence to support the complaint (even after investigation), and because some reports or reporters will simply not be credible.

The security function includes a communication and outreach function, with information sharing with industry partners regarding malicious or abusive behavior, in order to ensure coordinated abuse mitigation across multiple TLDs.

Assessing abuse reports requires great care, and the registry operator will rely upon professional, trained investigators who are versed in such matters. The goals are accuracy, good record-keeping, and a zero false-positive rate so as not to harm innocent registrants.

Different types of malicious activities require different methods of investigation and documentation. Further, the registry operator expects to face unexpected or complex situations that call for professional advice, and will rely upon professional, trained investigators as needed.

In general, there are two types of domain abuse that must be addressed:

a) Compromised domains. These domains have been hacked or otherwise compromised by criminals, and the registrant is not responsible for the malicious activity taking place on the domain. For example, the majority of domain names that host phishing sites are compromised.  The goal in such cases is to get word to the registrant (usually via the registrar) that there is a problem that needs attention with the expectation that the registrant will address the problem in a timely manner. Ideally such domains do not get suspended, since suspension would disrupt legitimate activity on the domain.

b) Malicious registrations. These domains are registered by malefactors for the purpose of abuse. Such domains are generally targets for suspension, since they have no legitimate use.

The standard procedure is that the registry operator will forward a credible alleged case of malicious domain name use to the domain's sponsoring registrar with a request that the registrar investigate the case and act appropriately. The registrar will be provided evidence collected as a result of the investigation conducted by the trained abuse handlers. As part of the investigation, if inaccurate or false WHOIS registrant information is detected, the registrar is notified about this.  The registrar is the party with a direct relationship with—and a direct contract with—the registrant. The registrar will also have vital information that the registry operator will not, such as:

• Details about the domain purchase, such as the payment method used (credit card, PayPal, etc.);
• The identity of a proxy-protected registrant;
• The purchaser's IP address;
• Whether there is a reseller involved, and;
• The registrant's past sales history and purchases in other TLDs (insofar as the registrar can determine this).

Registrars do not share the above information with registry operators due to privacy and liability concerns, among others. Because they have more information with which to continue the investigation, and because they have a direct relationship with the registrant, the registrar is in the best position to evaluate alleged abuse. The registrar can determine if the use violates the registrar's legal terms of service or the registry Anti-Abuse Policy, and can decide whether or not to take any action. While the language and terms vary, registrars will be expected to include language in their registrar-registrant contracts that indemnifies the registrar if it takes action, and allows the registrar to suspend or cancel a domain name; this will be in addition to the registry Anti-Abuse Policy. Generally, registrars can act if the registrant violates the registrar's terms of service, or violates ICANN policy, or if illegal activity is involved, or if the use violates the registry's Anti-Abuse Policy.

If a registrar does not take action within a time period indicated by the registry operator (usually 24 hours), the registry operator might then decide to take action itself. At all times, the registry operator reserves the right to act directly and immediately if the potential harm to Internet users seems significant or imminent, with or without notice to the sponsoring registrar.

The registry operator will be prepared to call upon relevant law enforcement bodies as needed. There are certain cases, for example, Illegal pharmacy domains, where the registry operator will contact the Law Enforcement Agencies to share information about these domains, provide all the evidence collected and work closely with them before any action will be taken for suspension. The specific action is often dependent upon the jurisdiction of which the registry operator, although the operator in all cases will adhere to applicable laws and regulations.

When valid court orders or seizure warrants are received from courts or law enforcement agencies of relevant jurisdiction, the registry operator will order execution in an expedited fashion. Compliance with these will be a top priority and will be completed as soon as possible and within the defined timelines of the order. There are certain cases where Law Enforcement Agencies request information about a domain including but not limited to:

• Registration information
• History of a domain, including recent updates made
• Other domains associated with a registrant's account
• Patterns of registrant portfolio

Requests for such information is handled on a priority basis and sent back to the requestor as soon as possible. Afilias sets a goal to respond to such requests within 24 hours.

The registry operator may also engage in proactive screening of its zone for malicious use of the domains in the TLD, and report problems to the sponsoring registrars. The registry operator could take advantage of a combination of the following resources, among others:

• Blocklists of domain names and nameservers published by organizations such as SURBL and Spamhaus.
• Anti-phishing feeds, which will provide URLs of compromised and maliciously registered domains being used for phishing.
• Analysis of registration or DNS query data [DNS query data received by the TLD nameservers.]

The registry operator will keep records and track metrics regarding abuse and abuse reports. These will include:
• Number of abuse reports received by the registry's abuse point of contact described above;
• Number of cases and domains referred to registrars for resolution;
• Number of cases and domains where the registry took direct action;
• Resolution times;
• Number of domains in the TLD that have been blacklisted by major anti-spam blocklist providers, and;
• Phishing site uptimes in the TLD.


Removal of orphan glue records

By definition, orphan glue records used to be glue records. Glue records are related to delegations and are necessary to guide iterative resolvers to delegated nameservers. A glue record becomes an orphan when its parent nameserver record is removed without also removing the corresponding glue record. (Please reference the ICANN SSAC paper SAC048 at: http://www.icann.org/en/committees/security/sac048.pdf.) Orphan glue records may be created when a domain (example.tld) is placed on EPP ServerHold or ClientHold status. When placed on Hold, the domain is removed from the zone and will stop resolving. However, any child nameservers (now orphan glue) of that domain (e.g., ns1.example.tld) are left in the zone. It is important to keep these orphan glue records in the zone so that any innocent sites using that nameserver will continue to resolve. This use of Hold status is an essential tool for suspending malicious domains.

Afilias observes the following procedures, which are being followed by other registries and are generally accepted as DNS best practices. These procedures are also in keeping with ICANN SSAC recommendations.

When a request to delete a domain is received from a registrar, the registry first checks for the existence of glue records. If glue records exist, the registry will check to see if other domains in the registry are using the glue records. If other domains in the registry are using the glue records then the request to delete the domain will fail until no other domains are using the glue records. If no other domains in the registry are using the glue records then the glue records will be removed before the request to delete the domain is satisfied. If no glue records exist then the request to delete the domain will be satisfied.

If a registrar cannot delete a domain because of the existence of glue records that are being used by other domains, then the registrar may refer to the zone file or the "weekly domain hosted by nameserver report" to find out which domains are using the nameserver in question and attempt to contact the corresponding registrar to request that they stop using the nameserver in the glue record. The registry operator does not plan on performing mass updates of the associated DNS records.

The registry operator will accept, evaluate, and respond appropriately to complaints that orphan glue is being used maliciously. Such reports should be made in writing to the registry operator, and may be submitted to the registry's abuse point-of-contact. If it is confirmed that an orphan glue record is being used in connection with malicious conduct, the registry operator will have the orphan glue record removed from the zone file. Afilias has the technical ability to execute such requests as needed.


Methods to promote WHOIS accuracy

The creation and maintenance of accurate WHOIS records is an important part of registry management. As described in our response to question #26, WHOIS, the registry operator will manage a secure, robust and searchable WHOIS service for this TLD.

        WHOIS data accuracy

The registry operator will offer a "thick" registry system. In this model, all key contact details for each domain name will be stored in a central location by the registry. This allows better access to domain data, and provides uniformity in storing the information. The registry operator will ensure that the required fields for WHOIS data (as per the defined policies for the TLD) are enforced at the registry level. This ensures that the registrars are providing required domain registration data.  Fields defined by the registry policy to be mandatory are documented as such and must be submitted by registrars. The Afilias registry system verifies formats for relevant individual data fields (e.g. e-mail, and phone/fax numbers). Only valid country codes are allowed as defined by the ISO 3166 code list. The Afilias WHOIS system is extensible, and is capable of using the VAULT system, described further below.

Similar to the centralized abuse point of contact described above, the registry operator can institute a contact email address which could be utilized by third parties to submit complaints for inaccurate or false WHOIS data detected. This information will be processed by Afilias' support department and forwarded to the registrars. The registrars can work with the registrants of those domains to address these complaints. Afilias will audit registrars on a yearly basis to verify whether the complaints being forwarded are being addressed or not. This functionality, available to all registry operators, is activated based on the registry operator's business policy.

Afilias also incorporates a spot-check verification system where a randomly selected set of domain names are checked periodically for accuracy of WHOIS data. Afilias' .PRO registry system incorporates such a verification system whereby 1% of total registrations or 100 domains, whichever number is larger, are spot-checked every month to verify the domain name registrant's critical information provided with the domain registration data. With both a highly qualified corps of engineers and a 24x7 staffed support function, Afilias has the capacity to integrate such spot-check functionality into this TLD, based on the registry operator's business policy. Note: This functionality will not work for proxy protected WHOIS information, where registrars or their resellers have the actual registrant data. The solution to that problem lies with either registry or registrar policy, or a change in the general marketplace practices with respect to proxy registrations.

Finally, Afilias' registry systems have a sophisticated set of billing and pricing functionality which aids registry operators who decide to provide a set of financial incentives to registrars for maintaining or improving WHOIS accuracy. For instance, it is conceivable that the registry operator may decide to provide a discount for the domain registration or renewal fees for validated registrants, or levy a larger cost for the domain registration or renewal of proxy domain names.  The Afilias system has the capability to support such incentives on a configurable basis, towards the goal of promoting better WHOIS accuracy.

        Role of registrars
As part of the RRA (Registry Registrar Agreement), the registry operator will require the registrar to be responsible for ensuring the input of accurate WHOIS data by their registrants. The Registrar/Registered Name Holder Agreement will include a specific clause to ensure accuracy of WHOIS data, and to give the registrar rights to cancel or suspend registrations if the Registered Name Holder fails to respond to the registrar's query regarding accuracy of data. ICANN's WHOIS Data Problem Reporting System (WDPRS) will be available to those who wish to file WHOIS inaccuracy reports, as per ICANN policy (http://wdprs.internic.net/).


Controls to ensure proper access to domain functions

Several measures are in place in the Afilias registry system to ensure proper access to domain functions, including authentication provisions in the RRA relative to notification and contact updates via use of AUTH-INFO codes.

IP address access control lists, TLS/SSL certificates and proper authentication are used to control access to the registry system. Registrars are only given access to perform operations on the objects they sponsor.

Every domain will have a unique AUTH-INFO code. The AUTH-INFO code is a 6- to 16-character code assigned by the registrar at the time the name is created. Its purpose is to aid identification of the domain owner so proper authority can be established. It is the "password" to the domain name. Registrars must use the domain's password in order to initiate a registrar-to-registrar transfer. It is used to ensure that domain updates (update contact information, transfer, or deletion) are

undertaken by the proper registrant, and that this registrant is adequately notified of domain update activity. Only the sponsoring registrar of a domain has access to the domain's AUTH-INFO code stored in the registry, and this is accessible only via encrypted, password-protected channels.

Information about other registry security measures such as encryption and security of registrar channels are confidential to ensure the security of the registry system. The details can be found in the response to question #30b.

Validation and abuse mitigation mechanisms

Afilias has developed advanced validation and abuse mitigation mechanisms. These capabilities and mechanisms are described below. These services and capabilities are discretionary and may be utilized by the registry operator based on their policy and business need.

Afilias has the ability to analyze the registration data for known patterns at the time of registration. A database of these known patterns is developed from domains and other associated objects (e.g., contact information) which have been previously detected and suspended after being flagged as abusive. Any domains matching the defined criteria can be flagged for investigation. Once analyzed and confirmed by the domain anti-abuse team members, these domains may be suspended. This provides proactive detection of abusive domains.

Provisions are available to enable the registry operator to only allow registrations by pre-authorized and verified contacts. These verified contacts are given a unique code that can be used for registration of new domains.

Registrant pre-verification and authentication

One of the systems that could be used for validity and identity authentication is VAULT (Validation and Authentication Universal Lookup). It utilizes information obtained from a series of trusted data sources with access to billions of records containing data about individuals for the purpose of providing independent age and id verification as well as the ability to incorporate additional public or private data sources as required. At present it has the following: US Residential Coverage - 90% of Adult Population and also International Coverage - Varies from Country to Country with a minimum of 80% coverage (24 countries, mostly European).

Various verification elements can be used. Examples might include applicant data such as name, address, phone, etc. Multiple methods could be used for verification include integrated solutions utilizing API (XML Application Programming Interface) or sending batches of requests.

• Verification and Authentication requirements would be based on TLD operator requirements or specific criteria.
• Based on required WHOIS Data; registrant contact details (name, address, phone)
• If address/ZIP can be validated by VAULT, the validation process can continue (North America +25 International countries)
• If in-line processing and registration and EPP/API call would go to the verification clearinghouse and return up to 4 challenge questions.
• If two-step registration is required, then registrants would get a link to complete the verification at a separate time. The link could be specific to a domain registration and pre-populated with data about the registrant.
• If WHOIS data is validated a token would be generated and could be given back to the registrar which registered the domain.
• WHOIS data would reflect the Validated Data or some subset, i.e., fields displayed could be first initial and last name, country of registrant and date validated. Other fields could be generic validation fields much like a "privacy service".
• A "Validation Icon" customized script would be sent to the registrants email address. This could be displayed on the website and would be dynamically generated to avoid unauthorized use of the Icon. When clicked on the Icon would should limited WHOIS details i.e. Registrant: jdoe, Country: USA, Date Validated: March 29, 2011, as well as legal disclaimers.
• Validation would be annually renewed, and validation date displayed in the WHOIS.

Abuse prevention resourcing plans

Since its founding, Afilias is focused on delivering secure, stable and reliable registry services. Several essential management and staff who designed and launched the Afilias registry in 2001 and expanded the number of TLDs supported, all while maintaining strict service levels over the past decade, are still in place today. This experiential continuity will endure for the implementation and on-going maintenance of this TLD. Afilias operates in a matrix structure, which allows its staff to be allocated to various critical functions in both a dedicated and a shared manner. With a team of specialists and generalists, the Afilias project management methodology allows efficient and effective use of our staff in a focused way. Abuse prevention and detection is a function that is staffed across the various groups inside Afilias, and requires a team effort when abuse is either well hidden or widespread, or both. While all of Afilias' 200+ employees are charged with responsibility to report any detected abuse, the engineering and analysis teams, numbering over 30, provide specific support based on the type of abuse and volume and frequency of analysis required. The Afilias security and support teams have the authority to initiate mitigation.

Afilias has developed advanced validation and abuse mitigation mechanisms. These capabilities and mechanisms are described below. These services and capabilities are discretionary and may be utilized by the registry operator based on their policy and business need.

This TLD's anticipated volume of registrations in the first three years of operations is listed in response #46. Afilias' anti-abuse function anticipates the expected volume and type of registrations, and together will adequately cover the staffing needs for this TLD. The registry operator will maintain an abuse response team, which may be a combination of internal staff and outside specialty contractors, adjusting to the needs of the size and type of TLD. The team structure planned for this TLD is based on several years of experience responding to, mitigating, and managing abuse for TLDs of various sizes. The team will generally consist of abuse handlers (probably internal), a junior analyst, (either internal or external), and a senior security consultant (likely an external resource providing the registry operator with extra expertise as needed). These responders will be specially trained in the investigation of abuse complaints, and will have the latitude to act expeditiously to suspend domain names (or apply other remedies) when called for.

The exact resources required to maintain an abuse response team must change with the size and registration procedures of the TLD. An initial abuse handler is necessary as a point of contact for reports, even if a part-time responsibility. The abuse handlers monitor the abuse email address for complaints and evaluate incoming reports from a variety of sources. A large percentage of abuse reports to the registry operator may be unsolicited commercial email. The designated abuse handlers can identify legitimate reports and then decide what action is appropriate, either to act upon them, escalate to a security analyst for closer investigation, or refer them to registrars as per the above-described procedures. A TLD with rare cases of abuse would conform to this structure.

If multiple cases of abuse within the same week occur regularly, the registry operator will consider staffing internally an additional security analyst to investigate the complaints as they become more frequent. Training an abuse analyst requires 3-6 months and likely requires the active guidance of an experienced senior security analyst for guidance and verification of assessments and recommendations being made.

If this TLD were to regularly experience multiple cases of abuse within the same day, a full-time senior security analyst would likely be necessary. A senior security analyst capable of fulfilling this role should have several years of experience and able to manage and train the internal abuse response team.

The abuse response team will also maintain subscriptions for several security information services, including the blocklists from organizations like SURBL and Spamhaus and anti-phishing and other domain related abuse (malware, fast-flux etc.) feeds. The pricing structure of these services may depend on the size of the domain and some services will include a number of rapid suspension requests for use as needed.

For a large TLD, regular audits of the registry data are required to maintain control over abusive registrations. When a registrar with a significant number of registrations has been compromised or acted maliciously, the registry operator may need to analyze a set of registration or DNS query data. A scan of all the domains of a registrar is conducted only as needed. Scanning and analysis

for a large registrar may require as much as a week of full-time effort for a dedicated machine
and team.

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29. Rights Protection Mechanisms: Applicants must describe how their registry will comply with policies and practices that minimize abusive registrations and other activities that affect the legal rights of others, such as the Uniform Domain Name Dispute Resolution Policy (UDRP), Uniform Rapid Suspension (URS) system, and Trademark Claims and Sunrise services at startup.

A complete answer should include:

- A description of how the registry operator will implement safeguards against allowing unqualified registrations (e.g., registrations made in violation of the registry's eligibility restrictions or policies), and reduce opportunities for behaviors such as phishing or pharming. At a minimum, the registry operator must offer a Sunrise period and a Trademark Claims service during the required time periods, and implement decisions rendered under the URS on an ongoing basis; and
- A description of resourcing plans for the initial implementation of, and ongoing maintenance for, this aspect of the criteria (number and description of personnel roles allocated to this area).

>To be eligible for a score of 2, answers must also include additional measures specific to rights protection, such as abusive use policies, takedown procedures, registrant pre-verification, or authentication procedures, or other covenants.

A complete answer is expected to be no more than 10 pages.

Rights protection is a core responsibility of the TLD operator, and is supported by a fully-
developed plan for rights protection that includes:
• Establishing mechanisms to prevent unqualified registrations (e.g., registrations made in
violation of the registry's eligibility restrictions or policies);
• Implementing a robust Sunrise program, utilizing the Trademark Clearinghouse, the services of
one of ICANN's approved dispute resolution providers, a trademark validation agent, and drawing
upon sunrise policies and rules used successfully in previous gTLD launches;
• Implementing a professional trademark claims program that utilizes the Trademark Clearinghouse,
and drawing upon models of similar programs used successfully in previous TLD launches;
• Complying with the URS requirements;
• Complying with the UDRP;
• Complying with the PDDRP, and;
• Including all ICANN-mandated and independently developed rights protection mechanisms ("RPMs")
in the registry-registrar agreement entered into by ICANN-accredited registrars authorized to
register names in the TLD.

The response below details the rights protection mechanisms at the launch of the TLD (Sunrise and
Trademark Claims Service) which comply with rights protection policies (URS, UDRP, PDDRP, and
other ICANN RPMs), outlines additional provisions made for rights protection, and provides the
resourcing plans.


Safeguards for rights protection at the launch of the TLD

The launch of this TLD will include the operation of a trademark claims service according to the
defined ICANN processes for checking a registration request and alerting trademark holders of
potential rights infringement.

The Sunrise Period will be an exclusive period of time, prior to the opening of public

registration, when trademark and service mark holders will be able to reserve marks that are an identical match in the .WEB domain. Following the Sunrise Period, Afilias will open registration to qualified applicants.

The anticipated Rollout Schedule for the Sunrise Period will be approximately as follows:
• Launch of the TLD – Sunrise Period begins for trademark holders and service mark holders to submit registrations for their exact marks in the .ART domain.
• Quiet Period – The Sunrise Period will close and will be followed by a Quiet Period for testing and evaluation.
• Land rush period opens after the Quiet period
• Quiet period of 30 days begins after the close of Land rush
• One month after close of Quiet Period – Registration in the .ART domain will be opened to qualified applicants.

        Sunrise Period Requirements & Restrictions
Those wishing to reserve their marks in the .WEB domain during the Sunrise Period must own a current trademark or service mark listed in the Trademark Clearinghouse.

Notice will be provided to all trademark holders in the Clearinghouse if someone is seeking a Sunrise registration. This notice will be provided to holders of marks in the Clearinghouse that are an Identical Match (as defined in the Trademark Clearing House) to the name to be registered during Sunrise.

Each Sunrise registration will require a minimum term, to be determined at a later date.

Afilias will establish the following Sunrise eligibility requirements (SERs) as minimum requirements, verified by Clearinghouse data, and incorporate a Sunrise Dispute Resolution Policy (SDRP). The SERs include: (i) ownership of a mark that satisfies the criteria set forth in section 7.2 of the Trademark Clearing House specifications, (ii) description of international class of goods or services covered by registration; (iii) representation that all provided information is true and correct; and (iv) provision of data sufficient to document rights in the trademark.

The SDRP will allow challenges based on the following four grounds: (i) at time the challenged domain name was registered, the registrants did not hold a trademark registration of national effect (or regional effect) or the trademark had not been court-validated or protected by statute or treaty; (ii) the domain name is not identical to the mark on which the registrant based its Sunrise registration; (iii) the trademark registration on which the registrant based its Sunrise registration is not of national effect (or regional effect) or the trademark had not been court-validated or protected by statute or treaty; or (iv) the trademark registration on which the domain name registrant based its Sunrise registration did not issue on or before the effective date of the Registry Agreement and was not applied for on or before ICANN announced the applications received.


Ongoing rights protection mechanisms

Several mechanisms will be in place to protect rights in this TLD. As described in our responses to questions #27 and #28, measures are in place to ensure domain transfers and updates are only initiated by the appropriate domain holder, and an experienced team is available to respond to legal actions by law enforcement or court orders.

This TLD will conform to all ICANN RPMs including URS (defined below), UDRP, PDDRP, and all measures defined in Specification 7 of the new TLD agreement.

        Uniform Rapid Suspension (URS)
The registry operator will implement decisions rendered under the URS on an ongoing basis. Per the URS policy posted on ICANN's Web site as of this writing, the registry operator will receive notice of URS actions from the ICANN-approved URS providers. These emails will be directed immediately to the registry operator's support staff, which is on duty 24x7. The support staff will be responsible for creating a ticket for each case, and for executing the directives from the URS provider. All support staff will receive pertinent training.

As per ICANN's URS guidelines, within 24 hours of receipt of the notice of complaint from the URS provider, the registry operator shall "lock" the domain, meaning the registry shall restrict all changes to the registration data, including transfer and deletion of the domain names, but the

name will remain in the TLD DNS zone file and will thus continue to resolve. The support staff will "lock" the domain by associating the following EPP statuses with the domain and relevant contact objects:
• ServerUpdateProhibited, with an EPP reason code of "URS"
• ServerDeleteProhibited, with an EPP reason code of "URS"
• ServerTransferProhibited, with an EPP reason code of "URS"
• The registry operator's support staff will then notify the URS provider immediately upon locking the domain name, via email.

The registry operator's support staff will retain all copies of emails from the URS providers, assign them a tracking or ticket number, and will track the status of each opened URS case through to resolution via spreadsheet or database.

The registry operator's support staff will execute further operations upon notice from the URS providers. The URS provider is required to specify the remedy and required actions of the registry operator, with notification to the registrant, the complainant, and the registrar.

As per the URS guidelines, if the complainant prevails, the "registry operator shall suspend the domain name, which shall remain suspended for the balance of the registration period and would not resolve to the original web site. The nameservers shall be redirected to an informational web page provided by the URS provider about the URS. The WHOIS for the domain name shall continue to display all of the information of the original registrant except for the redirection of the nameservers. In addition, the WHOIS shall reflect that the domain name will not be able to be transferred, deleted or modified for the life of the registration."

        Rights protection via the RRA
The following will be memorialized and be made binding via the Registry-Registrar and Registrar-Registrant Agreements:

• The registry may reject a registration request or a reservation request, or may delete, revoke, suspend, cancel, or transfer a registration or reservation under the following criteria:
a. to enforce registry policies and ICANN requirements; each as amended from time to time;
b. that is not accompanied by complete and accurate information as required by ICANN requirements and/or registry policies or where required information is not updated and/or corrected as required by ICANN requirements and/or registry policies;
c. to protect the integrity and stability of the registry, its operations, and the TLD system;
d. to comply with any applicable law, regulation, holding, order, or decision issued by a court, administrative authority, or dispute resolution service provider with jurisdiction over the registry;
e. to establish, assert, or defend the legal rights of the registry or a third party or to avoid any civil or criminal liability on the part of the registry and/or its affiliates, subsidiaries, officers, directors, representatives, employees, contractors, and stockholders;
f. to correct mistakes made by the registry or any accredited registrar in connection with a registration; or
g. as otherwise provided in the Registry-Registrar Agreement and/or the Registrar-Registrant Agreement.


Reducing opportunities for behaviors such as phishing or pharming

In our response to question #28, the registry operator has described its anti-abuse program. Rather than repeating the policies and procedures here, please see our response to question #28 for full details.

In the case of this TLD, Afilias will apply an approach that addresses registered domain names (rather than potentially registered domains). This approach will not infringe upon the rights of eligible registrants to register domains, and allows Afilias internal controls, as well as community-developed UDRP and URS policies and procedures if needed, to deal with complaints, should there be any.

Afilias is a member of various security fora which provide access to lists of names in each TLD which may be used for malicious purposes.  Such identified names will be subject to the TLD anti-abuse policy, including rapid suspensions after due process.

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Rights protection resourcing plans

Since its founding, Afilias is focused on delivering secure, stable and reliable registry
services. Several essential management and staff who designed and launched the Afilias registry in
2001 and expanded the number of TLDs supported, all while maintaining strict service levels over
the past decade, are still in place today. This experiential continuity will endure for the
implementation and on-going maintenance of this TLD. Afilias operates in a matrix structure, which
allows its staff to be allocated to various critical functions in both a dedicated and a shared
manner. With a team of specialists and generalists, the Afilias project management methodology
allows efficient and effective use of our staff in a focused way.

Supporting RPMs requires several departments within the registry operator as well as within
Afilias. The implementation of Sunrise and the Trademark Claims service and on-going RPM
activities will pull from the 102 Afilias staff members of the engineering, product management,
development, security and policy teams at Afilias which are on duty 24x7. A trademark validator
will also be assigned within the registry operator, whose responsibilities may require as much as
50% of full-time employment if the domains under management were to exceed several million. No
additional hardware or software resources are required to support this as Afilias has fully-
operational capabilities to manage abuse today.
```

30A. Security Policy: provide a summary of the security policy for the proposed registry, including but not limited to:

- indication of any independent assessment reports demonstrating security capabilities, and provisions for periodic independent assessment reports to test security capabilities;
- description of any augmented security levels or capabilities commensurate with the nature of the applied for gTLD string, including the identification of any existing international or industry relevant security standards the applicant commits to following (reference site must be provided);
- list of commitments made to registrants concerning security levels.

To be eligible for a score of 2, answers must also include:

- Evidence of an independent assessment report demonstrating effective security controls (e.g., ISO 27001).

A summary of the above should be no more than 20 pages. Note that the complete security policy for the registry is required to be submitted in accordance with 30(b).

```
Afilias aggressively and actively protects the registry system from known threats and
vulnerabilities, and has deployed an extensive set of security protocols, policies and procedures
to thwart compromise. Afilias' robust and detailed plans are continually updated and tested to
ensure new threats are mitigated prior to becoming issues. Afilias will continue these rigorous
security measures, which include:
• Multiple layers of security and access controls throughout registry and support systems;
• 24x7 monitoring of all registry and DNS systems, support systems and facilities;
• Unique, proven registry design that ensures data integrity by granting only authorized access to
the registry system, all while meeting performance requirements;
• Detailed incident and problem management processes for rapid review, communications, and problem
resolution, and;
• Yearly external audits by independent, industry-leading firms, as well as twice-yearly internal
audits.


Security policies and protocols
```

Afilias has included security in every element of its service, including facilities, hardware, equipment, connectivity/Internet services, systems, computer systems, organizational security, outage prevention, monitoring, disaster mitigation, and escrow/insurance, from the original design, through development, and finally as part of production deployment. Examples of threats and the confidential and proprietary mitigation procedures are detailed in our response to question #30(b).

There are several important aspects of the security policies and procedures to note:
• Afilias hosts domains in data centers around the world that meet or exceed global best practices.
• Afilias' DNS infrastructure is massively provisioned as part of its DDoS mitigation strategy, thus ensuring sufficient capacity and redundancy to support new gTLDs.
• Diversity is an integral part of all of our software and hardware stability and robustness plan, thus avoiding any single points of failure in our infrastructure.
• Access to any element of our service (applications, infrastructure and data) is only provided on an as-needed basis to employees and a limited set of others to fulfill their job functions. The principle of least privilege is applied.
• All registry components–critical and non-critical–are monitored 24x7 by staff at our NOCs, and the technical staff has detailed plans and procedures that have stood the test of time for addressing even the smallest anomaly. Well-documented incident management procedures are in place to quickly involve the on-call technical and management staff members to address any issues.

Afilias follows the guidelines from the ISO 27001 Information Security Standard (Reference: http://www.iso.org/iso/iso_catalogue/catalogue_tc/catalogue_detail.htm?csnumber=42103 ) for the management and implementation of its Information Security Management System. Afilias also utilizes the COBIT IT governance framework to facilitate policy development and enable controls for appropriate management of risk (Reference: http://www.isaca.org/cobit). Best practices defined in ISO 27002 are followed for defining the security controls within the organization. Afilias continually looks to improve the efficiency and effectiveness of our processes, and follows industry best practices as defined by the IT Infrastructure Library, or ITIL (Reference: http://www.itil-officialsite.com/).

The Afilias registry system is located within secure data centers that implement a multitude of security measures both to minimize any potential points of vulnerability and to limit any damage should there be a breach. The characteristics of these data centers are described fully in our response to question #30(b).

The Afilias registry system employs a number of multi-layered measures to prevent unauthorized access to its network and internal systems. Before reaching the registry network, all traffic is required to pass through a firewall system. Packets passing to and from the Internet are inspected, and unauthorized or unexpected attempts to connect to the registry servers are both logged and denied. Management processes are in place to ensure each request is tracked and documented, and regular firewall audits are performed to ensure proper operation. 24x7 monitoring is in place and, if potential malicious activity is detected, appropriate personnel are notified immediately.

Afilias employs a set of security procedures to ensure maximum security on each of its servers, including disabling all unnecessary services and processes and regular application of security-related patches to the operating system and critical system applications. Regular external vulnerability scans are performed to verify that only services intended to be available are accessible.

Regular detailed audits of the server configuration are performed to verify that the configurations comply with current best security practices. Passwords and other access means are changed on a regular schedule and are revoked whenever a staff member's employment is terminated.

        Access to registry system
Access to all production systems and software is strictly limited to authorized operations staff members. Access to technical support and network operations teams where necessary are read only and limited only to components required to help troubleshoot customer issues and perform routine checks. Strict change control procedures are in place and are followed each time a change is required to the production hardware/application. User rights are kept to a minimum at all times. In the event of a staff member's employment termination, all access is removed immediately.

Afilias applications use encrypted network communications. Access to the registry server is

controlled. Afilias allows access to an authorized registrar only if each of the authentication factors matches the specific requirements of the requested authorization. These mechanisms are also used to secure any web-based tools that allow authorized registrars to access the registry. Additionally, all write transactions in the registry (whether conducted by authorized registrars or the registry's own personnel) are logged.

EPP connections are encrypted using TLS/SSL, and mutually authenticated using both certificate checks and login/password combinations. Web connections are encrypted using TLS/SSL for an encrypted tunnel to the browser, and authenticated to the EPP server using login/password combinations.

All systems are monitored for security breaches from within the data center and without, using both system-based and network-based testing tools. Operations staff also monitor systems for security-related performance anomalies. Triple-redundant continual monitoring ensures multiple detection paths for any potential incident or problem. Details are provided in our response to questions #30(b) and #42. Network Operations and Security Operations teams perform regular audits in search of any potential vulnerability.

To ensure that registrar hosts configured erroneously or maliciously cannot deny service to other registrars, Afilias uses traffic shaping technologies to prevent attacks from any single registrar account, IP address, or subnet. This additional layer of security reduces the likelihood of performance degradation for all registrars, even in the case of a security compromise at a subset of registrars.

There is a clear accountability policy that defines what behaviors are acceptable and unacceptable on the part of non-staff users, staff users, and management. Periodic audits of policies and procedures are performed to ensure that any weaknesses are discovered and addressed. Aggressive escalation procedures and well-defined Incident Response management procedures ensure that decision makers are involved at early stages of any event.

In short, security is a consideration in every aspect of business at Afilias, and this is evidenced in a track record of a decade of secure, stable and reliable service.


Independent assessment

Supporting operational excellence as an example of security practices, Afilias performs a number of internal and external security audits each year of the existing policies, procedures and practices for:
• Access control;
• Security policies;
• Production change control;
• Backups and restores;
• Batch monitoring;
• Intrusion detection, and
• Physical security.

Afilias has an annual Type 2 SSAE 16 audit performed by PricewaterhouseCoopers (PwC). Further, PwC performs testing of the general information technology controls in support of the financial statement audit. A Type 2 report opinion under SSAE 16 covers whether the controls were properly designed, were in place, and operating effectively during the audit period (calendar year). This SSAE 16 audit includes testing of internal controls relevant to Afilias' domain registry system and processes. The report includes testing of key controls related to the following control objectives:
• Controls provide reasonable assurance that registrar account balances and changes to the registrar account balances are authorized, complete, accurate and timely.
• Controls provide reasonable assurance that billable transactions are recorded in the Shared Registry System (SRS) in a complete, accurate and timely manner.
• Controls provide reasonable assurance that revenue is systemically calculated by the Deferred Revenue System (DRS) in a complete, accurate and timely manner.
• Controls provide reasonable assurance that the summary and detail reports, invoices, statements, registrar and registry billing data files, and ICANN transactional reports provided to registry operator(s) are complete, accurate and timely.
• Controls provide reasonable assurance that new applications and changes to existing applications are authorized, tested, approved, properly implemented and documented.

• Controls provide reasonable assurance that changes to existing system software and implementation of new system software are authorized, tested, approved, properly implemented and documented.
• Controls provide reasonable assurance that physical access to data centers is restricted to properly authorized individuals.
• Controls provide reasonable assurance that logical access to system resources is restricted to properly authorized individuals.
• Controls provide reasonable assurance that processing and backups are appropriately authorized and scheduled and that deviations from scheduled processing and backups are identified and resolved.

The last Type 2 report issued was for the year 2010, and it was unqualified, i.e., all systems were evaluated with no material problems found.

During each year, Afilias monitors the key controls related to the SSAE controls. Changes or additions to the control objectives or activities can result due to deployment of new services, software enhancements, infrastructure changes or process enhancements. These are noted and after internal review and approval, adjustments are made for the next review.

In addition to the PricewaterhouseCoopers engagement, Afilias performs internal security audits twice a year. These assessments are constantly being expanded based on risk assessments and changes in business or technology.

Additionally, Afilias engages an independent third-party security organization, PivotPoint Security, to perform external vulnerability assessments and penetration tests on the sites hosting and managing the Registry infrastructure. These assessments are performed with major infrastructure changes, release of new services or major software enhancements. These independent assessments are performed at least annually.  A report from a recent assessment is attached with our response to question #30(b).

Afilias has engaged with security companies specializing in application and web security testing to ensure the security of web-based applications offered by Afilias, such as the Web Admin Tool (WAT) for registrars and registry operators.

Finally, Afilias has engaged IBM's Security services division to perform ISO 27002 gap assessment studies so as to review alignment of Afilias' procedures and policies with the ISO 27002 standard. Afilias has since made adjustments to its security procedures and policies based on the recommendations by IBM.


Special TLD considerations

Afilias' rigorous security practices are regularly reviewed; if there is a need to alter or augment procedures for this TLD, they will be done so in a planned and deliberate manner.


Commitments to registrant protection

With over a decade of experience protecting domain registration data, Afilias understands registrant security concerns. Afilias supports a "thick" registry system in which data for all objects are stored in the registry database that is the centralized authoritative source of information. As an active member of IETF (Internet Engineering Task Force), ICANN's SSAC (Security & Stability Advisory Committee), APWG (Anti-Phishing Working Group), MAAWG (Messaging Anti-Abuse Working Group), USENIX, and ISACA (Information Systems Audits and Controls Association), the Afilias team is highly attuned to the potential threats and leading tools and procedures for mitigating threats. As such, registrants should be confident that:
• Any confidential information stored within the registry will remain confidential;
• The interaction between their registrar and Afilias is secure;
• The Afilias DNS system will be reliable and accessible from any location;
• The registry system will abide by all polices, including those that address registrant data;
• Afilias will not introduce any features or implement technologies that compromise access to the registry system or that compromise registrant security.

Afilias has directly contributed to the development of the documents listed below and we have implemented them where appropriate. All of these have helped improve registrants' ability to

protect their domains name(s) during the domain name lifecycle.
- [SAC049]: SSAC Report on DNS Zone Risk Assessment and Management (03 June 2011)
- [SAC044]: A Registrant's Guide to Protecting Domain Name Registration Accounts (05 November 2010)
- [SAC040]: Measures to Protect Domain Registration Services Against Exploitation or Misuse (19 August 2009)
- [SAC028]: SSAC Advisory on Registrar Impersonation Phishing Attacks (26 May 2008)
- [SAC024]: Report on Domain Name Front Running (February 2008)
- [SAC022]: Domain Name Front Running (SAC022, SAC024) (20 October 2007)
- [SAC011]: Problems caused by the non-renewal of a domain name associated with a DNS Name Server (7 July 2006)
- [SAC010]: Renewal Considerations for Domain Name Registrants (29 June 2006)
- [SAC007]: Domain Name Hijacking Report (SAC007) (12 July 2005)

To protect any unauthorized modification of registrant data, Afilias mandates TLS/SSL transport (per RFC 5246) and authentication methodologies for access to the registry applications. Authorized registrars are required to supply a list of specific individuals (five to ten people) who are authorized to contact the registry. Each such individual is assigned a pass phrase. Any support requests made by an authorized registrar to registry customer service are authenticated by registry customer service. All failed authentications are logged and reviewed regularly for potential malicious activity. This prevents unauthorized changes or access to registrant data by individuals posing to be registrars or their authorized contacts.

These items reflect an understanding of the importance of balancing data privacy and access for registrants, both individually and as a collective, worldwide user base.

The Afilias $^{24}/_7$ Customer Service Center consists of highly trained staff who collectively are proficient in 15 languages, and who are capable of responding to queries from registrants whose domain name security has been compromised—for example, a victim of domain name hijacking.  Afilias provides specialized registrant assistance guides, including specific hand-holding and follow-through in these kinds of commonly occurring circumstances, which can be highly distressing to registrants

Security resourcing plans

Please refer to our response to question #30b for security resourcing plans.

# EXHIBIT AC-80

# CONFIDENTIAL

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 1              A-P-P-E-A-R-A-N-C-E-S

 2                   ---o0o---

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791

ARBITRATION - VOLUME V

**BARKLEY**
*Court Reporters*

1    CALIFORNIA, CALIFORNIA, AUGUST 7, 2020

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3          ARBITRATOR BIENVENU:  Good day, everyone.

4    It is an early morning on the West Coast.  We have

5    a big day ahead of us.

6          I'll ask if there are preliminary matters

7    that the parties or Amici would like to raise.

8          MR. ALI:  Just very briefly, Mr. Chairman.

9    Mr. LeVee had asked me earlier today to provide an

10   estimate regarding the cross-examination times for

11   Mr. Rasco and Mr. Disspain.

12          All I can say is that we worked pretty

13   much late into the night and all night to cut back

14   our examinations of both as much as we could to

15   allow the Panel time to ask questions and for

16   Mr. LeVee and Mr. Marenberg to conduct their

17   respective redirects of the witnesses.

18          I can't say much more than that because I

19   think we have done what we can.  We hope that the

20   witnesses will be efficient in their responses and

21   that the redirects will be efficient as well to

22   allow you sufficient time to question the

23   witnesses.

24          I did make a commitment to Mr. LeVee, and

25   we will do everything that we can to abide by the


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 1            Do you see that?

 2     A.    Yes.

 3     Q.    And that's NDC, correct?

 4     A.    Yes.

 5     Q.    And if you turn to

 6         Redacted - Third-Party Designated Confidential Information

 7

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 9

10            Do you see that?

11     A.    I see that, yes.

12     Q.    So you understood that after signing this

13  agreement, entering into this agreement,

14         Redacted - Third-Party Designated Confidential Information

15

16

17     A.    Well, I don't necessarily agree with that.

18  I think,      Redacted - Third-Party Designated Confidential Information

19

20

21

22     Q.    In spite of what this says.

23            Okay.  Let's look at some of the other

24  provisions.  Let's take a look at

25         Redacted - Third-Party Designated Confidential Information
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 1  statement that you thought this arrangement with

 2  VeriSign was acceptable under the guidebook,

 3  correct?

 4       A.   I did.

 5       Q.   Did you wonder why
               Redacted - Third-Party Designated Confidential Information
 6

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 8       A.   No, not really.  As I just mentioned, I

 9  think        Redacted - Third-Party Designated Confidential Information

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14       Q.   And you thought that it was prudent not to

15  let anyone know that NDC -- strike that.
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2          Redacted - Third-Party Designated Confidential Information

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8              Do I understand that correctly?

9      A.    That's correct.  My experience working

10  with public companies, they are pretty quirky about

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15      Q.    Was it your understanding that under the

16  guidebook a nonapplicant was permitted to

17  indirectly participate in the resolution of the

18  contention set or otherwise seeking to become the

19  registry operator through an applicant's

20  application?

21      A.    I'm sorry, can you kind of rephrase that

22  question?  I don't understand.

23      Q.    Yeah.  What this provision states, if I

24  understand it correctly, is that

25          Redacted - Third-Party Designated Confidential Information

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3     A.    Well, I believe what this says is -- not

4   what this says, but they

5

6     Q.    Yeah.   That's not what this says, though,

7   is it, sir?

8     A.    It is contingent on a lot of things.

9     Q.    Yeah.   And so your view is that when they

10  say they were

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14    A.    I think in terms of

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18                                          So yeah,

19  that's the way I viewed it.

20    Q.     So what was the

21  interest rate on the loan that VeriSign was

22  providing you with?

23    A.

24

25

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1          Redacted - Third-Party Designated Confidential Information

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4      Q.    But NDC effectively

5     Redacted - Third-Party Designated Confidential Information

6      A.    I don't -- I don't see how you come to

7   that.    Redacted - Third-Party Designated Confidential Information

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9

10      Q.    You basically

11     Redacted - Third-Party Designated Confidential Information

12      A.    No, I disagree.

13      Q.        Redacted - Third-Party Designated Confidential Information

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16      A.        Redacted - Third-Party Designated Confidential Information

17                      At that point, when we signed

18   the DAA, there was not even any clarity as to

19   whether or not the .WEB TLD would ever be

20   delegated.  It was on hold and had been on hold for

21   years.  So I don't...

22      Q.        Redacted - Third-Party Designated Confidential Information

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25      A.    If that's the way you want to phrase it.

1   that correct?

2       A.   Yes, that was for -- in my mind,

3           Redacted - Third-Party Designated Confidential Information

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6       Q.   And let's look at some of the terms and

7   conditions.   Redacted - Third-Party Designated Confidential Information

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20      A.   I think this section

21          Redacted - Third-Party Designated Confidential Information

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1    Q.    Yeah, we'll come to that, sir.

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4         Do you see that?

5    A.    I do.

6    Q.    Redacted - Third-Party Designated Confidential Information

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21    A.         Redacted - Third-Party Designated Confidential Information

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1    Q.    Redacted - Third-Party Designated Confidential Information

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10    A.    Well, I wouldn't phrase it that way.

11    VeriSign was not the bidder.    NDC was the bidder.

12    NDC always retained control.    As the one putting up

13    Redacted - Third-Party Designated Confidential Information

14    Q.        Redacted - Third-Party Designated Confidential Information

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18    A.        Redacted - Third-Party Designated Confidential Information

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20    Q.        Redacted - Third-Party Designated Confidential Information

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*Court Reporters*

A.    Yes, that's correct.

Q.    Did you arrive two business days prior to the start of the auction?

A.    I believe it was one business day.  I don't think it ended up being two, but I can't be certain.  I think it was just one business day.

Q.

Do you see that?

A.    I do, yes.

Q.

A.

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1    A.        Redacted - Third-Party Designated Confidential Information

2    Q.        Redacted - Third-Party Designated Confidential Information

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4    A.        Redacted - Third-Party Designated Confidential Information

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6

7    Q.        Redacted - Third-Party Designated Confidential Information

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25   A.        Redacted - Third-Party Designated Confidential Information

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14    Q.          Redacted - Third-Party Designated Confidential Information

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16    A.          Redacted - Third-Party Designated Confidential Information

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21    Q.    How did you know that?

22    A.    We had discussions.

23    Q.          Redacted - Third-Party Designated Confidential Information

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1    A.         Redacted - Third-Party Designated Confidential Information

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3

4    Q.    And they did that during the negotiations?

5    A.    I believe so, yes.

6    Q.    Okay.  We are going to come back to that

7    point, but let me just ask you this:  If that was

8    VeriSign's position,
              Redacted - Third-Party Designated Confidential Information
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14   A.         Redacted - Third-Party Designated Confidential Information

15   Q.           Redacted - Third-Party Designated Confidential Information

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19   A.         Redacted - Third-Party Designated Confidential Information

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21   Q.          Redacted - Third-Party Designated Confidential Information

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25   A.    Yes, I am there.

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1    Q.    Redacted - Third-Party Designated Confidential Information

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9    A.    Redacted - Third-Party Designated Confidential Information

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16    Q.   But if you disclosed -- strike that.

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20    A.    Redacted - Third-Party Designated Confidential Information

21

22    Q.    Redacted - Third-Party Designated Confidential Information

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2     A.   You know, I don't know what I would have

3 done in that circumstance.

4     Q.

5

6

7

8     A.

9

10          MR. De GRAMONT:  Mr. Chairman, I am going

11 to suggest that we take our break earlier today.

12 It might enable me to cut down on some of the

13 questions.  Would that be acceptable to the Panel?

14          ARBITRATOR BIENVENU:  It would certainly

15 be acceptable to us, and I don't expect

16 Mr. Marenberg would have any difficulty with that.

17          MR. MARENBERG:  No objection,

18 Mr. Chairman.

19          ARBITRATOR BIENVENU:  Excellent.  So let's

20 break for 15 minutes.

21          And, Mr. Rasco, sorry, we have to -- you

22 still there, Mr. Rasco?

23          THE WITNESS:  I am still here.

24          ARBITRATOR BIENVENU:  Yes.  I am going to

25 instruct you during our break, and that holds true

1

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3      A.    That's what it says.

4      Q.        Redacted - Third-Party Designated Confidential Information

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6

7

8      A.        Redacted - Third-Party Designated Confidential Information

9

10

11     Q.        Redacted - Third-Party Designated Confidential Information

12

13     A.    Yeah.  But, I mean, look, as a

14  businessperson, I don't know that anything is that

15  simple when you're talking about something of this

16  magnitude.

17        Redacted - Third-Party Designated Confidential Information

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1     Q.    So you knew who all the other applicants

2  were, but they didn't know that VeriSign was behind

3  your application?

4     A.    Well, VeriSign was not behind my

5  application.  NU DOT CO is and always was in

6  control of our application.  There was never --

7  VeriSign never controlled our application and never

8  controlled NU DOT CO.

9     Q.    Well, I think the Panel will have to

10  determine that based on the terms of the DAA, sir.

11         Let me point you to the last sentence of

12  your June 7th email.  It says, quote, "It pains me

13  personally to stroke a check to ICANN like this,

14  but that's what we're going to have to do just like

15  others did on .APP and .SHOP."

16         Now, it couldn't have been that painful to

17  stroke a check to ICANN since VeriSign was paying

18  for it, right?

19     A.    Well, no matter what, yes, it was painful.

20     Q.    How so?

21     A.    Figuratively speaking it was just sending

22  ICANN $135 million wasn't -- actually, at this time

23  I didn't know how much it was going to be, but I

24  was just speaking figuratively.

25     Q.    But it was VeriSign's money, but it pained

1   that message at 12:45 or at 12:05.

         2        Q.   And you say, quote, "I can confirm that

         3   there have been no changes to the NU DOT CO LLC

         4   organization that would need to be reported to

         5   ICANN."

         6             Do you recall that?

         7        A.   Yes, I do.

         8        Q.   But you didn't answer the part of his

         9   question asking you to confirm that there had not

        10   been changes to the application.

        11             Do you see that?

        12        A.   Yeah.  As I testified, I honestly thought

        13   this was a routine inquiry one month out from the

        14   auction, considering the fact that it had been four

        15   years since we submitted our application.  I just

        16   read it and fired off an answer.

        17             I mean, I don't think anything was

        18   inaccurate or misleading here.  Nothing did change

        19   in our application and nothing did change in NU DOT

        20   CO.

        21             Yeah, I see that I direct the answer, the

        22   part of the organization, but I never intended to

        23   withhold anything.  There was no changes that I

        24   felt I needed to report.

        25             So I really just, again, as a routine


                                862

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1 inquiry, I was like, okay, I guess they are getting

2 ready for the auction.

3     Q.   And you state that other members of the

4 contention set were putting pressure on you to do a

5 private auction and you had your conversation with

6 Mr. Nevett re: the additional Board members, et

7 cetera, but it never entered into your mind that

8 this communication from ICANN had anything to do

9 with that?

10     A.   No, at this point, no.  I hadn't heard

11 back from Jon.  I don't believe I heard back from

12 Jon after our exchange, and I don't recall having

13 heard from anyone, so no, it didn't spark anything

14 at that point.

15     Q.   Notwithstanding the terms of the DAA that

16 we just reviewed, your view was that nothing about

17 your application had changed whatsoever; is that

18 your testimony, sir?

19     A.   Nothing in the application changed that

20 would require any kind of disclosure to ICANN.

21     Q.       Redacted - Third-Party Designated Confidential Information

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23

24     A.       Redacted - Third-Party Designated Confidential Information

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Q.

Do you recall that?

A.      Correct.

Q.      Okay.  You had several exchanges of emails
with the ombudsman on July 6, 7 and 8.

Do you recall that?

A.      I do.  I recall one email that I responded
to him, but yes.

Q.      Okay.  And then on July 8th, Ms. Willett
emailed you and asked you to call her.

Do you recall that?

A.      I do, yes.

Q.      And, in fact, you did call her, correct?

A.      I did.

Q.      Okay.  And if you take a look behind Tab
13, we see the message that she sent to you on July
8th.  It is Tab 13, "Rasco Witness Statement
Exhibit O."  At the bottom of the page she asks you

1    at ICANN?

2        A.   I absolutely did not.

3        Q.   Did you ever tell Ms. Willett or anyone

4    else at ICANN that VeriSign was funding your

5    application?

6        A.   I did not.

7        Q.   Prior to the auction?

8        A.   Prior to the auction, I didn't mention

9    that anyone else was involved in the auction.

10       Q.   Your testimony to the Panel is that when

11   you told Ms. Willett the decision to skip the

12   private auction was, in fact, NDC's, that that

13   testimony was, quote, "unequivocally true,"

14   unquote?

15       A.   Yes, that's correct.

16       Q.   Okay.  So the auction went forward on 27

17   July 2016, correct?

18       A.   That's right.

19       Q.   Let's turn to what's behind Tab 15 of your

20   binder.  It is Exhibit C-97.  It is a letter dated

21   July 26, 2016, from Mr. Livesay to you.

22            Do you recall at this time, were you

23   already at VeriSign's headquarters in Virginia?

24   This was the day before the auction.

25       A.   Was I -- was I there when?

1

2      THE WITNESS:  I am having a little trouble

3  to try to figure out how to answer the question.

4          The way that I understood

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18          ARBITRATOR BIENVENU:  Was the question of

19  whether the guidebook -- or I'll say the program

20  rules in order to include both the guidebook and

21  the auction rules.  Was the question of whether the

22  program rules required disclosure of the DAA to

23  ICANN discussed with ICANN?

24          THE WITNESS:  Discussed with ICANN, no, I

25  don't believe so.  In what context?  I am not sure.

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 1
 2                    REPORTER'S CERTIFICATE

 3                         ---o0o---

 4          STATE OF CALIFORNIA       )
                                      )  ss.
 5          COUNTY OF SAN FRANCISCO   )

 6

 7          I, BALINDA DUNLAP, certify that I was the

 8   official court reporter and that I reported in

 9   shorthand writing the foregoing proceedings; that I

10   thereafter caused my shorthand writing to be

11   reduced to typewriting, and the pages included,

12   constitute a full, true, and correct record of said

13   proceedings:

14          IN WITNESS WHEREOF, I have subscribed this

15   certificate at San Francisco, California, on this

16   18th day of August, 2020.

17

18

19          B. Dunlap

20   _____

21   BALINDA DUNLAP, CSR NO. 10710, RPR, CRR, RMR

22

23

24

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```
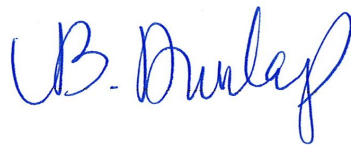
**BARKLEY**
*Court Reporters*

# EXHIBIT AC-81

# HIGHLY CONFIDENTIAL-
# ATTORNEYS' EYES ONLY

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTER FOR DISPUTE RESOLUTION

| | |
|---|---|
| AFILIAS DOMAINS NO. 3 LTD., | ICDR CASE NO: 01-18-0004-2702 |
| Claimant, | |
| and | |
| INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, | |
| Respondent, | |
| and | |
| NU DOTCO, LLC. and VERISIGN, INC. | |
| *Amicus Curiae* | |

**WITNESS STATEMENT OF PAUL LIVESAY IN SUPPORT OF**

**ICANN'S REJOINDER AND *AMICI'S* BRIEFS**

*Confidential    Attorneys' Eyes Only*

*Not to be Publicly Disclosed in IRP*

I, Paul Livesay, declare as follows:

1.      I am a former Vice-President and Associate General Counsel of VeriSign, Inc. ("Verisign" or the "Company"). I have personal knowledge of the matters set forth herein, except where I indicate otherwise, and am competent to testify as to those matters.

2.      From 2014 through 2018, I served as a Vice-President and Associate General Counsel for Verisign. In that capacity, I was in charge of intellectual property matters, had responsibility for certain strategic business transactions for the Company, and provided general advice and counseling to the Company's management on business and legal matters. My position at the company had both business and legal components. My statement is only a statement of facts and not legal reasoning or opinions. Previously, I had been with Verisign in 2009-2010 as Vice-President, Strategy and Management, for Verisign's digital certificate business.

3.      I have been an intellectual property and technology transactions attorney for over twenty-five years. Prior to joining Verisign in 2014, among other roles, I practiced law at the firm of Wilson, Sonsini, Goodrich & Rosati, was General Counsel of RSA Data Security, Inc., was General Counsel at the design firm IDEO LLC, and was Vice-President, Technology, for Symantec Corporation. I am a member of the Bar of the State of California.

**The Secondary Market for new gTLDs and Discussions with .WEB Applicants**

4.      In 2014, I was put in charge of identifying potential business opportunities for Verisign in ICANN's New gTLD Program. Up until that point, Verisign had participated in the New gTLD Program by filing applications for new TLDs that were variants of its company name (*i.e.*, ".Verisign") or internationalized versions of Verisign's existing TLDs, but Verisign had not sought to acquire the rights to a new gTLD not already associated with Verisign.
Redacted - Third Party Designated Confidential Information

. The period for filing new applications as part of the New gTLD Program had ended. Redacted - Third Party Designated Confidential Information

5.     Redacted - Third Party Designated Confidential Information


I studied very closely the New gTLD Applicant Guidebook (the "Guidebook") published by ICANN, the Auction Rules, and other information regarding the New gTLD Program available on ICANN's website, www.icann.org, to familiarize myself with the rules applicable to the Program.  Redacted - Third Party Designated Confidential Information


6.     The Guidebook and Auction Rules do not prohibit applicants from entering into business transactions with other entities with respect to an applied-for TLD.  Based on the Guidebook, it is apparent that ICANN's concern with respect to such transactions is whether a transaction would require re-evaluation of the applicant, which could result in a delay in the resolution of a contention set.  For example, Section 4.1.3 of the Guidebook acknowledges that applicants may seek to resolve string contentions (*i.e.*, which of various competing applicants for a TLD would be awarded the TLD) by establishing joint ventures among themselves, which could change the ownership of the applicant or the identity of the applicant itself.[1]  The Guidebook cautions that material changes such as these could require re-evaluation, and encourages applicants to combine in ways that do not require re-evaluation: "Applicants are encouraged to resolve contention by combining in a way that does not materially affect the

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[1] Afilias C-3 (*gTLD Applicant Guidebook*, Module 4, § 4.1.3, *available at* https://newgtlds.icann.org/en/applicants/agb).

remaining application. Accordingly, new joint ventures must take place in a manner that does not materially change the application, to avoid being subject to re-evaluation."[2]

7.      Similarly, Clause 68 of the Auction Rules recognizes that applicants may enter into "settlement agreements or post-Auction ownership transfer arrangements, with respect to any Contention Strings in the Auction"; although once within an active auction timeline, these activities are prohibited during a "Blackout Period" extending from the deposit deadline for an auction through full payment of the winning auction bid, but permitted both for the period prior to and after the Blackout Period.[3]

8.      Redacted - Third Party Designated Confidential Information

). Donuts was a major participant in the new gTLD Program, filing hundreds of applications for new gTLDs.  Under the arrangement between Donuts and Demand Media, which was entered into while the new gTLD applications were pending, the gTLDs would be transferred to Demand Media after rights to the subject new gTLDs were awarded to Donuts in exchange for Demand Media's assistance in funding Donuts' acquisition of the gTLDs. Donuts also was one of the several applicants for the .WEB gTLD.  Attached hereto as Exhibit A is a true and correct copy of a press release dated June 11, 2012 from Demand Media describing its arrangement with Donuts (https://ir.leafgroup.com/investor-overview/investor-

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[2] *Id.*

[3] Afilias C-4 (*Auction Rules for New gTLDs, Indirect Contentions Edition, Version 2015-02-24*, Clause 68(a) & (b), *available at* https://newgtlds.icann.org/en/applicants/auctions).

press-releases/press-release-details/2012/Demand-Media-to-Participate-in-Historic-Expansion-of-Generic-Top-Level-Web-Domain-Name-Extensions/default.aspx).

9.      Through my research, I also became aware that it was not uncommon for entities interested in acquiring a new gTLD to form a special purpose entity to be the applicant for a new gTLD.  For example, I understand that Donuts formed a separate special purpose entity for each gTLD for which it applied.  For .WEB, Donuts formed Ruby Glen, LLC and used that entity to apply for the gTLD.  By contrast, Google used the same entity, Charleston Road Registry Inc., to apply for all of the new gTLDs it sought to acquire.

10.     One effect of the use of special purpose entities was to facilitate secondary market transfers of new gTLDs through the transfer of the special purpose entity independent of other assets of a party supporting the applicant.  Another effect of the use of such entities can be to maintain as confidential the party for whose benefit the application was being pursued.  In this regard, the new gTLD application form required the disclosure of the name of the applicant and the identity of any person or entity that owned more than 15% of the applicant.[4]  In some instances, this resulted in the disclosure of the real party in interest.  For example, Google is identified as the owner of Charleston Road Registry Inc.  In other instances, the requirement for a disclosure of the real party in interest was avoided by forming another entity to be the parent of the applicant, so the real parties in interest were not disclosed as the parent entity in the application.  Donuts formed "Covered TLD LLC," for example, and made that entity the disclosed parent entity on many of its applications.

11.     Redacted - Third Party Designated Confidential Information

ICANN's website identified each new gTLD for which an application had been filed and listed the identity of applicants along with a copy of non-confidential parts of their respective applications.  Redacted - Third Party Designated Confidential Information

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[4] Afilias C-3 (*gTLD Applicant Guidebook*, Module 2, Attachment to Module 2, *Evaluation Questions and Criteria*, Question 11(c), *available at* https://newgtlds.icann.org/en/applicants/agb).

12. Redacted - Third Party Designated Confidential Information

13. Redacted - Third Party Designated Confidential Information

14. Redacted - Third Party Designated Confidential Information

**The Domain Acquisition Agreement between Verisign and NDC**

15.     Redacted - Third Party Designated Confidential Information

16.     Redacted - Third Party Designated Confidential Information

. Private

auctions are conducted on terms privately negotiated among the competing bidders for the TLD,

and private auction agreements commonly include terms for the losing applicants to split the

proceeds of the auction among themselves.  In private auctions, which may have been the most

common form of resolving contention sets, there are no Guidebook requirements, and commonly

no other requirements, with respect to how a participant conducts its bid, disclosure of financing

terms, disclosure of interested parties, or post award intentions of the participants.  Indeed, some

applicants seem to have made a lucrative business out of losing private auctions.  In a public

auction, by contrast, the terms are not privately negotiated among the participants/competitors,

and the proceeds of the auction are placed in a fund to be set up by ICANN for investment

benefitting the Internet community as a whole rather than benefitting the losing bidders in a

private auction.

17.     Redacted - Third Party Designated Confidential Information

18.     On August 15, 2015, NDC and Verisign entered into the Domain Acquisition

Agreement ("DAA").  A copy of the DAA is attached hereto as Exhibit D.  The DAA is a

conditional agreement pursuant to which Verisign agreed to provide the funds for NDC to

participate in an auction for the .WEB gTLD.  In the event NDC prevailed at the auction and

entered into a registry agreement for .WEB with ICANN -- upon application to ICANN and with ICANN's consent -- NDC would assign the .WEB registry agreement to Verisign.

19.    Redacted - Third Party Designated Confidential Information

20.    The DAA is compliant with all terms of the Guidebook and consistent with transactions by others with respect to the new gTLD Program. Verisign did not acquire any interest in or control over NDC. The application for .WEB was not transferred to Verisign. The DAA's registry agreement assignment provision was conditional and contingent, applied only to an executed registry agreement following an award of .WEB to NDC, and was subject to ICANN's prior consent. The structure of the agreement also was consistent with industry practices in the secondary market for new gTLD applications of which I became aware in my research of the New gTLD Program, as explained above and as further documented below.

21.    Redacted - Third Party Designated Confidential Information

22.    The express terms of the DAA establish that it does not transfer NDC's application for .WEB and that any transfer to Verisign would be in the future and contingent on

ICANN's normal processes for such transfers, including application to ICANN for consent to an assignment of the registry agreement and ICANN's consent. For example, the DAA provides:

Redacted - Third Party Designated Confidential Information

Thus, a transfer or assignment would only take place after a registry agreement was signed between ICANN and NDC, ICANN's subsequent consent to an assignment of the registry agreement to Verisign, and the subsequent execution and delivery of the Transfer Agreement.

23. The lack of any transfer of rights in NDC's Application or assignment of a registry agreement is further confirmed by the terms of the DAA that permitted a termination of Redacted - Third Party Designated Confidential Information

24.     Redacted - Third Party Designated Confidential Information

25.     The Guidebook does not require an applicant to reveal the existence of, sources or amounts of any funding for a public or private auction for a new gTLD or other resolution of a contention set. ICANN's new gTLD application requires applicants to provide certain financial information to ICANN regarding its ability to *operate* a new gTLD.[5] There is no requirement that an applicant disclose any information regarding funding for participation in an auction. It is further my understanding that financial information submitted as part of a gTLD application also is designated confidential by ICANN and not disclosed to other applicants or the public. Accordingly, under the terms of the new gTLD Program, even if the sources or terms of their funding for participation in the auction were subject to disclosure to ICANN, which they were not, other members of the contention set would never have access to that information.

26.     As another example of the confidential nature of financial arrangements, it was disclosed after the fact that Automattic Inc. ("Automattic") financed the successful bid in a private auction for the .BLOG gTLD by applicant Primer Nivel S.A. ("Primer Nivel"). The auction took place in February 2015. In May 2016, before the .WEB auction, it was reported that Primer Nivel's bid had been financed by Automattic, the owner of the blogging platform wordpress.com. According to press reports, Automattic paid Primer Nivel $19 million in exchange for Primer Nivel's agreement to assign the .BLOG gTLD to Automattic if it was successful in the private auction. One of the press reports that I reviewed regarding this

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[5] Afilias C-3 (*gTLD Applicant Guidebook*, §§ 1.2.1.2 , 1.2.2 & 2.2.2.2, *available at* https://newgtlds.icann.org/en/applicants/agb).

transaction is attached hereto as Exhibit E (Kevin Murphy, WordPress Reveals IT Bought .blog For $19 Million, Domain Incite (May 13, 2016), http://domainincite.com/20440-wordpress-reveals-it-bought-blog-for-19-million). This funding transaction appears to have been kept confidential and not revealed to ICANN or other bidders, which included an Afilias entity (Afilias Domains No. 1 Limited), prior to the .BLOG auction. Specifically, a press report states that WordPress financed Primer Nivel's winning auction bid but "wanted to stay stealth while in the bidding process and afterward in order not to draw too much attention." *See* Ex. F (Alan Dunn, Knock Knock WordPress Acquires Blog for 19 million, NameCorp (May 15, 2016), https://namecorp.com/knock-knock-wordpress-acquires-blog-for-19-million/). On April 29, 2016, ICANN consented to the assignment of .BLOG from Primer Nivel to Knock Knock WHOIS There, LLC, a subsidiary of Automattic. *See* Ex. G (https://www.icann.org/resources/agreement/blog-2015-05-14-en). To the best of my knowledge, Afilias did not object to the .BLOG auction after Automattic's role in financing Primer Nivel's bid was revealed. This transaction further supported my understanding then that pre-auction financing agreements, such as the DAA, were consistent with the Guidebook.

**The Assurances of Performance**

27.     Redacted - Third Party Designated Confidential Information

28. Redacted - Third Party Designated Confidential Information

**Afilias Claims in the IRP**

29.     It is my understanding that Afilias argues in this IRP that the DAA constitutes an impermissible transfer by NDC of rights in its new gTLD application. Such an argument is inconsistent with the express terms of the DAA and Confirmation of Understandings described above. Further, such an interpretation of the Guidebook would be contrary to industry practices with respect to the New gTLD Program that I learned in researching the Guidebook and secondary market.

30.     Redacted - Third Party Designated Confidential Information

31.     Redacted - Third Party Designated Confidential Information

A public auction is specifically provided for in the Guidebook, is fair and conducted under ICANN's oversight, and I am not aware of any requirement under the Guidebook that an applicant agree to a private auction. To the contrary, the Guidebook provides a private auction may only be conducted if *all* members of the Contention Set agree to have a private auction.[6]

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[6] Afilias C-3 (*gTLD Applicant Guidebook*, §§ 4.13 & 4.3, *available at* https://newgtlds.icann.org/en/applicants/agb).

32.     Redacted - Third Party Designated Confidential Information

33.     Redacted - Third Party Designated Confidential Information

34.     Redacted - Third Party Designated Confidential Information

35.     I understand that Afilias has stated that its bidding in the .WEB auction was constrained by the terms of its financing arrangement, which limited its bidding to no more than $135 million.[7] The limits on Afilias' funding demonstrates that Afilias' own conduct as a bidder during the .WEB auction was limited by its own financing arrangements, appearing to confirm again the industry practice of financing arrangements with parties not part of the .WEB contention set.

**The Auction**

36.     In accordance with the DAA, Verisign provided funds for NDC to use in bidding for the .WEB gTLD in the public auction. NDC submitted a final bid that ICANN deemed to be and announced as the winning bid. Shortly after the auction, NDC paid ICANN $135 million as the winning bid for the .WEB gTLD. Those funds were provided to NDC by Verisign.

37.     ]Redacted - Third Party Designated Confidential Information

38.     Finally, I understand that Afilias makes a claim that there was some form of collusion between Verisign and ICANN during or following the auction proceedings. This is untrue. I was responsible for this transaction. I did not have any communications with ICANN before or following the auction process. Redacted - Third Party Designated Confidential Information

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[7] *See* Witness Statement of Ram Mohan, 1 November 2018, ¶ 35, fn. 38
(https://www.icann.org/en/system/files/files/irp-afilias-witness-statement-mohan-redacted-26nov18-en.pdf).

. As a major participant in the DNS, Verisign has regular dealings with ICANN on a range of matters. Also, with respect to the questionnaire ICANN sent out to Verisign, NDC and contention set members who objected to ICANN regarding the public auction for .WEB, I am unaware of any advance notice by ICANN to NDC or Verisign of the questionnaire.

I swear under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 1st day of June 2020 at San Carlos, California.
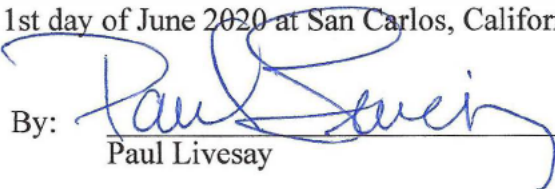
By: _____
Paul Livesay

# EXHIBIT AC-82

**New** Generic Top-Level
**Domains**
ICANN

About    Applicants    Program Status    News & Media

NEW GTLD CURRENT APPLICATION STATUS

Download All PICs
View All GAC Advice Responses
Contention Sets

VERISIGN

[Search]    [Reset]

## CURRENT APPLICATION STATUS

Type

Application Status ▾

Updates ▾

Objections ▾

GAC EW ▾

Contention Sets ▾

PICs ▾

**Apply Filters**

## APPLICATION PROCESSING

Show All Applications That Have:

Passed IE

Passed EE

Executed Contract

This page reflects the current application status. Application status will be updated from time to time to reflect the various New gTLD Program processes. Except for the application statuses "Withdrawn", "Delegated" and "RA Terminated", application statuses are not final.

A change in application status is intended to inform the applicants and the community of an application's current status. A change or update is not a definite indication that an application may proceed to another phase of the program. For more information including definitions of application statuses see the applicant advisory.

Please Note: The information on this page relating to the applicant, including contact information, reflects the information provided during the application phase of the New gTLD Program. Contact information is not maintained for withdrawn applications. Additionally, the information for TLDs that have contracted with ICANN may no longer be current as this information is not maintained on this page post delegation and does not necessarily reflect the current Registry information. For a current list of Registries and Registry contact information, please visit https://www.icann.org/resources/pages/registries/registries-agreements-en and https://www.icann.org/resources/pages/listing-2012-02-25-en, respectively.

| ► | Prioritization Number ⊙ | String [1] ⊙ | Applicant ⊙ | Location [2] ⊙ |
|---|---|---|---|---|
| ► | 16 | 大拿 | VeriSign Sarl | CH |
| ► | 20 | 點看 | VeriSign Sarl | CH |
| ► | 26 | कॉम | VeriSign Sarl | CH |
| ► | 33 | 닷넷 | VeriSign Sarl | CH |
| ► | 37 | नेट | VeriSign Sarl | CH |
| ► | 58 | คอม | VeriSign Sarl | CH |

**Reset All**

| | | | | |
|---|---|---|---|---|
| ▶ | 61 | ком | VeriSign Sarl | CH |
| ▶ | 66 | 点看 | VeriSign Sarl | CH |
| ▶ | 76 | דוק | VeriSign Sarl | CH |
| ▶ | 90 | 닷컴 | VeriSign Sarl | CH |
| ▶ | 101 | کوم | VeriSign Sarl | CH |
| ▶ | 105 | コム | VeriSign Sarl | CH |
| ▶ | 1480 | COMSEC | VeriSign, Inc. | US |
| ▶ | 1551 | VERISIGN | VeriSign, Inc. | US |

Displaying 1 - 14 of 14

Notes:

1. **String [1]:** ASCII or Unicode for IDN strings
2. **Location [2]:** Indicated by applicant as principal place of business. Two-letter country code is based on ISO 3166-1 code lists. See http://www.iso.org/iso/country_codes/iso_3166_code_lists/country_names_and_code_elements.htm
3. **Community:** Based on applicant's answer to question 19
4. **Geographic:** Based on applicant's answer to question 21
5. **Applicant Support:** Three applications have applied for applicant support. See application IDs: 1-1309-46695 (KIDS), 1-1873-71868 (IDN) and 1-2104-81541 (UMMAH)
6. **Format:** In some cases the display of the application data has been adjusted for format consistency
7. The Geographic Names Panel has determined that the string does not fall within the criteria for a geographic name contained in the Applicant Guidebook Section 2.2.1.4.
8. The Geographic Names Panel has determined that the string falls within the criteria for a geographic name contained in the Applicant Guidebook Section 2.2.1.4. The applicant was contacted to provide documentation of support/non-objection per Section 2.2.1.4.3 of the Applicant Guidebook.
9. The String Similarity Panel has determined that this string is visually similar to an existing TLD (.mil), creating a probability of user confusion.
10. Per the 4 June 2013 New gTLD Program Committee (NGPC) approved resolution to adopt the "NGPC Scorecard of 1As Regarding Non-Safeguard Advice in the GAC Beijing Communiqué."
11. Per the 10 September 2013 New gTLD Program Committee (NGPC) approved resolution to adopt the "ICANN Board New gTLD Program Committee Scorecard in response to GAC Durban Communiqué."
12. Per the 4 February 2018 Board resolution, the Board directed the President and CEO that the applications for .CORP, .HOME, and .MAIL should not proceed in the New gTLD Program.

# EXHIBIT AC-83

# CONFIDENTIAL

1          INDEPENDENT REVIEW PROCESS

2     INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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   AFILIAS DOMAINS NO. 3 LTD.,        )
7                                      )
                    Claimant,          )
8                                      )
           vs.                         )     ICDR Case No.
9                                      )     01-18-0004-
   INTERNET CORPORATION FOR            )     2702
10   ASSIGNED NAMES AND NUMBERS,       )
                                       )
11                  Respondent.        )
                                       )
12

13

14                 VOLUME VII

15       ARBITRATION HEARING HELD BEFORE

16            AUGUST 11, 2020

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24   BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR
     465538

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1              INDEPENDENT REVIEW PROCESS

2     INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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   AFILIAS DOMAINS NO. 3 LTD.,      )
7                                   )
                    Claimant,       )
8                                   )
              vs.                   )    ICDR Case No.
9                                   )    01-18-0004-
   INTERNET CORPORATION FOR         )    2702
10  ASSIGNED NAMES AND NUMBERS,     )
                                    )
11                  Respondent.     )
                                    )
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15                   ---o0o---

16           TUESDAY, AUGUST 11, 2020

17       ARBITRATION HEARING HELD BEFORE

18             PIERRE BIENVENU
               RICHARD CHERNICK
19           CATHERINE KESSEDJIAN

20       VOLUME VII (Pages 1113-1308)

21                   ---o0o---

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   REPORTER: BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR
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**BARKLEY**
*Court Reporters*

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Court Reporters

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1              A-P-P-E-A-R-A-N-C-E-S
                   ---o0o---
2


3    THE TRIBUNAL:

4          Pierre Bienvenu,
           pierre.bienvenu@nortonrosefulbright.com
5          Richard Chernick,
           richard@richardchernick.com
6          Catherine Kessedjian, ckarbitre@outlook.fr

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1          INDEX OF EXAMINATION
                 ---o0o---
2
PAUL LIVESAY                                      PAGE
3
CROSS-EXAMINATION BY MR. LITWIN                   1121
4

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 1                CALIFORNIA, AUGUST 11, 2020

 2                       ---o0o---

 3           ARBITRATOR BIENVENU:  Mr. Livesay, good

 4   morning.  Good morning, sir.  I don't know where

 5   you're joining us from, but I made the presumption

 6   that "good morning" would work.

 7           THE WITNESS:  Yes, it's morning.  I am

 8   here in California.

 9           ARBITRATOR BIENVENU:  Excellent.  Sir,

10   could I ask you to speak closer to your mic or to

11   increase the volume of your mic?

12           THE WITNESS:  Is that better?  Can you

13   hear me now better?

14           ARBITRATOR BIENVENU:  It is better, but we

15   could do with a bit more volume.

16           THE WITNESS:  Let me put the mic here in

17   front of my face.  How about that?

18           ARBITRATOR BIENVENU:  Mr. Livesay, my name

19   is Pierre Bienvenu.  I chair the Panel.  My

20   colleagues are Catherine Kessedjian, who is joining

21   us from Paris, and Mr. Richard Chernick, who is

22   joining from Los Angeles.

23           You have, sir, filed in connection with

24   this Independent Review Process a witness statement

25   dated 1st June 2020, correct?
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1    A.    Redacted - Third-Party Designated Confidential Information

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3    Q.    Redacted - Third-Party Designated Confidential Information

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Q.   And are you aware, sir, that in a

financing agreement, when a financier secures a

security interest, that is limited to the amount of

investment that they have made, the amount of

funding they have provided; isn't that true?

A.   I wouldn't know because this isn't a

financing agreement in the common sense.  Even in

the highlighted part, it says it serves like a

security interest.  I am not saying it is a

security interest in the terms that you would have,

like, mortgage interest, for instance.  We don't

have any -- we are trying to, like I said,

analogize, when you put a lot of money on the

table, how do you ensure that those moneys are used

the way you and this other third party agreed.

        Like I said, as much as I like Jose, they

were a new party to us.  They were working in the

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1 secondary market of TLDs.  They had been in private

2 auction along with all of these folks in this

3 cohort.

4          To me, as I am looking at this, it looks a

5 bit swampy, and I am thinking, how would we go

6 about preserving our interests so we don't get

7 hosed one way or another.  And so we started

8 looking at ways to do that.

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24          In fact, you talked about a mortgage.  So

25 maybe we could use that as a paradigm to compare

1 how this worked here.

2        In a mortgage, the borrower wants to buy

3 some real estate, and the bank loans, let's say,

4 $500,000 to the borrower to enable them to do that.

5 And in exchange, they take a security interest in

6 the property; is that your understanding of how a

7 mortgage works?

8    A.   Yeah, that's why I think comparing this to

9 a mortgage is totally inappropriate.  Because the

10 thing about mortgages is, you're right, the lender

11 actually has an interest that's filed in states

12 with the Secretary of State or whoever, regarding

13 the particular property.

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22    Q.   Right.

23    A.   I don't think a mortgage is a fair

24 comparison because of that.

25    Q.   I agree with you, Mr. Livesay.  In fact,

1  when a bank has to foreclose, it recoups its

2  security interest up to the amount, in my example,

3  of the $500,000 principal.  Anything that the

4  auction of the property achieves above that goes to

5  the borrower, because the borrower is the owner.

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9  Q.

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21     Q.    I'm sorry, you're using the term

22   "nth-order possibility"?

23     A.    Yeah.

24     Q.    What does that mean?

25     A.    Another word for saying seems like a very

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 1   remote possibility, right?  You look at a tree of

 2   potential outcomes.  We simply ran through a lot of

 3   them, some seemed a lot more remote than others, so

 4   we tried to develop an outcome for it.  Some of

 5   them, we just said, "This seems like the way," and

 6   we shook hands and signed the deal.

 7       Q.        Redacted - Third-Party Designated Confidential Information

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 9       A.        Redacted - Third-Party Designated Confidential Information

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13       A.     Redacted - Third-Party Designated Confidential Information

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17       A.        Redacted - Third-Party Designated Confidential Information

18       Q.        Redacted - Third-Party Designated Confidential Information

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23       A.        Redacted - Third-Party Designated Confidential Information

24       Q.        Redacted - Third-Party Designated Confidential Information

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1   Q.   Maybe I can help you with the dates.  The

           2   ICANN auction for .WEB took place in July of 2016.

           3   So did VeriSign disclose --

           4   A.   Okay.  Fair enough.  It would have been

           5   after the auction.  So that's correct.

           6   Q.   Okay.

           7   A.   My years are flipping in my head right

           8   now.  Sorry about that.

           9   Q.        Redacted - Third-Party Designated Confidential Information

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          14   A.        Redacted - Third-Party Designated Confidential Information

          15   Q.        Redacted - Third-Party Designated Confidential Information

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18     Q.    So your view was that -- strike that.

19           I am going to move on.

20           I'd like to direct your attention to your

21    witness statement where you write that,

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17        ARBITRATOR BIENVENU:  I think you

18   mentioned at the beginning of your evidence, but I

19   could be wrong, but I think you mentioned that

20   among the documents that you reviewed for the

21   preparation of your testimony today were the

22   filings that the parties made in the IRP; is that

23   correct?

24        THE WITNESS:  Some of them.  I don't

25   believe all of them.  I read Afilias' document

1 discussed seeking an advisory opinion from ICANN as

2 to the -- as to the compliant nature of the

3 agreement you were looking at with the program

4 rules?

5          THE WITNESS:

6          Redacted - Third-Party Designated Confidential Information

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21          ARBITRATOR BIENVENU:  Very well.  Thank

22 you, Mr. Livesay.

23          Mr. Johnston, any redirect, and do you

24 want to take --

25          ARBITRATOR KESSEDJIAN:  Mr. Chairman --

1272

1  that's straight and open.

2          ARBITRATOR KESSEDJIAN:  Okay.  Thank you.

3  Now, you said that at some stage in your testimony

4  tonight -- tonight for me -- that VeriSign didn't

5  want -- or VeriSign had the confidentiality clauses

6  in the DAA because without them, it would be

7  concerned that it would -- and I use your terms, at

8  least the ones that I have noted.  I don't have the

9  real live feed.  I didn't sign up for that --

10  upsetting the path.  That's your words, at least

11  from what I have taken as notes.

12          Now, do you refer to that as a concern

13  that VeriSign, that if it were discovered by

14  anybody that VeriSign was behind one of the

15  contention set applicants, it would really be a

16  problem?  Could you explore more what you meant by

17  upsetting the path?

18          THE WITNESS:  I guess the only way I can

19  say it is all the alleged claims we are hearing now

20  from Afilias, however wrong I think they are, we

21  would have heard.  But that wasn't really the main

22  drive.  The main drive was we figured we'd be

23  reviewed and have to take that when it came out.

24          The point was there looked like a path,

25  that there's a specific point where it would be

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1 evaluated, whether we were an appropriate assignee

2 or not of the RA.  So I think we just looked at a

3 particular path that looked like it would work, and

4 it still required disclosure, eventually, and

5 that's the path we are on.

6 　　　　　ARBITRATOR KESSEDJIAN:  Thank you,

7 Mr. Livesay.

8 　　　　　No more questions, Mr. Chairman.

9 　　　　　ARBITRATOR BIENVENU:  Thank you.  And

10 apologies for forgetting to ask you for your

11 questions.

12 　　　　　Mr. Chernick, any questions?

13 　　　　　ARBITRATOR CHERNICK:  No thank you.

14 　　　　　ARBITRATOR BIENVENU:  Mr. Johnston, do you

15 want to take a few minutes before you start your

16 redirect or do you want to start right away?

17 　　　　　MR. JOHNSTON:  I think two minutes would

18 be helpful, but I think it will only take two

19 minutes.

20 　　　　　ARBITRATOR BIENVENU:  Very well.  Let us

21 know when you're ready.

22 　　　　　MR. JOHNSTON:  Can we have a room, JD?

23 　　　　　MR. ENGLISH:  Sure.  Give me one second.

24 　　　　　(Whereupon a recess was taken.)

25 　　　　　ARBITRATOR BIENVENU:  Mr. Johnston, are we

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 2                 REPORTER'S CERTIFICATE

 3                     ---o0o---

 4          STATE OF CALIFORNIA      )
                                     )  ss.
 5          COUNTY OF SAN FRANCISCO  )

 6

 7          I, BALINDA DUNLAP, certify that I was the

 8   official court reporter and that I reported in

 9   shorthand writing the foregoing proceedings; that I

10   thereafter caused my shorthand writing to be

11   reduced to typewriting, and the pages included,

12   constitute a full, true, and correct record of said

13   proceedings:

14          IN WITNESS WHEREOF, I have subscribed this

15   certificate at San Francisco, California, on this

16   20th day of August, 2020.

17

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20   _____

21   BALINDA DUNLAP, CSR NO. 10710, RPR, CRR, RMR

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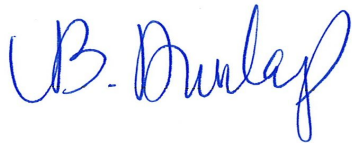
**BARKLEY**
*Court Reporters*

# EXHIBIT AC-84

# HIGHLY CONFIDENTIAL-
# ATTORNEYS' EYES ONLY

# EXHIBIT D-

# HIGHLY CONFIDENTIAL-
# ATTORNEYS' EYES ONLY

# EXHIBIT AC-85
# HIGHLY CONFIDENTIAL-ATTORNEYS' EYES ONLY

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTER FOR DISPUTE RESOLUTION

<table>
<tr><td>

AFILIAS DOMAINS NO. 3 LTD.,

    Claimant,

and

INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS,

    Respondent,

and

VERISIGN, INC. and NU DOTCO, LLC.

    *Amicus Curiae*.

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ICDR CASE NO: 01-18-0004-2702

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</table>

**WITNESS STATEMENT OF JOSE IGNACIO RASCO III**

**1 June 2020**

**HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY**

Steven A. Marenberg
Josh B. Gordon
April Hua
PAUL HASTINGS LLP
1999 Avenue of the Stars, 27th Floor
Los Angeles, California, 90067

Counsel to *Amicus Curiae*
Nu Dotco, LLC

1

I, Jose Ignacio Rasco III, declare as follows:

1.     My full name is Jose Ignacio Rasco III, and I reside in Miami, Florida. I am currently the Chief Financial Officer and a Manager of Nu Dotco, LLC ("NDC"), a company founded to submit applications and acquire rights for new generic top level domains ("gTLD") as part of the Internet Corporation for Assigned Names and Number's ("ICANN") New gTLD Program.

## I.    Biography

2.     In 2001, I graduated from the University of Pennsylvania's Wharton School with a Bachelor of Science Degree in Economics with concentrations in Accounting and Real Estate. In 2003, I earned a Master's Degree in Taxation from Florida International University.

3.     In 2005, I saw an opportunity to enter the domain name industry after I began working with Juan Diego Calle, an entrepreneur working within the internet space. In 2007, the Colombian government announced the release of the .CO geographic top level domain ("TLD") for public auction. In 2009, I, Mr. Calle, Nicolai Bezsonoff, and a few others co-founded .CO Internet S.A.S. ("dotCO") to acquire, develop, and operate the .CO TLD. I served as dotCO's Chief Financial Officer, while Mr. Calle and Mr. Bezsonoff served as dotCO's Chief Executive Officer and Chief Operating Officer, respectively. We operated dotCO as a joint venture with Neustar, Inc. ("Neustar"), an American technology company that served as our technical partner. In 2009, dotCO successfully bid for the .CO TLD, which we then operated with considerable success. Under our leadership, for example, we increased registrations and revenue to the point where .CO operated on par with top-echelon domains. Following that success, we sold dotCO to Neustar in 2014.

4.     In 2012, while still at dotCO, Mr. Calle, Mr. Bezsonoff, and I began to strategize the future of our domain industry business. During this time, we closely followed ICANN's

announcement of its New gTLD Program, under which ICANN promised to introduce numerous new gTLDs to the domain name system. As a complement to our existing dotCO business, we decided to participate in the New gTLD Program by applying to be operators of certain new gTLDs. We focused on those potential gTLDs that could occupy a corporate space similar to .CO and had the greatest potential for commercial success.

## II.    NDC's Management and Ownership

5.    The business organization we used to pursue our interest in participating in ICANN's New gTLD Program was NDC, a name ("Nu Dotco") that is a takeoff on our then-existing business "dotCO." On March 19, 2012, Mr. Calle, Mr. Bezsonoff, and I founded NDC, a company organized under the laws of Delaware with its principal place of business in Florida. Maintaining the same positions and roles we served at dotCO, I served as NDC's Chief Financial Officer, Mr. Calle served as NDC's Chief Executive Officer, and Mr. Bezsonoff served as NDC's Chief Operating Officer.

6.    At its formation, NDC was owned by two entities as follows: Domain Marketing Holdings, LLC ("DMH") owned 85% of NDC; Nuco LP, LLC ("Nuco") owned the other 15%. That ownership structure remained the same until December 2017, at which time Nuco distributed its 15% ownership interest in NDC to Nuco's members. As a result of that distribution, as of December 2017, DMH continued to hold 85% of NDC and the three other entities that had comprised Nuco collectively held the remaining 15% (with each necessarily owning less than 15%).

7.    Accordingly, other than DMH and Nuco, no other entity or person has ever owned at least 15% of NDC. Similarly, there have been no changes or amendments to NDC's management since 2012. Mr. Calle, Mr. Bezsonoff, and I remain the sole officers of NDC and continue to perform the duties associated with those positions.

8.     Formed for the specific purpose of submitting applications to ICANN to acquire gTLDs, NDC ultimately applied for thirteen (13) gTLDs through ICANN's New gTLD Program, including .WEB.[1]

### III.    NDC's Application for .WEB

9.     On June 13, 2012, NDC submitted an application to ICANN to acquire the right to operate the .WEB gTLD (the "Application").  Exhibit A attached hereto is a true and correct copy of the Application, together with the exhibits to that Application.[2]  NDC timely paid the required $185,000 application fee.

10.    NDC's Application satisfied all of ICANN's requirements. For example:

- **Corporate Information**

11.    Mr. Bezsonoff and I completed NDC's .WEB Application.  In that regard, as specified by Sections 1 and 8 of the ICANN gTLD application form, we identified NDC as the applicant and as a Delaware limited liability company.  Ex. A.1, §8(b).  As specified by Sections 6 and 7 of the form, we listed me as NDC's "Primary Contact" and listed Mr. Bezsonoff as NDC's "Secondary Contact."  *Id*. at §§6-7.  And as specified by Sections 11(a) & (b), we listed three people as NDC's directors and officers: me as CFO, Mr. Calle as CEO, and Mr. Bezsonoff as COO.  *Id.* at §§11(a), (b).  This information was accurate at the time NDC's Application was prepared and submitted and this information remains accurate today.

12.    To comply with the requirements of Section 11(c) of the gTLD application form, we identified "all shareholders holding at least 15% of shares" in NDC.  As was accurate at the time, we listed Domain Marketing Holdings, LLC and Nuco LP, LLC as entities that held at least

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[1] NDC applied for the following 13 gTLDs: .INC, .LLC, .GROUP, .LTD, .DESIGN, .MOVIE, .BOOK, .WEB, .CORP, .GMBH, .APP, .LAW, and .TECH.
[2] Exhibit A.1 contains publicly available portions of the Application.  Exhibit A.2 contains non-public, confidential portions of the Application.  Exhibits Aa-Ap contain exhibits submitted with the Application.

a 15% ownership interest in the LLC. *Id.* at §11(c). As stated above, these two entities are the only entities or persons that have ever held at least 15% of NDC.

- **Mission/Purpose of Proposed .gTLD**

13. Consistent with other gTLD applications NDC had submitted, in Section 18(a) of the Application we stated that the "mission/purpose" of .WEB was "to provide the internet community at-large with an alternative 'home domain' for their online presence. We envision that through strategic marketing campaigns designed to brand the domain, it will become a premium online namespace for a variety of businesses and websites. This general domain will provide new registrants with better, more relevant alternatives to the limited options remaining for current commercial TLD names." *Id.* at §18(a).

14. Sections 18(b) and 18(c) of the ICANN gTLD application ask applicants, respectively, to describe how the "proposed gTLD will benefit registrants, Internet users, and others" and to describe "operating rules … to eliminate or minimize social costs." *Id.* at §§18(b), (c). In answering these questions, NDC provided its general vision of new gTLDs in the marketplace and its general strategy at the time as to how .WEB might be successfully and productively introduced and used to benefit consumers. *Id*. Although NDC used its experience with .CO as an *example* of how .WEB might accomplish these goals, we understood, and we stated in our answers, that specific plans would depend on market conditions and thus were not fully described in the Application. Nonetheless, we repeatedly stated NDC's intent to follow ICANN's policies, rules, and recommendations in connection with .WEB.

15. With slight modifications to reflect the specific gTLD at issue, NDC's statements in Section 18 of its .WEB Application were largely identical to corresponding statements in all of NDC's other ICANN gTLD applications. We understood Section 18 to request general

descriptions of marketing and other business intent, not binding commitments of future actions. In fact, as described in more detail below, I understand that ICANN does not use Section 18 to evaluate gTLD applications and does not take any interest in any distinctions that might arise between statements made in Section 18 of a gTLD application and how a domain is ultimately operated. To the best of my knowledge, other applicants—including Claimant Afilias Domains No. 3 Ltd. ("Afilias")—similarly responded to Section 18 (and other sections) of the ICANN gTLD application form with near-identical statements in each of their applications, irrespective of how they operated domains they ultimately acquired or whether they subsequently transferred the domains to another entity. And, also to the best of my knowledge, ICANN has never policed any distinctions between Section 18 statements and such subsequent actions.

16. Nonetheless, I understand that Afilias has alleged that NDC's answers to the application form's "mission/purpose" inquiries in Section 18 were made false or misleading, thereby requiring an update to NDC's Application, by NDC's entry into the Domain Acquisition Agreement ("DAA") with Verisign over three years later. *See* Part VI, *infra*. That is incorrect. First, NDC's subjective views as to the "mission/purpose" of gTLDs, including .WEB, and how .WEB might benefit consumers and others have not changed, irrespective of who operates .WEB. Second, NDC's Section 18 responses expressly stated that NDC's marketing and other business plans were not final and were subject to market conditions. In all of my experience with ICANN applications, I have never updated, nor known any applicant to update, an application to reflect new and different marketing and business plans for a gTLD.

17. Third, given that NDC's marketing and business plans were subject to change, as a baseline position NDC stated that it planned to follow ICANN's policies, rules, and recommendations in connection with .WEB. Nothing in the DAA required an update to that

statement, including because I understood that Verisign, a longstanding registry owner and operator with whom ICANN was very familiar, would also follow those policies, rules, and recommendations.  As a baseline, therefore, I did not believe anything about our Section 18 responses had materially changed on account of the DAA and I did not believe any amendment to NDC's Application was required or warranted.  Among other things, in

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18.     Moreover, as stated above, it has always been my understanding that the Section 18 "mission/purpose" inquiry is intended to provide ICANN with certain New gTLD Program statistics and is not part of the evaluation criteria.  Rather, when evaluating whether an applicant is qualified to participate in a new gTLD contention set, ICANN has always been most concerned with whether that applicant has the financial ability and technical infrastructure to successfully operate the gTLD registry.  For example, the ICANN Guidebook states that responses to Section 18 are "not used as part of the evaluation or scoring of the application, except to the extent that the information may overlap with questions or evaluation areas that are scored."[3]

19.     Instead, the Guidebook explains that Section 18 responses are used in connection with *ex-post* reviews of the gTLD program in general and not in connection with any specific application:

> The information gathered in response to Question 18 is intended to inform the post-launch review of the New gTLD Program, from the perspective of assessing the relative costs and benefits achieved in the expanded gTLD space.  For the application to be considered complete, answers to this section must be fulsome and

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[3] Afilias C-3 (*gTLD Applicant Guidebook*, Attachment to Module 2, A-11, A-12, *available at* https://newgtlds.icann.org/en/applicants/agb).

sufficiently quantitative and detailed to inform future study on plans vs. results. The New gTLD Program will be reviewed, as specified in section 9.3 of the Affirmation of Commitments. This will include consideration of the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion. *Id.*

20.    As a result, while helpful for ICANN to assess the New gTLD Program in general, Section 18 responses are not a material part of evaluating a particular application and, moreover, are not subject to subsequent enforcement by ICANN in the event those responses differ from how or by whom a domain is ultimately operated. Accordingly, for this additional reason, I again did not believe that NDC was obligated to update any such response in its .WEB Application.

- **Technical Capabilities**

21.    In Sections 23-44, NDC provided a robust description of its technical ability to operate the .WEB gTLD. For example, NDC explained that it had partnered with Neustar, an experienced domain registry company with proven and scalable infrastructure. Ex. A.2, §§23-27. NDC further provided detailed information regarding the specific services Neustar would provide, including the necessary security, abuse prevention, and rights protection services. *E.g., id.* at §§28-44.

- **Financial Information**

22.    Redacted - Third Party Designated Confidential Information

This financial information is considered confidential by ICANN, and is not disclosed by ICANN in its public posting of new gTLD applications. Therefore, only ICANN would have had access to this information about NDC's financial ability to operate the .WEB gTLD. Other members of the Contention Set, including those who might bid at auction for .WEB, would not have had access to such financial information.

23.    Notably, the ICANN application form did not call for, and therefore NDC did not provide, any information regarding NDC's financial capability to acquire the .WEB gTLD in an auction or sources of financing for that auction. In more than a dozen ICANN applications I have overseen for NDC, ICANN has never requested and NDC has never provided such information.

24.    As NDC's primary contact for the Application, I received confirmation from ICANN that our .WEB Application had been accepted—meaning that the Application had satisfied all applicable ICANN criteria and evaluations—in June 2013.

25.    Pursuant to the ICANN Guidebook, if more than one applicant applies for a gTLD, then the approved applicants are grouped together into a "Contention Set," with the competing applications resolved either through (i) a private auction or other negotiated settlement conducted by agreement of the applicants or, if all members of the Contention Set do not agree to a private auction, (ii) a public auction conducted under the auspices of ICANN.

26.    In addition to NDC, there were six other approved applicants for the .WEB gTLD: Web.com Group, Inc., Charleston Road Registry Inc. (Google), Schlund Technologies GmbH, Dot Web Inc. (Radix), Ruby Glen LLC ("Donuts"), and Afilias. In February 2014, ICANN officially formed a Contention Set for .WEB comprising these seven applicants, including NDC.

27.    It was not until April 2016, however, that ICANN sent notice to the Contention Set that ICANN would issue the .WEB gTLD and, therefore, that ICANN had scheduled a public

auction for .WEB to take place on July 27, 2016. Until ICANN sent that formal notice, there was no guarantee that ICANN would hold an auction for .WEB. Rather, as had occurred with other domain strings (such as .CORP), ICANN had the right to decline to issue the .WEB gTLD and thus not to hold an auction.

28.     As a result, between June 2013, when ICANN approved NDC's application, and April 2016, when ICANN scheduled the public auction, there was no clarity as to how NDC's application for .WEB might ultimately be resolved.

## IV.     Changes to the gTLD Marketplace and the Emergence of New Participants

29.     Following NDC's successful acquisition and operation of the .CO domain in 2010 and ICANN's introduction of the New gTLD Program in or around 2012, NDC decided to focus its gTLD acquisition strategy on similar company-type domains. For example, because "CO" is short for "Company," NDC applied for domain strings such as .INC, .LLC, .CORP, .LTD, and others in this corporate short identifier space. NDC also applied for domain strings related to high traffic Internet searches, including .MOVIE, .BOOK, and, of course, .WEB. In total, NDC submitted 13 ICANN applications for these and similar domains.

30.     Between 2012 and 2015 several other companies emerged as repeat participants in the ICANN New gTLD Program. Prominent among these was Donuts. On information and belief, Donuts raised funds through private equity transactions to finance ICANN applications and auction bids. With that money, it is my understanding that Donuts applied for and bid on at least 300 gTLD domain strings, far more than NDC or, I believe, most other companies.

31.     Donuts also emerged as a driving force behind the private auctions permitted by ICANN. As briefly described above, ICANN does not specify how applicants might privately resolve the Contention Set, and applicants may mutually agree to resolve the Contention Set through a private auction or other means. In fact, ICANN encourages applicants to resolve

Contention Sets on their own terms—viewing a public auction as a last resort—and historically has neither participated in nor policed those private resolutions.

32.     To the contrary, once ICANN has determined that a gTLD application satisfies the requirements of the Guidebook and placed the various applicants into a Contention Set, to the best of my knowledge, ICANN has effectively fulfilled any gatekeeping function that it might undertake: ICANN has determined that the applicant is qualified and capable of operating the gTLD if that applicant emerges from the Contention Set and secures the rights to operate the domain.  Beyond that, to the best of my knowledge, ICANN takes no position **on which** applicant in a Contention Set subsequently becomes eligible to sign a registry agreement with ICANN for the domain in question **or how** they do so.  In fact, the Auction Rules expressly state that applicants within a Contention Set may discuss and negotiate, among other things, "settlement agreements or post-Auction ownership transfer arrangements" for the domain in question so long as the Contention Set is not within a designated Blackout Period shortly before a public auction.[4]

33.     Accordingly, over the years, applicants have considered and employed numerous means to resolve Contention Sets.  For example, when NDC first considered participating in the New gTLD Program, we researched the program rules and considered various means of resolving Contention Sets, including trading domains with other applicants who might have a greater interest in a particular domain string than NDC, cross-selling percentage interests in different domains, and buying various applicants out of their applications before any auction was held.  Although NDC has never used these means in practice, I have never considered, and am not aware of anyone who does consider, such means of resolving Contention Sets to be prohibited by the ICANN rules.

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[4] Afilias C-4 (*Auction Rules for New gTLDs: Indirect Contentions Edition*, 68(a)-(b), *available at* https://newgtlds.icann.org/en/applicants/auctions).

34.     Following the disclosure by ICANN of the various entities that had submitted gTLD applications, NDC and those entities engaged in numerous discussions regarding how we might resolve Contention Sets without proceeding to a public ICANN auction.  Most of the ideas discussed were variations on private auctions, and private auctions have since become the most prominent means to resolve Contention Sets.  Although the terms of those auctions may vary depending on the agreement reached by members of the Contention Set, a common form of private auction—which Donuts was heavily involved in creating—is resolved in favor of the highest-bidding applicant.  Unlike a public auction under the auspices of ICANN, however, the money offered by the *highest* bidder is often divided equally among the *losing* bidders, not paid to ICANN.  As a result, each member of the Contention Set stands to benefit from a private auction as long as the "losers' share" exceeds expenses, including the ICANN $185,000 application fee.

35.     As another example, in July 2016, Oliver Mauss, the CEO of 1&1 Internet, which owns the Schlund entity that had applied for .WEB and was in the .WEB Contention Set, emailed Mr. Calle with a proposal for an "alternative private auction."  Exhibit C attached hereto is a true and correct copy of that email, which Mr. Calle forwarded to me on July 5, 2016.  In his email, Mr. Mauss described the "basic principles" of his proposal: "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;" and "the highest bid wins, but the winner pays a lower price than the 2nd highest bid."  *Id*.  According to Mr. Mauss, this proposal had several advantages over a typical private auction (which he called an "Applicant Auction") and an ICANN public auction.  *Id*.  For example, "the winning party pays less for the asset in comparison to both" an ICANN public auction or an "Applicant Auction;" "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." *Id*. Essentially, Mr. Mauss concluded, the "benefit for the strong bidders comes from a lower share of proceeds for the weak bidders than in the Applicant Auction." *Id*. We did not agree to participate in Mr. Mauss's proposal, but it was yet another example of means through which participants in the New gTLD Program attempted to resolve Contention Sets without proceeding to a public ICANN auction.

36.     Following ICANN's publication of the Guidebook in 2012, Donuts made significant efforts to coordinate private auctions between gTLD applicants. For example, Donuts hired a mathematician to develop models for operating such auctions, developed tutorials, and hosted meetings and mock auctions so participants could experience and evaluate how private auctions might work. I participated in at least one such meeting, which was held during an ICANN conference (but was not on the official conference schedule) and which I understood had been arranged by Donuts. At that meeting, a mathematician and a private auction company provided information to gTLD applicants about how a private auction might work.

37.     Other companies, including Afilias, similarly prioritized private auctions, ultimately treating gTLD applications as a form of arbitrage in which each application was an asset to be leveraged for profit without ever intending to actually operate any, or most, of the gTLDs. Based on my active participation in the domain industry for over 12 years and numerous conversations with other participants, it is my understanding that such practices were commonly known in the industry. I believe that ICANN was aware of these practices and, to my knowledge, did not object to them. I believed that these practices were acceptable to ICANN, which sought only to ensure that the ultimate operator was qualified and technically and financially capable of operating each respective gTLD.

38.     By 2015, Donuts had become a well-financed, major force in the New gTLD Program.  In addition, large companies such as Amazon and Google also began to participate in the Program, including by participating in private and public auctions.

39.     As private auctions proliferated and the value of gTLD domain strings increased, including as a result of the influx of money from participants such as Donuts, Amazon, and Google, the market expectations for the .WEB domain and other new gTLDs increased.

40.     Given these changes in the marketplace, Redacted - Third Party Designated Confidentia Information

## V.     The Domain Acquisition Agreement and Confirmation of Understandings

### A.     The Domain Acquisition Agreement

41.     In or around May 2015, I received a phone call from Verisign expressing interest in working with NDC to acquire the rights to .WEB.  As noted above, by that date ICANN had formed the Contention Set for .WEB (meaning no new applicants could join) and

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In addition, as also noted above, by that date ICANN had yet to schedule a public auction for .WEB, and thus the domain was still on hold, so there was no clarity as to a resolution by either a public *or* a private auction.  Consequently, because

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42.     As stated above, based on my experience and discussions with others in the industry, it was common industry knowledge by 2015-2016 that gTLD applicants used various means to resolve Contention Sets and monetize their applications. In addition to private auctions, it was common knowledge that interested parties had monetized successful gTLD applications by assigning interests in domain strings after securing the rights from ICANN. And it was commonly understood that ICANN approved of these assignments. In fact, when NDC first developed its strategy in connection with the New gTLD Program, we considered the possibilities presented by these secondary market opportunities to acquire others' rights in domains, and we came to understand that other gTLD applicants had utilized such opportunities and entered into registry agreements with ICANN based on those opportunities.

43.     For example, in or around 2013-2014 I knew that Donuts and Rightside Media had entered into an arrangement whereby certain gTLD applications were potentially financed by the other party in exchange for an interest in the domains in question if and when the domains were acquired. To the best of my knowledge, more than twenty (20) domains have been assigned under this arrangement without any update to ICANN applications disclosing the underlying arrangement. Later on, I knew that the .BLOG gTLD had been acquired by WordPress, or an affiliated entity, after another entity, Primer Nevel S.A, prevailed at auction and executed a registry agreement with ICANN.

44.     In addition, I have reason to believe that Radix Registry ("Radix") acquired the rights to the .TECH gTLD through an agreement with Dot Tech, LLC. Dot Tech, LLC was in the .TECH Contention Set with NDC. At no time in the auction process for .TECH did NDC think or know that Radix was participating in any way in the auction and Dot Tech LLC did not update its ICANN application prior to the auction to reveal any agreement with Radix. Dot Tech, LLC won

the .TECH auction on or around September 17, 2014. Thereafter, on October 23, 2014, Dot Tech, LLC updated its application to, among other things, add Radix personnel (including Brijesh Joshi, a Radix Director) as officers and as the new Primary and Secondary Contacts and to reflect that a Radix entity was the only party holding 15% or more of the shares of Dot Tech, LLC. Attached hereto as Exhibits D and E, respectively, are Dot Tech, LLC's original June 2012 application and the revised application dated October 23, 2014. On November 7, 2014, less than two months after Dot Tech, LLC won the auction, **Radix** issued a press release stating that "**Radix** made the winning bid of $6.7 million for rights to .TECH, competing with Google, Donuts, and other industry players." (Emphasis added.) Indeed, based on the unsigned .TECH Registry Agreement available on ICANN's website, that agreement was set to be signed for Dot Tech LLC by Brijesh Joshi, the Radix Director whose name appeared on the Dot Tech LLC application for the first time after the auction was held, not anyone from Dot Tech LLC who had participated in the .TECH Contention Set. Attached hereto as Exhibits F and G, respectively, are true and correct copies of Radix's press release and the publicly available, unsigned, .TECH Registry Agreement.

45.    It was in this context—our knowledge of these transactions, and our interest in maximizing NDC's return from our .WEB Application—that we began to consider any type of contact with Verisign about .WEB. In the spring and summer of 2015 NDC engaged in discussions with Verisign about the .WEB domain. Those discussions culminated in the August 25, 2015 "Domain Acquisition Agreement" between NDC and Verisign. Ex. B.

46.    In the DAA, Redacted - Third Party Designated Confidential Information

47. Redacted - Third Party Designated Confidential Information

48. Redacted - Third Party Designated Confidential Information

49. Redacted - Third Party Designated Confidential Information

50. Redacted - Third Party Designated Confidential Information

51. Redacted - Third Party Designated Confidential Information

52. Redacted - Third Party Designated Confidential Information

53.     Redacted - Third Party Designated Confidential Information

Not only in the past did any transfer depend on

ICANN determining to delegate a .WEB TLD (as noted above), and not only must ICANN consent

to an assignment of a .WEB registry agreement to Verisign, but the DAA further provides that

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**B.      The Confirmation Of Understandings**

54.     In July 2016, Verisign requested that NDC confirm the parties' understanding

regarding NDC's .WEB Application in light of allegations by Donuts that NDC had transferred

control of NDC to a third party or assigned the .WEB Application to a third party.  *See* Part VII.C,

*infra*.  Because those allegations were unequivocally false, and because

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to Verisign's request, and the parties subsequently executed a letter agreement dated July 26, 2016

(the "Confirmation of Understandings").  Exhibit H attached hereto is a true and correct copy of

the Confirmation of Understandings.  Redacted - Third Party Designated Confidential Information




55.     I understand that Afilias has alleged that the Confirmation of Understandings

contained "false 'talking points'" provided to me by Verisign that I "duly signed" because I was

"instructed" to do so by Verisign.  Reply Memorial ¶79.  That is false.  I did not view the

Confirmation of Understandings as "talking points," let alone as something to be used in

coordinating any response to ICANN, but instead as an accurate statement of NDC's rights and

obligations that protected NDC.  As a result, I signed the Confirmation of Understandings of my

own accord, for NDC and not for Verisign, because it was a true and accurate description of certain

facts and understandings between NDC and Verisign, each of which is consistent with NDC's

intent in executing the DAA.  In addition, Redacted - Third Party Designated Confidential Information

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56.     For example, in the Confirmation of Understandings, Redacted - Third Party Designated Confidential Information

57.      Fully agreeing that the Confirmation of Understandings set forth NDC's rights as the applicant for .WEB and its rights and obligations under the DAA, each of which I understood to be consistent with and in compliance with ICANN rules and procedures, I signed the Confirmation of Understandings as of July 26, 2016.   Importantly, the Confirmation of Understandings in no way contradicted what I told ICANN in June and July 2016—that NDC had not experienced any changes in its organizational management or control.  *See* Part VII.C, *infra*.

As explained in detail below, my statements to ICANN were truthful, and I never deceived or misled ICANN or anyone else regarding NDC's .WEB Application.

**VI.     Neither the DAA Nor the Confirmation of Understandings Warranted an Update to NDC's .WEB Application**

58.     As discussed in Part III, *supra*, I did not believe that the DAA warranted or required any update to NDC's .WEB Application.  The same is therefore true of the Confirmation of Understandings.  For example, I address in Part III, *supra*, why I disagree with Afilias' assertions that the DAA rendered NDC's "mission/purpose" responses false or misleading.  Simply put, nothing in the DAA changed NDC's view of the "mission/purpose" of .WEB or changed how NDC might operate .WEB or NDC's technical or financial capability to operate .WEB.  Because nothing in those responses became false or misleading, I did not believe any update to the Application was necessary.

59.     Indeed, Afilias assumes that, as of August 2015, there was no scenario in which NDC itself might operate .WEB.  That is incorrect, including because

Redacted - Third Party Designated Confidential Information   and, as of August 2015, ICANN had yet to even conclude whether or how the .WEB Contention Set would be resolved.  There was no guarantee, therefore, that the DAA would be in effect when the Contention Set was resolved.

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These facts informed my belief that NDC was under no obligation to update its .WEB application upon execution of the DAA.

60.     I understand that Afilias has emphasized two provisions of the DAA in support of its argument that the DAA required an update to NDC's .WEB Application.  First, Afilias repeatedly quotes the following: Redacted - Third Party Designated Confidential Information

61.    Redacted - Third Party Designated Confidential Information

In fact, in the context of private auctions, there is no disclosure of interested parties or planned transfers of acquired domains, and I am not aware of any applicant, including Afilias, questioning or challenging the results of a private auction on any basis, let alone on the basis that the winner of the auction subsequently transferred its rights in the domain to another, previously unknown party. Redacted - Third Party Designated Confidential Information

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62.     Second, Afilias also relies on language

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**VII.    Pre-Auction Communications with the .WEB Contention Set and ICANN**

    **A.     NDC Did Not Agree to a Private Auction for .WEB**

63.     As noted above, in April 2016, eight months after NDC and Verisign executed the DAA, ICANN informed the .WEB Contention Set that it had scheduled a public auction for July 27, 2016.  Thereafter, members of that Contention Set began to discuss the private and public auction options for .WEB.

64.     For example, between April and June 2016, I and Mr. Calle (the CEO of NDC) had various phone, email, and text conversations with other members of the Contention Set regarding both .WEB and other outstanding TLDs for which we had pending applications.  In the course of those conversations, other members of the Contention Set, including Donuts and Afilias, attempted to persuade NDC to participate in a private auction for .WEB.

65.     Because there is no obligation under the ICANN Guidebook or otherwise to participate in a private auction, NDC declined to do so in connection with .WEB.  Not only did

Mr. Calle and I repeatedly decline requests from Donuts, Afilias, and others, but we also never signed any agreement committing NDC to a private auction for .WEB. To be plain, NDC was not required to participate in a private auction for .WEB and never agreed to do so.

66. Nor would NDC Redacted - Third Party Designated Confidential Information

**B. Other Contention Set Members Sought to Pressure NDC to Agree to a Private Auction**

67. At the time, I understood that other members of the .WEB Contention Set were unhappy that NDC would not agree to a private auction. Recall that a private auction requires the consent of all members of the Contention Set. And recall that, in a private auction, the winner secures the rights to the gTLD at issue and the winning bid is shared among the losing parties. In contrast, in a public auction, the winning bid is retained by ICANN (for investment in the Internet infrastructure) and the losing bidders recover nothing.[5] Accordingly, other members of the Contention Set stood to lose the opportunity to "earn" significant amounts of money as the losers in a private auction were .WEB to proceed to a public auction.

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[5] Applicants can recover portions of their application fee depending on if and when they exit the auction process, but recover nothing if they complete the auction but do not prevail.

68.     One such party was Donuts.  On June 6, 2016, I received an email from Jon Nevett, a co-founder of Donuts, regarding .WEB.  Exhibit I attached hereto is a true and correct copy of an email string containing Mr. Nevett's June 6 email and our subsequent communications.  In his June 6 email, Mr. Nevett said that he was unsure if I, Mr. Calle, and Mr. Bezsonoff were "still the Board members of your applicant" and asked us to agree to a two-month delay of the public auction for .WEB while the Contention Set tried "to work this out cooperatively."  *Id*.  Based on prior communications with Mr. Nevett, I understood him to be asking to discuss further NDC's participation in a private auction.  On June 7, I replied to Mr. Nevett's email and informed him that NDC would not agree to a private auction (maintaining its intention to proceed to a public auction administered by ICANN) and would not agree to a postponement of the public auction.  *Id*.  In particular, I told Mr. Nevett that, based on his request, "I went back to check with all the powers that be and there was no change in the response and [NDC] will not be seeking an extension."  *Id*.

69.     In addition, in response to Mr. Nevett's inquiry about whom at NDC he should contact regarding .WEB, I stated that "Nicolai [Bezsonoff] is at [Neustar] full time and no longer involved with our TLD applications.  I'm still running our program and Juan [Calle] sits on the board with me and several others."  *Id*.  Mr. Nevett responded with "Thanks Jose," and asked a follow-up question about unrelated domains.  He did not ask for any other information or for any clarification about what I had written.  *Id*.

70.     I am aware that my reply to Mr. Nevett is being mischaracterized and used as the basis to withhold the award of .WEB to NDC following our successful auction bid in July 2016.  My email to Mr. Nevett was an informal email between colleagues who, though also competitors, had a cordial, and even friendly relationship.  In that context, I sought to politely respond to Mr.

Nevett's inquiry and deflect further questions. I never intended to suggest any of the changes to the ownership or control of NDC that have been alleged. Nor did I have any obligation or intention to provide detailed, formal information about our company or its management to Donuts.

71.     To the contrary, as I have previously attested, I intended the following by the statements in my June 7 email:

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72. Again, I did not intend my June 7 email to a competitor to convey formal information about NDC's corporate organization, let alone to communicate some change to NDC's management that warranted an update to our .WEB Application, as there had been no such change since NDC submitted its .WEB Application. Rather, the language I used was intended to politely dissuade Mr. Nevett from continuing to pursue the issue of a private auction but, at the same time, not to create any ill will between us. I viewed the email as a polite "stiff-arm" response to a competitor to whom neither I nor NDC had any duty to provide either information or explanations for our decisions.

73. On the same day that Jon Nevett of Donuts emailed me, June 7, 2016, Steve Heflin of Afilias contacted Mr. Calle by text message to similarly ask if NDC would reconsider its decision to forego a private auction for .WEB. Exhibit J attached hereto is a true and correct copy of those text messages, which Mr. Calle forwarded to me on June 7, 2016. In those messages, Afilias offered to "guarantee [NDC] score[s] at least 16 mil if you go into the private auction and

lose." Mr. Calle declined Afilias' offer. *Id*. Afilias then offered to increase the guaranteed payment to "$17.02" million. Mr. Calle again declined. *Id*.

74. John Kane of Afilias also texted me to make the same request. I again declined. Exhibit K attached hereto is a true and correct copy of my text messages with Mr. Kane.

**C. ICANN Investigated and Dismissed Complaints by the Other Contention Set Members**

75. Unable to persuade NDC to participate in a private auction for .WEB, and, in my opinion, motivated entirely by a desire to delay the upcoming *public* auction so as to preserve the possibility that they might profit from the losers' share in a *private* auction, on June 23, 2016, Donuts and Ruby Glen (which is owned and operated by Donuts) complained to ICANN that NDC had changed its ownership and/or management structure but had not reported the change to ICANN as allegedly required. Donuts and Ruby Glen requested that ICANN investigate those allegations and requested that the public auction for .WEB be delayed during that investigation. Exhibit L attached hereto is a true and correct copy of Donuts' and Ruby Glen's June 23, 2016 complaint to ICANN (the "Donuts Complaint").

76. Signed by Jon Nevett of Donuts—with whom I had emailed between June 6-8, 2016—the Donuts Complaint was entirely premised on the misconception that my statements to Mr. Nevett on June 7 revealed a change in "ownership or control" of NDC that NDC had not communicated to ICANN through an update to NDC's .WEB Application. *See id*.

77. On June 27, 2016, I received an email message from a member of ICANN's New gTLD Operations department stating that ICANN "would like to confirm that there have not been changes to [NDC's] application or the [NDC] organization that need to be reported to 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

[and/or] application contacts)." Exhibit M attached hereto is a true and correct copy of ICANN's June 27, 2016 email and subsequent communications on that day between me and ICANN. ICANN's email requested that, if "there have been any such changes," NDC submit the changes to ICANN via ICANN's customer portal. *Id.*

78.     I responded to ICANN's email on the same day, confirming that "there have been no changes to the [NDC] organization that would need to be reported to ICANN." *Id.* ICANN responded that same day, informing me that no further action was required at the time. *Id.* I believed—and still believe—that my answer to ICANN's inquiry was accurate and fully responsive. It most certainly was not an "outright lie" as Afilias accuses it to be. *Cf.* Reply Memorial, ¶73. To the contrary, as shown on Exhibit M, ICANN's June 27 emails to me did not reference any complaint received by ICANN from any other party or any specific information that ICANN or any other party believed might be incorrect. Rather, given the type of potential changes highlighted in ICANN's email—"changes that occur as part of regular business operations *(e.g., changes to officers and directors [and/or] application contacts)*" (my emphasis)—I understood ICANN to be making a routine inquiry of the Contention Set members given that many years had passed since the .WEB applications had been submitted and that the public auction date had been set and was rapidly approaching. That is, in the context of this very specific inquiry, I understood ICANN to be asking whether the identifying information set forth in NDC's application, (*e.g.*, management, ownership, and contacts) had changed, not whether **any aspect of NDC's business had changed**. As such, it never occurred to me that ICANN's routine inquiry might require disclosure of NDC's financing arrangement with Verisign in general or the DAA in particular, especially given the well-known industry practice of transferring domains, with ICANN's consent, after the auction process concluded.

79.     The next I heard from anyone at ICANN about any potential concerns regarding NDC's .WEB Application was July 6-7, 2016, when I received emails from ICANN ombudsman Chris LaHatte informing me that "one or more" of the other applicants for .WEB had complained that NDC's .WEB Application had not been properly updated due to changes in NDC's board. Exhibit N attached hereto is a true and correct copy of Mr. LaHatte's emails to me and my response.

80.     In particular, Mr. LaHatte referenced an email "which suggests that one of [NDC's] directors is no longer taking an active part in the application, and that there are other directors now involved." *Id*. And he informed me that the "complainant also suggested that NDC's shareholders have changed since the original application." *Id*. In the communications with ICANN that followed, I endeavored to be as thorough and responsive as possible, and I provided accurate and what I thought were clear answers to the questions I was asked. For example:

81.     I responded to Mr. LaHatte on July 8, 2016, telling him that there had "been no changes to the [NDC] application. Neither the governance, management nor the ownership in [NDC] has changed." *Id*. I further explained that, in an LLC like NDC, "there are no directors, it is a manager managed company, as designated by the Members of the LLC within the Operating Agreement of the Limited Liability Company." *Id*. And in the case of NDC, I explained that there "has never been an amendment to that operating agreement. There are no new 'directors,' nor have any left the company." *Id*. Finally, I explained that, "while the managers are ultimately responsible for the LCC, as a manager, 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." *Id*.

82.     My July 8 email was accurate at the time and remains accurate today.  Mr. LaHatte asked if other NDC directors were involved with the .WEB application and if any shareholders had changed.  I truthfully answered that neither was true.  Moreover, in stating that I confer with other Members regarding "major decisions," I only meant to clarify our general practice at NDC and not to represent anything specifically about .WEB.  *Cf.* Reply Memorial, ¶81.

83.     Also on July 8, 2016, I received an email from Christine Willet, whom I understand to be a Vice President, gTLD Operations, Global Domains Division, at ICANN.  Ms. Willett asked me to call her regarding NDC's .WEB Application and I did so the same day.

84.     During that July 8, 2016 telephone conversation with Ms. Willett, I reiterated what I had explained to Mr. LaHatte, which was that neither the ownership nor the control of NDC had changed Redacted - Third Party Designated Confidential Information

85.     During that same telephone conversation, I also explained that
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86.     Realizing that Donuts had misconstrued my June 7 response to Mr. Nevett and that my email was now the basis for the complaint to ICANN, I further explained to Ms. Willett that
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87.     I understand that Afilias now contends that my statements to the other applicants were intentionally misleading.  However, I was under no obligation to be completely forthcoming about our internal operations or plans with parties who were competing for the same gTLD.  Nor did I expect the same candor from the other applicants.  My statements to Donuts were an attempt at politely deflecting a competitor.  Nothing in ICANN's rules prohibits doing so.  To be clear, nothing I said to Donuts or to ICANN was a "blatant falsehood" or any attempt to "affirmatively conceal" anything from anyone.  *Cf*. Reply Memorial, ¶78.  Afilias' assertions to the contrary are simply not true.

88.     In fact, on July 11, 2016, I wrote to Ms. Willett to make sure the statements I made in our conversation on July 8 were clear.  Exhibit O attached hereto is a true and correct copy of my July 11, 2016 email to Ms. Willett.  In addition to reiterating what I had told her about the lack of any changes to the ownership or control of NDC, I also reiterated that I shared her understanding that other applicants had raised the complaint "in order to get more time to convince us to resolve the contention set via a private auction, even though we have made it very clear to them (and all other applicants) that we will not participate in a private auction and that we are committed to participating in ICANN's auction as scheduled."  *Id.*  In addition, I noted that under ICANN's rules every member of the Contention Set was required to join in a request for the postponement of a public auction, but as of July 11, 2016, the deadline to make such a unanimous request for .WEB had passed.  *Id.*

89.     On July 13, 2016, Ms. Willet informed the Contention Set that, among other things, ICANN had investigated the complaints of "potential changes of control" of NDC and, "to date we have found no basis to initiate the application change request process or postpone the auction." Exhibit P attached hereto is a true and correct copy of Ms. Willett's letter dated July 13, 2016.

90.     Although my June 7, 2016 email to Mr. Nevett was taken entirely out of context, my responses to ICANN's inquiries were unequivocal and accurate.  In particular, as described above, I repeatedly told Ms. Willett and Mr. LaHatte in July 2016 that there had been no change to NDC's management, control, or ownership since the filing of NDC's .WEB Application, including because the LLC Operating Agreement had not been amended.  *See, e.g.,* ¶¶ 81, 84, *supra*.  Those statements were unequivocally true.

91.     Moreover, the only changes to NDC's ownership structure (pursuant to which Nuco distributed its shares in NDC to its shareholders) that have ever been made did not occur until December 2017, more than five years *after* NDC submitted its .WEB Application in 2012 and more than one year *after* both my communications with ICANN and the .WEB Auction in 2016. And in any event, that change to NDC's ownership structure did not result in any new person or entity having more than a 15% interest in NDC, the threshold required to be disclosed in the ICANN application form.  *See*, ¶12, *supra*.  As such, even today, nearly eight years after NDC submitted its .WEB Application, the information therein remains accurate.

**D.      Afilias Attempted to Arrange a Private Auction for .WEB During the ICANN Blackout Period**

92.     As noted above, ICANN informed the parties in April 2016 that a public auction for .WEB had been scheduled for July 27, 2016.

93.     Under the ICANN Auction Rules and Bidder Agreement, upon the commencement of a "Blackout Period," "all applicants for Contention Strings within the 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."[6] Violations of the Blackout Period can result in disqualification from the Contention Set.

94.     The Blackout Period for .WEB commenced on July 20, 2016, when the deposit deadline for the .WEB auction expired. In particular, on July 20, 2016, I received an email from Larry Ausubel of Power Auctions LLC (the administrator appointed by ICANN to conduct the .WEB auction) advising me—as every other member of the Contention Set was also advised—that "the Deposit Deadline for .WEB/.WEBS has passed and we are now in the Blackout Period." Exhibit Q attached hereto is a true and correct copy of the July 20, 2016 email from Mr. Ausubel.

95.     On July 22, 2016, two days after Mr. Ausubel notified the Contention Set that the Blackout Period had begun, I received a text message from John Kane of Afilias asking: "If ICANN delays the auction next week would you again consider a private auction? Y-N." Exhibit R attached hereto is a true and correct copy of that July 22, 2016 text message.

96.     I did not respond to Afilias' text message, as it was sent within the Blackout Period in violation of the Auction Rules and Bidder Agreement. Specifically, I understood that message to be an attempt to discuss resolution of the .WEB Contention Set by settlement during the Blackout Period and thus viewed it as a direct inquiry regarding NDC's strategy for the upcoming auction, in violation of the Blackout Period.

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[6] Afilias C-4 (*Auction Rules for New gTLDs: Indirect Contentions Edition*, 68(a), *available at* https://newgtlds.icann.org/en/applicants/auctions).

97.     I also understood Afilias' text message to refer back to a proposal made by Afilias to Mr. Calle in June 2016 under which Afilias attempted to induce NDC to agree to a private auction for .WEB by guaranteeing NDC over $17 million if NDC lost that auction.  Because we were in the Blackout Period and the public auction was scheduled for five days later, July 27, I ignored Afilias' improper contact.

## VIII.   The .WEB Public Auction

98.     The public auction for .WEB took place on July 27, 2016, continuing into the morning of July 28, 2016.  I participated in that auction from Verisign's offices in Reston, Virginia.

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99.     Redacted - Third Party Designated Confidential Information

100.    Similarly, I believed that it was reasonable for

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Given the significant interest in the .WEB domain, there were numerous rounds of bidding across the two auction days. In an ICANN auction, a price is set in each round and applicants must enter a bid amount that is equal to or greater than the set price to continue to the next round. Although applicants know *how many* parties are participating in each round, they do not know *which* parties remain at any time or the limits of each party's financing or interest in the gTLD.

101. The .WEB auction concluded on July 28

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Apart from that statement, I have never possessed any information regarding the terms of Afilias' financing, which I believe remains confidential.

102. Financing arrangements secured by the .WEB Contention Set were not disclosed by NDC or other bidders, as any such arrangements are commonly confidential. Nor is there any ICANN or other requirement that the Contention Set disclose available financing to ICANN or other members of the Contention Set. To the contrary, doing so would provide an unfair advantage to bidders that, upon such disclosure, would know the limits of their competitors' funds and thus know what amount of money would secure the winning bid. Such disclosure would thus be counterintuitive to a competitive auction, and I am not aware of any auction, ICANN or otherwise, that proceeds in such a manner. As a result, I did not know (and could not have known) that Afilias

37

Nor would it have been appropriate for others to

know the amount NDC could or might bid.

103.    Having secured the winning bid, NDC

I

understand that ICANN has retained the entire            notwithstanding that it has not yet

agreed to execute a Registry Agreement with NDC for the .WEB gTLD.

## IX.    Post-Auction Communications with ICANN Regarding .WEB

104.    On September 16, 2016, I received an email from Ms. Willett at ICANN stating

that Ruby Glen and Afilias had continued to complain that NDC should not have participated in

the .WEB public auction and that NDC's Application should be rejected.  That letter was a surprise

to me, as prior to receiving it I had not heard from or communicated with Ms. Willett or anyone

else at ICANN about .WEB since confirming our payment for .WEB in August 2016.

105.    In her letter, Ms. Willett requested that NDC provide responses to 20 questions

posed by ICANN so that ICANN could evaluate those complaints.  Ms. Willett's email also invited

Ruby Glen, Afilias, and Verisign to respond to the same questions, and I understand that each of

those entities received the same request from ICANN.  Exhibit S attached hereto is a true and

correct copy of Ms. Willett's September 16, 2016 email.

106.    NDC provided responses to ICANN's 20 questions on October 10, 2016.  Exhibit

T attached hereto is a true and correct copy of the October 10, 2016 email I sent to ICANN

attaching those responses and the responses themselves.

107.    Since submitting those responses in October 2016, NDC has periodically made

inquiries to ICANN through the ICANN customer service portal regarding the status of .WEB.

ICANN has never responded beyond a statement that the resolution of .WEB is on hold due to the

pendency of accountability mechanisms or similar processes.

108.     I understand Afilias has suggested that NDC somehow colluded with Verisign and ICANN regarding ICANN's investigation of Afilias' complaints. That is false. NDC does not have any ability to direct or control ICANN's investigation and has not remotely attempted to do so. NDC was not consulted by ICANN about its investigation and has no more insight into ICANN's investigation than any other party.

109.     What is true, however, is that it is now June 2020, nearly four years after the public auction for .WEB. NDC has been seriously injured by the delays caused by the various—and in my opinion entirely unfounded—complaints and objections by Donuts and the pursuit of this proceeding by Afilias. Among other things, Redacted - Third Party Designated Confidential Information

110.     Redacted - Third Party Designated Confidential Information                                by members of the .WEB Contention Set, including Afilias, following their unsuccessful attempts to either (i) coerce NDC to participate in a private auction for .WEB—thus ensuring a profit even if they lost that auction—or, (ii) when those efforts failed, to obtain the rights to .WEB themselves. Having accomplished neither, it is my belief that Afilias' continued complaints are no more than a transparent attempt to profit at NDC's and Verisign's expense. I respectfully submit that, as set forth in this statement, there is no factual basis for those complaints.

I swear under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge and belief.

Executed on this 30th day of May, 2020 at Miami, Florida.

José Ignacio Rasco III

# EXHIBIT AC-86

# HIGHLY CONFIDENTIAL-
# ATTORNEYS' EYES ONLY

# EXHIBIT H-

# HIGHLY CONFIDENTIAL-
# ATTORNEYS' EYES ONLY

Redacted – Third Party Designated Confidential Information

# EXHIBIT AC-87

# CONFIDENTIAL

# EXHIBIT M

## CONFIDENTIAL

Redacted – Third Party Designated Confidential Information

# EXHIBIT AC-88

# CONFIDENTIAL

# EXHIBIT O

## CONFIDENTIAL

Redacted – Third Party Designated Confidential Information

# EXHIBIT AC-89

# CONFIDENTIAL

# EXHIBIT P

## CONFIDENTIAL

# EXHIBIT AC-90

# CONFIDENTIAL

# EXHIBIT J

## CONFIDENTIAL

Redacted – Third Party Designated Confidential Information

# EXHIBIT AC-91

# CONFIDENTIAL

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


**AFILIAS DOMAINS NO. 3 LIMITED,**

*Claimant*

**v.**

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

*Respondent*


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

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**AMENDED REQUEST BY AFILIAS DOMAINS NO. 3 LIMITED
FOR INDEPENDENT REVIEW**

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21 March 2019

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**TABLE OF CONTENTS**

**GLOSSARY OF DEFINED TERMS**

| | |
|---|---|
| Afilias | Afilias Domains No. 3 Limited |
| AGB | ICANN's New gTLD Applicant Guidebook[1] |
| Articles | ICANN's Articles of Incorporation[2] |
| Auction Rules | ICANN's Auction Rules for New gTLDs: Indirect Contention Edition[3] |
| Bidder | A "Qualified Applicant" or a "Designated Bidder" under the New gTLD Program Rules |
| Bidder Agreement | New gTLD Auctions Bidder Agreement; the agreement between members of the .WEB contention set and ICANN's third-party auction manager, Power Auctions LLC[4] |
| Bylaws | ICANN's Bylaws, as amended 18 June 2018[5] |
| CEP | ICANN's Cooperative Engagement Process, described in Bylaws Art. 4, Sec. 4.3(e) |
| Change Request Criteria | ICANN's New gTLD Application Change Request Process and Criteria[6] |
| DAA or Domain Acquisition Agreement | NDC's Domain Acquisition Agreement with VeriSign <sup>Third Party Designated Confidential Information Redacted</sup>[7] |
| Designated Bidder | "A party designated by a Qualified Applicant to bid on its behalf in an Auction"[8] |
| DIDP | ICANN's Documentary Information Disclosure Policy |
| DNS or Domain Name System | The Internet's addressing system |
| GNSO | ICANN's Generic Names Supporting Organization, ICANN's policy-making body |
| GNSO Report | The GNSO's Final Report, Part A: Introduction of New Generic Top-Level Domains dated 8 August 2017[9] |
| gTLD | Generic Top-Level Domain |
| ICANN | The Internet Corporation for Assigned Names and Numbers |
| ICDR | The International Centre for Dispute Resolution |
| Interim Procedures | The Interim Supplementary Procedures for ICANN IRP |
| IRP | ICANN's Independent Review Process[10] |
| NDC | Nu Dotco LLC |
| New gTLD Program Rules, or Rules | The AGB, the Auction Rules, and other rules related to the New gTLD Program |
| Procedures Officer Decision | Declaration of the Procedures Officer dated 28 February 2019[11] |
| Qualified Applicant | "An entity that has submitted an Application for a new gTLD, has received all necessary approvals from ICANN, and which is included within a Contention Set to be resolved by an Auction."[12] |
| Rationales | ICANN Board Rationales for the Approval of the Launch of the New gTLD Program dated 20 June 2011[13] |
| Request | Afilias' Amended Request for Independent Review dated 20 March 2019 |

| Ruby Glen | Ruby Glen, LLC |
|-----------|----------------|
| VeriSign | VeriSign, Inc. |
| .WEB | The .WEB gTLD registry |
| .WEB Auction | The ICANN-administered Auction for .WEB |

1.      Afilias submits this Request[14] pursuant to Section 4.3 of the Bylaws,[15] the International Arbitration Rules of the ICDR, and the Interim Procedures.  Afilias has suffered direct harm as a result of ICANN's breaches of its Articles and Bylaws.[16]

2.      This IRP arises out of ICANN's breaches of its Articles and Bylaws as a result of the ICANN Board's and Staff's failure to faithfully enforce the rules for, and underlying policies of, ICANN's New gTLD Program, including the rules, procedures, and policies set out in the AGB[17] and the Auction Rules.[18]  This IRP also encompasses the ICANN Board's breach of its Bylaws in connection with its adoption of Rule 7 of the Interim Procedures.[19]

3.      Afilias was one of seven entities that applied for .WEB.[20]  Under the New gTLD Program Rules, unless it is resolved voluntarily, ICANN 'breaks the tie' among the applicants by administering an auction.  The proceeds of the auction are paid to ICANN.

4.      As Afilias learned after commencing this IRP,[21] nearly a year prior to the .WEB Auction, another applicant, NDC, secretly entered into a "domain acquisition agreement" with VeriSign, the registry market's dominant player.[22] VeriSign had not applied for .WEB.  Pursuant to this DAA, Third Party Designated Confidential Information Redacted

.[23]  At the time, neither NDC nor VeriSign discloses the DAA to ICANN or and NDC did not modify its .WEB application as required by the New gTLD Program Rules 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.  NDC won the .WEB Auction on VeriSign's behalf with a bid exceeding USD 135 million; Afilias presented the second-highest bid.  VeriSign has paid the exit bid amount to ICANN.

5.      Based on the terms of the DAA, it is evident that NDC violated the New gTLD Program Rules. ICANN, however, has refused to disqualify NDC from the .WEB contention set, or to disqualify NDC's bids in the .WEB Auction.  Specifically, ICANN has breached the obligation contained in its Bylaws to make decisions by applying its documented policies "neutrally, objectively, and fairly."[24]  ICANN has also breached its obligations

under international and California law to act in good faith. Furthermore, by failing to implement faithfully the New gTLD Program Rules and thereby enabling VeriSign eventually to acquire the .WEB gTLD, ICANN has eviscerated one of the central 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.[25]

## 1. THE PARTIES

### 1.1 Afilias

6.       Afilias is organized 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 TLD registries.[26]

### 1.2 ICANN

7.       ICANN is a not-for-profit corporation organized under the laws of the State of California.  As multiple IRP panels have stated, ICANN functions as the global regulator[27] of the Domain Name System, or DNS. Although a private organization in form, ICANN has extraordinary powers and regulatory responsibilities to governments and Internet stakeholders worldwide.

8.       ICANN's Articles stipulate that it must "operate in a manner consistent with [its] Articles and its Bylaws for the benefit of the Internet community as a whole[.]"[28]  ICANN is required to carry out its activities "in conformity with relevant principles of international law and international conventions and applicable local law[.]"[29] As determined by the first-ever IRP panel (Schwebel, Paulsson, Trevizian), this includes the obligation of good faith.[30]  ICANN must also adhere to the "Core Values" and "Commitments" expressed in its Bylaws, which require it to "[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly[.]"[31]  The version of the Bylaws in effect when the AGB was published and when the .WEB Auction occurred also included the requirement that ICANN apply documented policies "with integrity and fairness."[32]  The Bylaws expressly prohibit ICANN from "apply[ing] its standards, policies, procedures, or practices inequitably or singl[ing] out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion

of effective competition."[33]   ICANN is also required to operate "through open and transparent processes that enable competition and open entry in Internet-related markets[,]"[34] and "[i]ntroduc[e] and promot[e] competition in the registration of domain names where practicable and beneficial to the public interest[.]"[35]   The Bylaws "are intended to apply in the broadest possible range of circumstances" and "are intended to apply consistently and comprehensively to ICANN's activities."[36]

## 2.   SUMMARY OF SALIENT FACTS

### 2.1   The New gTLD Program and the AGB

9.      As presented more fully in the accompanying Expert Report of Jonathan Zittrain, ICANN was created in 1998 to promote competition in the DNS by introducing new gTLDs and encouraging new registries to compete with VeriSign.[37]  The ICANN Board's Rationales for the Approval of the Launch of the New gTLD Program emphasized that the New gTLD Program "represents ICANN's continued adherence to its mandate to introduce competition in the DNS, and also represents the culmination of an ICANN community policy recommendation of how this can be achieved."[38]

10.      In June 2011, ICANN's Board of Directors approved the AGB, describing it as "the implementation of [a] Board-approved consensus policy concerning the introduction of new gTLDs."[39]  The AGB is a detailed 338-page set of policies, rules, and procedures that provides a "step-by-step procedure for new gTLD applicants."[40]  ICANN is required to interpret and enforce the New gTLD Program Rules strictly in accordance with its Articles and Bylaws, which, pursuant to the requirement that ICANN "carry[] out its activities in conformity with relevant principles of international law[,]"[41] requires ICANN to interpret and apply them in good faith.[42]

### 2.2   Overview of Relevant New gTLD Program Rules

### 2.2.1   Applicants' Required Disclosures and Public Review of Applications

11.      Transparency is a central policy of the AGB.  To that end, the AGB requires applicants to answer a series of detailed questions describing their business plan for the proposed gTLD; to demonstrate the requisite financial, technical, and operational capabilities needed to operate a registry; and to provide documentation

substantiating the claims made in the application.[43]  Further, the AGB requires "applicant[s] (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any and all others acting on [their] behalf)" to provide extensive background information, including the identity of all persons responsible for managing and operating each applicant.[44]  Applicants are required to maintain the accuracy and truthfulness of their applications at all times.[45]

12.     Save for confidential financial and technical details, applications are published for public review and comment on ICANN's website.  This allows the public (including other applicants) to know who is applying for which gTLDs and why.  All complete applications are subject to a 60-day public comment period, during which ICANN's Government Advisory Committee, the public, and other interested parties may review and comment on the applications.  The AGB's public comment mechanisms are designed to comply with ICANN's Commitments and Core Values to "promot[e] competition," "achiev[e] broad representation of global Internet communities," and "develop[] policy appropriate to [ICANN's] mission through bottom-up, consensus-based processes."[46]

### 2.2.2   Applicants' Obligation to Amend Their Applications

13.     To ensure ongoing transparency into the application process, the AGB requires applicants to notify ICANN *promptly* of any change in circumstances that would cause any information in an application to become untrue or inaccurate, including by omission of material information.

14.     AGB Section 1.2.7 states that:

> 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.  This includes applicant-specific information such as changes in financial position and changes in ownership or control of the applicant.  ICANN reserves the right to require a re-evaluation of the application in the event of a material change.  This could involve additional fees or evaluation in a subsequent application round.  *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**.*[47]

15.     AGB Module 6 (Terms and Conditions) further clarifies the scope of this obligation, providing that:

> 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 in circumstances* that would render any information provided in the application *false or misleading*.[48]

16. The obligation to ensure the completeness, truthfulness, and accuracy of the disclosures provided in the application extends throughout the process and is ultimately reflected in the Registry Agreement between ICANN and the prospective registry operator. ICANN's standard form Registry Agreement, which is incorporated into the AGB, states as follows:

> 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[.][49]

17. The above requirements of completeness, truthfulness, and accuracy throughout the AGB process are intended to (i) protect the interests of other stakeholders, in particular other members of a contention set, and (ii) ensure a fair and transparent application and evaluation process by which registry rights are awarded—as originally envisioned by the GNSO.[50] These objectives are also reflected in ICANN's published criteria for determining whether to accept or reject an applicant's request to amend an application, assuming that such a request is made in the first place.[51] According to ICANN, the "criteria were carefully developed to enable applicants to make necessary changes to their applications *while ensuring a fair and equitable process for all applicants*."[52] The criteria therefore recommend rejection of change requests that would "*affect other third parties materially*," "*particularly other applicants*," or put the applicant filing the change request in a position of advantage or disadvantage compared to other applicants.[53] They state that if a change request would "*materially impact other third parties*, it will likely be found to cause issues of unfairness," therefore weighing in favor of denial.[54] The relevant focus of the criteria is to assess whether "the change [would] affect *string contention*."[55] As ICANN's explanatory notes state: "This criterion assesses how the change request will impact

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the status of the application and *its competing applications*, the string, [and] *the contention set*[.]"[56]

18.     In short, the fundamental premise underlying ICANN's Change Request Criteria is that applicants must disclose any information that could potentially impact string contention or the interests of other applicants. The focus is less on the nature or effects of the new circumstances on the applicant, but rather on the impact of the new circumstances on other applicants in the contention set and the fairness of the process.

### 2.2.3     Anti-Assignment Rules

19.     The AGB's Terms and Conditions strictly prohibit an applicant from reselling, assigning, or transferring any of its rights in connection with its *application*:

> Applicant understands and agrees that it will acquire rights in connection with a gTLD only in the event that it enters into a registry agreement with ICANN, and that applicant's rights in connection with such gTLD will be limited to those expressly stated in the registry agreement. … *Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application*.[57]

20.     Here, too, the terms and purpose of the AGB and Auction Rules are clear: if an applicant is permitted to act secretly on behalf of a non-applicant, the result is that the public and other applicants are deceived about the identity of the true party in interest. [58]   The anti-assignment provision is therefore necessary to ensure that all interested parties in each application are publicly disclosed, furthering ICANN's policy of transparency.

### 2.2.4     Multiple Applicants and Contention Set Resolution

21.     Where multiple applicants seeking the same gTLD are approved, as was the case with .WEB,[59] all approved applicants are placed into a "contention set" for resolution.[60]  The AGB "encourage[s]" contention set members to negotiate and resolve their competing claims without the need for ICANN's intervention,[61] such as through joint ventures or royalty or revenue sharing agreements.[62]   Alternatively, contention set members can resolve their competing claims by an auction administered by the contention set, provided that all members agree to do so.  The vast majority of contention sets have been resolved through such private auctions.

22.     If a contention set is not privately resolved by an ICANN-set deadline, the AGB provides that ICANN 'break the tie' by administering an auction of last resort.[63]  The ICANN Board adopted the mechanism of contention set resolution via auction because it considered an auction to be "an objective test; other means are

subjective and might give unfair results, are unpredictable, and might be subject to abuses."[64]  Further, according

to the Board, resolution via auction "provide[s] objectivity and transparency: 'Auctions rely on relatively simple and

transparent rules that apply to all participants.  As such they are fair and transparent.…'"[65]  In selecting an auction

mechanism, ICANN sought to *avoid* scenarios where winners "flipped" or "resold" the acquired gTLD to "larger

entities at substantial profit without ever delivering service to a single customer."[66]  For this reason, ICANN

stressed that it "intend[ed] to use auctions in the new gTLD process as a tie-breaking mechanism ... for the

resolution of string contention **among competing new gTLD applicants** for identical or similar strings."[67]  The

Rules thus made it clear that the ICANN-administered auction was not open for all comers, but only for bona fide

approved applicants for the same new gTLD.

23.     The AGB and the Auction Rules provide a detailed set of rules that govern ICANN-administered

auctions.  The AGB provides that, during the auction, "[t]he auctioneer [will] successively increase[] the prices

associated with applications within the contention set, and the respective **applicants** [will] indicate their willingness

to pay these prices.  As the prices rise, **applicants** will successively choose to exit from the auction."[68]  The AGB

further provides that "**[o]nly bids that comply with all aspects of the auction rules will be considered valid**."[69]

If a Bidder submits an invalid bid during a round of the auction, "**the bid is taken to be an exit bid at the start-

of-round price for the current auction round**."[70]  In other words, Bidders that submit invalid bids cannot progress

to the next round of the auction.

24.     Under the Auction Rules, participation in an ICANN-administered auction is limited to Bidders,[71]

defined as either: (i) a Qualified Applicant ("[a]n entity that has submitted an Application for a new gTLD, has

received all necessary approvals from ICANN, and which is included within a Contention Set to be resolved by an

Auction")[72] or (ii) a Designated Bidder (an entity that a Qualified Applicant designates "to bid on its behalf").[73]

25.     The Auction Rules provide that a Bidder may only "**bid on its behalf**," not on behalf of a third

party.  For example, Auction Rule 13 provides that prior to an ICANN-administered Auction, "each Bidder shall

nominate up to two people ('Authorized Individuals') **to bid on its behalf** in the Auction."[74]  Pursuant to Auction

Rule 15, the actions of Authorized Individuals are attributable "to the Bidder that nominated the Authorized Individual *to bid on its behalf*."[75]  Consistent with these rules, the standard Bidder Agreement provides that "the Qualified Applicant will *place bids in the Auction on its own behalf* or may designate an agent ('Designated Bidder') to enter bids at the Auction *on the Qualified Applicant's behalf*."[76]

**2.3     .WEB and the .WEB Auction**

26.     The .WEB gTLD is one of the—if not the—crown jewels of the New gTLD Program.  As set out in greater detail in Dr. George Sadowsky's Expert Report,[77] .WEB is a unique gTLD because of properties inherent in its name, and it is widely viewed as the one potential new gTLD with a sufficiently broad and global appeal to compete with VeriSign's .COM.[78]

27.     Some of the largest players in the domain name business applied for .WEB.  ICANN ultimately included seven applicants in the .WEB contention set: Afilias; Google, Inc. (through Charleston Road Registry Inc.); Donuts, Inc. (through Ruby Glen); Radix FZC (through DotWeb Inc.); InterNetX GmbH (Schlund Technologies GmbH); Web.com Group, Inc.; and NDC.[79]

28.     NDC was established as a special purpose vehicle to acquire gTLDs in the New gTLD Program. NDC applied for twelve other gTLDs, but lost every auction it entered other than the .WEB Auction.  NDC's application did not identify or include any information about VeriSign.  To the contrary, NDC represented that it would itself aggressively market .WEB as an alternative to .COM in order to increase competition and fight "congestion" in a market for "commercial TLD names [that] fundamentally advantages older incumbent players," and that its partner Neustar, Inc. would provide the back-end support necessary to operate the registry.[80]

29.     ICANN set a 27 July 2016 date for the .WEB Auction if the contention set had not voluntarily resolved itself beforehand.[81]  By mid-May 2016, it seemed that all of the contention set members had agreed to participate in a private auction.[82]  An auction vendor was retained to administer the private auction on 15-16 June 2016.[83]  NDC, however, failed to meet the deadline to submit its application to participate in this private auction. Because voluntary resolution of contention sets must be unanimous, NDC's refusal meant that the contention set

would have to be resolved at the ICANN-administered auction scheduled for the following month.

30.    On 1 June 2016, Afilias' John Kane contacted Jose Ignacio Rasco III—who is one of NDC's three founders, one of its three managers, its CFO, and the primary contact identified in its .WEB application—to ascertain why NDC had failed to submit its application.[84]  Rasco told him that his "***board [had] instructed [him]*** to skip [the private auction] and proceed to [the] ICANN [auction]."[85]  Other contention set members received similar responses from Rasco.  For example, Rasco informed contention set member Ruby Glen:

> The three of us are still technically the managers of the LLC, but ***the decision goes beyond just us***.  …  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….[86]

31.    In submitting Rasco's reply to ICANN, Ruby Glen complained that a third party was likely controlling NDC.  ICANN thereupon undertook to investigate the matter, writing to NDC's Rasco:[87]

> We would like to confirm that there have not been ***changes to your application or*** the [NDC] organization that need to be reported to 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 or directors, application contacts).[88]

Rasco's response was carefully crafted and answered only part of ICANN's inquiry: "I can confirm that there have been no changes to the [NDC] organization that would need to be reported to ICANN."[89]  Notably missing was a response to ICANN's request that NDC "confirm that there have not been changes to your application … that need to be reported to ICANN."[90]

32.    On 8 July 2016, ICANN's Christine Willett (Vice President, gTLD Operations, Global Domains Division) followed up with Rasco by phone, but does not appear to have pressed Rasco on his response to ICANN's query, which is surprising—if not incredible—given that there were abundant rumors circulating at the time (which were known to ICANN) that VeriSign was somehow involved with NDC.  In a summary of that conversation provided to the ICANN Ombudsman later that day, Willett wrote that Rasco had represented to her that, in responding to Ruby Glen and Afilias:

> [H]e used language to give the impression that the decision to not resolve contention privately was not entirely his.  However, ***this decision was in fact his***.[91]

33.     In short, either Rasco had lied to Willett, or the two of them had their conversation on a "don't ask, don't tell" understanding.  Indeed, as of                    Third Party Designated Confidential Information Redacted

                                                                                        . Thus, the decision whether or not to participate in the private auction was not "in fact his" (i.e., Rasco's).     Third Party Designated Confidential Information Redacted

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34.     On 13 July 2016, Willett wrote to the contention set, stating that ICANN intended to proceed with the .WEB Auction, as scheduled, on Wednesday 27 July 2016.  She stated: "in regards to potential changes of control of [NDC], we have investigated the matter, and to date we have found no basis to initiate the application change request or postpone this auction."[93]

35.     At the .WEB Auction, several contention set members dropped out early, with four bidders passing the prior record and through the round ending at USD 71.9 million.  Thereafter, only Afilias and one other bidder continued to bid.  Under the terms of its bank financing agreements, Afilias was able to bid up to USD 135 million for .WEB, which was more than three times the record bid in any previous ICANN auction.[94]  In the final round, Afilias submitted a bid of USD 135 million, short of the USD 142 million needed to progress to the next round.  ICANN subsequently announced that NDC had won the auction.

## 2.4     How VeriSign Sought to Acquire .WEB.

### 2.4.1     VeriSign Pursues .WEB Secretly as it Negotiates with ICANN for .COM

36.     When the New gTLD Program application window opened in 2012, VeriSign had applied only for non-Latin character versions of .COM and .NET, as well as two gTLDs associated with its trademarks.  VeriSign did not apply for .WEB.  Instead, Third Party Designated Confidential Information , VeriSign entered into the DAA.[95]  VeriSign and NDC kept

the existence of the DAA a secret from the public, and apparently from ICANN, until after the auction results were announced. (As discussed below, the *terms* of the DAA remain a secret from the public; Afilias' counsel first learned of the terms pursuant to a Confidentiality Agreement in December 2018, as a result of discovery granted in this IRP.)

37. Following the .WEB Auction, VeriSign filed a 10-Q statement with the SEC. A footnote in that statement obliquely referred to the result of the .WEB Auction:

> Subsequent 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.[96]

VeriSign's disclosure was not accurate: Third Party Designated Confidential Information Redacted

A flurry of media reports immediately appeared, speculating that VeriSign had acquired .WEB.[97]

38. On 1 August 2016, and in response to the speculation in the marketplace, VeriSign issued a press release, stating that it had "entered into an agreement with [NDC] wherein [VeriSign] provided funds for [NDC's] bid for the .web TLD …. We anticipate that [NDC] will execute the .web Registry Agreement with [ICANN] and will then seek to assign the Registry Agreement to Verisign upon consent from ICANN."[98] As shown below, VeriSign's press release did not accurately describe the terms of the DAA.

39. Following complaints by Afilias, ICANN requested VeriSign and NDC to provide a copy of their agreement. Third Party Designated Confidential Information Redacted Afilias, however, did not become aware of the DAA or when it was provided to ICANN until it received the DAA on 18 December 2018, when it was produced to Afilias by ICANN based on a production order from the Emergency Panelist (and under a Confidentiality Agreement in which only Afilias' General Counsel, outside counsel, and experts assisting in this case may see it). Prior to this, ICANN had refused to provide the DAA (or even confirm its existence), or otherwise provide any other .WEB-related documents that Afilias had requested pursuant to ICANN's Documentary Information Disclosure Policy.[99]

### 2.4.2 The Terms of the Domain Acquisition Agreement

40. By agreeing to the DAA, Third Party Designated Confidential Information Redacted

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42.     By entering into the DAA,     Third Party Designated Confidential Information Redacted

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43.     Reflecting its total control over NDC's .WEB application, VeriSign has reported that it is involved in the delegation process for .WEB.  During an earnings call on 8 February 2018, VeriSign CEO D. James Bidzos reported that "[w]e are now engaged in ICANN's process to move the delegation of .web forward."[113]  Bidzos made similar comments on 23 April 2018 and 26 July 2018.[114]

## 2.5     Afilias Complains to ICANN

44.     On 8 August 2016, Afilias wrote to ICANN, stating that VeriSign's arrangement with NDC violated the New gTLD Program Rules and demanding that ICANN disqualify NDC's bid and, in accordance with the Rules,

award .WEB to the next highest bidder, Afilias.[115]  Afilias also lodged a complaint with the ICANN Ombudsman.[116]

45.      Having received no response to its letter, on 9 September 2016, Afilias again wrote to ICANN, requesting that ICANN specify what steps it had taken to disqualify NDC's bid and to confirm that ICANN would not enter into a Registry Agreement with NDC for .WEB until the Ombudsman had completed its investigation, the ICANN Board had reviewed the matter, and any ICANN accountability mechanisms had been completed.[117]

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46.      On 16 September 2016, ICANN sent Afilias, VeriSign, NDC, and Ruby Glen a questionnaire to "facilitate informed resolution" of questions regarding, among other things, whether NDC should have participated in the 27-28 July 2016 .WEB Auction and whether NDC's application for the .WEB gTLD should be rejected.[118]

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47.      On 30 September 2016, Mr. Akram Atallah (President, ICANN's Global Domains Division) wrote to Afilias and stated:  "As an applicant in the contention set, the primary contact for the Afilias's application *will be notified of [any] future changes to the contention set status or updates regarding the status of [.WEB]*….  We will continue to take Afilias's comments, and other inputs that we have sought, into consideration *as we consider this matter*."[119]

48.      Afilias responded to ICANN's request on 7 October 2016.[120]  Afilias does not know what ICANN did with the information it received, including presumably from VeriSign, NDC, and Ruby Glen.

49.      Throughout 2017, ICANN did not—as Mr. Atallah had promised—notify Afilias of *any* "changes to the contentions set status" or *any* "updates regarding the status of .WEB."  However, Afilias had no reason to believe that ICANN was not investigating and considering the issues raised by Afilias – which, again, is what ICANN said it would do.

50.      Beginning in February 2018, Afilias' counsel at Dechert made repeated requests to ICANN for updates on whether it had reached any decision on how it intended to proceed with .WEB.  On 28 April 2018, ICANN's counsel at Jones Day responded to Afilias' counsel that "*the .WEB contention set is on hold*.  When

the contention set is updated, your client – along with all other members of the contention set – will be notified promptly[.]"[121]

51.     Without providing any reasons for its decision, on 7 June 2018, ICANN notified Afilias that it had decided to take the .WEB contention set off hold status—signaling that it intended to proceed with delegation of .WEB to NDC;[122] and, of course, in light of the terms of the DAA, of which ICANN was now fully aware, to VeriSign.

52.     In response to ICANN's notification, on 18 June 2018 Afilias initiated a CEP—an ICANN accountability mechanism intended to allow the parties to amicably resolve or narrow the issues in dispute.[123]  In response, on 20 June 2018, ICANN once again placed the .WEB contention set "on-hold."[124]  ICANN terminated the CEP on 13 November 2018.[125]  Afilias commenced this IRP the following day on 14 November 2018.  The .WEB contention set is still on-hold.

## 3.     NDC VIOLATED THE NEW GTLD PROGRAM RULES

53.     Below we set out how NDC violated the AGB by (i) omitting material information from and failing to correct material misleading information in its .WEB application, (ii) assigning its rights and obligations in its .WEB application to VeriSign, and, (iii) agreeing to submit bids on VeriSign's behalf at the .WEB Auction.

### 3.1     NDC Failed to Amend its Application

54.     The information that NDC failed to disclose—  Third Party Designated Confidential Information Redacted

—was material to its application, to the fairness and integrity of the resolution-by-auction process, and ultimately to the objectives of the New gTLD Program itself.  NDC's failures to disclose these facts and to amend its application following its agreement with VeriSign constitute breaches of the AGB requiring NDC's disqualification.

55.     NDC's failure to disclose the terms of its agreement with VeriSign was an omission of material information, as its obligations assumed under the DAA fundamentally changed the nature of NDC's application. VeriSign has long enjoyed a monopoly, by virtue of its control over the .COM and .NET gTLDs, and a fundamental purpose of the New gTLD Program was to break this monopoly.  Afilias and the other applicants sought to acquire

15

.WEB for exactly this purpose: to compete with VeriSign. It would be absurd to suggest that NDC believed that its agreement with VeriSign would not be materially relevant to the other applicants, the Internet community, and, indeed, to ICANN. Indeed, the lengths to which it went to conceal VeriSign's involvement suggests that it was well aware how material this involvement was.

56.     As discussed previously, the AGB requires applicants to answer a series of detailed "mandatory" questions concerning, *inter alia*, the specific entity applying for a given gTLD; the primary individuals at the entity responsible for the application; the names and positions of the directors, officers, and/or partners of the entity; the names and positions of all shareholders holding at least 15% of the entity; the "mission/purpose" of the proposed gTLD; and how the applicant expected to use the gTLD to "benefit registrants, Internet users, and others."[126] The information that NDC provided in response to several of these mandatory questions became untrue, inaccurate, false, and/or misleading when NDC entered into the DAA (*i.e.*, a "change in circumstance").

57.     However, NDC ignored the AGB's rules and procedures for amending its application. Instead, NDC concealed that VeriSign—a non-applicant that had not been through the public comment or evaluation processes and whose monopoly the New gTLD Program was designed to challenge—had now become the real party-in-interest behind its application. By concealing VeriSign's "indirect participation in the Contention Set," NDC misled ICANN, the other members of the .WEB contention set, and indeed 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). Once NDC had sold its rights in its .WEB application to VeriSign, this representation was simply and entirely false.

58.     Third Party Designated Confidential Information     NDC's application was no longer true, accurate, or complete. For example, NDC was required, at Section 18 of its application, to describe the "Mission/Purpose" of its proposed .WEB registry. Here, ICANN required NDC to detail its business plan for .WEB, including how the .WEB registry would "benefit registrants" and "add to the current space, in terms of competition, differentiation, or innovation."[127] For NDC's "application to be considered complete, answers to this section must be fulsome and sufficiently

quantitative…."[128]

59.	Answers provided in response to Section 18 are included in the non-confidential version of applications posted to ICANN's website, so that members of the public may understand who is applying for which gTLDs and for what purpose.  NDC's application contained a detailed response to Section 18, repeatedly noting that .WEB would follow the marketing path that NDC's management used with .CO.  For example, NDC wrote:

> Prospective users benefit from the long-term commitment of a proven executive team that has a track-record of building and successfully marketing affinity TLD's (e.g., .CO targeting innovative businesses and entrepreneurs). … 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.[129]

60.	Further, 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—the oldest of such incumbent players).[130]  The only possible reading of NDC's business plan was that NDC intended to acquire .WEB for itself, to operate .WEB itself, and to market .WEB itself. <sup>Third Party Designated Confidential Information</sup> none of these things were true: NDC's business plan for .WEB had been reduced to one singular objective: to secretly obtain the rights in .WEB for VeriSign, and then to assign .WEB to VeriSign.

61.	Other parts of NDC's application were also, at best, misleading.  For example, in Section 1 of its application, NDC continued to identify itself as the "applicant," that is, the "entity that would enter into a Registry Agreement with ICANN."[131] <sup>Third Party Designated Confidential Information</sup> this was all but fiction except in the most superficial sense:

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62.	By failing to submit the necessary change requests to fully detail the operation and effect of the DAA on its application, NDC flouted both the letter and the spirit of the numerous transparency and disclosure requirements contained in the New gTLD Program Rules.  ICANN's failure to disqualify NDC for these violations breaches its obligations under its Articles and Bylaws and, further, is a gross abdication of its responsibilities as the administrator of the New gTLD Program and, specifically, of the .WEB Auction.

**3.2   NDC Violated the AGB's Prohibition Against the Resale, Transfer, or Assignment of NDC's Application**

63.     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."[132]

64.     Contrary to the AGB's anti-assignment clause, NDC transferred to VeriSign its obligations to take certain actions required of applicants under the AGB.  For example, 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."[133]                              Third Party Designated Confidential Information Redacted

."[134]  NDC therefore impermissibly transferred its obligation to amend its application, as necessary, to VeriSign.

65.     NDC also impermissibly transferred crucial rights as an applicant to VeriSign.  For example, pursuant to the AGB, applicants "are encouraged to reach a settlement or agreement among themselves that resolves the contention."[135]   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.[136]

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[137]     Third Party Designated Confidential Information Redacted

[138]     Third Party Designated Confidential Information Redacted

[139] in direct violation of the

AGB, which strictly limits participation in contention sets to applicants.  Indeed, with the transfer of such rights, NDC was no longer an applicant for .WEB in any real sense;   Third Party Designated Confidential Information Redacted

66.     Finally, VeriSign's control over NDC in all matters regarding its .WEB application is further demonstrated by the fact that VeriSign is "engaged in ICANN's process to move the delegation of .web forward."[140] As the purported winner of the .WEB Auction, it is NDC that has the obligation under the AGB to negotiate and execute a Registry Agreement for .WEB with ICANN. VeriSign has no standing to be at the negotiating table in any capacity regarding the delegation of .WEB. VeriSign's participation in the "ICANN process" for the delegation of .WEB reflects NDC's impermissible transfer of its obligation as the winning applicant to negotiate and conclude a Registry Agreement with ICANN and participate in the pre-delegation testing for .WEB.

67.     Third Party Designated Confidential Information Redacted

68.     NDC's sale, assignment, and/or transfer of its rights and obligations in its .WEB application to VeriSign violates the Terms and Conditions of the AGB. ICANN's failure to disqualify NDC constitutes a clear breach of ICANN's Articles and Bylaws and, further, is a gross abdication of its responsibilities as the administrator of the New gTLD Program.

## 3.3     Each of NDC's Bids at the .WEB Auction Was Invalid

69.     As set forth above, the AGB provides that "[o]nly bids that comply with *all aspects* of the auction rules will be considered valid." [141]  In relevant part, the Auction Rules provide that a Bidder may only "bid on *its* behalf"[142] at an ICANN-administered Auction and that all such bids must reflect "a price which the *Bidder* is willing to pay to resolve string contention within a Contention Set in favor of its Application."[143]  An invalid bid must be treated as "an exit bid at the start-of-round price for the current auction round."[144]  Accordingly, any entity that

submits an invalid bid may not proceed to the next round of the auction.

70.     NDC participated in the .WEB Auction as the Bidder for its Application.  Although NDC was

obligated under the Auction Rules to participate in the .WEB Auction "on its own behalf,"[145] Third Party Designated
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[146]                                   Third Party Designated Confidential Information Redacted

71.     Moreover, although NDC was obligated to submit bids at the .WEB Auction that reflected the

amount that *it* was willing to pay for .WEB,              Third Party Designated Confidential Information Redacted

72.                                   Third Party Designated Confidential Information Redacted

73.     Thus, even though NDC mechanically entered bids during the .WEB Auction, it was *VeriSign*

that was the true bidder-in-interest.             Third Party Designated Confidential Information Redacted

[147]                   Third Party Designated Confidential Information Redacted

[148]

74.     For these reasons, none of NDC's bids complied with "all aspects of the auction rules."  ICANN's

failure to deem NDC's initial bid at the .WEB Auction an exit bid constitutes a clear breach of ICANN's Articles and

Bylaws and, further, is a gross abdication of its responsibilities as the administrator of the .WEB Auction.

**4.     ICANN'S FAILURE TO DISQUALIFY NDC BREACHES ICANN'S OBLIGATION TO APPLY
        DOCUMENTED ICANN POLICIES NEUTRALLY, OBJECTIVELY, AND FAIRLY**

75.     The Bylaws obligate ICANN to "[m]ake decisions by applying its documented policies

consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment…."[149] ICANN is permitted to "single out [a] … party for disparate treatment" if it is "justified by substantial and reasonable cause, such as the promotion of effective competition."[150] Even where the AGB grants ICANN the discretion whether or not to take action, ICANN cannot refrain from acting where the neutral, objective, and fair application of its policies require it to act.

76.     The GNSO, ICANN's policy making body, determined that the New gTLD Program must be administered pursuant to "a clear and pre-published application process using objective and measurable criteria."[151] This policy was cited in the ICANN Board's Resolutions that approved the New gTLD Program.[152] In so doing, the Board observed that the AGB satisfies the GNSO's policy by mapping out the various phases of the application process, from submission through transition to delegation.

77.     Moreover, the ICANN Board determined that ICANN would administer an auction as a method of last resort for resolving contention where "contending applications have not resolved the contention among themselves."[153] In explaining its decision to adopt the auction method for this purpose, the ICANN Board explained that compared with other methods of resolution, auctions are "fair and transparent."[154] As the auction administrator, ICANN is further obligated to act in good faith.

78.     ICANN failed to apply these policies "neutrally, objectively, and fairly" here:

- The AGB required ICANN to "disqualify" NDC because it "fail[ed] to provide ICANN with the identifying information necessary to confirm the identity" of the true applicant, namely VeriSign.[155]

- The AGB required ICANN to "reject" NDC's application for the omission of material information from its application, namely that it was obligated to assign .WEB to VeriSign.[156]

- The AGB required ICANN to "deny" NDC's application for "fail[ing] to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading."[157]

- ICANN failed to fully investigate rumors that NDC had reached an agreement with VeriSign prior to the .WEB Auction. Although ICANN specifically asked NDC to confirm that "there have not been changes to your application … that need to be reported to ICANN,"[158] NDC declined to do so and ICANN failed to pursue a response.

- ICANN failed to sanction NDC for lying to ICANN investigators about its decision not to participate in a .WEB private auction.

- ICANN further violated its policy of transparency by refusing to update Afilias as to the status of its investigation, the details of its findings, and its intentions in that regard for over 18 months. ICANN concealed the terms of the DAA and its decision to delegate .WEB to NDC (and hence to VeriSign).

- ICANN also failed administer the .WEB Auction "neutrally, objectively, and fairly[.]"[159] The AGB provides that bids are valid only if they comply with "all aspects of the auction rules."[160] None of NDC's bids were valid, as they were submitted on VeriSign's, not NDC's behalf, and reflected the amount that VeriSign, not NDC, was willing to pay for .WEB. Once the DAA was disclosed to ICANN, ICANN failed to disqualify NDC on the basis that its bids submitted at the .WEB Auction were all invalid.

**5. ICANN'S DECISION TO FINALIZE A REGISTRY AGREEMENT WHILE KNOWING OF NDC'S ARRANGEMENT WITH VERISIGN VIOLATES ICANN'S MANDATE TO PROMOTE COMPETITION**

79. The harm to Afilias caused by ICANN's failure to enforce its policies, rules, and procedures is compounded by the fact that NDC's and VeriSign's subterfuge subverts another one of ICANN's Core Values, and indeed, one of the principal purposes for the New gTLD Program's creation: to introduce and promote competition, including, specifically, competition that could break VeriSign's monopoly.

80. As discussed in the Expert Report of Dr. Zittrain, ICANN was founded to introduce competition in the domain name space. This Competition Mandate was reflected in ICANN's founding documents, its Bylaws, its policymaking, and in the New gTLD Program itself. When ICANN was established, its Memorandum of Understanding with the United States Government tasked ICANN with privatizing the management of the DNS "in a manner that increases competition" by adopting "market mechanisms to support competition and consumer choice … [to] promote innovation, [preserve diversity,] and enhance user choice and satisfaction."[161] ICANN's first generation of leaders understood plainly ICANN's purpose: as Esther Dyson, ICANN's first chairman, said in her testimony about the New gTLD Program, "***our … mission was to break the [NSI/VeriSign] monopoly***…."[162] Thus, one of the Core Values stated in ICANN's Bylaws is to introduce and promote competition.[163] Indeed, the Bylaws state at the outset that ICANN "must operate … through open and transparent processes ***that enable competition and open entry in Internet-related markets***."[164] ICANN's mandate to introduce and promote competition must inform all of its decision-making.

81. The ICANN Board launched the New gTLD Program "in fulfilment of a core part of ICANN's Bylaws: the introduction of competition and consumer choice in the DNS."[165] The Board's view reflects the

intentions of the GNSO, ICANN's primary policy-making organ, which stated that one of the "key drivers for the introduction of new top-level domains" is to "stimulate competition at the registry service level which is consistent with ICANN's Core Value 6."[166]

82.     As discussed in the Expert Report of Dr. Sadowsky, .WEB is widely seen as the best potential competitor to .COM.  In recognition of its competitive potential, the members of the .WEB contention set bid a record amount to secure the rights to .WEB.  Afilias bid more than three times what any gTLD had publicly auctioned for in history to acquire .WEB to compete with VeriSign.  VeriSign—bidding secretly through NDC—outbid Afilias in what was plainly an effort to protect its dominant market position.

83.     ICANN's failure to apply its documented policies consistently, neutrally, objectively, and fairly—and its failure to carry out its activities through open and transparent processes—have also resulted in the violation of ICANN's mandate to introduce and promote competition.  For reasons described in Dr. Sadowsky's Expert Report, .WEB remains the last, best hope of creating a competitive environment at the wholesale registry level of the DNS and ending VeriSign's market power, which, to date, has been regulated through price controls.  By violating its Commitments and Core Values in its Bylaws, thereby enabling VeriSign to gain control over .WEB, ICANN has all but destroyed the last best chance to create a truly competitive environment within the DNS—*i.e.*, one of the principal purposes of the New gTLD Program, and indeed, of ICANN's existence.

**6.     ICANN VIOLATED ITS BYLAWS IN ADOPTING RULE 7 OF THE INTERIM PROCEDURES**

84.     As described more fully in Afilias' briefing to the Procedures Officer appointed by the ICDR for this IRP, VeriSign exploited its leadership position on the committee that drafted the Interim Procedures to ensure that the Interim Procedures contained provisions that gave it (and NDC, which VeriSign controls in all relevant respects), an absolute right to participate in this IRP.  Moreover, VeriSign did so with the knowledge and assistance of ICANN personnel.

85.     Although the drafting committee had begun work on the Interim Procedures in 2016 and, in fact, had published a draft set of rules for public comment in November 2016, VeriSign connived to amend Rule 7

(Consolidation, Intervention and Joinder) in October 2018, just days before the Board voted to adopt the Interim Procedures on 25 October 2018.

86.     The Board's adoption of Rule 7 violated ICANN's Bylaws in several respects:

- *First*, the Bylaws require that the drafting committee be comprised of members of the global Internet community, but the committee wrongly included ICANN's internal and external counsel in quorum counts. Barring the inclusion of ICANN's lawyers, the committee would have lacked a quorum when changes to Rule 7 were discussed in October 2018.

- *Second*, the Bylaws require that the Interim Procedures conform to "norms of international arbitration," but the final text of Rule 7 provides for rights of participation that are wholly foreign to all forms of international arbitration.

- *Third,* the Bylaws require that the Interim Procedures be published for public comment pursuant to ICANN's practices, which require public review of all "significant changes" to the rules. Rule 7 was not re-submitted for public comment, although the revised rule was certainly a "significant change" from the version that had been published for public comment in November 2016.

- *Fourth,* the Bylaws provide that the Board may reasonably withhold approval of the Interim Procedures, yet the Board's approval was based on its understanding that certain drafting "principles" had been followed and that the 11th hour edits to Rule 7 reflected the committee's prior discussions. In fact, at least as regards Rule 7, each of the drafting principles that were to guide the committee's work had been materially violated and the text of Rule 7 admittedly did not reflect the committee's prior discussions.

87.     The Procedures Officer found that "the issues raised [by Afilias] are of such importance to the global Internet community and Claimants that they should not be decided by a 'Procedures Officer'" and therefore referred the question of the enforceability of Rule 7 of the Interim Procedures to the Panel.

88.     VeriSign and NDC, relying on the text of Rule 7 that had been added at the 11th hour, moved to participate in this IRP as *amicus curiae*.[167] As already evinced by the substantial briefing before the Procedures Officer, the wrongful adoption of Rule 7 has significantly increased Afilias' costs associated with prosecuting this IRP. Moreover, ICANN's effectuation of the rule changes in this manner for the benefit of VeriSign is part of a course of conduct <sup>Third Party Designated Confidential Information Redacted</sup>, when ICANN learned of but concealed from the public the terms of the DAA from the public, and falsely promised Afilias that it would investigate and consider Afilias' complaints. Since that time, ICANN has continually violated its commitments and core values of transparency, non-discrimination, promotion of competition, and decision-making through the consistent, neutral, objective, and fair application of document policies – all for the purpose of assisting VeriSign's efforts to obtain the rights in .WEB

for itself.

## 7. RELIEF REQUESTED

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.


Respectfully submitted,

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## LIST OF EXHIBITS

| Exhibit No. | Description |
|---|---|
| C-69 | Domain Acquisition Agreement between VeriSign, Inc. and Nu Dotco LLC <span style="font-size:small">Third Party Designated Confidential Information Redacted</span> |
| C-70 | Declaration of the Procedures Officer (29 Feb. 2019) |
| C-71 | Emergency Panelist's Decision on Afilias' Request for Production of Documents in Support of Its Request for Interim Measures (2 Dec. 2018) |
| C-72 | United States Department of Commerce, Amendment to Financial Assistance Award (VeriSign, Inc.) (26 Oct. 2018) |
| C-73 | World Bank, Open Learning Center, *Beneficial Ownership Transparency*, *available at* https://olc.worldbank.org/print/content/beneficial-ownership-transparency (last accessed on 17 Mar. 2019) |
| C-74 | ICANN, Contention Set Status, New Generic Top-Level Domains (as of 19 Feb. 2019), *available at* https://gtldresult.icann.org/applicationstatus/stringcontentionstatus (last accessed on 15 Mar. 2019) |
| C-75 | *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Ca.), Exhibit D to Declaration of Christine Willett in Support of ICANN's Opposition to Plaintiff's *Ex Parte* Application for Temporary Restraining Order (25 July 2016) |
| C-76 | ICANN New Generic Top-Level Domains, New gTLD Auction Results, *available at* https://gtldresult.icann.org/applicationstatus/auctionresults (last accessed on 15 Mar. 2019) |
| C-77 | A. Allemann, "It looks like Verisign bought .Web domain for $135 million (SEC Filing)," *Domain Name Wire* (28 July 2016), *available at* https://domainnamewire.com/2016/07/28/looks-like-verisign-bought-web-domain-135-million-sec-filing/ (last accessed on 15 Mar. 2019) |
| C-78 | Letter from A. Ali (Counsel for Afilias) to ICANN Board (23 Feb. 2018) |
| C-79 | Letter from A. Ali (Counsel for Afilias) to ICANN Board of Directors (23 Apr. 2018) |
| C-80 | Letter from J. LeVee (Counsel for ICANN) to A. Ali (Counsel for Afilias) (28 Apr. 2018) |
| C-81 | VeriSign (VRSN) CEP Jim Bidzos on Q4 2018 Results – Earnings Call Transcript (7 Feb. 2019), *available at* https://seekingalpha.com/article/4239256-verisign-inc-vrsn-ceo-jim-bidzos-q4-2018-results-earnings-call-transcript?part=single (last accessed on 17 Mar. 2019) |

## LIST OF LEGAL AUTHORITY

| Authority No. | Description |
|---|---|
| CA-11 | *Booking.com B.V. v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration (3 Mar. 2015) |

1    ICANN, *gTLD Applicant Guidebook* (4 June 2012) ("**AGB**"), **[Ex. C-3]**.

2    ICANN, Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers (approved on 9 Aug. 2016, filed on 3 Oct. 2016) ("**Articles**"), **[Ex. C-2]**.

3    Power Auctions LLC, *Auction Rules for New gTLDs: Indirect Contentions Edition* (24 Feb. 2015) ("**Auction Rules**"), **[Ex. C-4]**.

4    ICANN, New gTLD Auctions Bidder Agreement (3 Apr. 2014), **[Ex. C-5]**.

5    ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018) ("**Bylaws**"), **[Ex. C-1]**.

6    ICANN, New gTLD Application Change Request Process and Criteria ("**Change Request Criteria**"), **[Ex. C-56]**.

7    Domain Acquisition Agreement between VeriSign, Inc. and Nu Dotco LLC<sup>Third Party Designated Confidential Information Redacted</sup> ("**DAA**"), **[Ex. C-69]**.

8    Auction Rules **[Ex. C-4]**, p. 17.

9    ICANN, Generic Names Supporting Organization, Final Report, Part A: Introduction of New Generic Top-Level Domains (8 Aug. 2017) ("**GNSO Report**"), **[Ex. C-20]**.

10   Bylaws **[Ex. C-1]**, Art. 4, Sec. 4.3.

11   Declaration of the Procedures Officer (29 Feb. 2019) ("**Procedures Officer Decision**"), **[Ex. C-70]**.

12   Auction Rules **[Ex. C-4]**, p. 19.

13   ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (20 June 2011) ("**Rationales**"), **[Ex. C-9]**.

14   On 9 January 2019 and 29 January 2019, respectively, Afilias notified counsel for ICANN and the ICDR of its intention to amend its original Request for IRP pending the decision by the Procedures Officer. In light of ICANN's disclosure of the August 2015 Domain Acquisition Agreement between VeriSign and NDC, Afilias withdraws the witness statements of Ram Mohan, Jonathan Robinson, and John Kane filed with the original Request for IRP.

15   Bylaws **[Ex. C-1]**, Sec. 4.3. ICANN takes the position that the IRP is the only third-party dispute resolution process available to gTLD applicants for independent review of ICANN's actions. AGB **[Ex. C-3]**, p. 6-4. The enforceability of the "litigation waiver" ICANN imposed upon new gTLD applicants, however, is questionable under the laws of various jurisdictions. Afilias reserves its right to challenge ICANN's conduct in any court of competent jurisdiction worldwide.

16   Afilias requests leave to supplement this submission to take into consideration ICANN's compliance with its DIDP, customary document production during these proceedings, further witness evidence, and ICANN's submissions.

17   AGB **[Ex. C-3]**.

18   Auction Rules **[Ex. C-4]**. The Auction Rules are binding upon bidders in an ICANN auction. ICANN, New gTLD Auctions Bidder Agreement (3 Apr. 2014), **[Ex. C-5]**.

19   NDC and VeriSign have applied to participate in this IRP as *amicus curiae*. Afilias has objected to their participation, mainly based on the ICANN Board's improper approval of certain parts of Rule 7 of the Interim Procedures, and ICANN's Staff's conduct in connection therewith, as set out more fully in Afilias' submissions

to the Procedures Officer. These submissions are incorporated by reference herewith. This matter is now before the IRP Panel pursuant to the Procedures Officer Decision. Procedures Officer Decision **[Ex. C-70]**, p. 38. This Request also encompasses the ICANN Staff's improper refusal under ICANN's DIDP to disclose to Afilias documents relevant to the .WEB Auction, a decision that was upheld by the ICANN Board on 6 November 2011. ICANN, Approved Board Resolutions, Special Meeting of the ICANN Board (6 Nov. 2018), **[Ex. C-7]**, pp. 1-12.

20   *See* ICANN, New gTLD Application Submitted to ICANN by Afilias Domains No. 3 Limited, Application ID: 1-1013-6638 (13 June 2012), **[Ex. C-8]**.

21   Third Party Designated Confidential Information Redacted

     ICANN produced the DAA to Afilias, only after being required to do so by the Emergency Panelist. Emergency Panelist's Decision on Afilias' Request for Production of Documents in Support of Its Request for Interim Measures (2 Dec. 2018), **[Ex. C-71]**, pp. 5-6.

22   DAA **[Ex. C-69]**.

23   *Id.*, Ex. A, Sec. 1 (emphasis added).

24   Bylaws **[Ex. C-1]**, Sec 1.2(a)(v).

25   Since 2000, VeriSign has controlled the exclusive rights to the .COM and .NET registries. This market dominance has endured, leading the ICANN Board to opine in 2011 that "[t]o date, ICANN has not created meaningful competition at the registry level." Rationales **[Ex. C-9]**, p. 27. Members of the United States Senate opined in 2016 that "Verisign's government-approved control of the .com registry allows it to operate as a monopoly—a fact that has not gone unnoticed in the financial services industry and the stock market." Letter from Senators T. Cruz, M. Lee and S. Duffy (United States Senate) to R. Hesse (Acting Assistant Attorney General, United States Department of Justice) (12 Aug. 2016), **[Ex. C-10]**, p. 2. Financial analysts who have studied VeriSign agree, describing it as having "a virtual monopoly on Internet domains" that gives it "unrivalled power" in "the fastest-growing industry in the world -- the Internet." M. Hargrave, "Profit from a 'Monopoly on the Internet' with 45% Upside," *StreetAuthority* (6 Nov. 2013), **[Ex. C-11]**, p. 1. Industry observers have likewise concluded that VeriSign "holds a legal monopoly on the DNS industry" (B. Katz, "VeriSign Is Brian Katz's Highest Conviction Holding - Here's Why," *Seeking Alpha* (29 Dec. 2009), **[Ex. C-12]**, p. 2) and that its "exclusive contract with [ICANN] gives the company a significant barrier to entry for competitors." "Verisign: Time To Make Some Real Money," *Seeking Alpha* (29 June 2016), **[Ex. C-13]**, p. 1. Today, VeriSign continues to control more than 78% of all gTLD registrations. Verisign, "Fourth Quarter 2017 Domain Report," 15(1) *The Domain Name Industry Brief* (Feb. 2018), **[Ex. C-14]**, p. 2. To protect consumers, the U.S. government has required that ICANN contractually impose price caps on the wholesale prices of .COM registrations. VeriSign, *Verisign Statement on .com Registry Agreement Renewal* (1 Nov. 2012), **[Ex. C-15]**, p. 1; United States Department of Commerce, Amendment to Financial Assistance Award (VeriSign, Inc.) (29 Nov. 2012), **[Ex. C-16]**, p. 3. The U.S. government, however, recently permitted an amendment to the .COM registry agreement that lets VeriSign increase the price of .COM registrations by seven percent in the last four years of every six-year contract period. United States Department of Commerce, Amendment to Financial Assistance Award (VeriSign, Inc.) (26 Oct. 2018), **[Ex. C-72]**. Price controls had scant effect on VeriSign's profitability before the amendment: VeriSign's operating margin had exceeded 60%, among the highest of any S&P 500 company, before the amendment. VeriSign (VRSN) Q2 2018 Results - Earnings Call Transcript (26 July 2018), **[Ex. C-18]**; D. Dayen, "Special Investigation: The Dirty Secret Behind Warren Buffett's Billions," *The Nation*, **[Ex. C-17]**, p. 10. If its margins continue to grow at the current rate, within the next decade VeriSign will "post the highest rate of profitability of any public company on earth." *Id.*

26   Afilias, *About Us*, **[Ex. C-19]** ("Afilias is the ICANN Designated Registry Operator for a wide range of gTLDs, including the following: .INFO, .MOBI, .PRO, .PINK, .BLUE, .BLACK, .RED, .KIM, .SHIKSHA, .ORGANIC,

.dotCHINESEMobile, .LGBT, .VOTE, .VOTO, .GREEN .POKER, .PROMO, .BET, .PET, .BIO, .SKI, .ARCHI, and .LLC.").

27  *ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, Declaration of the Independent Review Panel (19 Feb. 2010), **[Ex. CA-1]**, ¶¶ 1-2, 10; *Vistaprint Ltd. v. ICANN*, ICDR Case No. 01-14-0000-6505, Final Declaration of the Independent Review Panel (9 Oct. 2015), **[Ex. CA-2]**, ¶ 125.

28  Articles **[Ex. C-27]**, ¶ 2(III); *see* Bylaws **[Ex. C-1]**, Sec. 1.2(a).

29  Bylaws **[Ex. C-1]**, Sec. 1.2(a); Articles **[Ex. C-2]**, ¶ 2(III).

30  *ICM Registry v. ICANN*, Declaration of the Independent Review Panel **[Ex. CA-1]**, ¶ 152 ("the provision of Article 4 of ICANN's Articles of Incorporation prescribing that ICANN 'shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law,' requires ICANN to operate in conformity with relevant general principles of law (*such as good faith*) as well as relevant principles of international law, applicable international conventions, and the law of the State of California.") (emphasis added).

31  Bylaws **[Ex. C-1]**, Sec 1.2(a)(v).

32  ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 11 Feb. 2016), **[Ex. C-23]**, Art. I, Sec. 2(8).

33  Bylaws **[Ex. C-1]**, Sec. 2.3.

34  Articles **[Ex. C-2]**, ¶ 2(III); Bylaws **[Ex. C-1]**, Sec. 1.2(a).

35  Bylaws **[Ex. C-1]**, Sec. 1.2(b)(iv).

36  *Id.*, Sec 1.2(c).

37  Expert Report by Jonathan Zittrain (26 Sep. 2018), ¶¶ 21-24, 41-45.

38  Rationales **[Ex. C-9]**, p. 7.

39  AGB **[Ex. C-3]**, p. 1-2.

40  ICANN, *News & Media: New gTLD Frequently Asked Questions*, **[Ex. C-22]**, p. 9; *see also Booking.com B.V. v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration (3 Mar. 2015), **[Ex. CA-11]**, ¶ 17 (describing the AGB as the "crystallization of Board-approved consensus policy concerning the introduction of new gTLDs.") (internal citation omitted).

41  Bylaws **[Ex. C-1]**, Sec. 1.2(a); Articles **[Ex. C-2]**, ¶ 2(III).

42  *See also* B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (2006), **[Ex. CA-3]**, p. 107 ("In short, good faith requires that one party should be able to place confidence in the words of the other, as a reasonable man might be taken to have understood them in the circumstances.").

43  AGB **[Ex. C-3]**, pp. 1-4, 1-25, A-5 – A-46.

44  *Id.*, p. 6-2.

45  *Id.*, pp. 1-30, 6-2.

46  *Id.*, p. 1-5.

47  *Id.*, Sec. 1.2.7 (at p. 1-11) (emphasis added).

48  *Id.*, p. 6-2 (emphasis added).

49  ICANN, Registry Agreement (as of 31 July 2017), **[Ex. C-26]**, Sec. 1.3(a)(i) (emphasis added).

50   GNSO Report **[Ex. C-20]**, p. 13 (ICANN's "evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination.").

51   Change Request Criteria **[Ex. C-56]**, pp. 1-3.

52   *Id.* (emphasis added).

53   *Id.* (emphasis added).

54   *Id.* (emphasis added).

55   *Id.* (emphasis added).

56   *Id.* (emphasis added).

57   AGB **[Ex. C-3]**, p. 6-6 (emphasis added).

58   As observed by the World Bank: "Transparency of beneficial ownership will help ensure that the puppet masters and their associates and facilitators are not able to operate in secrecy and impede development." *See* World Bank, Open Learning Center, *Beneficial Ownership Transparency*, *available at* https://olc.worldbank.org/print/content/beneficial-ownership-transparency (last accessed on 17 Mar. 2019), **[Ex. C-73]**.

59   AGB **[Ex. C-3]**, p. 1-15 (identifying the lifecycle timeline for an uncomplicated gTLD application).

60   *Id.*, p. 1-13.

61   *Id.*, p. 1-28.

62   *Id.*, p. 4-6.

63   *Id.*, p. 4-19.

64   Rationales **[Ex. C-9]**, p. 104.

65   ICANN, Economic Case for Auctions in New gTLDs (8 Aug. 2008), **[Ex. C-27]**, p. 2.

66   *Id.*, pp. 5, 6 ("Winners [of lotteries] would often 'flip' or resell their licenses to larger entities at substantial profit without ever delivering service to a single customer. … The disadvantages of comparative evaluations [include] … [i]f other than the highest-value applicant wins the comparative evaluation, the winner is likely to 'flip' the rights for speculative profits[.]").

67   *Id.*, p. 1 (emphasis added).

68   AGB **[Ex. C-3]**, p. 4-20 (emphasis added).  Reflecting the AGB, the Auction Rules also provide that "[a] Bid represents a price, ***which the Bidder is willing to pay*** to resolve string contention within a Contention Set in favor of its Application."  Auction Rules **[Ex. C-4]**, p. 5 (emphasis added).

69   AGB **[Ex. C-3]**, p. 4-22 (emphasis added).

70   *Id.*, p. 4-23 (emphasis added).

71   *Id.*, p. 2.

72   Auction Rules **[Ex. C-4]**, p. 19.

73   *Id.*, p. 17.

74   *Id.*, p. 3 (emphasis added).

75   *Id.* (emphasis added).

76    New gTLD Auctions Bidder Agreement **[Ex. C-5]**, p. 1 (emphasis added).

77    Report of George Sadowsky (20 Mar. 2019), ¶¶ 39-46.

78    P. Lamantia, ".WEB Acquired for $135 Million. Too much? How does it compare?," *Authentic Web* (*undated*), **[Ex. C-29]**, p. 2 ("*.WEB is a different animal. … WEB is what we call a 'super generic' and arguably the best new TLD alternative to .COM. It is a word that is commonly used with intuitive meaning. .WEB could make a serious dent to .COM over the long run.*") (emphasis added); K. Murphy, "Verisign likely $135 million winner of .web gTLD," *Domain Incite* (1 Aug. 2016), **[Ex. C-30]**, p. 2 ("*[.WEB] is both most sufficiently generic, sufficiently catchy, sufficiently short and of sufficient semantic value to provide a real challenge to .com*.") (emphasis added); C. Negris, "How a $135 million auction affects the domain name industry and your business," *BIV* (10 Aug. 2016), **[Ex. C-31]**, p. 2 ("*.web is widely considered [to be] the gTLD with the most potential out of 1,930 applications for new domain extensions ICANN received to battle .com and .net for widespread adoption*.") (emphasis added); "The Next Big Domain Extension," *Supremacy SEO* (*undated*), **[Ex. C-32]**, p. 2 ("*.web is the one domain that could unseat .com*.") (emphasis added).

79    ICANN, Contention Set Status, New Generic Top-Level Domains (as of 19 Feb. 2019), *available at* https://gtldresult.icann.org/applicationstatus/stringcontentionstatus (last accessed on 15 Mar. 2019), **[Ex. C-74]**.

80    ICANN, New gTLD Application Submitted to ICANN by NU DOTCO LLC, Application ID: 1-1296-36138 (13 June 2012) ("**NDC App.**"), **[Ex. C-24]**, p. 6. Neustar Inc. accordingly provided copious technical disclosures in the NDC App. *Id.*, pp. 13-18.

81    Email Communications between .WEB Applicants (*various dates*), **[Ex. C-33]**, p. 3 (email from J. Kane dated 28 Apr. 2016).

82    *Id.*, p. 2.

83    *Id.*

84    Email from J. Kane (Vice President, Afilias' Corporate Services) to H. Lubsen (CEO, Afilias) (7 July 2016), **[Ex. C-34]**.

85    *Id.* (emphasis added).

86    Email communications between J. Nevett (CEO, Donuts, Inc.) and J. I. Rasco (CFO, NDC) (6 & 7 June 2016), **[Ex. C-35]**.

87    Ruby Glen's complaint was also investigated by ICANN's Ombudsman. *See Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Ca.), Exhibit B to Declaration of Christine Willett in Support of ICANN's Opposition to Plaintiff's *Ex Parte* Application for Temporary Restraining Order (25 July 2016) ("**Willett Decl., Ex. B**"), **[Ex. C-38]**.

88    *Id.*, [PDF] p. 3 (emphasis added).

89    *Id.*

90    *Id.*

91    *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Ca.), Exhibit D to Declaration of Christine Willett in Support of ICANN's Opposition to Plaintiff's *Ex Parte* Application for Temporary Restraining Order (25 July 2016), **[Ex. C-75]**, [PDF] p. 4 (emphasis added).

92    DAA **[Ex. C-69]**, Ex. A, Secs. 1(a), 1(i) (emphasis added).

93    Letter from A. Willett (ICANN) to Members of the .WEB/.WEBS Contention Set (13 July 2017), **[Ex. C-44]**, p. 1.

94    ICANN New Generic Top-Level Domains, New gTLD Auction Results, *available at* https://gtldresult.icann.org/applicationstatus/auctionresults (last accessed on 15 Mar. 2019), **[Ex. C-76]**.

95    DAA **[Ex. C-69]**, p. 15.

96    Verisign Inc., *Form 10-Q (Quarterly Report)* (28 July 2016), **[Ex. C-45]**, Note 11 (at p. 13).

97    A. Allemann, "It looks like Verisign bought .Web domain for $135 million (SEC Filing)," *Domain Name Wire* (28 July 2016), *available at* https://domainnamewire.com/2016/07/28/looks-like-verisign-bought-web-domain-135-million-sec-filing/ (last accessed on 15 Mar. 2019), **[Ex. C-77]**; K. McCarthy, "Someone (cough, cough VeriSign) just gave ICANN $135m for the rights to .web," *The Register* (28 July 2016), **[Ex. C-43]**; K. Murphy, "Verisign likely $135 million winner of .web gTLD," *Domain Incite* (1 Aug. 2016), **[Ex. C-30]**.

98    VeriSign, *VeriSign Statement Regarding .Web Auction Results* (1 Aug. 2016), **[Ex. C-46]**.

99    Letter from A. Ali (Counsel for Afilias) to ICANN Board (23 Feb. 2018), **[Ex. C-78]**; Letter from A. Ali (Counsel for Afilias) to ICANN Board of Directors (23 Apr. 2018), **[Ex. C-79]**.

100   DAA **[Ex. C-69]**, Sec. 1; Ex. A, Secs. 4(b), 4(d).

101   *Id.*, Sec. 10(a) (emphasis added).

102   *Id.*, Sec. 4(f) (emphasis added).

103   *Id.*, Sec. 4(j) (emphasis added).

104   *Id.*, Ex. A, Sec. 1 (emphasis added).

105   *Id.*, Ex. A, Sec. 1(i) (emphasis added).

106   *Id.* (emphasis added).

107   *Id.*, Ex. A, Sec. 8 (emphasis added).

108   *Id.*, Ex. A, Sec. 1(h) (emphasis added).

109   *Id.*, Ex. A, Sec. 2(e) (emphasis added).

110   *Id.*, Ex. A, Sec. 1(f) (emphasis added).

111   *Id.*, Ex. A, Sec. 3(g) (emphasis added).

112   *Id.*, Ex. A, Sec. 10.

113   Verisign Inc., Edited Transcript of Earnings Conference Call or Presentation (8 Feb. 2018), **[Ex. C-47]**, p. 4.

114   VeriSign (VRSN) Q1 2018 Results - Earnings Call Transcript (26 Apr. 2018), **[Ex. C-48]**, p. 2 ("***And for those who weren't here or aren't familiar with what the status is, we're engaged in ICANN's process to move the delegation forward for .web.***") (emphasis added); VeriSign (VRSN) Q2 2018 Results - Earnings Call Transcript (26 July 2018), **[Ex. C-18]**, p. 6 ("***Well, we're engaged in ICANN's process on .web to move the delegation forward but this is ICANN's process so we can't say exactly when it will conclude.***") (emphasis added).

115   Letter from S. Hemphill (General Counsel, Afilias) to A. Atallah (President, ICANN's Global Domains Division) (8 Aug. 2016), **[Ex. C-49]**.

116  It should be noted at the time that Afilias took these actions, Afilias was relying on the limited public disclosures that had been made by VeriSign.  Afilias' counsel did not know the extent of the violations until it obtained the DAA during the course of this IRP.

117  Letter from S. Hemphill (General Counsel, Afilias) to A. Atallah (President, ICANN's Global Domains Division) (9 Sep. 2016), **[Ex. RE-12]**.

118  Letter from C. Willett (Vice President, ICANN's gTLD Operations) to J. Kane (Vice President, Afilias' Corporate Services) (16 Sep. 2016), **[Ex. C-50]**, p. 1.

119  Letter from A. Atallah (President, ICANN's Global Domains Division) to S. Hemphill (General Counsel, Afilias) (30 Sep. 2016), **[Ex. C-61]**, p. 1 (emphasis added).

120  Letter from J. Kane (Vice President, Afilias' Corporate Services) to C. Willett (Vice President, ICANN's gTLD Operations) (7 Oct. 2016), **[Ex. C-51]**.

121  Letter from J. LeVee (Counsel for ICANN) to A. Ali (Counsel for Afilias) (28 Apr. 2018), **[Ex. C-80]**, p. 1.

122  Email from ICANN Global Support to J. Kane (Vice President, Afilias' Corporate Services) (7 June 2018), **[Ex. C-62]**.

123  *See* Letter from A. Ali (Counsel for Afilias) to ICANN (18 June 2018), **[Ex. C-52]**; Email from ICANN to A. Ali (Counsel for Afilias) (20 June 2018), **[Ex. C-53]**, p. 2.

124  Email from ICANN to A. Ali (Counsel for Afilias) (20 June 2018), **[Ex. C-53]**, p. 2.

125  Email from ICANN Independent Review to A. Ali and R. Wong (Counsel for Afilias) (13 Nov. 2018), **[Ex. C-54]**.

126  AGB **[Ex. C-3]**, p. A-12.

127  *Id.*

128  *Id.*, p. A-11.

129  NDC App. **[Ex. C-24]**, [PDF] pp. 6, 7.

130  *Id.*, [PDF] p. 6.

131  AGB **[Ex. C-3]**, p. A-5; *see* NDC App. **[Ex. C-24]**, [PDF] p. 1.  The final section of the public portions of NDC's application provide a "demonstration of technical and operational capability."  *Id.*, p. 13.  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.

132  AGB **[Ex. C-3]**, p. 6-6 (emphasis added).

133  *Id.*, p. 6-2.

134  DAA **[Ex. C-69]**, Sec. 4(f).

135  AGB **[Ex. C-3]**, p. 4-6.

136  *Id.*

137  DAA **[Ex. C-69]**, Sec. 4(j).

138  *Id.*, Ex. A, Sec. 1(i).

139  *Id.*, Sec. 10(a).

140  Verisign Inc., Edited Transcript of Earnings Conference Call or Presentation (8 Feb. 2018), **[Ex. C-47]**, p. 4.

141 AGB **[Ex. C-3]**, p. 4-22 (emphasis added).

142 Auction Rules **[Ex. C-4]**, p. 3 (emphasis added).

143 *Id.*, p. 5 (emphasis added).

144 AGB **[Ex. C-3]**, p. 4-23.

145 New gTLD Auctions Bidder Agreement **[Ex. C-5]**, p. 1.

146 DAA **[Ex. C-69]**, Ex. A, Sec. 1.

147 *Id.*, Sec. 1, Ex. A, Secs. 4(b), 4(d).

148 *Id.*, Sec. 1, Ex. A, Sec. 2(d).

149 Bylaws **[Ex. C-1]**, Sec. 1.2(a)(v).

150 *Id.*, Sec. 2.3.

151 GNSO Report **[Ex. C-20]**, pp. 7, 26.

152 Rationales **[Ex. C-9]**, p. 12.

153 *Id.*, p. 101.

154 Economic Case for Auctions in New gTLDs **[Ex. C-27]**, p. 2.

155 AGB **[Ex. C-3]**, p. 1-24.

156 *Id.*, p. 6-2.

157 *Id.*, p. 1-30.

158 Willett Decl., Ex. B **[Ex. C-38]**, [PDF] p. 3.

159 Bylaws **[Ex. C-1]**, Art. 1, Sec. 1.2(a)(v).

160 AGB **[Ex. C-3]**, p. 4-22.

161 ICANN, Memorandum of Understanding between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers (25 Nov. 1999), **[Ex. C-57]**, Secs. II(A), II(C)(2).

162 Statement of Esther Dyson (Founding Chair of ICANN), S. Hrg. 112-394, ICANN's Expansion of Top Level Domains, Hearing before the Committee on Commerce, Science, and Transportation, U.S. Senate, 112th Congress, First Session (8 Dec. 2011), **[Ex. C-58]**, p. 46 (emphasis added).

163 Bylaws **[Ex. C-1]**, Art. 1, Sec. 1.2(b)(iii).

164 *Id.*, Sec. 1.2(a) (emphasis added).

165 Rationales **[Ex. C-9]**, p. 7.

166 GNSO Report **[Ex. C-20]**, ¶¶ 13, 13(iv). In the then-current Bylaws, Core Value 6 was identical to Art. 1, Sec. 1.2(b)(iii) of today's Bylaws.

167 VeriSign's CEO confirms that his company seeks to do more than simply submit a "friend of the court" type of brief. In a recent analyst call, he stated that: "We are not a parties to that arbitration yet BUT we are actively seeking to join and participate in it." VeriSign (VRSN) CEP Jim Bidzos on Q4 2018 Results – Earnings Call Transcript (7 Feb. 2019), *available at* https://seekingalpha.com/article/4239256-verisign-inc-vrsn-ceo-jim-bidzos-q4-2018-results-earnings-call-transcript?part=single (last accessed on 17 Mar. 2019), **[Ex. C-81]**.

# EXHIBIT AC-92

# HIGHLY CONFIDENTIAL-
# ATTORNEYS' EYES ONLY

# EXHIBIT AC-31

**HIGHLY CONFIDENTIAL-
ATTORNEYS' EYES ONLY**

# EXHIBIT AC-93

# HIGHLY CONFIDENTIAL-
# ATTORNEYS' EYES ONLY

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


**AFILIAS DOMAINS NO. 3 LIMITED,**
*Claimants*
v.
**INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,**
*Respondent*


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


**EXPERT REPORT BY KEVIN MURPHY**


**ICANN INDEPENDENT REVIEW PROCESS**


May 30, 2020

# EXHIBIT AC-94

# CONFIDENTIAL

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

**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 *Amici*'s Brief | Afilias' Response to the *Amici Curiae* Briefs dated 24 July 2020. |
| Amended Request for IRP | Afilias's Amended Request for Independent Review dated 21 March 2019. |
| *Amici* | Collectively, Verisign, Inc. and Nu DotCo, LLC. |
| *Amici*'s PHB | Verisign, Inc. and Nu DotCo, LLC's post-hearing brief dated 12 October 2020. |
| Articles | *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, 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 *Amici*'s Briefs | ICANN's response dated 24 July 2020 to the *amici curiae* 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 *Amici* pursuant to the Panel's communication dated 16 October 2020. |
| NDC | *Amicus Curiae* Nu DotCo, LLC. |
| NDC's Brief | Nu DotCo, LLC's *amicus curiae* 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 *amicus curiae* 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 | *Amicus Curiae* Verisign, Inc. |
| Verisign's Brief | Verisign, Inc.'s *amicus curiae* brief dated 26 June 2020. |
| 10 June Application | Afilias' application dated 10 June 2020 regarding the status of the evidence originating from the *Amici* 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.[1]

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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[1] 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,[2] the Panel decided to join to the Claimant's other claims in Phase II those aspects of Afilias' Rule 7 Claim over which the Panel determined that it had jurisdiction[3] – 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"[4] (*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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[2]     *See* Decision on Phase I, para. 183.

[3]     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.

[4]     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."[5]

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.[6] 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.[7]

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

[6] See Bylaws, Ex. C-1, Section 4.3 (m).

[7] 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, Afilias 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, Afilias filed its request for IRP with the ICDR. On the same day, ICANN informed Afilias that it would only keep the .WEB gTLD contention set "on-hold" until 27 November 2018, so as to allow Afilias 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. Afilias 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.[8]

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".[9] 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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8     See ICANN's Response to Afilias' Costs Submission, dated 23 October 2020, at para. 23.

9     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 *Amici* 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. | *Amici*'s Briefs (along with all supporting exhibits, if any, and legal authorities) | Verisign and NDC | 26 June 2020 |
| 12. | Simultaneous Responses to the *Amici*'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.[10]

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*.[11]

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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[10]  Procedural Order No. 3, pp. 2-3.

[11]  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."[12] 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".[13]

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 Responded 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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[12]   29 April 2020 Application, p. 11.

[13]   *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"[14] (**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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[14]   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.[15] 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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[15]  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,[16] 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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[16]   *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".[17]

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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[17]   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.[18] 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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[18]    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 Afilias Domains No. 3 Limited ("Afilias") 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

.[19] 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

.[20]

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.[21]

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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[19]  Merits hearing transcript, 11 August 2020, pp. 1125:17-1126:15 (Mr. Livesay).

[20]  Mr. Livesay's witness statement, 1 June 2020, para. 4.

[21]  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."[22] 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]".[23] 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."[24]

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."[25]

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."[26] 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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[22]  Mr. Rasco's email dated 7 June 2016, Ex. C-35.

[23]  Ms. Willett's witness statement, 31 May 2019, Ex. A.

[24]  Exchanges between Messrs. Rasco and Jared Erwin, Ex. C-96.

[25]  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.

[26]  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.[27] 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.[28] Donuts' and Radix's Reconsideration Request was denied on 21 July 2016.[29]

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.[30]

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.[31] Mr. Rasco did not respond to this query, as he testified he considered

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[27]   Reconsideration Request by Ruby Glen, LLC and Radix FZC, Ex. R-5, p. 2.

[28]   See Bylaws, Ex. C-1, Article 4, Section 4.2.

[29]   Reconsideration Request by Ruby Glen, LLC and Radix FZC, Ex. R-5, pp. 11-12.

[30]   *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.

[31]   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.[32]

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."[34]

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

."[35] On 1 August 2016, Verisign issued a press release stating that it had "entered into an agreement with Nu Dot Co LLC wherein the Company provided funds for Nu Dot Co's bid for the .web TLD."[36]

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

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[32] Mr. Rasco's witness statement, 10 December 2018, para. 17.

[33] Mr. Livesay's witness statement, 1 June 2020, para. 27, and Ex. H attached thereto.

[34] Verisign's Form 10-Q, Quarterly Report, Ex. C-45, p. 13.

[35] Ms. Willett's email dated 31 July 2016, Ex. C-100, [PDF] pp. 1-2.

[36] Verisign statement regarding .WEB auction results, Ex. C-46.

.WEB (**Donuts CEP**).[37] The CEP is a non-binding process in which parties are encouraged to participate to attempt to resolve or narrow a dispute.[38] 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, Afilias 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, Afilias sent ICANN a second letter regarding Afilias' 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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[37] Cooperative Engagement and Independent Review Processes Status Update, 8 August 2016, Ex. C-108, [PDF] p. 1.

[38] Bylaws, Ex. C-1, Article 4, Section 4.3 (e).

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

[40] 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.[41]

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.[42] 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".[43] 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[44] and Verisign[45], and on 10 October 2016 by NDC.[46]

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.[47]

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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[41] Afilias' Letter to Mr. Atallah dated 9 September 2016, Ex. C-103.

[42] ICANN's letter to Mr. Kane dated 16 September 2016 and attached Questionnaire, Ex. C-50.

[43] Respondent's Rejoinder, para. 46.

[44] Afilias' letter to Ms. Willett dated 7 October 2016, Ex. C-51.

[45] Arnold & Porter's letter to Ms. Willett dated 7 October 2016, Ex. C-109.

[46] Mr. Rasco's email to ICANN dated 10 October 2016, Ex. C-110.

[47] 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."[48]

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**).[49] 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.[50] 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".[51] 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.[52]

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."[53]

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."[54] The DOJ requested that ICANN take no action on .WEB during the pendency of the investigation. Between February

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[48]    ICANN's letter to Mr. Hemphill dated 30 September 2016, Ex. C-61.

[49]    Joint Fact Chronology, and ICANN's Privilege Log of 24 April 2020, pp. 29-30.

[50]    Respondent's Rejoinder, para. 40.

[51]    *Ibid*, para. 3.

[52]    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.

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

[54]    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

.[55] 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.[56]

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.[57] 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.[58]

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."[59]

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[55] Respondent's Rejoinder, para. 49.

[56] Mr. Rasco's email to ICANN dated 15 February 2018, Ex. C-182.

[57] Dechert's letter to the Board dated 23 February 2018, Ex. C-78.

[58] Irell & Manella's letter to Messrs. Jeffrey and Atallah dated 28 February 2018, Ex. R-20.

[59] 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.[60] This request was treated as a new DIDP request (**Second DIDP Request**)[61]. On the same date, counsel for Afilias submitted a reconsideration request challenging ICANN's response to Afilias' First DIDP Request (**Reconsideration Request 18-7**).[62]

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."[63] Afilias responded to that letter on 1 May 2018, reiterating the arguments it had previously made.[64]

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.[65] 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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[60]   Dechert's letter to the Board dated 23 April 2018, Ex. C-79.

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

[62]   Afilias Domain No. 3 Limited Reconsideration Request, Ex. R-31 or VRSN-26.

[63]   Jones Day's letter to Mr. Ali dated 28 April 2018, Ex. C-80.

[64]   Dechert's letter to Mr. LeVee dated 1 May 2018, Ex. C-114.

[65]   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.[66]

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.[67] 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.[68]

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.[69]

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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[66] Exchange of emails between ICANN Staff dated 14 June 2018, Ex. C-170.

[67] Dechert's letter to ICANN dated 18 June 2018, Ex. C-52.

[68] Exchange of emails between ICANN Staff dated 14 June 2018, Ex. C-170.

[69] 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.[70]

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.[71]

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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[70] Amended Request for IRP, para. 2.

[71] *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.[72]

## 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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[72]   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.[73]

135. The Respondent explains that, with the exception of approximately two weeks in June 2018, after Afilias' DIDP-related Reconsideration Requests were resolved and before Afilias 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.[74]

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".[75] 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.[76]

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[73] Respondent's Response, para. 61.

[74] *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.

[75] Respondent's Response, para. 63.

[76] *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.[77]

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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[77] Respondent's Response, para. 55.

The Respondent contends that Afilias' 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 Afilias' letters dated August and September 2016, and were therefore known to the Claimant at that time.[78]

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.[79]

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.[80]

144. The Claimant submits that the Respondent's defences are baseless and self-contradictory:

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[78] *Ibid*, paras. 73-76.

[79] Claimant's Reply, paras. 1-3.

[80] *Ibid*, para. 8.

on the one hand it argues that it appropriately handled Afilias' 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.[81] 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 shill like NDC".[82] 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.[83] 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.[84]

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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[81]  *Ibid*, para. 20.

[82]  *Ibid*, para. 27.

[83]  Claimant's Reply, para. 40.

[84]  *Ibid*, para. 69.

carefully deliberated policy development work by the ICANN community.[85]

148.    The Claimant also submits that NDC's bids in the auction were invalid for failure to comply with the Auction Rules.[86] 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 [87] 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 form 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.[88]

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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[85]    *Ibid*, para. 85.

[86]    *Ibid*, para. 88.

[87]    *Ibid*, para. 95.

[88]    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.[89]

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.[90] 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.[91]

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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[89] *Ibid*, para. 118.

[90] *Ibid*, paras. 125-128.

[91] 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.[92]

### 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.[93] 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.[94] 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.[95] 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.[96] 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.[97]

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

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[92] *Ibid*, paras. 147-155.

[93] Respondent's Rejoinder, para. 1.

[94] *Ibid*, paras. 2 and 89.

[95] *Ibid*, paras. 3 and 89.

[96] *Ibid*, para. 4.

[97] *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.[98]

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.[99]

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.[100]

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.[101] 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.[102] 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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[98] Respondent's Rejoinder, paras. 40-41 and 92.

[99] *Ibid*, paras. 51-53.

[100] *Ibid*, paras. 54-62.

[101] *Ibid*, paras. 9 and 63-64.

[102] *Ibid*, para. 65.

actions, even if it did not have a copy of the Domain Acquisition Agreement.[103] 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.[104] 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.[105] The Respondent also notes that the Claimant was represented by experienced counsel throughout the period at issue.[106]

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.[107] In addition, the Respondent avers that its post-auction investigation was prompt, thorough, fair, and fully consistent with its Bylaws and Articles.[108]

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.[109]

163.    The Respondent contends that it has, as yet, taken no position on whether NDC violated the Guidebook.[110] 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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[103] *Ibid*, paras. 66-70.

[104] Respondent's Rejoinder, paras. 64-65.

[105] *Ibid*, paras. 72-75.

[106] *Ibid*, paras. 76-78.

[107] *Ibid*, paras. 104-105.

[108] *Ibid*, paras. 8 and 107-113.

[109] *Ibid*, paras. 80-88.

[110] *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."[111]

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.[112] 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.[113]

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.[114]

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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[111] *Ibid*, para. 82.

[112] Respondent's Rejoinder, para. 83.

[113] *Ibid*, para. 87.

[114] *Ibid*, para. 95.

Murphy, that there is no evidence that Verisign's operation of .WEB would restrain competition.[115]

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.[116]

## 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.[117] NDC notes that Afilias itself has participated extensively in the secondary market for new gTLDs.[118]

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.[119]

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.[120]

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[115] *Ibid*, paras. 94-103.

[116] *Ibid*, paras. 114-124.

[117] NDC's Brief, paras. 32-37.

[118] *Ibid*, paras. 38-39.

[119] *Ibid*, paras. 55-56.

[120] *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.[121]

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.[122]

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.[123]

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.[124] 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.[125]

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[121] *Ibid*, paras. 70-74.

[122] NDC's Brief, paras. 75-79.

[123] *Ibid*, para. 80.

[124] *Ibid*, paras. 81-84.

[125] *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.[126] 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.[127] In that respect, NDC argues that Afilias' own participation in the secondary market – on both sides of transfers – belies its protestations in this case.[128] In addition, NDC submits that Afilias itself violated the Guidebook by contacting NDC during the Blackout Period.[129]

176. For these reasons, NDC requests that the Panel deny in its entirety the relief requested by the Claimant.[130]

### 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.[131]

178. The Domain Acquisition Agreement, according to its terms, does not constitute a resale,

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[126] *Ibid*, paras. 96-99.

[127] *Ibid*, paras. 100-107.

[128] *Ibid*, paras. 108-113.

[129] *Ibid*, paras. 114-119.

[130] *Ibid*, para. 120.

[131] 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.[132] 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.[133]

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.[134] 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.[135]

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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[132]    *Ibid*, paras. 2-4, 6 and 11-20.

[133]    *Ibid*, paras. 4 and 21-34.

[134]    Verisign's Brief, paras. 5, 9-10 and 35-45.

[135]    *Ibid*, para. 46.

approve such assignment.[136]

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.[137] Redacted - Third Party Designated Confidential Information

.[138] 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".[139]

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.[140] Furthermore, Verisign asserts that the mission statement in a new gTLD application is irrelevant to its evaluation.[141]

183.   Verisign also argues that there is no basis for refusing to delegate .WEB based on ICANN's mandate to promote competition.[142] 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.[143] 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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[136] *Ibid*, paras. 49-51.

[137] *Ibid*, para. 52.

[138] *Ibid*, para. 57.

[139] *Ibid*, para. 62.

[140] *Ibid*, paras. 65-76.

[141] *Ibid*, paras. 77-86.

[142] *Ibid*, paras. 88-93.

[143] Verisign's Brief, paras. 94-101.

issues to the relevant authorities.[144]

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.[145] 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.[146] 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.[147]

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 Afilias' 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.[148]

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

#### 1. Afilias' 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.[149] The Claimant insists on the fact that Verisign failed to apply for .WEB by the set deadline[150] 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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[144] *Ibid*, paras. 102-107.

[145] *Ibid*, paras. 108-112.

[146] *Ibid*, paras. 112-119.

[147] *Ibid*, paras. 125-134.

[148] *Ibid*, para. 140.

[149] Claimant's Response to *Amici*'s Briefs, paras. 5-66.

[150] 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.[151]

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 blindside them with a high bid that none could have seen coming.[152] 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.[153] 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.[154] The Claimant vehemently denies that the other transactions identified by the *Amici* as industry practice are analogous to the Domain Acquisition Agreement.[155]

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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[151] Claimant's Response to *Amici*'s Briefs, paras. 8-16.

[152] *Ibid*, para. 20.

[153] *Ibid*, para. 22.

[154] *Ibid*, paras. 24-29.

[155] *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;[156] that ICANN never informed Afilias of such decision until well into this IRP;[157] and that such decision is not even documented.[158]

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 Afilias' request to reconsider the denial of its most recent document disclosure request.[159] 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.[160]

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.[161] The Claimant also rejects any analogy between the Domain Acquisition Agreement and a financing agreement.[162] 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:
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[156] *Ibid*, paras. 54-55.

[157] Claimant's Response to *Amici*'s Briefs, para. 56.

[158] *Ibid*, paras. 49-58.

[159] *Ibid*, para. 62.

[160] *Ibid*, para. 65.

[161] *Ibid*, paras. 67-71.

[162] *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.[164]

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.[165]

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.[166] 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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[163] *Ibid*, paras. 74-98.

[164] Claimant's Response to *Amici*'s Briefs, paras. 99-114.

[165] *Ibid*, paras. 121-136.

[166] *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.[167]

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.[168]

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.[169] 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.[170]

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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[167]   *Ibid*, paras. 145-147.

[168]   Claimant's Response to *Amici*'s Briefs, paras. 148-149.

[169]   *Ibid*, paras. 151-158.

[170]   *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.[171]

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.[172]

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.[173] 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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[171]   *Ibid*, paras. 165-178.

[172]   *Ibid*, paras. 179-184.

[173]   Claimant's Response to *Amici*'s Briefs, paras. 164 and 185-198.

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

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.[176] 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).[177]

### 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.[178]

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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[174]  *Ibid*, paras. 199-209.

[175]  *Ibid*, paras. 210-213.

[176]  *Ibid*, paras. 218-220.

[177]  *Ibid*, paras. 223-236.

[178]  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.[179]

## 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.[180]

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 .[181]

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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[179] *Ibid*, para. 7.

[180] Claimant's PHB, paras. 1-2.

[181] 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".[182]

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.[183]

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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[182] *Ibid*, paras. 21-23.

[183] *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.[184]

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.[185]

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[184] Claimant's PHB, paras. 61-76.

[185] *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.[186]

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.[187]

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.[188]

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.[189]

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[186] *Ibid*, para. 103.

[187] Claimant's PHB, paras. 126-138.

[188] *Ibid*, paras. 139-143.

[189] *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.[190]

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.[191]

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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[190]    *Ibid*, para. 157.

[191]    Claimant's PHB, paras. 159-170.

Articles and Bylaws.[192]

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.[193]

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.[194]

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.[195]

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[192]    *Ibid*, paras. 177-183.

[193]    Claimant's PHB, paras. 184-192.

[194]    *Ibid*, paras. 193-195.

[195]    *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.[196]

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."[197]

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.[198]

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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[196] *Ibid*, paras. 203-210.

[197] Claimant's PHB, paras. 211-220.

[198] *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.[199]

### 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. [200] 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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[199] *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.

[200] Respondent's PHB, paras. 1-6.

was merely a ministerial act triggered by the removal of the set's on hold status.[201]

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.[202] 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.[203]

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.[204]

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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[201]    Respondent's PHB, paras. 10-12.

[202]    *Ibid*, para. 14.

[203]    *Ibid*, paras. 15-45.

[204]    *Ibid*, paras. 46-48.

on behalf of ICANN are subject to a fiduciary duty to act in good faith in the interests of ICANN.[205]

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.[206] 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.[207] 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.[208] 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.[209]

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.[210] 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.[211]

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[205] Respondent's PHB, paras. 49-57.

[206] *Ibid*, paras. 58-61.

[207] *Ibid*, paras. 62-69.

[208] *Ibid*, paras. 70-72.

[209] *Ibid*, paras. 73-85.

[210] *Ibid*, paras. 86-101.

[211] *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".[212] 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.[213] 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.[214] According to the Respondent, its commitment to transparency and accountability is not relevant to the Claimant's contention regarding NDC's alleged violations.[215]

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.[216] The Respondent adds that its obligations to act transparently did not require the Board to inform Afilias 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.[217]

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.[218]

238. According to the Respondent, the Claimant's claims that ICANN's pre- and post- auction

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[212] Respondent's PHB, para. 138.

[213] *Ibid*, paras. 136-150.

[214] *Ibid*, paras. 151-156.

[215] *Ibid*, paras. 157-158.

[216] *Ibid*, para. 159.

[217] *Ibid*, paras. 182-189.

[218] *Ibid*, paras. 190-197.

investigations violated the Articles and Bylaws have no merit and in any event are time-barred.[219]

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.[220]

### 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.[221]

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.[222] 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.[223] 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.[224]

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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219  *Ibid*, paras. 198-217.

220  Respondent's PHB, paras. 218-231.

221  *Ibid*, paras. 6 and 13-21.

222  *Ibid*, paras. 22-49.

223  *Ibid*, paras. 62-67.

224  *Ibid*, paras. 68-81.

process rights because of their limited participation in the IRP.[225]

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.[226] 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.[227] The *Amici* aver that ICANN has approved many assignments of registry agreements under such circumstances.[228]

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.[229]

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.[230]

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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[225] *Ibid*, paras. 82-86.

[226] *Ibid*, paras. 8 and 87-123.

[227] *Amici*'s PHB, paras. 100-109.

[228] *Ibid*, paras. 124-153.

[229] *Ibid*, paras. 153-180.

[230] *Ibid*, paras. 181-205.

the Blackout Period.[231]

## 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[232], 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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[231] *Ibid*, paras. 206-214.

[232] 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.[233] 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 Afilias' allegations that NDC violated the Guidebook and Auction Rules. In any event,

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[233] See Afilias' 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.[234]

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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[234] 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.[235]

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[3]**
>
> 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.
>
> ---
> [3] 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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[235] 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.[236]

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"[237] 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".[238] 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.[239]

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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[236]  See Decision on Phase I, paras. 139-171.

[237]  "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).

[238]  Merits hearing transcript, 5 August 2020, pp. 495 and 498; see also pp. 479-480 (Ms. Eisner).

[239]  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.[240]

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.[241]

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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[240] Merits hearing transcript, 5 August 2020, pp. 496-498 (Ms. Eisner).

[241] 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,[242] 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.[243]

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,[244] 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."[245]

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[242] *Ibid*, para. 179.

[243] Claimant's PHB, para. 182.

[244] ICANN's letter to Mr. Kane dated 16 September 2016 and attached Questionnaire, Ex. C-50.

[245] 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 Afilias 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.[246] 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.[247] 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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[246] Dechert's letter to the Board dated 23 February 2018, Ex. C-78.

[247] 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 Afilias' 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.[248]

278. The rules applicable to a CEP are described in an ICANN document dated 11 April 2013 (**CEP Rules**).[249] 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 Afilias 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".[250] 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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[248] Bylaws, Ex. C-1, Article 4, Section 4.3(e)(i)-(ii).

[249] Cooperative Engagement Process Rules, 11 April 2013, Ex. C-121.

[250] 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 Afilias 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.[251] 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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[251] David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888*, p. 41. See also Black's Law Online Dictionary, 2nd 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[252] and, according to the California Supreme Court, which "exists in one form or another in every American jurisdiction".[253] 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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[252] Respondent's PHB, para. 50.

[253] *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."[254]

### 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".[255]

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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[254] *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).

[255] 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.[256]

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;[257]

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

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, […][259]

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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[256] Bylaws, Ex. C-1, Section 1.2(a)(v)(vi).

[257] *Ibid*, Section 1.2 (b) (v) and (vi).

[258]  *Ibid*, Section 1.2 (b) (c).

[259]  *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,[260] and then to the Ombudsman,[261] 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."[262] 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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[260]  Exchanges between Messrs. Erwin and Rasco, Ms. Willett's witness statement, 31 May 2019, Ex. B.

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

[262]  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.[263]

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.[264]

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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[263] Afilias' letter to Mr. Atallah dated 8 August 2016, Ex. C-49, pp. 1 and 3-4.

[264]  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 Afilias' Application of 29 April 2020, that counsel knew Verisign's lead counsel from prior cases, and therefore decided to contact him.[265]

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



.[266] 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.[267]

### (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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[265] 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).

[266] Arnold & Porter's letter to Mr. Enson dated 23 August 2016, Ex. C-102.

[267] 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.[268] The Questionnaire was sent out to Afilias, Ruby Glen, NDC, and Verisign, under cover of a letter of even date signed by Ms. Willett.[269] 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.[270]

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.[271]

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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[268] Merits hearing transcript, 5 August 2020, p. 545 (Ms. Willett). Ms. Willett left the employ of the Respondent in December 2019.

[269] ICANN's letter to Mr. Kane dated 16 September 2016 and attached Questionnaire, Ex. C-50.

[270] *Ibid*, p. 1 [emphasis added].

[271] 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 <u>in ICANN's evaluation of the issues raised</u> […]".[272]

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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[272]  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.[273]

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 Afilias 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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[273] 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.[274] 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.[275]

### (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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[274] Merits hearing transcript, 6 August 2020, pp. 719-720 (Ms. Willett).

[275] 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.[276]

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 Afilias 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.[277] 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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[276] Respondent's Rejoinder, para. 82.

[277] 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.[278] 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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[278] 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."[279]

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,[280] 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 Afilias 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".[281]

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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[279]    Respondent's Rejoinder, paras. 40-41.

[280]    Respondent's Response, paras. 40-54.

[281]    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.[282]

- The session was attended by a significant number of Board members, in his estimation more than 50%.[283] Also in attendance were ICANN's CEO, its in-house lawyers, and likely Mr. Atallah.[284]

- The letters that Afilias had sent Mr. Atallah were known to those in attendance and "would have been part of the briefing";[285] the Questionnaire prepared by ICANN in response to these letters was also known.[286] However, the DAA, the 23 August 2016 letter sent on behalf of the *Amici,* and the Questionnaire were not part of the briefing materials.[287]

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[282] Merits hearing transcript, 7 August 2020, pp. 918-919 (Mr. Disspain).

[283] *Ibid*, p. 923 (Mr. Disspain).

[284] Merits hearing transcript, 7 August 2020, p. 924 (Mr. Disspain).

[285] Merits hearing transcript, 7 August 2020, p. 917 (Mr. Disspain).

[286] Merits hearing transcript, 7 August 2020, p. 928 (Mr. Disspain).

[287] 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.[288]

- The Board made this choice without the need for a vote, straw poll or show of hands.[289]

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.[290]

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.[291] 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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[288] Merits hearing transcript, 7 August 2020, pp. 938-939 (Mr. Disspain).

[289] Merits hearing transcript, 7 August 2020, p. 935 (Mr. Disspain).

[290] Merits hearing transcript, 4 August 2020, pp. 282-286 (Ms. Burr).

[291] 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"[292] 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."[293] 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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[292]   See Bylaws Ex. C-1, Art. 3.

[293]   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.[294] 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 Afilias' Reconsideration Request 18-7 was denied.[295] 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,[296] and Mr. Atallah's letter of 30 September 2016.[297] 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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[294]  Merits hearing transcript, 6 August 2020, pp. 697-698 (Ms. Willett).

[295]  See above, para. 117.

[296]  ICANN's letter to Mr. Kane dated 16 September 2016 and attached Questionnaire, Ex. C-50.

[297]  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,[298] 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.[299]

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.[300] 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.[301] 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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[298]  Mr. Disspain's witness statement, 1 June 2020, para. 13.

[299]  Merits hearing transcript, 7 August 2020, pp. 978-980 (Mr. Disspain).

[300]  *Ibid*, pp. 981-982 (Mr. Disspain).

[301]  *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.[302]

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.[303] Once the investigation was completed, Ms. Willett informed Ruby Glen of ICANN's decision[304] and advised Ruby Glen that if dissatisfied with the decision, it could invoke ICANN's accountability mechanisms.[305] 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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[302] Merits hearing transcript, 6 August 2020, pp. 749-750 (Ms. Eisner).

[303] Merits hearing transcript, 6 August 2020, p. 617 (Ms. Willett).

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

[305] 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. […][306]

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.[307]

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".[308] 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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[306] See Respondent's Response, para. 63.

[307] Respondent's PHB, para. 90 [emphasis added].

[308] Respondent's Response, para. 4.

whether NDC violated the Guidebook".[309]

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.[310] 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".[311]

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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[309] Respondent's Rejoinder, para. 81.

[310] See Decision on Phase I, para. 40.

[311] 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)."[312] As seen, the Respondent

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[312] 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.[313]

353.     As noted in the History of the Proceedings section of this Final Decision,[314] 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,[315] 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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[313] Registry Operators' Submission Re: Objections to the Proposed Versign Settlement, Ex. R-21, p. 8 [emphasis added].

[314]   See above, para. 40.

[315]   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".[316] 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.[317]

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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[316] 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 <u>as to each Claim</u>".

[317] 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.[318] 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.[319] 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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[318] See Afilias' Reply Costs Submission, para. 9.

[319] 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.[320] 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.[321] 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.[322] 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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[320]  Decision on Phase I, para. 205(c)).

[321]  The Claimant's Submissions on Costs were corrected on 16 October 2020 apparently due to a technical problem with Afilias' exhibit management software.

[322]  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.[323] 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 Afilias prior to the Respondent's Rejoinder.[324]

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.[325]

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.[326]

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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[323] Claimant's Submissions on Costs, para. 16.

[324] *Ibid*, paras. 12-17.

[325] *Ibid*, paras. 19-25.

[326] *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.[327]

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.[328]

### 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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[327] Respondent's PHB, paras. 232-234.

[328] *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."[329]

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.[330] 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,[331] the allegedly limited remedial jurisdiction of the Panel,[332] 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.[333] 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.[334]

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".[335]

### 4.    Respondent's Response Submission on Costs

383.    In its 23 October 2020 Response to Afilias' Costs Submission, the Respondent contends

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[329]    Claimant's Reply Submissions on Costs, paras. 3-4.

[330]    *Ibid*, para. 5.

[331]    *Ibid*, para. 6.

[332]    *Ibid*, para. 7.

[333]    *Ibid*, para. 8.

[334]    *Ibid*, para. 9.

[335]    *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.[336] The Respondent further argues that the Claimant's cost-shifting arguments are misplaced and baseless since its arguments in defence were nor frivolous or abusive.[337] 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.[338]

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.[339]

## 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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[336] Respondent's Reply Submissions on Costs, paras. 4-8.

[337] *Ibid*, paras. 9-24.

[338] *Ibid*, paras. 25-28.

[339] *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".[340]

## 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 <u>as a whole</u>, or an IRP defence <u>as a whole</u>, 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".[341] 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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[340] Rule 13 b. of the Interim Procedures, Ex. C-59, requires the Panel to designate the prevailing party "as to each Claim".

[341] ICANN's Response to Afilias' 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".[342] 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."[343] For its part, the term "abusive" is defined by the Merriam-Webster Dictionary as "characterized by wrong or improper use or action"[344], while the term "abuse" is defined in Black's Law

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[342]  Merriam-Webster *s.v.* "frivolous": https://www.merriam-webster.com/dictionary/frivolous (consulted on 23 March 2021).

[343]  Black's Law Online Dictionary, 2nd ed., *s.v.* "frivolous": https://thelawdictionary.org/frivolous/ (consulted on 23 March 2021).

[344]  Merriam-Webster *s.v.* "abusive": https://www.merriam-webster.com/dictionary/abusive (consulted on 23 March 2021).

Dictionary as a "misuse of anything".[345]

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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[345] Black's Law Online Dictionary, 2nd 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.[30] ICANN provided Afilias with no explanation justifying its decision.
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> 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.[31] 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.
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> 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."[32] 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.[33]
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> 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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[30] Email from Independent Review (ICANN) to A. Ali and R. Wong (Counsel for Afilias) (14 Nov. 2018), **[Ex. C-64]**, p. 1.

[31] Letter from A. Ali (Counsel for Afilias) to Independent Review (ICANN) (20 Nov. 2018), **[Ex. C-65]**.

32      Letter from J. LeVee (Jones Day) to A. Ali (Counsel for Afilias) (26 Nov. 2018), **[Ex. C-66]**.

33      Letter from J. LeVee (Jones Day) to A. Ali (Counsel for Afilias) (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.[346] 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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[346] See ICANN's Response to Afilias' 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*

_____                           _____

Catherine Kessedjian                              Richard Chernick


*(s) Pierre Bienvenu*

_____

Pierre Bienvenu, Ad. E., Chair



Dated:  20 May 2021

# EXHIBIT AC-95

19 May 2022

**Via Email**

Altanovo Domains Limited
c/o Counsel for Altanovo Domains Limited
Mr. Arif Hyder Ali (arif.ali@dechert.com)
Dechert LLP

Nu Dotco, LLC
c/o Counsel for Nu Dotco, LLC
Mr. Steven A. Marenberg (stevenmarenberg@paulhastings.com)
Paul Hastings LLP

Verisign, Inc.
c/o Counsel for Verisign, Inc.
Mr. Ronald L. Johnston (Ronald.Johnston@arnoldporter.com)
Arnold & Porter Kaye Scholer LLP

Dear Altanovo Domains Limited, Nu Dotco, LLC and Verisign, Inc.,

Pursuant to Board Resolution 2022.03.10.06, the Board Accountability Mechanisms Committee (BAMC) will "review, consider, and evaluate the allegations relating to the Domain Acquisition Agreement (DAA) between" Nu Dotco LLC (NDC) and Verisign, Inc., "and the allegations relating to [Afilias Domains No. 3 Ltd.'s (now Altanovo Domains Limited)] conduct during the Auction Blackout Period" of the .WEB Auction.

In order to ensure that the BAMC is reviewing a complete picture of the parties' positions, as well as the supporting materials regarding each issue (the DAA and the Auction Blackout Period), the BAMC hereby requests that Altanovo, NDC and Verisign provide a comprehensive written summary of their claims and the materials supporting their claims. These submissions are meant to supersede both the submissions in the .WEB Independent Review Process (IRP) as well as the correspondence on these topics; and these submissions will represent the basis upon which the BAMC will review, consider, and evaluate the allegations relating to the DAA and the allegations relating to the Auction Blackout Period.

The BAMC strongly encourages the parties to be as succinct as possible in their submissions. Along those lines, the initial submissions of each set of parties will be limited to 75 pages inclusive of any footnotes or endnotes, meaning that Afilias/Altanovo's submission is limited to 75 pages and NDC/Verisign's submission is limited to 75 pages collectively. The parties will also have an opportunity to provide reply submissions, which will be limited to 30 pages inclusive of any footnotes or endnotes for each set of parties. The BAMC further requests that

the submissions include an Executive Summary, as well as a Table of Contents.  Also, in an effort to be conscious of the volume of supporting materials, the BAMC requests that the parties' submission of supporting materials contain an index and, where possible, include a link/URL address for the location of the document instead of attaching the document itself.[1]

These submissions and supporting materials will be publicly posted on ICANN's website.  However, consideration will be provided to suggested redactions before posting.  Accordingly, when you provide your submissions (initial and reply), please also provide a separate version with proposed redactions for consideration in our public posting.

If Altanovo, NDC, and Verisign choose to provide the above-described submissions, the BAMC requests that the parties provide their initial submissions and supporting materials to ICANN via email at independentreview@icann.org by 15 July 2022.  Reply submissions are due on 15 August 2022.  If the parties feel as though additional time is needed, the BAMC asks that the parties confer and provide ICANN with new proposed submission dates, via email at independentreview@icann.org.

Best regards,

J. Beckwith Burr
Chair, Board Accountability Mechanisms Committee (BAMC)
ICANN

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[1] For instance, reference to the Bylaws should be a link to the applicable Bylaws, not an attachment of the full Bylaws.  Similarly, if there are materials that have been previously submitted in the IRP, the party should provide a link and specific identification (e.g., exhibit number) of the operative exhibit.  If the posted exhibit is redacted, the party may attach the unredacted version to its BAMC submission.

19 May 2022

**Via Email**

Altanovo Domains Limited
c/o Counsel for Altanovo Domains Limited
Mr. Arif Hyder Ali (arif.ali@dechert.com)
Dechert LLP

Nu Dotco, LLC
c/o Counsel for Nu Dotco, LLC
Mr. Steven A. Marenberg (stevenmarenberg@paulhastings.com)
Paul Hastings LLP

Verisign, Inc.
c/o Counsel for Verisign, Inc.
Mr. Ronald L. Johnston (Ronald.Johnston@arnoldporter.com)
Arnold & Porter Kaye Scholer LLP

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the submissions include an Executive Summary, as well as a Table of Contents.  Also, in an effort to be conscious of the volume of supporting materials, the BAMC requests that the parties' submission of supporting materials contain an index and, where possible, include a link/URL address for the location of the document instead of attaching the document itself.[1]

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If Altanovo, NDC, and Verisign choose to provide the above-described submissions, the BAMC requests that the parties provide their initial submissions and supporting materials to ICANN via email at independentreview@icann.org by 15 July 2022.  Reply submissions are due on 15 August 2022.  If the parties feel as though additional time is needed, the BAMC asks that the parties confer and provide ICANN with new proposed submission dates, via email at independentreview@icann.org.

Best regards,

J. Beckwith Burr
Chair, Board Accountability Mechanisms Committee (BAMC)
ICANN

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# EXHIBIT AC-96

# CONFIDENTIAL

# EXHIBIT I

## CONFIDENTIAL

Redacted – Third Party Designated Confidential Information

# EXHIBIT AC-97

# CONFIDENTIAL

# EXHIBIT K

## CONFIDENTIAL

Redacted – Third Party Designated Confidential Information

# EXHIBIT AC-98

# CONFIDENTIAL

# EXHIBIT C

## CONFIDENTIAL

# EXHIBIT AC-99

# CONFIDENTIAL

# EXHIBIT N

## CONFIDENTIAL

Redacted – Third Party Designated Confidential Information

# EXHIBIT AC-100

# CONFIDENTIAL

# EXHIBIT R

## CONFIDENTIAL

Redacted – Third Party Designated Confidential Information

# EXHIBIT AC-101

# CONFIDENTIAL

# EXHIBIT AC-102

## ASSIGNMENT AND ASSUMPTION AGREEMENT
## Dot-ATTORNEY Registry Agreement

This Assignment and Assumption of the Dot-ATTORNEY Registry Agreement ("Assignment and Assumption Agreement") is entered into as of 7 May 2014 (the "Effective Date") by and between Victor North, LLC, a Delaware limited liability company with its principal place of business located at 155 108th Avenue NE, Suite 510, Bellevue, WA 98004 USA ("Victor North") and United TLD Holdco, Ltd., a Cayman Islands corporation with its principal place of business located at Ugland House, South Church Street, George Town, Grand Cayman KY1-1104, Cayman Islands ("United TLD"). The parties to this Agreement shall be referred to individually as a "Party" and collectively as the "Parties."

### RECITALS

A.      Victor North is a party to that certain Registry Agreement entered into 20 March 2014, by and between Victor North and the Internet Corporation for Assigned Names and Numbers, a California nonprofit public benefit corporation ("ICANN") for the **.attorney** top-level domain (the "Registry Agreement").

B.      Pursuant to Section 7.5 of the Registry Agreement, in a letter from Victor North's parent, Donuts, Inc. dated April 25, 2014, Victor North requested ICANN's prior written consent to an assignment of the Registry Agreement from Victor North to United TLD.

C.      On 2 May 2014, ICANN granted its conditional written consent ("ICANN's Consent") to Victor North for assignment of the Registry Agreement to United TLD.

D.      Having received ICANN's Consent as aforementioned, and both Parties having represented herein below its fulfillment of all conditions of ICANN's Consent, Victor North hereby desires to assign its rights and obligations under the Registry Agreement to United TLD, and United TLD hereby desires to assume Victor North's rights and obligations under the Registry Agreement via assignment, pursuant to the terms and conditions of this Assignment and Assumption Agreement.

### AGREEMENT

In consideration of the mutual promises set forth herein and for good and valuable consideration, the sufficiency of which is hereby acknowledged, the Parties now agree as follows:

1.      Victor North hereby assigns, transfers, and conveys to United TLD all of Victor North's rights, obligations, title, and interest in and to the Registry Agreement.

2.      United TLD hereby accepts the assignment of the Registry Agreement and assumes all liabilities of Victor North relating thereto, whether contingent or accrued, and further agrees to assume and perform all of the covenants, obligations and agreements of Victor North under the Registry Agreement from and after the Effective Date.

3.      The Parties hereby agree that United TLD shall be substituted for Victor North as the Registry Operator for all purposes of the Registry Agreement.

4.        The Parties hereby represent that all conditions set forth in ICANN's Consent have been fulfilled as of the Effective Date of this Assignment and Assumption Agreement.

5.        The Parties hereby acknowledge that ICANN's Consent to Victor North's assignment of the Registry Agreement does not waive any rights ICANN may have to take action with respect to the performance of covenants, obligations and agreements of Victor North under the Registry Agreement prior to the Effective Date or any breaches of the Registry Agreement by Victor North occurring prior to the Effective Date.

6.        Each Party shall, upon the reasonable request of the other Party, make, execute, acknowledge, and deliver any and all further documents and instruments, and do and cause to be done all such further acts, to evidence and/or in any manner perfect Victor North's assignment of the Registry Agreement to United TLD pursuant to this Agreement.

IN WITNESS WHEREOF, the Parties have caused this Assignment and Assumption Agreement to be executed and delivered as of the Effective Date first stated above.

**VICTOR NORTH, LLC**

By:_____

Name: _____

Title: _____

**UNITED TLD HOLDCO, LTD.**

By: _____

Name: _____

Title: _____

2

# EXHIBIT AC-103

# New gTLD Application Submitted to ICANN by: Victor North, LLC

**String: attorney**

**Originally Posted: 13 June 2012**

**Application ID: 1-1348-99321**

## Applicant Information

### 1. Full legal name

Victor North, LLC

### 2. Address of the principal place of business

Contact Information Redacted

### 3. Phone number

Contact Information Redacted

### 4. Fax number

Contact Information Redacted

## 5. If applicable, website or URL

# Primary Contact

## 6(a). Name

Daniel Schindler

## 6(b). Title

EVP, Donuts Inc.

## 6(c). Address

## 6(d). Phone Number

Contact Information Redacted

## 6(e). Fax Number

## 6(f). Email Address

Contact Information Redacted

# Secondary Contact

## 7(a). Name

Jonathon Nevett

## 7(b). Title

```
EVP, Donuts Inc.
```

## 7(c). Address

## 7(d). Phone Number

Contact Information Redacted

## 7(e). Fax Number

## 7(f). Email Address

Contact Information Redacted

# Proof of Legal Establishment

## 8(a). Legal form of the Applicant

```
Limited Liability Company
```

## 8(b). State the specific national or other jursidiction that defines the type of entity identified in 8(a).

```
Delaware.
```

```
http://delcode.delaware.gov/title6/c018/sc01/index.shtml
```

## 8(c). Attach evidence of the applicant's establishment.

```
Attachments are not displayed on this form.
```

## 9(a). If applying company is publicly traded, provide the exchange and symbol.

## 9(b). If the applying entity is a subsidiary, provide the parent company.

```
Covered TLD, LLC
```

## 9(c). If the applying entity is a joint venture, list all joint venture partners.

# Applicant Background

## 11(a). Name(s) and position(s) of all directors

## 11(b). Name(s) and position(s) of all officers and partners

## 11(c). Name(s) and position(s) of all shareholders holding at least 15% of shares

| Covered TLD, LLC | N/A |
|---|---|

## 11(d). For an applying entity that does not have directors, officers, partners, or shareholders: Name(s) and position(s) of all individuals having legal or executive responsibility

| Paul Stahura | CEO, Donuts Inc. |
|---|---|

# Applied-for gTLD string

## 13. Provide the applied-for gTLD string. If an IDN, provide the U-label.

```
attorney
```

**14(a). If an IDN, provide the A-label (beginning with "xn--").**

**14(b). If an IDN, provide the meaning or restatement of the string in English, that is, a description of the literal meaning of the string in the opinion of the applicant.**

**14(c). If an IDN, provide the language of the label (in English).**

**14(c). If an IDN, provide the language of the label (as referenced by ISO-639-1).**

**14(d). If an IDN, provide the script of the label (in English).**

**14(d). If an IDN, provide the script of the label (as referenced by ISO 15924).**

**14(e). If an IDN, list all code points contained in the U-label according to Unicode form.**

**15(a). If an IDN, Attach IDN Tables for the proposed registry.**

`Attachments are not displayed on this form.`

**15(b). Describe the process used for development of the IDN tables submitted, including consultations and sources used.**

**15(c). List any variant strings to the applied-for gTLD string according to the relevant IDN tables.**

# 16. Describe the applicant's efforts to ensure that there are no known operational or rendering problems concerning the applied-for gTLD string. If such issues are known, describe steps that will be taken to mitigate these issues in software and other applications.

Donuts has conducted technical analysis on the applied-for string, and concluded that there are no known potential operational or rendering issues associated with the string.

The following sections discuss the potential operational or rendering problems that can arise, and how Donuts mitigates them.

## Compliance and Interoperability

The applied-for string conforms to all relevant RFCs, as well as the string requirements set forth in Section 2.2.1.3.2 of the Applicant Guidebook.


## Mixing Scripts

If a domain name label contains characters from different scripts, it has a higher likelihood of encountering rendering issues. If the mixing of scripts occurs within the top-level label, any rendering issue would affect all domain names registered under it. If occurring within second level labels, its ill-effects are confined to the domain names with such labels.

All characters in the applied-for gTLD string are taken from a single script. In addition, Donuts's IDN policies are deliberately conservative and compliant with the ICANN Guidelines for the Implementation of IDN Version 3.0. Specifically, Donuts does not allow mixed-script labels to be registered at the second level, except for languages with established orthographies and conventions that require the commingled use of multiple scripts, e.g. Japanese.


## Interaction Between Labels

Even with the above issue appropriately restricted, it is possible that a domain name composed of labels with different properties such as script and directionality may introduce unintended rendering behaviour.

Donuts adopts a conservative strategy when offering IDN registrations. In particular, it ensures that any IDN language tables used for offering IDN second level registrations involve only scripts and characters that would not pose a risk when combined with the top level label.


## Immature Scripts

Scripts or characters added in Unicode versions newer than 3.2 (on which IDNA2003 was based) may encounter interoperability issues due to the lack of software support.

Donuts does not currently plan to offer registration of labels containing such scripts or characters.


## Other Issues

To further contain the risks of operation or rendering problems, Donuts currently does not offer registration of labels containing combining characters or characters that require IDNA contextual rules handling. It may reconsider this decision in cases where a language has a clear need for such characters.

Donuts understands that the following may be construed as operational or rendering issues, but considers them out of the scope of this question. Nevertheless, it will take reasonable steps to protect registrants and Internet users by working with vendors and relevant language communities to mitigate such issues.

- missing fonts causing string to fail to render correctly; and
- universal acceptance of the TLD;

# 17. (OPTIONAL) Provide a representation of the label according to the International Phonetic Alphabet (http://www.langsci.ucl.ac.uk/ipa/).

# Mission/Purpose

## 18(a). Describe the mission/purpose of your proposed gTLD.

Q18A SV  CHAR: 7791

ABOUT DONUTS
Donuts Inc. is the parent applicant for this and multiple other TLDs.  The company intends to increase
competition and consumer choice at the top level.  It will operate these carefully selected TLDs safely
and securely in a shared resources business model.  To achieve its objectives, Donuts has recruited
seasoned executive management with proven track records of excellence in the industry.  In addition to
this business and operational experience, the Donuts team also has contributed broadly to industry
policymaking and regulation, successfully launched TLDs, built industry-leading companies from the
ground up, and brought innovation, value and choice to the domain name marketplace.

ABOUT DONUTS' RESOURCES
Donuts' has raised more than US$100 million from a number of capital sources for TLDs. Our well-
resourced, capable and skilled organization will operate these TLDs and benefit Internet users by:

1.  Providing the operational and financial stability necessary for TLDs of all sizes, but particularly
for those with smaller volume (which are more likely to succeed within a shared resources model);
2.  Competing more powerfully against incumbent gTLDs; and
3.  More thoroughly and uniformly executing consumer and rights holder protections.

THE .ATTORNEY TLD
This TLD is attractive and useful to end-users as it better facilitates search, self-expression,
information sharing and the provision of legitimate goods and services.   Along with the other TLDs in
the Donuts family, this TLD will provide Internet users with opportunities for online identities and
expression that do not currently exist.  In doing so, the TLD will introduce significant consumer choice
and competition to the Internet namespace – the very purpose of ICANN's new TLD program.

This TLD is a generic term and its second level names will be attractive to a variety of Internet users.
Making this TLD available to a broad audience of registrants is consistent with the competition goals of
the New TLD expansion program, and consistent with ICANN's objective of maximizing Internet
participation.   Donuts believes in an open Internet and, accordingly, we will encourage inclusiveness
in the registration policies for this TLD.  In order to avoid harm to legitimate registrants, Donuts
will not artificially deny access, on the basis of identity alone (without legal cause), to a TLD that
represents a generic form of activity and expression.

The .ATTORNEY TLD will be attractive to registrants with a connection to lawyers, attorneys-in-fact
(non-lawyer representatives), or the legal profession.  This is a broad and diverse group.  It may
include practicing attorneys in various jurisdictions, but also would include law schools, paralegals,
legal support companies (e.g., companies involved in legal research, discovery, temporary legal
services, software and other legal tools, etc.), legal periodicals, and many others.  Importantly, it
could be a place of expression related to the legal profession.  We will operate the .ATTORNEY TLD in
the best interests of registrants in all jurisdictions who approach the TLD from a variety of
perspectives and in a legitimate and secure manner.

DONUTS' APPROACH TO PROTECTIONS
No entity, or group of entities, has exclusive rights to own or register second level names in this TLD. There are superior ways to minimize the potential abuse of second level names, and in this application Donuts will describe and commit to an extensive array of protections against abuse, including protections against the abuse of trademark rights.

We recognize some applicants seek to address harms by constraining access to the registration of second level names. However, we believe attempts to limit abuse by limiting registrant eligibility is unnecessarily restrictive and harms users by denying access to many legitimate registrants. Restrictions on second level domain eligibility would prevent law-abiding individuals and organizations from participating in a space to which they are legitimately connected, and would inhibit the sort of positive innovation we intend to see in this TLD. As detailed throughout this application, we have struck the correct balance between consumer and business safety, and open access to second level names.

By applying our array of protection mechanisms, Donuts will make this TLD a place for Internet users that is far safer than existing TLDs. Donuts will strive to operate this TLD with fewer incidences of fraud and abuse than occur in incumbent TLDs. In addition, Donuts commits to work toward a downward trend in such incidents.

OUR PROTECTIONS
Donuts has consulted with and evaluated the ideas of international law enforcement, consumer privacy advocacy organizations, intellectual property interests and other Internet industry groups to create a set of protections that far exceed those in existing TLDs, and bring to the Internet namespace nearly two dozen new rights and protection mechanisms to raise user safety and protection to a new level.

These include eight, innovative and forceful mechanisms and resources that far exceed the already powerful protections in the applicant guidebook. These are:

1. Periodic audit of WhoIs data for accuracy;
2. Remediation of inaccurate Whois data, including takedown, if warranted;
3. A new Domain Protected Marks List (DPML) product for trademark protection;
4. A new Claims Plus product for trademark protection;
5. Terms of use that prohibit illegal or abusive activity;
6. Limitations on domain proxy and privacy service;
7. Published policies and procedures that define abusive activity; and
8. Proper resourcing for all of the functions above.

They also include fourteen new measures that were developed specifically by ICANN for the new TLD process. These are:

1. Controls to ensure proper access to domain management functions;
2. $^{24}/_{7}/_{365}$ abuse point of contact at registry;
3. Procedures for handling complaints of illegal or abusive activity, including remediation and takedown processes;
4. Thick WhoIs;
5. Use of the Trademark Clearinghouse;
6. A Sunrise process;
7. A Trademark Claims process;
8. Adherence to the Uniform Rapid Suspension system;
9. Adherence to the Uniform Domain Name Dispute Resolution Policy;
10. Adherence to the Post Delegation Dispute Resolution Policy;
11. Detailed security policies and procedures;
12. Strong security controls for access, threat analysis and audit;
13. Implementation DNSSEC; and
14. Measures for the prevention of orphan glue records.

Due to the level of end-user trust potentially associated with this string, and consistent with the requirements of Question 30, Donuts will employ these additional four, protections:

1.      For this string, to supplement the periodic audit documented above, a deeper and more extensive verification of Whois data accuracy, with associated remediation and takedown processes.
2.      Exclusion of registrars with a history of poor compliance;
3.      Regular monitoring by the registry of registered domains for pharming, phishing, spam, botnets, copyright infringement and other forms of abuse, and remediation and takedown processes; and
4.      In addition to registry-based procedures, requirements that registrars have a $^{24}/_{7}/_{365}$ abuse contact, and remediation and takedown processes.

DONUTS' INTENTION FOR THIS TLD
As a senior government authority has recently said, "a successful applicant is entrusted with operating a critical piece of global Internet infrastructure."  Donuts' plan and intent is for this TLD to serve the international community by bringing new users online through opportunities for economic growth, increased productivity, the exchange of ideas and information and greater self-expression.

## 18(b). How do you expect that your proposed gTLD will benefit registrants, Internet users, and others?

Q18B SV CHAR: 8719

DONUTS' PLACE WITHIN ICANN'S MISSION

ICANN and the new TLD program share the following purposes:
1.      To make sure that the Internet remains as safe, stable and secure as possible, while
2.      Helping to ensure there is a vibrant competitive marketplace to efficiently bring the benefits of the namespace to registrants and users alike.

ICANN harnesses the power of private enterprise to bring forth these public benefits.  While pursuing its interests, Donuts helps ICANN accomplish its objectives by:

1.      Significantly widening competition and choice in Internet identities with hundreds of new top-level domain choices;
2.      Providing innovative, robust, and easy-to-use new services, names and tools for users, registrants, registrars, and registries while at the same time safeguarding the rights of others;
3.      Designing, launching, and securely operating carefully selected TLDs in multiple languages and character sets; and
4.      Providing a financially robust corporate umbrella under which its new TLDs will be protected and can thrive.

ABOUT DONUTS' RESOURCES
Donuts' financial resources are extensive.  The company has raised more than US$100 million from a number of capital sources including multiple multi-billion dollar venture capital and private equity funds, a top-tier bank, and other well-capitalized investors.  Should circumstances warrant, Donuts is prepared to raise additional funding from current or new investors.  Donuts also has in place pre-funded, Continued Operations Instruments to protect future registrants. These resource commitments mean Donuts has the capability and intent to launch, expand and operate its TLDs in a secure manner, and to properly protect Internet users and rights-holders from potential abuse.

Donuts firmly believes a capable and skilled organization will operate multiple TLDs and benefit Internet users by:

1.  Providing the operational and financial stability necessary for TLDs of all sizes, but particularly for those with smaller volume (which are more likely to succeed within a shared resources and shared services model);
2.  Competing more powerfully against incumbent gTLDs; and
3.  More thoroughly and uniformly executing consumer and rights holder protections.


Donuts will be the industry leader in customer service, reputation and choice.  The reputation of this, and other TLDs in the Donuts portfolio, will be built on:
1. Our successful launch and marketplace reach;
2. The stability of registry operations; and
3. The effectiveness of our protection mechanisms.

THE GOAL OF THIS TLD

This and other Donuts TLDs represent discrete segments of commerce and human interest, and will give Internet users a better vehicle for reaching audiences.  In reviewing potential strings, we deeply researched discrete industries and sectors of human activity and consulted extensive data sources relevant to the online experience.  Our methodology resulted in the selection of this TLD – one that offers a very high level of user utility, precision in content delivery, and ability to contribute

positively to economic growth.

SERVICE LEVELS

Donuts will endeavor to provide a service level that is higher than any existing TLD.  Donuts'
commitment is to meet and exceed ICANN-mandated availability requirements, and to provide industry-
leading services, including non-mandatory consumer and rights protection mechanisms (as described in
answers to Questions 28, 29, and 30) for a beneficial customer experience.

REPUTATION

As noted, Donuts management enjoys a reputation of excellence as domain name industry contributors and
innovators.  This management team is committed to the successful expansion of the Internet, the secure
operation of the DNS, and the creation of a new segment of the web that will be admired and respected.

The Donuts registry and its operations are built on the following principles:

1. More meaningful product choice for registrants and users;
2. Innovative services;
3. Competitive pricing; and
4. A more secure environment with better protections.

These attributes will flow to every TLD we operate.  This string's reputation will develop as a
compelling product choice, with innovative offerings, competitive pricing, and safeguards for consumers,
businesses and other users.

Finally, the Donuts team has significant operational experience with registrars, and will collaborate
knowledgeably with this channel to deliver new registration opportunities to end-users in way that is
consistent with Donuts principles.

NAMESPACE COMPETITION

This TLD will contribute significantly to the current namespace.  It will present multiple new domain
name alternatives compared to existing generic and country code TLDs.  The DNS today offers very limited
addressing choices, especially for registrants who seek a specific identity.

INNOVATION

Donuts will provide innovative registration methods that allow registrants the opportunity to secure an
important identity using a variety of easy-to-use tools that fit individual needs and preferences.

Consistent with our principle of innovation, Donuts will be a leader in rights protection, shielding
those that deserve protection and not unfairly limiting or directing those that don't. As detailed in
this application, far-reaching protections will be provided in this TLD.  Nevertheless, the Donuts
approach is inclusive, and second level registrations in this TLD will be available to any responsible
registrant with an affinity for this string.  We will use our significant protection mechanisms to
prevent and eradicate abuse, rather than attempting to do so by limiting registrant eligibility.

This TLD will contribute to the user experience by offering registration alternatives that better meet
registrants' identity needs, and by providing more intuitive methods for users to locate products,
services and information.  This TLD also will contribute to marketplace diversity, an important element
of user experience.  In addition, Donuts will offer its sales channel a suite of innovative registration
products that are inviting, practical and useful to registrants.

As noted, Donuts will be inclusive in its registration policies and will not limit registrant
eligibility at the second level at the moment of registration.  Restricting access to second level names
in this broadly generic TLD would cause more harm than benefit by denying domain access to legitimate
registrants.  Therefore, rather than artificially limiting registrant access, we will control abuse by
carefully and uniformly implementing our extensive range of user and rights protections.

Donuts will not limit eligibility or otherwise exclude legitimate registrants in second level names.
Our primary focus will be the behavior of registrants, not their identity.

Donuts will specifically adhere to ICANN-required registration policies and will comply with all
requirements of the Registry Agreement and associated specifications regarding registration policies.
Further, Donuts will not tolerate abuse or illegal activity in this TLD, and will have strict
registration policies that provide for remediation and takedown as necessary.

Donuts TLDs will comply with all applicable laws and regulations regarding privacy and data protection. Donuts will provide a highly secure registry environment for registrant and user data (detailed information on measures to protect data is available in our technical response).

Donuts will permit the use of proxy and privacy services for registrations in this TLD, as there are important, legitimate uses for such services (including free speech rights and the avoidance of spam). Donuts will limit how such proxy and privacy services are offered (details on these limitations are provided in our technical response).  Our approach balances the needs of legitimate and responsible registrants with the need to identify registrants who illegally use second level domains.

Donuts will build on ICANN's outreach and media coverage for the new TLD Program and will initiate its own effort to educate Internet users and rights holders about the launch of this TLD.  Donuts will employ three specific communications efforts. We will:

1. Communicate to the media, analysts, and directly to registrants about the Donuts enterprise.
2. Build on existing relationships to create an open dialogue with registrars about what to expect from Donuts, and about the protections required by any registrar selling this TLD.
3. Communicate directly to end-users, media and third parties interested in the attributes and benefits of this TLD.

## 18(c). What operating rules will you adopt to eliminate or minimize social costs?

Q18C Standard CHAR: 1440

Generally, during the Sunrise phase of this TLD, Donuts will conduct an auction if there are two or more competing applications from validated trademark holders for the same second level name.  Alternatively, if there is a defined trademark classification reflective of this TLD, Donuts may give preference to second-level applicants with rights in that classification of goods and services.  Post-Sunrise, requests for registration will generally be on a first-come, first-served basis.

Donuts may offer reduced pricing for registrants interested in long-term registration, and potentially to those who commit to publicizing their use of the TLD.  Other advantaged pricing may apply in selective cases, including bulk purchase pricing.

Donuts will comply with all ICANN-related requirements regarding price increases: advance notice of any renewal price increase (with the opportunity for existing registrants to renew for up to ten years at their current pricing); and advance notice of any increase in initial registration pricing.

The company does not otherwise intend, at this time, to make contractual commitments regarding pricing. Donuts has made every effort to correctly price its offerings for end-user value prior to launch. Our objective is to avoid any disruption to our customers after they have registered.  We do not plan or anticipate significant price increases over time.

# Community-based Designation

## 19. Is the application for a community-based TLD?

No

**20(a). Provide the name and full description of the community that the applicant is committing to serve.**


**20(b). Explain the applicant's relationship to the community identified in 20(a).**


**20(c). Provide a description of the community-based purpose of the applied-for gTLD.**


**20(d). Explain the relationship between the applied-for gTLD string and the community identified in 20(a).**


**20(e). Provide a description of the applicant's intended registration policies in support of the community-based purpose of the applied-for gTLD.**


**20(f). Attach any written endorsements from institutions/groups representative of the community identified in 20(a).**

`Attachments are not displayed on this form.`


# Geographic Names


**21(a). Is the application for a geographic name?**

No


# Protection of Geographic Names


**22. Describe proposed measures for protection of geographic names at the second and other levels in the applied-for gTLD.**

Q22  CHAR: 4979

As previously discussed (in our response to Q18: Mission / Purpose) Donuts believes in an open Internet. Consistent with this we also believe in an open DNS, where second level domain names are available to all registrants who act responsibly.

The range of second level names protected by Specification 5 of the Registry Operator contract is extensive (approx. 2,000 strings are blocked).  This list resulted from a lengthy process of collaboration and compromise between members of the ICANN community, including the Governmental Advisory Committee. Donuts believes this list represents a healthy balance between the protection of national naming interests and free speech on the Internet.

Donuts does not intend to block second level names beyond those detailed in Specification 5.  Should a geographic name be registered in this TLD and used for illegal or abusive activity Donuts will remedy this by applying the array of protections implemented in this TLD.  (For details about these protections please see our responses to Questions 18, 28, 29 and 30).

Donuts will strictly adhere to the relevant provisions of Specification 5 of the New gTLD Agreement. Specifically:

1. All two-character labels will be initially reserved, and released only upon agreement between Donuts and the relevant government and country code manager.
2. At the second level, country and territory names will be reserved at the second and other levels according to these standards:
2.1. Short form (in English) of country and territory names documented in the ISO 3166-1 list;
2.2. Names of countries and territories as documented by the United Nations Group of Experts on Geographical Names, Technical Reference Manual for the Standardization of Geographical Names, Part III Names of Countries of the World; and
2.3. The list of United Nations member states in six official UN languages, as prepared by the Working Group on Country Names of the United Nations Conference on the Standardization of Geographical Names. Donuts will initially reserve country and territory names at the second level and at all other levels within the TLD.  Donuts supports this requirement by using the following internationally recognized lists to develop a comprehensive master list of all geographic names that are initially reserved:

1. The short form (in English) of all country and territory names contained on the ISO 3166-1 list, including the European Union, which is exceptionally reserved on the ISO 3166-1 List, and its scope extended in August 1999 to any application needing to represent the name European Union [http://www.iso.org/iso/support/country_codes/iso_3166_code_lists/iso-3166-1_decoding_table.htm#EU].

2. The United Nations Group of Experts on Geographical Names, Technical Reference Manual for the Standardization of Geographical Names, Part III Names of Countries of the World.

3. The list of UN member states in six official UN languages prepared by the Working Group on Country Names of the United Nations Conference on the standardization of Geographical Names

4. The 2-letter alpha-2 code of all country and territory names contained on the ISO 3166-1 list, including all reserved and unassigned codes

This comprehensive list of names will be ineligible for registration.  Only in consultation with the GAC and ICANN would Donuts develop a proposal for release of these reserved names, and seek approval accordingly.  Donuts understands governmental processes require time-consuming, multi-department consultations.  Accordingly, we will apportion more than adequate time for the GAC and its members to review any proposal we provide.

Donuts recognizes the potential use of country and territory names at the third level.  We will address and mitigate attempted third-level use of geographic names as part of our operations.

Donuts' list of geographic names will be transmitted to Registrars as part of the onboarding process and will also be made available to the public via the TLD website. Changes to the list are anticipated to be rare; however, Donuts will regularly review and revise the list as changes are made by government authorities.

For purposes of clarity the following will occur for a domain that is reserved by the registry:
1. An availability check for a domain in the reserved list will result in a "not available" status. The reason given will indicate that the domain is reserved.
2. An attempt to register a domain name in the reserved list will result in an error.
3. An EPP info request will result in an error indicating the domain name was not found.

4. Queries for a reserved name in the WHOIS system will display information indicating the reserved status and indicate it is not registered nor is available for registration.
5. Reserved names will not be published or used in the zone in any way.
6. Queries for a reserved name in the DNS will result in an NXDOMAIN response.


# Registry Services


## 23. Provide name and full description of all the Registry Services to be provided.

Q23  CHAR: 22971


TLD Applicant is applying to become an ICANN accredited Top Level Domain (TLD) registry. TLD Applicant meets the operational, technical, and financial capability requirements to pursue, secure and operate the TLD registry.  The responses to technical capability questions were prepared to demonstrate, with confidence, that the technical capabilities of TLD Applicant meet and substantially exceed the requirements proposed by ICANN.

The following response describes our registry services, as implemented by Donuts and our partners. Such partners include Demand Media Europe Limited (DMEL) for back-end registry services; AusRegistry Pty Ltd. (ARI) for Domain Name System (DNS) services and Domain Name Service Security Extensions (DNSSEC); an independent consultant for abuse mitigation and prevention consultation; Equinix and SuperNap for datacenter facilities and infrastructure; and Iron Mountain Intellectual Property Management, Inc. (Iron Mountain) for data escrow services. For simplicity, the term "company" and the use of the possessive pronouns "we", "us", "our", "ours", etc., all refer collectively to Donuts and our subcontracted service providers.

DMEL is a wholly-owned subsidiary of DMIH Limited, a well-capitalized Irish corporation whose ultimate parent company is Demand Media, Inc., a leading content and social media company listed on the New York Stock Exchange (ticker: DMD).  DMEL is structured to operate a robust and reliable Shared Registration System by leveraging the infrastructure and expertise of DMIH and Demand Media, Inc., which includes years of experience in the operation side for domain names in both gTLDs and ccTLDs for over 10 years.

1.0. EXECUTIVE SUMMARY

We offer all of the customary services for proper operation of a gTLD registry using an approach designed to support the security and stability necessary to ensure continuous uptime and optimal registry functionality for registrants and Internet users alike.

2.0. REGISTRY SERVICES

2.1. Receipt of Data from registrars

The process of registering a domain name and the subsequent maintenance involves interactions between registrars and the registry. These interactions are facilitated by the registry through the Shared Registration System (SRS) through two interfaces:

- EPP: A standards-based XML protocol over a secure network channel.
- Web: A web based interface that exposes all of the same functionality as EPP yet accessible through a web browser.

Registrants wishing to register and maintain their domain name registrations must do so through an ICANN accredited registrar.  The XML protocol, called the Extensible Provisioning Protocol (EPP) is the standard protocol widely used by registrars to communicate provisioning actions. Alternatively, registrars may use the web interface to create and manage registrations.

The registry is implemented as a "thick" registry meaning that domain registrations must have contact information associated with each. Contact information will be collected by registrars and associated with domain registrations.

2.1.1. SRS EPP Interface

The SRS EPP Interface is provided by a software service that provides network based connectivity. The EPP software is highly compliant with all appropriate RFCs including:

- RFC 5730 Extensible Provisioning Protocol (EPP)
- RFC 5731 Extensible Provisioning Protocol (EPP) Domain Name Mapping
- RFC 5732 Extensible Provisioning Protocol (EPP) Host Mapping
- RFC 5733 Extensible Provisioning Protocol (EPP) Contact Mapping
- RFC 5734 Extensible Provisioning Protocol (EPP) Transport over TCP
- RFC 5910 Domain Name System (DNS) Security Extensions for Extensible Provisioning Protocol (EPP)
- RFC 3915 Domain Registry Grace Period Mapping for EPP

2.1.1.1. SRS EPP Interface Security Considerations

Security precautions are put in place to ensure transactions are received only from authorized registrars in a private, secure manner. Registrars must provide the registry with narrow subnet ranges, allowing the registry to restrict network connections that originate only from these pre-arranged networks. The source IP address is verified against the authentication data received from the connection to further validate the source of the connection. Registrars may only establish a limited number of connections and the network traffic is rate limited to ensure that all registrars receive the same quality of service. Network connections to the EPP server must be secured with TLS. The revocation status and validity of the certificate are checked.

Successful negotiation of a TLS session begins the process of authentication using the protocol elements of EPP. Registrars are not permitted to continue without a successful EPP session establishment. The EPP server validates the credential information passed by the registrar along with validation of:

- Certificate revocation status
- Certificate chain
- Certificate Common Name matches the Common Name the registry has listed for the source IP address
- User name and password are correct and match those listed for the source IP address

In the event a registrar creates a level of activity that threatens the service quality of other registrars, the service has the ability to rate limit individual registrars.

2.1.1.2. SRS EPP Interface Stability Considerations

To ensure the stability of the EPP Interface software, strict change controls and access controls are in place. Changes to the software must be approved by management and go through a rigorous testing and staged deployment procedure.

Additional stability is achieved by carefully regulating the available computing resources. A policy of conservative usage thresholds leaves an equitable amount of computing resources available to handle spikes and service management.

2.1.2. SRS Web Interface

The SRS web interface is an alternative way to access EPP functionality using a web interface, providing the features necessary for effective operations of the registry. This interface uses the HTTPS protocol for secure web communication. Because users can be located worldwide, as with the EPP interface, the web interface is available to all registrars over multiple network paths.
Additional functionality is available to registrars to assist them in managing their account. For instance, registrars are able to view their account balance in near real time as well as the status of the registry services. In addition, notifications that are sent out in email are available for viewing.

2.1.2.1. Web Interface Security Considerations

Only registrars are authorized to use the SRS web interface, and therefore the web interface has several security measures to prevent abuse. The web interface requires an encrypted network channel using the HTTPS protocol. Attempts to access the interface through a clear channel are redirected to the encrypted channel.

The web interface restricts access by requiring each user to present authentication credentials before proceeding. In addition to the typical user name and password combinations, the web interface also requires the user to possess a hardware security key as a second factor of authentication.

Registrars are provided a tool to create and manage users that are associated with their account. With these tools, they can set access and authorization levels for their staff.

2.1.2.2. Web Interface Stability Considerations

Both the EPP interface and web interface use a common service provider to perform the work required to fulfill their requests. This provides consistency across both interfaces and ensures all policies and security rules are applied.

The software providing services for both interfaces executes on a farm of servers, distributing the load more evenly ensuring stability is maintained.

2.2. Dissemination of TLD Zone Files

2.2.1. Communication of Status Information of TLD Zone Servers to Registrars

The status of TLD zone servers and their ability to reflect changes in the SRS is of great importance to registrars and Internet users alike. We ensure that any change from normal operations is communicated to the relevant stakeholders as soon as is appropriate. Such communication might be prior to the status change, during the status change and/or after the status change (and subsequent reversion to normal) — as appropriate to the party being informed and the circumstance of the status change.

Normal operations are:

- DNS servers respond within SLAs for DNS resolution.
- Changes in the SRS are reflected in the zone file according to the DNS update time SLA.

The SLAs are those from Specification 10 of the Registry Agreement.

A deviation from normal operations, whether it is registry wide or restricted to a single DNS node, will result in the appropriate status communication being sent.

2.2.2. Communication Policy

We maintain close communication with registrars regarding the performance and consistency of the TLD zone servers.

A contact database containing relevant contact information for each registrar is maintained. In many cases, this includes multiple forms of contact, including email, phone and physical mailing address. Additionally, up-to-date status information of the TLD zone servers is provided within the SRS Web Interface.

Communication using the registrar contact information discussed above will occur prior to any maintenance that has the potential to effect the access to, consistency of, or reliability of the TLD zone servers. If such maintenance is required within a short timeframe, immediate communication occurs using the above contact information. In either case, the nature of the maintenance and how it affects the consistency or accessibility of the TLD zone servers, and the estimated time for full restoration, are included within the communication.

That being said, the TLD zone server infrastructure has been designed in such a way that we expect no downtime. Only individual sites will potentially require downtime for maintenance; however the DNS service itself will continue to operate with 100% availability.

2.2.3. Security and Stability Considerations

We restrict zone server status communication to registrars, thereby limiting the scope for malicious abuse of any maintenance window. Additionally, we ensure registrars have effective operational procedures to deal with any status change of the TLD nameservers and will seek to align its communication policy to those procedures.

2.3. Zone File Access Provider Integration

Individuals or organizations that wish to have a copy of the full zone file can do so using the Zone

Data Access service. This process is still evolving; however the basic requirements are unlikely to change. All registries will publish the zone file in a common format accessible via secure FTP at an agreed URL.

DMEL will fully comply with the processes and procedures dictated by the Centralized Zone Data Access Provider (CZDA Provider or what it evolves into) for adding and removing Zone File access consumers from its authentication systems. This includes:

- Zone file format and location.
- Availability of the zone file access host via FTP.
- Logging of requests to the service (including the IP address, time, user and activity log).
- Access frequency.

2.4. Zone File Update

To ensure changes within the SRS are reflected in the zone file rapidly and securely, we update the zone file on the TLD zone servers following a staged but rapid propagation of zone update information from the SRS, outwards to the TLD zone servers - which are visible to the Internet. As changes to the SRS data occur, those changes are updated to isolated systems which act as the authoritative primary server for the zone, but remain inaccessible to systems outside our network. The primary servers notify the designated secondary servers, which service queries for the TLD zone from the public. Upon notification, the secondary servers transfer the incremental changes to the zone and publicly present those changes.

The mechanisms for ensuring consistency within and between updates are fully implemented in our TLD zone update procedures. These mechanisms ensure updates are quickly propagated while the data remains consistent within each incremental update, regardless of the speed or order of individual update transactions.

2.5. Operation of Zone Servers

ARI maintains TLD zone servers which act as the authoritative servers to which the TLD is delegated.

2.5.1. Security and Operational Considerations of Zone Server Operations

The potential risks associated with operating TLD zone servers are recognized by us such that we will perform the steps required to protect the integrity and consistency of the information they provide, as well as to protect the availability and accessibility of those servers to hosts on the Internet. The TLD zone servers comply with all relevant RFCs for DNS and DNSSEC, as well as BCPs for the operation and hosting of DNS servers. The TLD zone servers will be updated to support any relevant new enhancements or improvements adopted by the IETF.

The DNS servers are geographically dispersed across multiple secure data centers in strategic locations around the world. By combining multi-homed servers and geographic diversity, ARI's zone servers remain impervious to site level, supplier level or geographic level operational disruption.

The TLD zone servers are protected from accessibility loss by malicious intent or misadventure, via the provision of significant over-capacity of resources and access paths. Multiple independent network paths are provided to each TLD zone server and the query servicing capacity of the network exceeds the extremely conservatively anticipated peak load requirements by at least 10 times, to prevent loss of service should query loads significantly increase.

As well as the authentication, authorization and consistency checks carried out by the registrar access systems and DNS update mechanisms, ARI reduces the scope for alteration of DNS data by following strict DNS operational practices:

- TLD zone servers are not shared with other services.
- The primary authoritative TLD zone server is inaccessible outside ARI's network.
- TLD zone servers only serve authoritative information.
- The TLD zone is signed with DNSSEC and a DNSSEC Practice/Policy Statement published.

2.6. Dissemination of Domain Registration Information

Domain name registration information is required for a variety of purposes. Our registry provides this information through the required WHOIS service through a standard text based network protocol on port 43. Whois also is provided on the registry's web site using a standard web interface. Both interfaces are publically available at no cost to the user and are reachable worldwide.

The information displayed by the Whois service consists not only of the domain name but also of relevant contact information associated with the domain. It also identifies nameserver delegation and the registrar of record. This service is available to any Internet user, and use of it does not require prior authorization or permission.

## 2.6.1. Whois Port 43 Interface

The Whois port 43 interface consists of a standard Transmission Control Protocol (TCP) server that answers requests for information over port 43 in compliance with IETF RFC 3912. For each query, the TCP server accepts the connection over port 43 and then waits for a set time for the query to be sent. This communication occurs via clear, unencrypted ASCII text. If a properly formatted and valid query is received, the registry database is queried for the registration data. If registration data exists, it is returned to the service where it is then formatted and delivered to the requesting client. Each query connection is short-lived. Once the output is transmitted, the server closes the connection.

## 2.6.2. Whois Web Interface

The Whois web interface also uses clear, unencrypted text. The web interface is in an HTML format suitable for web browsers. This interface is also available over an encrypted channel on port 43 using the HTTPS protocol.

## 2.6.3. Security and Stability Considerations

Abuse of the Whois system through data mining is a concern as it can impact system performance and reduce the quality of service to legitimate users. The Whois system mitigates this type of abuse by detecting and limiting bulk query access from single sources. It does this in two ways: 1) by rate limiting queries by non-authorized parties; and 2) by ensuring all queries result in responses that do not include data sets representing significant portions of the registration database.
In addition, the Whois web interface adds a simple challenge-response CAPCHA that requires a user to type in the characters displayed in image format.
Both systems have blacklist functionality to provide a complete block to individual IPs or IP ranges.

## 2.7. Internationalized Domain Names (IDNs)

An Internationalized Domain Name (IDN) contains at least one label that is displayed in a specific language script in IDN aware software.  We will offer registration of second level IDN labels at launch, IDNs are published into the TLD zone. The SRS EPP and Web Interfaces also support IDNs.
The IDN implementation is fully compliant with the IDNA 2008 suite of standards (RFC 5890, 5891, 5892 and 5893) as well as the ICANN Guidelines for the Implementation of IDN Version 3.0
 〈http://www.icann.org/en/resources/idn/implementation-guidelines〉 . To ensure stability and security, we have adopted a conservative approach in our IDN registration policies, as well as technical implementation.

All IDN registrations must be requested using the A-label form, and accompanied by an RFC 5646 language tag identifying the corresponding language table published by the registry. The candidate A-label is processed according to the registration protocol as specified in Section 4 of RFC 5891, with full U-label validation. Specifically, the "Registry Restrictions" steps specified in Section 4.3 of RFC 5891 are implemented by validating the U-label against the identified language table to ensure that the set of characters in the U-label is a proper subset of the character repertoire listed in the language table.

## 2.7.1. IDN Stability Considerations

To avoid the intentional or accidental registration of visually similar characters, and to avoid identity confusion between domains, there are several restrictions on the registration of IDNs.
Domains registered within a particular language are restricted to only the characters of that language. This avoids the use of visually similar characters within one language which mimic the appearance of a label within another language, regardless of whether that label is already within the DNS or not.
Child domains are restricted to a specific language and registrations are prevented in one language being confused with a registration in another language; for example Cyrillic a (U+0430) and Latin a (U+0061).

## 2.8. DNSSEC

DNSSEC provides a set of extensions to the DNS that allow an Internet user (normally the resolver acting on a user's behalf) to validate that the DNS responses they receive were not manipulated en-route. This type of fraud, commonly called 'man in the middle', allows a malicious party to misdirect Internet

users. DNSSEC allows a domain owner to sign their domain and to publish the signature, so that all DNS consumers who visit that domain can validate that the responses they receive are as the domain owner intended.

Registries, as the operators of the parent domain for registrants, must publish the DNSSEC material received from registrants, so that Internet users can trust the material they receive from the domain owner. This is commonly referred to as a "chain of trust." Internet users trust the root (operated by IANA), which publishes the registries' DNSSEC material, therefore registries inherit this trust. Domain owners within the TLD subsequently inherit trust from the parent domain when the registry publishes their DNSSEC material.

In accordance with new gTLD requirements, the TLD zone will be DNSSEC signed and the receipt of DNSSEC material from registrars for child domains is supported in all provisioning systems.

2.8.1. Stability and Operational Considerations for DNSSEC

2.8.1.1. DNSSEC Practice Statement

ARI's DNSSEC Practice Statement is included in our response to Question 43. The DPS following the guidelines set out in the draft IETF DNSOP DNSSEC DPS Framework document.

2.8.1.2. Resolution Stability

DNSSEC is considered to have made the DNS more trustworthy; however some transitional considerations need to be taken into account. DNSSEC increases the size and complexity of DNS responses. ARI ensures the TLD zone servers are accessible and offer consistent responses over UDP and TCP.

The increased UDP and TCP traffic which results from DNSSEC is accounted for in both network path access and TLD zone server capacity. ARI will ensure that capacity planning appropriately accommodates the expected increase in traffic over time.

ARI complies with all relevant RFCs and best practice guides in operating a DNSSEC-signed TLD. This includes conforming to algorithm updates as appropriate. To ensure Key Signing Key Rollover procedures for child domains are predictable, DS records will be published as soon as they are received via either the EPP server or SRS Web Interface. This allows child domain operators to rollover their keys with the assurance that their timeframes for both old and new keys are reliable.

3.0. APPROACH TO SECURITY AND STABILITY

Stability and security of the Internet is an important consideration for the registry system. To ensure that the registry services are reliably secured and remain stable under all conditions, DMEL takes a conservative approach with the operation and architecture of the registry system.

By architecting all registry services to use the least privileged access to systems and data, risk is significantly reduced for other systems and the registry services as a whole should any one service become compromised. By continuing that principal through to our procedures and processes, we ensure that only access that is necessary to perform tasks is given. ARI has a comprehensive approach to security modeled of the ISO27001 series of standards and explored further in the relevant questions of this response.

By ensuring all our services adhering to all relevant standards, DMEL ensures that entities which interact with the registry services do so in a predictable and consistent manner. When variations or enhancements to services are made, they are also aligned with the appropriate interoperability standards.

# Demonstration of Technical & Operational Capability

## 24. Shared Registration System (SRS) Performance

Q24  CHAR: 19964


TLD Applicant is applying to become an ICANN accredited Top Level Domain (TLD) registry. TLD Applicant
meets the operational, technical, and financial capability requirements to pursue, secure and operate
the TLD registry.  The responses to technical capability questions were prepared to demonstrate, with
confidence, that the technical capabilities of TLD Applicant meet and substantially exceed the
requirements proposed by ICANN.

1.0. INTRODUCTION

Our Shared Registration System (SRS) complies fully with Specification 6, Section 1.2 and the SLA Matrix
provided with Specification 10 in ICANN's Registry Agreement and is in line with the projections
outlined in our responses to Questions 31 and 46. The services provided by the SRS are critical to the
proper functioning of a TLD registry.

We will adhere to these commitments by operating a robust and reliable SRS founded on best practices and
experience in the domain name industry.

2.0. TECHNICAL OVERVIEW

A TLD operator must ensure registry services are available at all times for both registrants and the
Internet community as a whole. To meet this goal, our SRS was specifically engineered to provide the
finest levels of service derived from a long pedigree of excellence and experience in the domain name
industry. This pedigree of excellence includes a long history of technical excellence providing long
running, highly available and high-performing services that help thousands of companies derive their
livelihoods.

Our SRS services will give registrars standardized access points to provision and manage domain name
registration data. We will provide registrars with two interfaces: an EPP protocol over TCP/IP and a web
site accessible from any web browser (note: throughout this document, references to the SRS are
inclusive of both these interfaces).

Initial registration periods will comply with Specification 6 and will be in one (1) year increments up
to a maximum of ten (10) years. Registration terms will not be allowed to exceed ten (10) years. In
addition, renewal periods also will be in one-year increments and renewal periods will only allow an
extension of the registration period of up to ten years from the time of renewal.

The performance of the SRS is critical for the proper functioning of a TLD. Poor performance of the
registration systems can adversely impact registrar systems that depend on its responsiveness. Our SRS
is committed to exceeding the performance specifications described in Specification 10 in all cases. To
ensure that we are well within specifications for performance, we will test our system on a regular
basis during development to ensure that changes have not impacted performance in a material way. In
addition, we will monitor production systems to ensure compliance. If internal thresholds are exceeded,
the issue will be escalated, analyzed and addressed.

Our SRS will offer registry services that support Internationalized Domain Names (IDNs). Registrations
can be made through both the EPP and web interfaces.

3.0. ROBUST AND RELIABLE ARCHITECTURE
To ensure quality of design, the SRS software was designed and written by seasoned and experienced
software developers. This team designed the SRS using modern software architecture principles geared
toward ensuring flexibility in its design not only to meet business needs but also to make it easy to
understand, maintain and test.

A classic 3-tier design was used for the architecture of the system. 3-tier is a well-proven
architecture that brings flexibility to the system by abstracting the application layer from the
protocol layer. The data tier is isolated and only accessible by the services tier. 3-tier adds an
additional layer of security by minimizing access to the data tier through possible exploits of the
protocol layer.

The protocol and services layers are fully redundant. A minimum of three physical servers is in place in
both the protocol and services layers. Communications are balanced across the servers. Load balancing is
accomplished with a redundant load balancer pair.

4.0. SOFTWARE QUALITY

The software for the SRS, as well as other registry systems, was developed using an approach that

ensures that every line of source code is peer reviewed and source code is not checked into the source code repository without the accompanying automated tests that exercise the new functionality. The development team responsible for building the SRS and other registry software applies continuous integration practices to all software projects; all developers work on an up-to-date code base and are required to synchronize their code base with the master code base and resolve any incompatibilities before checking in. Every source code check-in triggers an automated build and test process to ensure a minimum level of quality. Each day an automated "daily build" is created, automatically deployed to servers and a fully-automated test suite run against it. Any failures are automatically assigned to developers to resolve in the morning when they arrive.

When extensive test passes are in order for release candidates, these developers use a test harness designed to run usability scenarios that exercise the full gamut of use cases, including accelerated full registration life cycles. These scenarios can be entered into the system using various distributions of activity. For instance, the test harness can be run to stress the system by changing the distribution of scenarios or to stress the system by exaggerating particular scenarios to simulate land rushes or, for long running duration scenarios, a more common day-to-day business distribution.

5.0. SOFTWARE COMPLIANCE

The EPP interface to our SRS is compliant with current RFCs relating to EPP protocols and best practices. This includes RFCs 5910, 5730, 5731, 5732, 5733 and 5734. Since we are also supporting Registry Grace Period functionality, we are also compliant with RFC 3915. Details of our compliance with these specifications are provided in our response to Question 25. We are also committed to maintaining compliance with future RFC revisions as they apply as documented in Section 1.2 of Specification 6 of the new gTLD Agreement.

We strive to be forward-thinking and will support the emerging standards of both IPv6 and DNSSEC on our SRS platform. The SRS was designed and has been tested to accept IPv6 format addresses for nameserver glue records and provision them to the gTLD zone. In addition, key registry services will be accessible over both IPv4 and IPv6. These include both the SRS EPP and SRS web-based interfaces, both port 43 and web-based WHOIS interfaces and DNS, among others. For details regarding our IPv6 reachability plans, please refer to our response to Question 36.

DNSSEC services are provided, and we will comply with Specification 6. Additionally, our DNSSEC implementation complies with RFCs 4033, 4034, 4035, and 4509; and we commit to complying with the successors of these RFCs and following the best practices described in RFC 4641. Additional compliance and commitment details on our DNSSEC services can be found in our response to Question 43.

6.0. DATABASE OPERATIONS

The database for our gTLD is Microsoft SQL Server 2008 R2. It is an industry-leading database engine used by companies requiring the highest level of security, reliability and trust. Case studies highlighting SQL Server's reliability and use indicate its successful application in many industries, including major financial institutions such as Visa, Union Bank of Israel, KeyBank, TBC Bank, Paymark, Coca-Cola, Washington State voter registration and many others. In addition, Microsoft SQL Server provides a number of features that ease the management and maintenance of the system. Additional details about our database system can be found in our response to Question 33.

Our SRS architecture ensures security, consistency and quality in a number of ways. To prevent eavesdropping, the services tier communicates with the database over a secure channel. The SRS is architected to ensure all data written to the database is atomic. By convention, leave all matters of atomicity are left to the database. This ensures consistency of the data and reduces the chance of error.  So that we can examine data versions at any point in time, all changes to the database are written to an audit database. The audit data contains all previous and new values and the date/time of the change. The audit data is saved as part of each atomic transaction to ensure consistency.

To minimize the chance of data loss due to a disk failure, the database uses an array of redundant disks for storage. In addition, maintain an exact duplicate of the primary site is maintained in a secondary datacenter. All hardware is fully duplicated and set up to take over operations at any time. All database operations are replicated to the secondary datacenter via synchronous replication. The secondary datacenter always maintains an exact copy of our live data as the transactions occur.

7.0. REDUNDANT HARDWARE

The SRS is composed of several pieces of hardware that are critical to its proper functioning, reliability and scale. At least two of each hardware component comprises the SRS, making the service fully redundant. Any component can fail, and the system is designed to use the facility of its pair. The

EPP interface to the SRS will operate with more than two servers to provide the capacity required to meet our projected scale as described in Question 46: Projections Template.

## 8.0. HORIZONTALLY SCALABLE

The SRS is designed to scale horizontally. That means that, as the needs of the registry grow, additional servers can be easily added to handle additional loads.

The database is a clustered 2-node pair configured for both redundancy and performance. Both nodes participate in serving the needs of the SRS. A single node can easily handle the transactional load of the SRS should one node fail. In addition, there is an identical 2-node cluster in our backup datacenter. All data from the primary database is continuously replicated to the backup datacenter.

Not only is the registry database storage medium specified to provide the excess of capacity necessary to allow for significant growth, it is also configured to use techniques, such as data sharing, to achieve horizontal scale by distributing logical groups of data across additional hardware. For further detail on the scalability of our SRS, please refer to our response to Question 31.

## 9.0. REDUNDANT HOT FAILOVER SITE

We understand the need for maximizing uptime. As such, our plan includes maintaining at all times a warm failover site in a separate datacenter for the SRS and other key registry services. Our planned failover site contains an exact replica of the hardware and software configuration contained in the primary site. Registration data will be replicated to the failover site continuously over a secure connection to keep the failover site in sync.

Failing over an SRS is not a trivial task. In contrast, web site failover can be as simple as changing a DNS entry. Failing over the SRS, and in particular the EPP interface, requires careful planning and consideration as well as training and a well-documented procedure. Details of our failover procedures as well as our testing plans are detailed in our response to Question 41.

## 10.0. SECURE ACCESS

To ensure security, access to the EPP interface by registrars is restricted by IP/subnet. Access Control Lists (ACLs) are entered into our routers to allow access only from a restricted, contiguous subnet from registrars. Secure and private communication over mutually authenticated TLS is required. Authentication credentials and certificate data are exchanged in an out-of-band mechanism. Connections made to the EPP interface that successfully establish an EPP session are subject to server policies that dictate connection maximum lifetime and minimal activity to maintain the session.

To ensure fair and equal access for all registrars, as well as maintain a high level of service, we will use traffic shaping hardware to ensure all registrars receive an equal number of resources from the system.

To further ensure security, access to the SRS web interface is over the public Internet via an encrypted HTTPS channel. Each registrar will be issued master credentials for accessing the web interface. Each registrar also will be required to use 2-factor authentication when logging in. We will issue a set of Yubikey (http://yubico.com) 2-factor, one-time password USB keys for authenticating with the web site. When the SRS web interface receives the credentials plus the one-time password from the Yubikey, it communicates with a RADIUS authentication server to check the credentials.

## 11.0. OPERATING A ROBUST AND RELIABLE SRS

### 11.1. AUTOMATED DEPLOYMENT

To minimize human error during a deployment, we use a fully-automated package and deployment system. This system ensures that all dependencies, configuration changes and database components are included every time. To ensure the package is appropriate for the system, the system also verifies the version of system we are upgrading.

### 11.2. CHANGE MANAGEMENT

We use a change management system for changes and deployments to critical systems. Because the SRS is considered a critical system, it is also subject to all change management procedures. The change management system covers all software development changes, operating system and networking hardware changes and patching. Before implementation, all change orders entered into the system must be reviewed with careful scrutiny and approved by appropriate management. New documentation and procedures are

written; and customer service, operations, and monitoring staff are trained on any new functionality added that may impact their areas.

## 11.3. PATCH MANAGEMENT

Upon release, all operating system security patches are tested in the staging environment against the production code base. Once approved, patches are rolled out to one node of each farm. An appropriate amount of additional time is given for further validation of the patch, depending on the severity of the change. This helps minimize any downtime (and the subsequent roll back) caused by a patch of poor quality. Once validated, the patch is deployed on the remaining servers.

## 11.4. REGULAR BACKUPS

To ensure that a safe copy of all data is on hand in case of catastrophic failure of all database storage systems, backups of the main database are performed regularly. We perform full backups on both a weekly and monthly basis. We augment these full backups with differential backups performed daily. The backup process is monitored and any failure is immediately escalated to the systems engineering team. Additional details on our backup strategy and procedures can be found in our response to Question 37.

## 11.5. DATA ESCROW

Data escrow is a critical registry function. Escrowing our data on a regular basis ensures that a safe, restorable copy of the registration data is available should all other attempts to restore our data fail. Our escrow process is performed in accordance with Specification 2. Additional details on our data escrow procedures can be found in our response to Question 38.

## 11.6. REGULAR TRAINING

Ongoing security awareness training is critical to ensuring users are aware of security threats and concerns. To sustain this awareness, we have training programs in place designed to ensure corporate security policies pertaining to registry and other operations are understood by all personnel. All employees must pass a proficiency exam and sign the Information Security Policy as part of their employment. Further detail on our security awareness training can be found in our response to Question 30a.

We conduct failover training regularly to ensure all required personnel are up-to-date on failover process and have the regular practice needed to ensure successful failover should it be necessary. We also use failover training to validate current policies and procedures. For additional details on our failover training, please refer to our response to Question 41.

## 11.7. ACCESS CONTROL

User authentication is required to access any network or system resource. User accounts are granted the minimum access necessary. Access to production resources is restricted to key IT personnel. Physical access to production resources is extremely limited and given only as needed to IT-approved personnel. For further details on our access control policies, please refer to our response to Question 30a.

## 11.8. $^{24}/_7$ MONITORING AND REGISTRAR TECHNICAL SUPPORT

We employ a full-time staff trained specifically on monitoring and supporting the services we provide. This staff is equipped with documentation outlining our processes for providing first-tier analysis, issue troubleshooting, and incident handling. This team is also equipped with specialty tools developed specifically to safely aid in diagnostics. On-call staff second-tier support is available to assist when necessary. To optimize the service we provide, we conduct ongoing training in both basic and more advanced customer support and conduct additional training, as needed, when new system or tool features are introduced or solutions to common issues are developed.

## 12.0. SRS INFRASTRUCTURE

As shown in Attachment A, Figure 1, our SRS infrastructure consists of two identically provisioned and configured datacenters with each served by multiple bandwidth providers.

For clarity in Figure 1, connecting lines through the load balancing devices between the Protocol Layer and the Services Layer are omitted. All hardware connecting to the Services Layer goes through a load-balancing device. This device distributes the load across the multiple machines providing the services. This detail is illustrated more clearly in subsequent diagrams in Attachment A.

```
13.0 RESOURCING PLAN
```

Resources for the continued development and maintenance of the SRS and ancillary services have been carefully considered. We have a significant portion of the required personnel on hand and plan to hire additional technical resources, as indicated below. Resources on hand are existing full time employees whose primary responsibility is the SRS.

For descriptions of the following teams, please refer to the resourcing section of our response to Question 31, Technical Review of Proposed Registry. Current and planned allocations are below.

Software Engineering:

- Existing Department Personnel: Project Manager, Development Manager, two Sr. Software Engineers, two, Sr. Database Engineer, Quality Assurance Engineer
- First Year New Hires: Web Developer, Database Engineer, Technical Writer, Build/Deployment Engineer

Systems Engineering:

- Existing Department Personnel: Sr. Director IT Operations, two Sr. Systems Administrators, two Systems Administrators, two Sr. Systems Engineers, two Systems Engineers
- First Year New Hires: Systems Engineer

Network Engineering:

- Existing Department Personnel: Sr. Director IT Operations, two Sr. Network Engineers, two Network Engineers
- First Year New Hires: Network Engineer

Database Operations:

- Existing Department Personnel: Sr. Database Operations Manager, 2 Database Administrators

Information Security Team:

- Existing Department Personnel: Director of Information Security, Sr. Information Security Specialist, Information Security Specialists, Sr. Information Security Engineer, Information Security Engineer
- First Year New Hires: Information Security Engineer

Network Operations Center (NOC):

- Existing Department Personnel: Manager, two NOC Supervisors, 12 NOC Analysts
- First Year New Hires: Eight NOC Analysts

# 25. Extensible Provisioning Protocol (EPP)

```
Q25  CHAR: 20820
```

TLD Applicant is applying to become an ICANN accredited Top Level Domain (TLD) registry. TLD Applicant meets the operational, technical, and financial capability requirements to pursue, secure and operate the TLD registry.  The responses to technical capability questions were prepared to demonstrate, with confidence, that the technical capabilities of TLD Applicant meet and substantially exceed the requirements proposed by ICANN.

```
1.0. INTRODUCTION
```

Our SRS EPP interface is a proprietary network service compliant with RFC 3735 and RFCs 5730-4. The EPP interface gives registrars a standardized programmatic access point to provision and manage domain name registrations.

```
2.0. IMPLEMENTATION EXPERIENCE
```

The SRS implementation for our gTLD leverages extensive experience implementing long-running, highly available network services accessible. Our EPP interface was written by highly experienced engineers

focused on meeting strict requirements developed to ensure quality of service and uptime. The development staff has extensive experience in the domain name industry.

3.0. TRANSPORT

The EPP core specification for transport does not specify that a specific transport method be used and is, thus, flexible enough for use over a variety of transport methods. However, EPP is most commonly used over TCP/IP and secured with a Transport Layer Security (TLS) layer for domain registration purposes. Our EPP interface uses the industry standard TCP with TLS.

4.0. REGISTRARS' EXPERIENCE

Registrars will find our EPP interface familiar and seamless. As part of the account creation process, a registrar provides us with information we use to authenticate them. The registrar provides us with two subnets indicating the connection's origination. In addition, the registrar provides us with the Common Name specified in the certificate used to identify and validate the connection.

Also, as part of the account creation process, we provide the registrar with authentication credentials. These credentials consist of a client identifier and an initial password and are provided in an out-of-band, secure manner. These credentials are used to authenticate the registrar when starting an EPP session.

Prior to getting access to the production interfaces, registrars have access to an Operational Test and Evaluation (OT&E) environment. This environment is an isolated area that allows registrars to develop and test against registry systems without any impact to production. The OT&E environment also provides registrars the opportunity to test implementation of custom extensions we may require.

Once a registrar has completed testing and is prepared to go live, the registrar is provided a Scripted Server Environment. This environment contains an EPP interface and database pre-populated with known data. To verify that the registrar's implementations are correct and minimally suitable for the production environment, the registrar is required to run through a series of exercises. Only after successful performance of these exercises is a registrar allowed access to production services.

5.0. SESSIONS

The only connections that are allowed are those from subnets previously communicated during account set up. The registrar originates the connection to the SRS and must do so securely using a Transport Layer Security (TLS) encrypted channel over TCP/IP using the IANA assigned standard port of 700.

The TLS protocol establishes an encrypted channel and confirms the identity of each machine to its counterpart. During TLS negotiation, certificates are exchanged to mutually verify identities. Because mutual authentication is required, the registrar certificate must be sent during the negotiation. If it is not sent, the connection is terminated and the event logged.

The SRS first examines the Common Name (CN). The SRS then compares the Common Name to the one provided by the registrar during account set up. The SRS then validates the certificate by following the signature chain, ensures that the chain is complete, and terminates against our store of root Certificate Authorities (CA). The SRS also verifies the revocation status with the root CA. If these fail, the connection is terminated and the event logged.

Upon successful completion of the TLS handshake and the subsequent client validation, the SRS automatically sends the EPP greeting. Then the registrar initiates a new session by sending the login command with their authentication credentials. The SRS passes the credentials to the database for validation over an encrypted channel. Policy limits the number of failed login attempts. If the registrar exceeds the maximum number of attempts, the connection to the server is closed. If authentication was successful, the EPP session is allowed to proceed and a response is returned indicating that the command was successful.

An established session can only be maintained for a finite period. EPP server policy specifies the timeout and maximum lifetime of a connection. The policy requires the registrar to send a protocol command within a given timeout period. The maximum lifetime policy for our registry restricts the connection to a finite overall timespan. If a command is not received within the timeout period or the connection lifetime is exceeded, the connection is terminated and must be reestablished. Connection lifecycle details are explained in detail in our Registrar Manual.

The EPP interface allows pipelining of commands. For consistency, however, the server only processes one command at a time per session and does not examine the next command until a response to the previous

command is sent. It is the registrar's responsibility to track both the commands and their responses.

## 6.0. EPP SERVICE SCALE

Our EPP service is horizontally scalable. Its design allows us to add commodity-grade hardware at any time to increase our capacity. The design employs a 3-tier architecture which consists of protocol, services and data tiers. Servers for the protocol tier handle the loads of SSL negotiation and protocol validation and parsing. These loads are distributed across a farm of numerous servers balanced by load-balancing devices. The protocol tier connects to the services tier through load-balancing devices.

The services tier consists of a farm of servers divided logically based on the services provided. Each service category has two or more servers. The services tier is responsible for registry policy enforcement, registration lifecycle and provisioning, among other services. The services tier connects to the data tier which consists of Microsoft SQL Server databases for storage.

The data tier is a robust SQL Server installation that consists of a 2-node cluster in an active/active configuration. Each node is designed to handle the entire load of the registry should the alternate node go offline.

Additional details on scale and our plans to service the load we anticipate are described in detail on questions 24: SRS Performance and 32: Architecture.

## 7.0. COMPLIANCE WITH CORE AND EPP EXTENSION RFCs

The EPP interface is highly compliant with the following RFCs:

- RFC 5730 Extensible Provisioning Protocol
- RFC 5731 EPP Domain Name Mapping
- RFC 5732 EPP Host Mapping
- RFC 5733 EPP Contact Mapping
- RFC 5734 EPP Transport over TCP
- RFC 3915 Domain Registry Grace Period Mapping
- RFC 5910 Domain Name System (DNS) Security Extensions Mapping

The implementation is fully compliant with all points in each RFC. Where an RFC specifies optional details or service policy, they are explained below.

## 7.1. RFC 5730 EXTENSIBLE PROVISIONING PROTOCOL

Section 2.1 Transport Mapping Considerations - ack.
Transmission Control Protocol (TCP) in compliance with RFC 5734 with TLS.

Section 2.4 Greeting Format – compliant
The SRS implementation responds to a successful connection and subsequent TLS handshake with the EPP Greeting. The EPP Greeting is also transmitted in response to a ⟨hello/⟩ command. The server includes the EPP versions supported which at this time is only 1.0. The Greeting contains namespace URIs as ⟨objURI/⟩ elements representing the objects the server manages.

The Greeting contains a ⟨svcExtension⟩ element with one ⟨extURI⟩ element for each extension namespace URI implemented by the SRS.

Section 2.7 Extension Framework – compliant
Each mapping and extension, if offered, will comply with RFC 3735 Guidelines for Extending EPP.

Section 2.9 Protocol Commands – compliant

Login command's optional ⟨options⟩ element is currently ignored. The ⟨version⟩ is verified and 1.0 is currently the only acceptable response. The ⟨lang⟩ element is also ignored because we currently only support English (en). This server policy is reflected in the greeting.

The client mentions ⟨objURI⟩ elements that contain namespace URIs representing objects to be managed during the session inside ⟨svcs⟩ element of Login request. Requests with unknown ⟨objURI⟩ values are rejected with error information in the response. A ⟨logout⟩ command ends the client session.

Section 4 Formal syntax - compliant
All commands and responses are validated against applicable XML schema before acting on the command or

sending the response to the client respectively. XML schema validation is performed against base schema (epp-1.0), common elements schema (eppcom-1.0) and object-specific schema.

Section 5 Internationalization Considerations - compliant
EPP XML recognizes both UTF-8 and UTF-16. All date-time values are presented in Universal Coordinated Time using Gregorian calendar.

7.2. RFC 5731 EPP DOMAIN NAME MAPPING

Section 2.1 Domain and Host names – compliant
The domain and host names are validated to meet conformance requirements mentioned in RFC 0952, 1123 and 3490.

Section 2.2 Contact and Client Identifiers – compliant
All EPP contacts are identified by a server-unique identifier. Contact identifiers conform to "clIDType" syntax described in RFC 5730.

Section 2.3 Status Values – compliant
A domain object always has at least one associated status value. Status value can only be set by the sponsoring client or the registry server where it resides. Status values set by server cannot be altered by client. Certain combinations of statuses are not permitted as described by RFC.

Section 2.4 Dates and Times – compliant
Date and time attribute values are represented in Universal Coordinated Time (UTC) using Gregorian calendar, in conformance with XML schema.

Section 2.5 Validity Periods – compliant
Our SRS implementation supports validity periods in unit year ("y"). The default period is 1y.

Section 3.1.1 EPP 〈check〉 Command – compliant
A maximum of 5 domains can be checked in a single command request as defined by server policy.

Section 3.1.2 EPP 〈info〉 Command – compliant
EPP 〈info〉 command is used to retrieve information associated with a domain object. If the querying Registrar is not the sponsoring registrar and the registrar does not provide valid authorization information, the server does not send any domain elements in response per server policy.

Section 3.1.3 EPP 〈transfer〉 Query Command – compliant
EPP 〈transfer〉 command provides a query operation that allows a client to determine the real-time status of pending and completed transfer requests. If the authInfo element is not provided or authorization information is invalid, the command is rejected for authorization.

Section 3.2.4 EPP 〈transfer〉 Command – compliant
All subordinate host objects to the domain are transferred along with the domain object.

7.3. RFC 5732 EPP HOST MAPPING

Section 2.1 Host Names – compliant
The host names are validated to meet conformance requirements mentioned in RFC 0952, 1123 and 3490.

Section 2.2 Contact and Client Identifiers – compliant
All EPP clients are identified by a server-unique identifier. Client identifiers conform to "clIDType" syntax described in RFC 5730.

Section 2.5 IP Addresses – compliant
The syntax for IPv4 addresses conform to RFC0791. The syntax for IPv6 addresses conform to RFC4291.

Section 3.1.1 EPP 〈check〉 Command – compliant
Maximum of five host names can be checked in a single command request set by server policy.

Section 3.1.2 EPP 〈info〉 Command – compliant
If the querying client is not a sponsoring client, the server does not send any host object elements in response and the request is rejected for authorization according to server policy.

Section 3.2.2 EPP 〈delete〉 Command – compliant
A delete is permitted only if the host is not delegated.

Section 3.2.2 EPP ⟨update⟩ Command – compliant
Any request to change host name of an external host that has associations with objects that are sponsored by a different client fails.

## 7.4. RFC 5733 EPP CONTACT MAPPING

Section 2.1 Contact and Client Identifiers – compliant
Contact identifiers conform to "clIDType" syntax described in RFC 5730.

Section 2.6 Email Addresses – compliant
Email address validation conforms to syntax defined in RFC5322.

Section 3.1.1 EPP ⟨check⟩ Command – compliant
Maximum of 5 contact id can be checked in a single command request.

Section 3.1.2 EPP ⟨info⟩ Command – compliant
If querying client is not sponsoring client, server does not send any contact object elements in response and the request is rejected for authorization.

Section 3.2.2 EPP ⟨delete⟩ Command – compliant
A delete is permitted only if the contact object is not associated with other known objects.

## 7.5. RFC 5734 EPP TRANSPORT OVER TCP

Section 2 Session Management – compliant
The SRS implementation conforms to the required flow mentioned in the RFC for initiation of a connection request by a client, to establish a TCP connection. The client has the ability to end the session by issuing an EPP ⟨logout⟩ command, which ends the session and closes the TCP connection. Maximum life span of an established TCP connection is defined by server policy. Any connections remaining open beyond that are terminated. Any sessions staying inactive beyond the timeout policy of the server are also terminated similarly. Policies regarding timeout and lifetime values are clearly communicated to registrars in documentation provided to them.

Section 3 Message Exchange – compliant
With the exception of EPP server greeting, EPP messages are initiated by EPP client in the form of EPP commands. Client-server interaction works as a command-response exchange where the client sends one command to the server and the server returns one response to the client in the exact order as received by the server.

Section 8 Security considerations – ack.
TLS 1.0 over TCP is used to establish secure communications from IP restricted clients. Validation of authentication credentials along with the certificate common name, validation of revocation status and the validation of the full certificate chain are performed. The ACL only allows connections from subnets prearranged with the Registrar.

Section 9 TLS Usage Profile – ack.
The SRS uses TLS 1.0 over TCP and matches the certificate common name. The full certificate chain, revocation status and expiry date is validated. TLS is implemented for mutual client and server authentication.

## 8.0. EPP EXTENSIONS

## 8.1. STANDARDIZED EXTENSIONS

Our implementation includes extensions that are accepted standards and fully documented. These include the Registry Grace Period Mapping and DNSSEC.

## 8.2. COMPLIANCE WITH RFC 3735

RFC 3735 are the Guidelines for Extending the Extensible Provisioning Protocol. Any custom extension implementations follow the guidance and recommendations given in RFC 3735.

## 8.3. COMPLIANCE WITH DOMAIN REGISTRY GRACE PERIOD MAPPING RFC 3915

Section 1 Introduction – compliant

Our SRS implementation supports all specified grace periods particularly, add grace period, auto-renew grace period, renew grace period, and transfer grace period.

Section 3.2 Registration Data and Supporting Information – compliant
Our SRS implementation supports free text and XML markup in the restore report.

Section 3.4 Client Statements – compliant
Client can use free text or XML markup to make 2 statements regarding data included in a restore report.

Section 5 Formal syntax - compliant
All commands and responses for this extension are validated against applicable XML schema before acting on the command or sending the response to the client respectively. XML schema validation is performed against RGP specific schema (rgp-1.0).

8.4. COMPLIANCE WITH DOMAIN NAME SYSTEM (DNS) SECURITY EXTENSIONS MAPPING RFC 5910

RFC 5910 describes an Extensible Provisioning Protocol (EPP) extension mapping for the provisioning and management of Domain Name System Security Extensions (DNSSEC) for domain names stored in a shared central repository. Our SRS and DNS implementation supports DNSSEC.

The information exchanged via this mapping is extracted from the repository and used to publish DNSSEC Delegate Signer (DS) resource records (RR) as described in RFC 4034.

Section 4 DS Data Interface and Key Data Interface – compliant
Our SRS implementation supports only DS Data Interface across all commands applicable with DNSSEC extension.

Section 4.1 DS Data Interface – compliant
The client can provide key data associated with the DS information. The collected key data along with DS data is returned in an info response, but may not be used in our systems.

Section 4.2 Key Data Interface – compliant
Since our gTLD's SRS implementation does not support Key Data Interface, when a client sends a command with Key Data Interface elements, it is rejected with error code 2306.

Section 5.1.2 EPP 〈info〉 Command – compliant
This extension does not add any elements to the EPP 〈info〉 command. When an 〈info〉 command is processed successfully, the EPP 〈resData〉 contains child elements for EPP domain mapping. In addition, it contains a child 〈secDNS:infData〉 element that identifies extension namespace if the domain object has data associated with this extension. It is conditionally based on whether or the client added the 〈extURI〉 element for this extension in the 〈login〉 command. Multiple DS data elements are supported.

Section 5.2.1 EPP 〈create〉 Command – compliant
The client must add an 〈extension〉 element, and the extension element MUST contain a child 〈secDNS:create〉 element if the client wants to associate data defined in this extension to the domain object. Multiple DS data elements are supported. Since the SRS implementation does not support maxSigLife, it returns a 2102 error code if the command included a value for maxSigLife.

Section 5.2.5 EPP 〈update〉 Command – compliant
Since the SRS implementation does not support the 〈secDNS:update〉 element's optional "urgent" attribute, an EPP error result code of 2102 is returned if the "urgent" attribute is specified in the command with value of Boolean true.

8.5. PROPRIETARY EXTENSION DOCUMENTATION

We are not proposing any proprietary EPP extensions for this TLD.

8.6. EPP CONSISTENT WITH THE REGISTRATION LIFECYCLE DESCRIBED IN QUESTION 27

Our EPP implementation makes no changes to the industry standard registration lifecycle and is consistent with the lifecycle described in Question 27.

9.0. RESOURCING PLAN

For descriptions of the following teams, please refer to our response to Question 31. Current and planned allocations are below.

Software Engineering:

-  Existing Department Personnel: Project Manager, Development Manager, 2 Sr. Software Engineers, Sr. Database Engineer, Quality Assurance Engineer
- First Year New Hires: Web Developer, Database Engineer, Technical Writer, Build/Deployment Engineer

Systems Engineering:

- Existing Department Personnel: Sr. Director IT Operations, two Sr. Systems Administrators, two Systems Administrators, two Sr. Systems Engineers, two Systems Engineers
- First Year New Hires: Systems Engineer

Network Engineering:

- Existing Department Personnel: Sr. Director IT Operations, two Sr. Network Engineers, two Network Engineers
- First Year New Hires: Network Engineer

Database Operations:

- Existing Department Personnel: Sr. Database Operations Manager, two Database Administrators

Information Security Team:

- Existing Department Personnel: Director of Information Security, Sr. Information Security Specialist, Information Security Specialists, Sr. Information Security Engineer, Information Security Engineer
- First Year New Hires: Information Security Engineer

Network Operations Center (NOC):

- Existing Department Personnel: Manager, two NOC Supervisors, 12 NOC Analysts
- First Year New Hires: Eight NOC Analysts


# 26. Whois

Q26 CHAR: 19908

1.0.    INTRODUCTION

Our registry provides a publicly available Whois service for registered domain names in the top-level domain (TLD). Our planned registry also offers a searchable Whois service that includes web-based search capabilities by domain name, registrant name, postal address, contact name, registrar ID and IP addresses without an arbitrary limit. The Whois service for our gTLD also offers Boolean search capabilities, and we have initiated appropriate precautions to avoid abuse of the service. This searchable Whois service exceeds requirements and is eligible for a score of 2 by providing the following:

- Web-based search capabilities by domain name, registrant name, postal address, contact names, registrar IDs, and Internet Protocol addresses without arbitrary limit.
- Boolean search capabilities.
- Appropriate precautions to avoid abuse of this feature (e.g., limiting access to legitimate authorized users).
- Compliance with any applicable privacy laws or policies.

The Whois service for our planned TLD is available via port 43 in accordance with RFC 3912. Also, our planned registry includes a Whois web interface. Both provide free public query-based access to the elements outlined in Specification 4 of the Registry Agreement. In addition, our registry includes a searchable Whois service. This service is available to authorized entities and accessible from a web browser.

2.0. HIGH-LEVEL WHOIS SYSTEM DESCRIPTION

The Whois service for our registry provides domain registration information to the public. This information consists not only of the domain name but also of relevant contact information associated with the domain. It also identifies nameserver delegation and the registrar of record. This service is available to any Internet user, and use does not require prior authorization or permission. To maximize accessibility to the data, Whois service is provided over two mediums, as described below. Where the medium is not specified, any reference to Whois pertains to both mediums. We describe our searchable Whois solution in Section 11.0.

One medium used for our gTLD's Whois service is port 43 Whois. This consists of a standard Transmission Control Protocol (TCP) server that answers requests for information over port 43 in compliance with IETF RFC 3912. For each query, the TCP server accepts the connection over port 43 and then waits for a set time for the query to be sent. This communication occurs via clear, unencrypted text. If no query is received by the server within the allotted time or a malformed query is detected, the connection is closed. If a properly formatted and valid query is received, the registry database is queried for the registration data. If registration data exists, it is returned to the service where it is then formatted and delivered to the requesting client. Each query connection is short-lived. Once the output is transmitted, the server closes the connection.

The other medium used for Whois is via web interface using clear, unencrypted text. The web interface is in an HTML format suitable for web browsers. This interface is also available over an encrypted channel on port 443 using the HTTPS protocol.

The steps for accessing the web-based Whois will be prominently displayed on the registry home page. The web-based Whois is for interactive use by individual users while the port 43 Whois system is for automated use by computers and lookup clients.

Both Whois service offerings comply with Specification 4 of the New GTLD Agreement. Although the Whois output is free text, it follows the output format as described for domain, registrar and nameserver data in Sections 1.4, 1.5 and 1.6 of Specification 4 of the Registry Agreement.

Our gTLD's WHOIS service is mature, and its current implementation has been in continuous operation for seven years. A dedicated support staff monitors this service 24/7. To ensure high availability, multiple redundant servers are maintained to enable capacity well above normal query rates.

Most of the queries sent to the port 43 Whois service are automated. The Whois service contains mechanisms for detecting abusive activity and, if abuse is detected, reacts appropriately. This capability contributes to a high quality of service and availability for all users.

2.1. PII POLICY

The services and systems for this gTLD do not collect, process or store any personally identifiable information (PII) as defined by state disclosure and privacy laws. Registry systems collect the following Whois data types: first name, last name, address and phone numbers of all billing, administration and technical contacts. Any business conducted where confidential PII consisting of customer payment information is collected uses systems that are completely separate from registry systems and segregated at the network layer.

3.0. RELEVANT NETWORK DIAGRAM(S)

Our network diagram (Q 26 - Attachment A, Figure 1) provides a quick-reference view of the Whois system. This diagram reflects the Whois system components and compliance descriptions and explanations that follow in this section.

3.1. NARRATIVE FOR Q26 - FIGURE 1 OF 1 (SHOWN IN ATTACHMENT A)

The Whois service for our gTLD operates from two datacenters from replicated data. Network traffic is directed to either of the datacenters through a global load balancer. Traffic is directed to an appropriate server farm, depending on the service interface requested. The load balancer within the datacenter monitors the load and health of each individual server and uses this information to select an appropriate server to handle the request.

The protocol server handling the request communicates over an encrypted channel with the Whois service provider through a load-balancing device. The WHOIS service provider communicates directly with a replicated, read-only copy of the appropriate data from the registry database. The Whois service provider is passed a sanitized and verified query, such as a domain name. The database attempts to locate the appropriate records, then format and return them. Final output formatting is performed by the requesting server and the results are returned back to the original client.

## 4.0. INTERCONNECTIVITY WITH OTHER REGISTRY SYSTEMS

The Whois port 43 interface runs as an unattended service on servers dedicated to this task. As shown in Attachment A, Figure 1, these servers are delivered network traffic by redundant load-balancing hardware, all of which is protected by access control methods. Balancing the load across many servers helps distribute the load and allows for expansion. The system's design allows for the rapid addition of new servers, typically same-day, should load require them.

Both our port 43 Whois and our web-based Whois communicate with the Whois service provider in the middle tier. Communication to the Whois service provider is distributed by a load balancing pair. The Whois service provider calls the appropriate procedures in the database to search for the registration records.

The Whois service infrastructure operates from both datacenters, and the global load balancer distributes Whois traffic evenly across the two datacenters. If one datacenter is not responding, the service sends all traffic to the remaining datacenter. Each datacenter has sufficient capacity to handle the entire load.

To avoid placing an abnormal load on the Shared Registration System (SRS), both service installations read from replicated, read-only database instances (see Figure 1). Because each instance is maintained via replication from the primary SRS database, each replicated database contains a copy of the authoritative data. Having the Whois service receive data from this replicated database minimizes the impact of services competing for the same data and enables service redundancy. Data replication is also monitored to prevent detrimental impact on the primary SRS.

## 5.0. FREQUENCY OF SYNCHRONIZATION BETWEEN SERVERS

As shown in Figure 1, the system replicates WHOIS services data continuously from the authoritative database to the replicated database. This persistent connection is maintained between the databases, and each transaction is queued and published as an atomic unit. Delays, if any, in the replication of registration information are minimal, even during periods of high load. At no time will the system prioritize replication over normal operations of the SRS.

## 6.0. POTENTIAL FORMS OF ABUSE

Potential forms of abuse of this feature, and how they are mitigated, are outlined below. For additional information on our approach to preventing and mitigating Whois service abuse, please refer to our response to Question 28.

## 6.1. DATA MINING ABUSE

This type of abuse consists primarily of a user using queries to acquire all or a significant portion of the registration database.

The system mitigates this type of abuse by detecting and limiting bulk query access from single sources. It does this in two ways: 1) by rate-limiting queries by non-authorized parties; and 2) by ensuring all queries result in responses that do not include data sets representing significant portions of the registration database.

## 6.2. INVALID DATA INJECTION

This type of abuse is mitigated by 1) ensuring that all Whois systems are strictly read-only; and 2) ensuring that any input queries are properly sanitized to prevent data injection.

## 6.3. DISCLOSURE OF PRIVATE INFORMATION

The Whois system mitigates this type of abuse by ensuring all responses, while complete, only contain information appropriate to Whois output and do not contain any private or non-public information.

## 7.0. COMPLIANCE WITH WHOIS SPECIFICATIONS FOR DATA OBJECTS, BULK ACCESS, AND LOOKUPS

Whois specifications for data objects, bulk access, and lookups for our gTLD are fully compliant with Specifications 4 and 10 to the Registry Agreement, as explained below.

## 7.1. COMPLIANCE WITH SPECIFICATION 4

Compliance of Whois specifications with Specification 4 is as follows:

- Registration Data Directory Services Component: Specification 4.1 is implemented as described. Formats follow the outlined semi-free text format. Each data object is represented as a set of key/value pairs with lines beginning with keys followed by a colon and a space as delimiters, followed by the value. Fields relevant to RFCs 5730-4 are formatted per Section 1.7 of Specification 4.
- Searchability compliance is achieved by implementing, at a minimum, the specifications in section 1.8 of specification 4. We describe this searchability feature in Section 11.0.
- Co-operation, ICANN Access and Emergency Operator Access: Compliance with these specification components is assured.
- Bulk Registration Data Access to ICANN: Compliance with this specification component is assured.

Evidence of Whois system compliance with this specification consists of:

- Matching existing Whois output with specification output to verify that it is equivalent.

7.2. COMPLIANCE WITH SPECIFICATION 10 FOR WHOIS

Our gTLD's Whois complies fully with Specification 10. With respect to Section 4.2, the approach used ensures that Round-Trip Time (RTT) remains below five times the corresponding Service Level Requirement (SLR).

7.2.1. Emergency Thresholds

To achieve compliance with this Specification 10 component, several measures are used to ensure emergency thresholds are never reached:

1) Provide staff training as necessary on Registry Transition plan components that prevent Whois service interruption in case of emergency (see the Question 40 response for details).
2) Conduct regular failover testing for Whois services as outlined in the Question 41 response.
3) Adhere to recovery objectives for Whois as outlined in the Question 39 response.

7.2.2. Emergency Escalation

Compliance with this specification component is achieved by participation in escalation procedures as outlined in this section.

8.0. COMPLIANCE WITH RFC 3912

Whois service for our gTLD is fully compliant with RFC 3912 as follows:

- RFC 3912 Element, "A Whois server listens on TCP port 43 for requests from Whois clients":  This requirement is properly implemented, as described in Section 1 above. Further, running Whois on ports other than port 43 is an option.
- RFC 3912 Element, "The Whois client makes a text request to the Whois server, then the Whois server replies with text content": The port 43 Whois service is a text-based query and response system. Thus, this requirement is also properly implemented.
- RFC 3912 Element, "All requests are terminated with ASCII CR and then ASCII LF. The response might contain more than one line of text, so the presence of ASCII CR or ASCII LF characters does not indicate the end of the response": This requirement is properly implemented for our TLD.
- RFC 3912 Element, "The Whois server closes its connection as soon as the output is finished": This requirement is properly implemented for our TLD, as described in Section 1 above.
- RFC 3912 Element, "The closed TCP connection is the indication to the client that the response has been received":  This requirement is properly implemented.

9.0. RESOURCING PLAN

Resources for the continued development and maintenance of the Whois have been carefully considered. Many of the required personnel are already in place. Where gaps exist, technical resource addition plans are outlined below as "First Year New Hires." Resources now in place, shown as "Existing Department Personnel", are employees whose primary responsibility is the registry system.

Software Engineering:

- Existing Department Personnel: Project Manager, Development Manager, two Sr. Software Engineers, Sr. Database Engineer, Quality Assurance Engineer
- First Year New Hires: Web Developer, Database Engineer, Technical Writer, Build/Deployment Engineer

Systems Engineering:

- Existing Department Personnel: Sr. Director IT Operations, two Sr. Systems Administrators, two Systems Administrators, two Sr. Systems Engineers, two Systems Engineers
- First Year New Hires: Systems Engineer

Network Engineering:

- Existing Department Personnel: Sr. Director IT Operations, two Sr. Network Engineers, two Network Engineers
- First Year New Hires: Network Engineer

Database Operations:

- Existing Department Personnel: Sr. Database Operations Manager, two Database Administrators

Information Security Team:

- Existing Department Personnel: Director of Information Security, Sr. Information Security Specialist, Information Security Specialists, Sr. Information Security Engineer, Information Security Engineer
- First Year New Hires: Information Security Engineer

Network Operations Center (NOC):

- Existing Department Personnel: Manager, two NOC Supervisors, 12 NOC Analysts
- First Year New Hires: Eight NOC Analysts

11.0. PROVISION FOR SEARCHABLE WHOIS CAPABILITIES

The searchable Whois service for our gTLD provides flexible and powerful search ability for users through a web-based interface. This service is provided only to entities with a demonstrated need for it. Where access to registration data is critical to the investigation of cybercrime and other potentially unlawful activity, we authorize access for fully vetted law enforcement and other entities as appropriate. Search capabilities for our gTLD's searchable Whois meet or exceed the requirements indicated in section 1.8 of specification 4.

Once authorized to use the system, a user can perform exact and partial match searches on the following fields:

- Domain name
- Registrant name
- Postal address including street, city and state, etc., of all registration contacts
- Contact names
- Registrant email address
- Registrar name and ID
- Nameservers
- Internet Protocol addresses

In addition, all other EPP Contact Object fields and sub-fields are searchable as well. The following Boolean operators are also supported: AND, OR, NOT. These operators can be used for joining or excluding results.

Certain types of registry related abuse are unique to the searchable Whois function. Providing searchable Whois warrants providing protection against this abuse. Potential problems include:

- Attempts to abuse Whois by issuing a query that essentially returns the entire database in the result set.
- Attempts to run large quantities of queries sufficient to reduce the performance of the registry database.

Precautions for preventing and mitigating abuse of the Whois search service include:

- Limiting access to authorized users only.
- Establishing legal agreements with authorized users that clearly define and prohibit system abuse.
- Queuing search queries into a job processing system.
- Executing search queries against a replicated read-only copy of the database.

- Limiting result sets when the query is clearly meant to cause a wholesale dump of registration data.

Only authorized users with a legitimate purpose for searching registration data are permitted to use the searchable Whois system. Examples of legitimate purpose include the investigation of terrorism or cybercrime by authorized officials, or any of many other official activities that public officials must conduct to fulfill their respective duties. We grant access for these and other purposes on a case-by-case basis.

To ensure secure access, a two-factor authentication device is issued to each authorized user of the registry. Subsequent access to the system requires the user name, password and a one-time generated password from the issued two-factor device.

Upon account creation, users are provided with documentation describing our terms of service and policies for acceptable use. Users must agree to these terms to use the system. These terms clearly define and illustrate what constitutes legitimate use and what constitutes abuse. They also inform the user that abuse of the system is grounds for limiting or terminating the user's account.

For all queries submitted, the searchable Whois system first sanitizes the query to deter potential harm to our internal systems. The system then submits the query to a queue for job processing. The system processes each query one by one and in the order received. The number of concurrent queries executed varies, depending on the current load.

To ensure Whois search capabilities do not affect other registry systems, the system executes queries against a replicated read-only version of the database. The system updates this database frequently as registration transactions occur. These updates are performed in a manner that ensures no detrimental load is placed on the production SRS.

To process successfully, each query must contain the criteria needed to filter its results down to a reasonable result set (one that is not excessively large). If the query does not meet this, the user is notified that the result set is excessive and is asked to verify the search criteria. If the user wishes to continue without making the indicated changes, the user must contact our support team to verify and approve the query. Each successful query submitted results in immediate execution of the query.

Query results are encrypted using the unique shared secret built into each 256-bit Advanced Encryption Standard (AES) two-factor device. The results are written to a secure location dedicated for result storage and retrieval. Each result report has a unique file name in the user's directory. The user's directory is assigned the permissions needed to prevent unauthorized access to report files. For the convenience of Registrars and other users, each query result is stored for a minimum of 30 days. At any point following this 30-day period, the query result may be purged by the system.

# 27. Registration Life Cycle

Q27 CHAR: 19951

1.0. INTRODUCTION
To say that the lifecycle of a domain name is complex would be an understatement. A domain name can traverse many states throughout its lifetime and there are many and varied triggers that can cause a state transition. Some states are triggered simply by the passage of time. Others are triggered by an explicit action taken by the registrant or registrar. Understanding these is critical to the proper operation of a gTLD registry. To complicate matters further, a domain name can contain one or more statuses. These are set by the registrar or registry and have a variety of uses.

When this text discusses EPP commands received from registrars, with the exception of a transfer request, the reader can assume that the command is received from the sponsoring registrar and successfully processed. The transfer request originates from the potential gaining registrar. Transfer details are explicit for clarity.

2.0. INDUSTRY STANDARDS
The registration life cycle approach for our gTLD follows industry standards for registration lifecycles and registration statuses. By implementing a registration life cycle that adheres to these standards, we avoid compounding an already confusing topic for registrants. In addition, since registrar systems are already designed to manage domain names in a standard way, a standardized registration lifecycle also lowers the barrier to entry for registrars.

The registration lifecycle for our gTLD follows core EPP RFCs including RFC 5730 and RFC 5731 and associated documentation of lifecycle information. To protect registrants, EPP Grace Period Mapping for domain registrations is implemented, which affects the registration lifecycle and domain status. EPP Grace Period Mapping is documented in RFC 3915.

3.0. REGISTRATION STATES
For a visual guide to this registration lifecycle discussion, please refer to the attachment, Registration Lifecycle Illustrations. Please note that this text makes many references to the status of a domain. For brevity, we do not distinguish between the domain mapping status 〈domain:status〉 and the EPP Grace Period Mapping status 〈rgp:rgpStatus〉 as making this differentiation in every case would make this document more difficult to read and in this context does not improve understanding.

4.0. AVAILABILITY
The lifecycle for any domain registration begins with the Available state. This is not necessarily a registration state, per se, but indicates the lack of domain registration implied and provides an entry and terminal point for the state diagram provided. In addition to the state diagram, please refer to Fig. 2 – Availability Check for visual representation of the process flow.

Before a user can register a new domain name, the registry performs an availability check. Possible outcomes of this availability check include:
1. Domain name is available for registration.
2. Domain name is already registered, regardless of the current state and not available for registration.
3. Domain name has been reserved by the registry.
4. Domain name string has been blocked because of a trademark claim.

5.0. INITIAL REGISTRATION
The first step in domain registration is the availability check as described above and shown in Fig. 2 – Availability Check. A visual guide to the description for domain registration in this section can be found in Fig. 3 – Domain Registration. If the domain is available for registration, a registrar submits a registration request.

With this request, the registrar can include zero or more nameserver hosts for zone delegation. If the registrar includes zero or one nameserver host(s), the domain is registered but the EPP status of the domain is set to inactive. If the registrar includes two or more, the EPP status of the domain is set to ok.

The request may also include a registration period (the number of years the registrar would like the domain registered). If this time period is omitted, the registry may use a default initial registration period. The policy for this aligns with the industry standard of one year as the default period. If the registrar includes a registration period, the value must be between one and ten years as specified in the gTLD Registry Agreement.

Once the registration process is complete within the registry, the domain registration is considered to be in the REGISTERED state but within the Add Grace Period.


6.0. REGISTERED STATE - ADD GRACE PERIOD
The Add Grace Period is a status given to a new domain registration. The EPP status applied in this state is addPeriod. The Add Grace Period is a state in which the registrar is eligible for a refund of the registration price should the registration be deleted while this status is applied. The status is removed and the registration transitions from the Add Grace Period either by an explicit delete request from the registrar or by the lapse of five days. This is illustrated in Fig. 1 and Fig. 3 of the illustrations attachment.

If the registrar deletes the domain during the Add Grace Period, the domain becomes immediately available for registration. The registrar is refunded the original cost of the registration.

If the five-day period lapses without receiving a successful delete command, the addPeriod status is removed from the domain.


7.0. REGISTERED STATE
A domain registration spends most of its time in the REGISTERED state. A domain registration period can initially be between one year and ten years in one-year increments as specified in the new gTLD Registry Agreement. At any time during the registration's term, several things can occur to either affect the

registration period or transition the registration to another state. The first three are the auto-renew process, an explicit renew EPP request and a successful completion of the transfer process.

## 8.0. REGISTRATION PERIOD EXTENSION
The registration period for a domain is extended either through a successful renew request by the registrar, through the successful completion of the transfer process or through the auto-renew process. This section discusses each of these three options.

## 8.1. EXTENSION VIA RENEW REQUEST
One way that a registrar can extend the registration period is by issuing a renew request. Each renew request includes the number of years desired for extension of the registration up to ten years. Please refer to the flow charts found in both Fig. 4 – Renewal and Fig. 5 – Renewal Grace Period for a visual representation of the following.

Because the registration period cannot extend beyond ten years, any request for a registration period beyond ten years fails. The domain must not contain the status renewProhibited. If this status exists on the domain, the request for a renewal fails.

Upon a successful renew request, the registry adds the renewPeriod status to the domain. This status remains on the domain for a period of five days. The number of years in the renew request is added to the total registration period of the domain. The registrar is charged for each year of the additional period.

While the domain has the renewPeriod status, if the sponsoring registrar issues a successful delete request, the registrar receives a credit for the renewal. The renewPeriod status is removed and the domain enters the Redemption Grace Period (RGP) state. The status redemptionPeriod is added to the status of the domain.

## 8.2. EXTENSION VIA TRANSFER PROCESS
The second way to extend the registration is through the Request Transfer process. A registrar may transfer sponsorship of a domain name to another registrar. The exact details of a transfer are explained in the Request Transfer section below. The successful completion of the Request Transfer process automatically extends the registration for one year. The registrar is not charged separately for the addition of the year; it comes automatically with the successful transfer. The transferPeriod status is added to the domain.

If the gaining registrar issues a successful delete request during the transferPeriod, the gaining registrar receives a credit for the transfer. The status redemptionPeriod is added to the status of the domain and transferPeriod is removed. The domain then enters the RGP state.

## 8.3. EXTENSION VIA AUTO-RENEW
The last way a registration period can be extended is passive and is the simplest way because it occurs without any action by the Registrar. When the registration period expires, for the convenience of the registrar and registrant, the registration renews automatically for one year. The registrar is charged for the renewal at this time. This begins the Auto Renew Grace Period. The autoRenewPeriod status is added to the domain to represent this period.

The Auto Renew Grace Period lasts for 45 days. At any time during this period, the Registrar can do one of four things: 1) passively accept the renewal; 2) actively renew (to adjust renewal options); 3) delete the registration; or 4) transfer the registration.

To passively accept the renewal, the registrar need only allow the 45-day time span to pass for the registration to move out of the Auto Renew Grace Period.

Should the registrar wish to adjust the renewal period in any way, the registrar can submit a renew request via EPP to extend the registration period up to a maximum of ten years. If the renew request is for a single year, the registrar is not charged. If the renew request is for more than a single year, the registrar is charged for the additional years that the registration period was extended. If the command is a success, the autoRenewPeriod status is removed from the domain.

Should the registrar wish to delete the registration, the registrar can submit a delete command via EPP. Once a delete request is received, the autoRenewPeriod status is removed from the domain and the redemptionPeriod status is added. The registrar is credited for the renewal fees. For illustration of this process, please refer to Fig. 6 – Auto Renew Grace Period.

The last way move a domain registration out of the Auto Renew state is by successful completion of the

Request Transfer process, as described in the following section. If the transfer completes successfully, the autoRenewPeriod status is removed and the transferPeriod status is added.

9.0. REQUEST TRANSFER

A customer can change the sponsoring registrar of a domain registration through the Request Transfer process. This process is an asynchronous, multi-step process that can take many as five days but may occur faster, depending on the level of support from participating Registrars.

The initiation of the transfer process is illustrated in Fig. 8 – Request Transfer. The transfer process begins with a registrar submitting a transfer request. To succeed, the request must meet several criteria. First, the domain status must not contain transferProhibited or pendingTransfer. Second, the initial domain registration must be at least 60 days old or, if transferred prior to the current transfer request, must not have been transferred within the last 60 days. Lastly, the transfer request must contain the correct authInfo (authorization information) value. If all of these criteria are met, the transfer request succeeds and the domain moves into the Pending Transfer state and the pendingTransfer status is added to the domain.

There are four ways to complete the transfer (and move it out of Pending Transfer status):
1. The transfer is auto-approved.
2. The losing registrar approves the transfer.
3. The losing registrar rejects the transfer.
4. The requesting registrar cancels the transfer.

After a successful transfer request, the domain continues to have the pendingTransfer status for up to five days. During this time, if no other action is taken by either registrar, the domain successfully completes the transfer process and the requesting registrar becomes the new sponsor of the domain registration. This is illustrated in Fig. 9 – Auto Approve Transfer.

At any time during the Pending Transfer state, either the gaining or losing registrar can request the status of a transfer provided they have the correct domain authInfo. Querying for the status of a transfer is illustrated in Fig. 13 – Query Transfer.

During the five-day Pending Transfer state, the losing registrar can accelerate the process by explicitly accepting or rejecting the transfer. If the losing registrar takes either of these actions, the pendingTransfer status is removed. Both of these actions are illustrated in Fig. 10 – Approve Transfer and Fig. 11 – Reject Transfer.

During the five-day Pending Transfer state, the requesting registrar may cancel the transfer request. If the registrar sends a cancel transfer request, the pendingTransfer status is removed. This is shown in Fig. 12 – Cancel Transfer.

If the transfer process is a success, the registry adds the transferPeriod status and removes the pendingTransfer status. If the domain was in the Renew Period state, upon successful completion of the transfer process, this status is removed.

The transferPeriod status remains on the domain for five days. This is illustrated in Fig. 14 – Transfer Grace Period. During this period, the gaining Registrar may delete the domain and obtain a credit for the transfer fees. If the gaining registrar issues a successful delete request during the transferPeriod, the gaining registrar receives a credit for the transfer. The status redemptionPeriod is added to the status of the domain and transferPeriod is removed. The domain then enters the RGP state.

10.0. REDEMPTION GRACE PERIOD
The Redemption Grace Period (RGP) is a service provided by the registry for the benefit of registrars and registrants. The RGP allows a registrar to recover a deleted domain registration. The only way to enter the RGP is through a delete command sent by the sponsoring registrar. A domain in RGP always contains a status of redemptionPeriod. For an illustrated logical flow diagram of this, please refer to Fig. 15 – Redemption Grace Period.

The RGP lasts for 30 days. During this time, the sponsoring registrar may recover the domain through a two-step process. The first step is to send a successful restore command to the registry. The second step is to send a restore report to the registry.

Once the restore command is processed, the registry adds the domain status of pendingRestore to the domain. The domain is now in the Pending Restore state, which lasts for seven days. During this time, the registry waits for the restore report from the Registrar. If the restore report is not received

within seven days, the domain transitions back to the RGP state. If the restore report is successfully processed by the registry, the domain registration is restored back to the REGISTERED state. The statuses of pendingRestore and redemptionPeriod are removed from the domain.

After 30 days in RGP, the domain transitions to the Pending Delete state. A status of pendingDelete is applied to the domain and all other statuses are removed. This state lasts for five days and is considered a quiet period for the domain. No commands or other activity can be applied for the domain while it is in this state. Once the five days lapse, the domain is again available for registration.

11.0. DELETE
To delete a domain registration, the sponsoring registrar must send a delete request to the registry. If the domain is in the Add Grace Period, deletion occurs immediately. In all other cases, the deleted domain transitions to the RGP. For a detailed visual diagram of the delete process flow, please refer to Fig. 7 – Delete.

For domain registration deletion to occur successfully, the registry must first ensure the domain is eligible for deletion by conducting two checks. The registry first checks to verify that the requesting registrar is also the sponsoring registrar. If this is not the case, the registrar receives an error message.

The registry then checks the various domain statuses for any restrictions that might prevent deletion. If the domain's status includes either the transferPending or deleteProhibited, the name is not deleted and an error is returned to the registrar.

If the domain is in the Add Grace Period, the domain is immediately deleted and any registration fees paid are credited back to the registrar. The domain is immediately available for registration.

If the domain is in the Renew Grace Period, the Transfer Grace Period or the Auto Renew Grace Period, the respective renewPeriod, transferPeriod or autoRenewPeriod statuses are removed and the corresponding fees are credited to the Registrar. The domain then moves to the RGP as described above.

12.0. ADDITIONAL STATUSES
There are additional statuses that the registry or registrar can apply to a domain registration to limit what actions can be taken on it or to limit its usefulness. This section addresses such statuses that have not already addressed in this response.

Some statuses are applied by the registrar and others are exclusively applied by the registry. Registry-applied statuses cannot be altered by registrars. Status names that registrars can add or remove begin with "client". Status names that only the registry can add or remove begin with "server". These statuses can be applied by a registrar using the EPP domain update request as defined in RFC 5731.

To prevent a domain registration from being deleted, the status values of clientDeleteProhibited or serverDeleteProhibited may be applied by the appropriate party.

To withhold delegation of the domain to the DNS, clientHold or serverHold is applied. This prevents the domain name from being published to the zone file. If it is already published, the domain name is removed from the zone file.

To prevent renewal of the domain registration clientRenewProhibited or serverRenewProhibited is applied by the appropriate party.

To prevent the transfer of sponsorship of a registration, the states clientTransferProhibited or serverTransferProhibited is applied to the domain. When this is done, all requests for transfer are rejected by the registry.

If a domain registration contains no host objects, the registry applies the status of inactive. Since there are no host objects associated with the domain, by definition, it cannot be published to the zone. The inactive status cannot be applied by registrars.

If a domain has no prohibitions, restrictions or pending operations and the domain also contains sufficient host object references for zone publication, the registry assigns the status of ok if there is no other status set.

There are a few statuses defined by the domain mapping RFC 5731 that our registry does not use. These statuses are: pendingCreate, pendingRenew and pendingUpdate. RFC 5731 also defines some status combinations that are invalid. We acknowledge these and our registry system disallows these combinations.

13.0. RESOURCING
Software Engineering:
- Existing Department Personnel: Project Manager, Development Manager, two Sr. Software Engineers, Sr. Database Engineer, Quality Assurance Engineer
- New Hires: Web Developer, Database Engineer, Technical Writer, Build/Deployment Engineer
Systems Engineering:
- Existing Department Personnel: Sr. Director IT Operations, 2 Sr. Systems Administrators, 2 Systems Administrators, 2 Sr. Systems Engineers, 2 Systems Engineers
- New Hires: Systems Engineer
Network Engineering:
- Existing Department Personnel: Sr. Director IT Operations, two Sr. Network Engineers, 2 Network Engineers
- New Hires: Network Engineer
Database Operations:
- Existing Department Personnel: Sr. Database Operations Manager, 2 Database Administrators
Network Operations Center:
- Existing Department Personnel: Manager, 2 NOC Supervisors, 12 NOC Analysts
- New Hires: Eight NOC Analysts

# 28. Abuse Prevention and Mitigation

Q28 SV CHAR: 30317

1.0. INTRODUCTION

Donuts will employ strong policies and procedures to prevent and mitigate abuse. Our intention is to ensure the integrity of this top-level domain (TLD) and maintain it as a trusted space on the Internet. We will not tolerate abuse and will use professional, consistent, and fair policies and procedures to identify and address abuse in the legal, operational, and technical realms

Our approach to abuse prevention and mitigation includes the following:

– An Anti-Abuse Policy that clearly defines malicious and abusive behaviors;
– An easy-to-use single abuse point of contact (APOC) that Internet users can use to report the malicious use of domains in our TLD;
– Procedures for investigating and mitigating abuse;
– Procedures for removing orphan glue records used to support malicious activities;
– Dedicated procedures for handling legal requests, such as inquiries from law enforcement bodies, court orders, and subpoenas;
– Measures to deter abuse of the Whois service; and
– Policies and procedures to enhance Whois accuracy, including compliance and monitoring programs.

Our abuse prevention and mitigation solution leverages our extensive domain name industry experience and was developed based on extensive study of existing gTLDs and ccTLDs for best registry practices. This same experience will be leveraged to manage the new TLD.

2.0. ANTI-ABUSE POLICY

The Anti-Abuse Policy for our registry will be enacted under the Registry-Registrar Agreement, with obligations from that agreement passed on to and made binding upon all registrants, registrars, and resellers. This policy will also be posted on the registry web site and accompanied by abuse point-of-contact contact information (see below).  Internet users can report suspected abuse to the registry and sponsoring registrar, and report an orphan glue record suspected of use in connection with malicious conduct (see below).

The policy is especially designed to address the malicious use of domain names. Its intent is to:

1. Make clear that certain types of behavior are not tolerated;
2. Deter both criminal and non-criminal but harmful use of domain names; and
3. Provide the registry with clearly stated rights to mitigate several types of abusive behavior when found.

This policy does not take the place of the Uniform Dispute Resolution Policy (UDRP) or the Uniform Rapid

Suspension System (URS), and it is not to be used as an alternate form of dispute resolution or as a brand protection mechanism.

Below is a policy draft based on the anti-abuse policies of several existing TLD registries with exemplary practices (including .ORG, .CA, and .INFO). We plan to adopt the same, or a substantially similar version, after the conclusion of legal reviews.

3.0. TLD ANTI-ABUSE POLICY

The registry reserves the right, at its sole discretion and at any time and without limitation, to deny, suspend, cancel, redirect, or transfer any registration or transaction, or place any domain name(s) on registry lock, hold, or similar status as it determines necessary for any of the following reasons:

(1) to protect the integrity and stability of the registry;
(2) to comply with any applicable laws, government rules or requirements, requests of law enforcement, or any dispute resolution process;
(3) to avoid any liability, civil or criminal, on the part of the registry operator, its affiliates, subsidiaries, officers, directors, or employees;
(4) to comply with the terms of the registration agreement and the registry's Anti-Abuse Policy;
(5) registrant fails to keep Whois information accurate and up-to-date;
(6) domain name use violates the registry's acceptable use policies, or a third party's rights or acceptable use policies, including but not limited to the infringement of any copyright or trademark;
(7) to correct mistakes made by the registry operator or any registrar in connection with a domain name registration; or
(8) as needed during resolution of a dispute.

Abusive use of a domain is an illegal, malicious, or fraudulent action and includes, without limitation, the following:

– Distribution of malware: The dissemination of software designed to infiltrate or damage a computer system without the owner's informed consent. Examples include computer viruses, worms, keyloggers, trojans, and fake antivirus products;
– Phishing: attempts to acquire sensitive information such as usernames, passwords, and credit card details by masquerading as a trustworthy entity in an electronic communication;
– DNS hijacking or poisoning;
– Spam: The use of electronic messaging systems to send unsolicited bulk messages. This includes but is not limited to email spam, instant messaging spam, mobile messaging spam, and the spamming of Internet forums;
– Use of botnets, including malicious fast-flux hosting;
– Denial-of-service attacks;
– Child pornography/child sexual abuse images;
– The promotion, encouragement, sale, or distribution of prescription medication without a valid prescription in violation of applicable law; and
– Illegal access of computers or networks.

4.0. SINGLE ABUSE POINT OF CONTACT

Our prevention and mitigation plan includes use of a single abuse point of contact (APOC). This contact will be a role-based e-mail address in the form of "abuse@registry.tld". This e-mail address will allow multiple staff members to monitor abuse reports. This role-based approach has been used successfully by ISPs, e-mail service providers, and registrars for many years, and is considered an Internet abuse desk best practice.

The APOC e-mail address will be listed on the registry web site. We also will provide a convenient web form for complaints. This form will prompt complainants to provide relevant information. (For example, complainants who wish to report spam will be prompted to submit the full header of the e-mail.) This will help make their reports more complete and accurate.

Complaints from the APOC e-mail address and web form will go into a ticketing system, and will be routed to our abuse handlers (see below), who will evaluate the tickets and execute on them as needed.

The APOC is mainly for complaints about malicious use of domain names. Special addresses may be set up for other legal needs, such as civil and criminal subpoenas, and for Sunrise issues.

5.0. ABUSE INVESTIGATION AND MITIGATION

Our designated abuse handlers will receive and evaluate complaints received via the APOC. They will

decide whether a particular issue merits action, and decide what action is appropriate.

Our designated abuse handlers have domain name industry experience receiving, investigating and resolving abuse reports. Our registry implementation plan will leverage this experience and deploy additional resources in an anti-abuse program tailored to running a registry.

We expect that abuse reports will be received from a wide variety of parties, including ordinary Internet users; security researchers and Internet security companies; institutions, such as banks; and law enforcement agencies.

Some of these parties typically provide good forensic data or supporting evidence of the alleged malicious behavior. In other cases, the party reporting an issue may not be familiar with how to provide evidence. It is not unusual, in the Internet industry, that a certain percentage of abuse reports are not actionable because there is insufficient evidence to support the complaint, even after additional investigation.

The abuse handling function will be staffed with personnel who have experience handling abuse complaints. This group will function as an abuse desk to "triage" and investigate reports. Over the past several years, this group has investigated allegations about a variety of problems, including malware, spam, phishing, and child pornography/child sexual abuse images.

6.0. POLICIES, PROCEDURES, AND SERVICE LEVELS

Our abuse prevention and mitigation plan includes development of an internal manual for assessing and acting upon abuse complaints. Our designated abuse handlers will use this to ensure consistent and fair processes. To prevent exploitation of internal procedures by malefactors, these procedures will not be published publicly.

Assessing abuse reports requires great care. The goals are accuracy, a zero false-positive rate to prevent harm to innocent registrants, and good documentation.

Different types of malicious activities require different methods of investigation and documentation. The procedures we deploy will address all the abuse types listed in our Anti-Abuse Policy (above). This policy will also contain procedures for assessing complaints about orphan nameservers used for malicious activities.

One of the first steps in addressing abusive or harmful activities is to determine the type of domain involved. Two types of domains may be involved: 1) a "compromised domain"; and/or 2) a maliciously registered domain.

A "compromised" domain is one that has been hacked or otherwise compromised by criminals; the registrant is not responsible for the malicious activity taking place on the domain. For example, most domain names that host phishing sites are compromised. The goal in such cases is to inform the registrant of the problem via the registrar. Ideally, such domains are not suspended, since suspension disrupts legitimate activity on the domain.

The second type of potentially harmful domain, the maliciously registered domain, is one registered by a bad actor for the purpose of abuse. Since it has no legitimate use, this type of domain is a candidate for suspension.

In general, we see the registry as the central entity responsible for monitoring abuse of the TLD and passing any complaints received to the domains' sponsoring registrars. In an alleged (though credible) case of malicious use, the case will be communicated to the domain's sponsoring registrar requesting that the registrar investigate, act appropriately, and report on it within a defined time period. Our abuse handlers will also provide any evidence they collect to the registrar.

There are several good reasons for passing a case of malicious domain name use on to the registrar. First, the registrar has a direct relationship and contract with the registrant. It is important to respect this relationship as it pertains both to business in general and any legal perspectives involved. Second, the registrar holds a better position to evaluate and act because the registrar typically has vital information the registry operator does not, including domain purchase details and payment method (i.e., credit card, etc.); the identity of a proxy-protected registrant; the IP address from which the domain purchase was made; and whether a reseller is involved. Finally, it is important the registrar know if a registrant is in violation of registry or registrar policies and terms—the registrar may wish to suspend the registrant's account, or investigate other domains the registrar has registered in this TLD or others.

The registrar is also often best for determining if questionable registrant activity violates the registrar's legal terms of service or the registry Anti-Abuse Policy, and deciding whether to take any action. Registrars will be required to include language in their registrar-registrant contracts that indemnifies the registrar if it takes action and allows the registrar to suspend or cancel a domain name.

If a registrar does not take action within the time indicated by us in the report (i.e., 24 hours), we may take action ourselves. In some cases, we may suspend the domain name(s), and we reserve the right to act directly and immediately. We plan to take action directly if time is of the essence, such as with a malware attack that may cause significant harm to Internet users.

It is important to note that strict service level agreements (SLAs) for abuse response and mitigation are not always appropriate, additional tailoring of any SLAs may be required, depending on the problem. For example, suspending a domain within 24 hours may not be the best course of action when working with law enforcement or a national clearinghouse to address reports of child pornography. Officials may need more than 24 hours to investigate and gather evidence.

7.0. ABUSE MONITORING AND METRICS

In addition to addressing abuse complaints, we will actively monitor the overall abuse status of the TLD, gather intelligence and track abuse metrics to address criminal use of domains in the TLD.

To enable active reporting of problems to the sponsoring registrars, our plan includes proactive monitoring for malicious use of the domains in the TLD. Our goal is to keep malicious activity at an acceptably low level, and mitigate it actively when it occurs—we may do so by using professional blocklists of domain names. For example, professional advisors such as LegitScript (www.legitscript.com) may be used to identify and close down illegal "rogue" Internet pharmacies.

Our approach also incorporates recordkeeping and metrics regarding abuse and abuse reports. These may include:

– The number of abuse reports received by the registry's abuse point of contact described above and the domains involved;
– The number of cases and domains referred to registrars for resolution;
– The number of cases and domains for which the registry took direct action;
– Resolution times (when possible or relevant, as resolution times for compromised domains are difficult to measure).

We expect law enforcement to be involved in only a small percentage of abuse cases and will call upon relevant law enforcement as needed.

8.0. HANDLING REPORTS FROM LAW ENFORCEMENT, COURT ORDERS

The new gTLD Registry Agreement contains this requirement: "Registry Operator shall take reasonable steps to investigate and respond to any reports from law enforcement and governmental and quasi-governmental agencies of illegal conduct in connection with the use of the TLD. In responding to such reports, Registry Operator will not be required to take any action in contravention of applicable law." (Article 2.8)

We will be responsive as required by Article 2.8. Our abuse handling team will comply with legal processes and leverage both experience and best practices to work effectively with law enforcement and other government agencies. The registry will post a Criminal Subpoena Policy and Procedure page, which will detail how law enforcement and government agencies may submit criminal and civil subpoenas. When we receive valid court orders or seizure warrants from courts or law enforcement agencies of relevant jurisdiction, we will expeditiously review and comply with them.

9.0. PROHIBITING DOMAIN HIJACKINGS AND UNAPPROVED UPDATES

Our abuse prevention and mitigation plan also incorporates registrars that offer domain protection services and high-security access and authentication controls. These include services designed to prevent domain hijackings and inhibit unapproved updates (such as malicious changes to nameserver settings). Registrants will then have the opportunity to obtain these services should they so elect.

10.0. ABUSE POLICY: ADDRESSING INTELLECTUAL PROPERTY INFRINGEMENT

Intellectual property infringement involves three distinct but sometimes intertwined problems: cybersquatting, piracy, and trademark infringement:

– Cybersquatting is about the presence of a trademark in the domain string itself.
– Trademark infringement is the misuse or misappropriation of trademarks – the violation of the exclusive rights attached to a trademark without the authorization of the trademark owner or any licensees. Trademark infringement sometimes overlaps with piracy.
– Piracy involves the use of a domain name to sell unauthorized goods, such as copyrighted music, or trademarked physical items, such as fake brand-name handbags. Some cases of piracy involve trademark infringement.

The Uniform Dispute Resolution Process (UDRP) and the new Uniform Rapid Suspension System (URS) are anti-cybersquatting policies. They are mandatory and all registrants in the new TLD will be legally bound to them. Please refer to our response to Question #29 for details on our plans to respond to URS orders.

The Anti-Abuse Policy for our gTLD will be used to address phishing cases that involve trademarked strings in the domain name. The Anti-Abuse Policy prohibits violation of copyright or trademark; such complaints will be routed to the sponsoring Registrar.

11.0. PROPOSED MEASURES FOR REMOVAL OF ORPHAN GLUE RECORDS

Below are the policies and procedures to be used for our registry in handling orphan glue records. The anti-abuse documentation for our gTLD will reflect these procedures.

By definition, a glue record becomes an "orphan" when the delegation point Name Server (NS) record referencing it is removed without also removing the corresponding glue record. The delegation point NS record is sometimes referred to as the parent NS record.

As ICANN's SSAC noted in its Advisory SAC048 "SSAC Comment on Orphan Glue Records in the Draft Applicant Guidebook" (http://www.icann.org/en/committees/security/sac048.pdf ), "Orphaned glue can be used for abusive purposes; however, the dominant use of orphaned glue supports the correct and ordinary operation of the Domain Name System (DNS)." For example, orphan glue records may be created when a domain (example.tld) is placed on Extensible Provisioning Protocol (EPP) ServerHold or ClientHold status. This use of Hold status is an essential tool for suspending malicious domains. When placed on Hold, the domain is removed from the zone and will stop resolving. However, any child nameservers (now orphan glue) of that domain (e.g., ns1.example.tld) are left in the zone. It is important to keep these orphan glue records in the zone so that any innocent sites using that nameserver will continue to resolve.


We will use the following procedure—used by several existing registries and considered a generally accepted DNS practice—to manage orphan glue records.. When a registrar submits a request to delete a domain, the registry first checks for the existence of glue records. If glue records exist, the registry checks to see if other domains in the registry are using the glue records. If other domains in the registry are using the glue records, then registrar EPP requests to delete the domain will fail until no other domains are using the glue records. (This functionality is currently in place for the .ORG registry.) However, if a registrar submits a complaint that orphan glue is being used maliciously and the malicious conduct is confirmed, the registry operator will remove the orphan glue record from the zone file via an exceptional process.

12.0. METHODS TO PROMOTE WHOIS ACCURACY

12.1. ENFORCING REQUIRED CONTACT DATA FIELDS

We will offer a "thick" registry system. In this model, all key contact details for each domain name will be stored in a central location by the registry. This allows for better access to domain data and provides uniformity in storing the information.

As per the EPP specification, certain contact data fields are mandatory. Our registry will enforce those, plus certain other fields as necessary. This ensures that registrars are providing required domain registration data. The following fields (indicated as "MANDATORY") will be mandatory at a minimum:

Contact Name [MANDATORY]
Street1 [MANDATORY]
City [MANDATORY]
State/Province [optional]
Country [MANDATORY]
Postal Code [optional]

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Registrar Phone [MANDATORY]
Phone Ext [optional]
Fax [optional]
Fax Ext [optional]
Email [MANDATORY]
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In addition, our registry will verify formats for relevant individual data fields (e.g. e-mail, and phone/fax numbers) and will reject any improperly formatted submissions. Only valid country codes will be allowed, as defined by the ISO 3166 code list.

We will reject entries that are clearly invalid. For example, a contact that contains phone numbers such as 555.5555, or registrant names that consist only of hyphens, will be rejected.

12.2. POLICIES AND PROCEDURES TO ENHANCE WHOIS ACCURACY COMPLIANCE

We generally will rely on registrars to enforce WHOIS accuracy measures, but will also rely on review and audit procedures to enhance compliance.

As part of our RRA (Registry-Registrar Agreement), we will require each registrar to be responsible for ensuring the input of accurate Whois data by its registrants. The Registrar/Registered Name Holder Agreement will include specific clauses to ensure accuracy of Whois data, as per ICANN requirements, and to give the registrar the right to cancel or suspend registrations if the registered name holder fails to respond to the registrar's query regarding accuracy of data. In addition, the Anti-Abuse Policy for our registry will give the registry the right to suspend, cancel, etc., domains that have invalid Whois data.

As part of our RRA (Registry-Registrar Agreement), we will include a policy similar to the one below, currently used by the Canadian Internet Registration Authority (CIRA), the operator of the .CA registry. It will require the registrar to help us verify contact data.

"CIRA is entitled at any time and from time to time during the Term…to verify: (a) the truth, accuracy and completeness of any information provided by the Registrant to CIRA, whether directly, through any of the Registrars of Record or otherwise; and (b) the compliance by the Registrant with the provisions of the Agreement and the Registry PRP. The Registrant shall fully and promptly cooperate with CIRA in connection with such verification and shall give to CIRA, either directly or through the Registrar of Record such assistance, access to and copies of, such information and documents as CIRA may reasonably require to complete such verification. CIRA and the Registrant shall each be responsible for their own expenses incurred in connection with such verification."
http://www.cira.ca/assets/Documents/Legal/Registrants/registrantagreement.pdf

On a periodic basis, we will perform spot audits of the accuracy of Whois data in the registry. Questionable data will be sent to the sponsoring registrars as per the above policy.

All accredited registrars have agreed with ICANN to obtain contact information from registrants, and to take reasonable steps to investigate and correct any reported inaccuracies in contact information for domain names registered through them. As part of our RRA (Registry-Registrar Agreement), we will include a policy that allows us to de-accredit any registrar who a) does not respond to our Whois accuracy requests, or b) fails to update Whois data or delete the name within 15 days of our report of invalid WHOIS data. In order to allow for inadvertent and unintentional mistakes by a registrar, this policy may include a "three strikes" rule under which a registrar may be de-accredited after three failures to comply.

12.3. PROXY/PRIVACY SERVICE POLICY TO CURB ABUSE

In our TLD, we will allow the use of proxy/privacy services. We believe that there are important, legitimate uses for such services. (For example, to protect free speech rights and avoid receiving spam.)

However, we will limit how proxy/privacy services are offered. The goal of this policy is to make proxy/privacy services unattractive to abusers, namely the spammers and e-criminals who use such services to hide their identities. We believe the policy below will enhance WHOIS accuracy, will help deter the malicious use of domain names in our TLD, and will aid in the investigation and mitigation of abuse complaints.

Registry policy will require the following, and all registrars and their registrants and resellers will be bound to it contractually:

a. Registrants must provide complete and accurate contact information to their registrar (or reseller, if applicable).. Domains that do not meet this policy may be suspended.
b. Registrars and resellers must provide the underlying registrant information to the registry operator, upon written request, during an abuse investigation. This information will be held in confidence by the registry operator.
c. The registrar or reseller must publish the underlying registrant information in the Whois if it is determined by the registry operator or the registrar that the registrant has breached any terms of service, such as the TLD Anti-Abuse Policy.

The purpose of the above policy is to ensure that, in case of an abuse investigation, the sponsoring registrar has access to the registrant's true identity, and can provide that data to the registry. If it is clear the registrant has violated the TLD's Anti-Abuse Policy or other terms of service, the registrant's identity will be published publicly via the Whois, where it can be seen by the public and by law enforcement.


13.0. REGISTRY-REGISTRAR CODE OF CONDUCT AS RELATED TO ABUSE

Donuts does not currently intend to become a registrar for this TLD.  Donuts and our back-end technical operator will comply fully with the Registry Code of Conduct specified in the New TLD Registry Agreement, Specification 9.  For abuse issues, we will comply  by establishing an adequate "firewall" between our registry operations and the operations of any affiliated registrar.  As the Code requires, the registry will not "directly or indirectly show any preference or provide any special consideration to any Registrar with respect to operational access to registry systems and related registry services". Here is a non-exhaustive list of specific steps to be taken to enforce this:

– Abuse complaints and cases will be evaluated and executed upon using the same criteria and procedures, regardless of a domain's sponsoring registrar.
– Registry personnel will not discuss abuse cases with non-registry personnel or personnel from separate entities operating under the company. This policy is designed to both enhance security and prevent conflict of interest.
– If a compliance function is involved, the compliance staff will have responsibilities to the registry only, and not to a registrar we may be "affiliated" with at any point in the future. For example, if a compliance staff member is assigned to conduct audits of WHOIS data, that person will have no duty to any registrar business we may be operating at the time. The person will be free of conflicts of interest, and will be enabled to discharge his or her duties to the registry impartially and effectively.

14.0. CONTROLS TO ENSURE PROPER ACCESS TO DOMAIN FUNCTIONS

Our registry incorporates several measures to ensure proper access to domain functions, including authentication provisions in the RRA relative to notification and contact updates via use of AUTH-INFO codes.

IP address access control lists, SSL certificates, and proper authentication will be used to control registrar access to the registry system. Registrars will be given access only to perform operations on the objects they sponsor.

Every domain will have a unique AUTH-INFO code as per EPP RFCs. The AUTH-INFO code is a 6- to 16-character code assigned by the registrar at the time the name is created. Its purpose is to aid identification of the domain owner so proper authority can be established. (It is the "password" to the domain name.) Registrars must use the domain's password to initiate a Registrar-to-Registrar transfer. It is used to ensure that domain updates (update contact information, transfer, or deletion) are undertaken by the proper registrant, and that this registrant is adequately notified of domain update activity. Only the sponsoring Registrar of a domain has access to the domain's AUTH-INFO code stored in the registry, and this is accessible only via encrypted, password-protected channels.

Our Registry-Registrar contract will require that each registrar assign a unique AUTH-INFO code to every domain it creates. Due to security risk, registrars should not assign the same AUTH-INFO code to multiple domains.

Information about other registry security measures such as encryption and security of Registrar channels are confidential to ensure the security of the registry system. Details can be found in our response to Question #30(b).

15.0   ADDITIONAL PROTECTIONS

Due to the level of end-user trust potentially associated with this string Donuts will employ these additional four protections to minimize abuse:

1. For this string, to supplement the periodic audit documented above, a deeper and more extensive verification of Whois data accuracy, with associated remediation and takedown processes;

2. Exclusion of registrars with a history of poor compliance;

3. Regular monitoring by the registry of registered domains for pharming, phishing, spam, botnets, copyright infringement and other forms of abuse, and remediation and takedown processes; and

4. In addition to registry-based procedures, requirements that registrars have a $^{24}/_{7}/_{365}$ abuse contact, and remediation and takedown processes.

16.0. RESOURCING PLAN

Our back-end registry operator will perform the majority of Abuse Prevention and Mitigation services for this TLD, as required by our agreement with them.  Donuts staff will supervise the activity of the provider.  In some cases Donuts staff will play a direct role in the handling of abuse cases.

The compliance department of our registry operator has two full time staff members who are trained in DNS, the investigation of abuse complaints, and related specialties.  The volume of abuse activity will be gauged and additional staff hired by our back-end registry operator as required  to meet their SLA commitments.  In addition to the two full-time members, they expect to retain the services of one or more outside contractors to provide additional security and anti-abuse expertise – including advice on the effectiveness of our policies and procedures.

Finally, Donuts' Legal Department will have one attorney whose role includes the oversight of legal issues related to abuse, and interaction with courts and law enforcement.

# 29. Rights Protection Mechanisms

Q29 SV CHAR: 25795

1.0. INTRODUCTION

To minimize abusive registrations and other activities that affect the legal rights of others, our approach includes well-developed policies for rights protection, both during our TLD's rollout period and on an ongoing basis. As per gTLD Registry Agreement Specification 7, we will offer a Sunrise Period and a Trademark Claims service during the required time periods, we will use the Trademark Clearinghouse, and we will implement Uniform Rapid Suspension (URS) on an ongoing basis. In addition to these newly mandated ICANN protections, we will implement two other trademark protections that were developed specifically for the new TLD program.  These additional protections are:  (i) a Domain Protected Marks List (DPML) for the blocking of trademarked strings across multiple TLDs; and (ii) a Claims Plus product to alert registrars to registrations that potentially infringe existing marks.

Below we detail how we will fulfill these requirements and further meet or exceed ICANN's requirements. We also describe how we will provide additional measures specific to rights protection above ICANN's minimum, including abusive use policies, takedown procedures, and other covenants.

Our RPM approach leverages staff with extensive experience in a large number of gTLD and ccTLD rollouts, including the Sunrises for .CO, .MOBI, .ASIA, .EU, .BIZ, .US., .TRAVEL, TEL, .ME, and .XXX. This staff will utilize their first-hand, practical experience and will effectively manage all aspects of Sunrise, including domain application and domain dispute processes.

The legal regime for our gTLD will include all of the ICANN-mandated protections, as well as some independently developed RPMs proactively included in our Registry-Registrar Agreement.  Our RPMs exceed the ICANN-required baseline. They are:

- Reserved names: to protect names specified by ICANN, including the necessary geographic names.
- A Sunrise Period: adhering to ICANN requirements, and featuring trademark validation via the Trademark Clearinghouse.
- A Trademark Claims Service: offered as per ICANN requirements, and active after the Sunrise period and for the required time during wider availability of the TLD.

- Universal Rapid Suspension (URS)
- Uniform Dispute Resolution Process (UDRP)
- Domain Protected Marks List (DPML)
- Claims Plus
- Abusive Use and Takedown Policies


2.0. NARRATIVE FOR Q29 FIGURE 1 OF 1

Attachment A, Figure 1, shows Rollout Phases and the RPMs that will be used in each. As per gTLD
Registry Agreement Specification 7, we will offer a Sunrise Period and a Trademark Claims service during
the required time periods. In addition, we will use the Trademark Clearinghouse to implement URS on an
ongoing basis.

3.0. PRE-SUNRISE: RESERVED AND PREMIUM NAMES

Our Pre-sunrise phase will include a number of key practices and procedures. First, we will reserve the
names noted in the gTLD Registry Agreement Specification 5. These domains will not be available in
Sunrise or subsequent registration periods. As per Specification 5, Section 5, we will provide national
governments the opportunity to request the release of their country and territory names for their use.
Please also see our response to Question 22, "Protection of Geographic Names."

We also will designate certain domains as "premium" domains. These will include domains based on generic
words and one-character domains. These domains will not be available in Sunrise, and the registry may
offer them via special means such as auctions and RFPs.

As an additional measure, if a trademark owner objects to a name on the premium name list, the trademark
owner may petition to have the name removed from the list and made available during Sunrise. The
trademark must meet the Sunrise eligibility rules (see below), and be an exact match for the domain in
question. Determinations of whether such domains will be moved to Sunrise will be at the registry's sole
discretion.

4.0. SUNRISE

4.1. SUNRISE OVERVIEW

Sunrise registration services will be offered for a minimum of 30 days during the pre-launch phase. We
will notify all relevant trademark holders in the Trademark Clearinghouse if any party is seeking a
Sunrise registration that is an identical match to the name to be registered during Sunrise.

As per the Sunrise terms, affirmed via the Registry-Registrar Agreement and the Registrar-Registrant
Agreement, the domain applicant will assert that it is qualified to hold the domain applied for as per
the Sunrise Policy and Rules.

We will use the Trademark Clearinghouse to validate trademarks in the Sunrise.

If there are multiple valid Sunrise applications for the same domain name string, that string will be
subject to auction between only the validated applicants. After receipt of payment from the auction
winning bidder, that party will become the registrant of the domain name. (note: in the event one of
the identical, contending marks is in a trademark classification reflective of the TLD precedence to
that mark may be given during Sunrise).

Sunrise applicants may not use proxy services during the application process.

4.2. SUNRISE: ELIGIBLE RIGHTS

Our Sunrise Eligibility Requirements (SERs) are:

1. Ownership of a qualifying mark.

a. We will honor the criteria in ICANN's Trademark Clearinghouse document section 7.2, number (i): The
registry will recognize and honor all word marks that are nationally or regionally [see Endnote 1]
registered and for which proof of use — which can be a declaration and a single specimen of current use
– was submitted to, and validated by, the Trademark Clearinghouse.

b. In addition, we may accept marks that are not found in the Trademark Clearinghouse, but meet other

criteria, such as national trademark registrations or common law rights.

2. Representation by the applicant that all provided information is true and correct; and

3. Provision of data sufficient to document rights in the trademark. (See information about required Sunrise fields, below).

## 4.3. SUNRISE TRADEMARK VALIDATION

Our goal is to award Sunrise names only to applicants who are fully qualified to have them. An applicant will be deemed to be qualified if that applicant has a trademark that meets the Sunrise criteria, and is seeking a domain name that matches that trademark, as per the Sunrise rules.

Accordingly, we will validate applications via the Trademark Clearinghouse.  We will compare applications to the Trademark Clearinghouse database, and those that match (as per the Sunrise rules) will be considered valid applications.

An application validated according to Sunrise rules will be marked as "validated," and will proceed. (See "Contending Applications," below.) If an application does not qualify, it will be rejected and will not proceed.

To defray the costs of trademark validation and the Trademark Claims Service, we will charge an application and/or validation fee for every application.

In January 2012, the ICANN board was briefed that "An ICANN cross-functional team is continuing work on implementation of the Trademark Clearinghouse according to a project plan providing for a launch of clearinghouse operations in October 2012. This will allow approximately three months for rights holders to begin recording trademark data in the Clearinghouse before any new gTLDs begin accepting registrations (estimated in January 2013)." (http://www.icann.org/en/minutes/board-briefing-materials-4-05jan12-en.pdf) The Clearinghouse Implementation Assistance Group (IAG), which Donuts is participating in, is working through a large number of process and technical issues as of this writing. We will follow the progress of this work, and plan our implementation details based on the final specifications.

Compliant with ICANN policy, our registry software is designed to properly check domains and compare them to marks in the Clearinghouse that contain punctuation, spaces, and special symbols.

## 4.5. CONTENDING APPLICATIONS, SUNRISE AUCTIONS

After conclusion of the Sunrise Period, the registry will finish the validation process. If there is only one valid application for a domain string, the domain will be awarded to that applicant. If there are two or more valid applications for a domain string, only those applicants will be invited to participate in a closed auction for the domain name. The domain will be awarded to the auction winner after payment is received.

After a Sunrise name is awarded to an applicant, it will then remain under a "Sunrise lock" status for a minimum of 60 days in order to allow parties to file Sunrise Challenges (see below). Locked domains cannot be updated, transferred, or deleted.

When a domain is awarded and granted to an applicant, that domain will be available for lookup in the public Whois. Any party may then see what domains have been awarded, and to which registrants. Parties will therefore have the necessary information to consider Sunrise Challenges.

Auctions will be conducted by very specific rules and ethics guidelines. All employees, partners, and contractors of the registry are prohibited from participating in Sunrise auctions.

## 4.6. SUNRISE DISPUTE RESOLUTION PROCESS (SUNRISE CHALLENGES)

We will retain the services of a well-known dispute resolution provider (such as WIPO) to help formulate the language of our Sunrise Dispute Resolution Process (SDRP, or "Sunrise Challenge") and hear the challenges filed under it. All applicants and registrars will be contractually obligated to follow the decisions handed down by the dispute resolution provider.

Our SDRP will allow challenges based on the following grounds, as required by ICANN. These will be part of the Sunrise eligibility criteria that all registrants (applicants) will be bound to contractually:

(i) at the time the challenged domain name was registered, the registrant did not hold a trademark

registration of national effect (or regional effect) or the trademark had not been court-validated or protected by statute or treaty;

(ii) the domain name is not identical to the mark on which the registrant based its Sunrise registration;

(iii) the trademark registration on which the registrant based its Sunrise registration is not of national effect (or regional effect) or the trademark had not been court-validated or protected by statute or treaty; or

(iv) the trademark registration on which the domain name registrant based its Sunrise registration did not issue on or before the effective date of the Registry Agreement and was not applied for on or before ICANN announced the applications received.

Our SDRP will be based generally on some SDRPs that have been used successfully in past TLD launches. The Sunrise Challenge Policies and Rules used in the .ASIA and .MOBI TLDs (minus their unique eligibility criteria) are examples.

We expect that that there will be three possible outcomes to a Sunrise Challenge:

1. Original registrant proves his/her right to the domain. In this case the registrant keeps the domain and it is unlocked for his/her use.
2. Original registrant is not eligible or did not respond, and the challenger proved his/her right to the domain. In this case the domains is awarded to the complainant.
3. Neither the original registrant nor the complainant proves rights to the domain. In this case the domain is cancelled and becomes available at a later date via a mechanism to be determined by the registry operator.

After any Sunrise name is awarded to an applicant, it will remain under a "Sunrise Lock" status for at least 60 days so that parties can file Sunrise Challenges. During this Sunrise Lock period, the domain will not resolve and cannot be modified, transferred, or deleted by the sponsoring registrar. A domain name will be unlocked at the end of that lock period only if it is not subject to a Sunrise Challenge. Challenged domains will remain locked until the dispute resolution provider has issued a decision, which the registry will promptly execute.

5.0. TRADEMARK CLAIMS SERVICES

The Trademark Claims Service requirements are well-defined in the Applicant Guidebook, in Section 6 of the "Trademark Clearinghouse" attachment. We will comply with the details therein. We will provide Trademark Claims services for marks in the Trademark Clearinghouse post-Sunrise and then for at least the first 60 days that the registry is open for general registration (i.e. during the first 60 days in the registration period(s) after Sunrise). The Trademark Claims service will provide clear notice to a prospective registrant that another party has a trademark in the Clearinghouse that matches the applied-for domain name—this is a notice to the prospective registrant that it might be infringing upon another party's rights.

The Trademark Clearinghouse database will be structured to report to registries when registrants are attempting to register a domain name that is considered an "Identical Match" with the mark in the Clearinghouse. We will build, test, and implement an interface to the Trademark Clearinghouse before opening our Sunrise period.  As domain name applications come into the registry, those strings will be compared to the contents of the Clearinghouse.

If the domain name is registered in the Clearinghouse, the registry will promptly notify the applicant. We will use the notice form specified in ICANN's Module 4, "Trademark Clearinghouse" document. The specific statement by the prospective registrant will warrant that: (i) the prospective registrant has received notification that the mark(s) is included in the Clearinghouse; (ii) the prospective registrant has received and understood the notice; and (iii) to the best of the prospective registrant's knowledge, the registration and use of the requested domain name will not infringe on the rights that are the subject of the notice.

The Trademark Claims Notice will provide the prospective registrant access to the Trademark Clearinghouse Database information referenced in the Trademark Claims Notice. The notice will be provided in real time (or as soon as possible) without cost to the prospective registrant or to those notified.

"Identical Match" is defined in ICANN's Module 4, "Trademark Clearinghouse" document, paragraph 6.1.5. We will examine the Clearinghouse specifications and protocol carefully when they are published. To

comply with ICANN policy, the software for our registry will properly check domains and compare them to marks in the Clearinghouse that contain punctuation, spaces, and special symbols.

6.0. GENERAL REGISTRATION

This is the general registration period open to all registrants. No trademark or other qualification will be necessary in order to apply for a domain in this period.

Domain names awarded via the Sunrise process, and domain strings still being contended via the Sunrise process cannot be registered in this period. This will protect the interests of all Sunrise applicants.

7.0. UNIFORM RAPID SUSPENSION (URS)

We will implement decisions rendered under the URS on an ongoing basis. (URS will not apply to Sunrise names while they are in Sunrise Lock period; during that time those domains are subject to Sunrise policy and Sunrise Challenge instead.)

As per URS policy, the registry will receive notice of URS actions from ICANN-approved URS providers. As per ICANN's URS requirements, we will lock the domain within 24 hours of receipt of the Notice of Complaint from the URS Provider. Locking means that the registry restricts all changes to the registration data, including transfer and deletion of domain names, though names will continue to resolve.

Our registry's compliance team will oversee URS procedures. URS e-mails from URS providers will be directed immediately to the registry's Support staff, which is on duty $^{24}/_7/_{365}$. Support staff will be responsible for executing the directives from the URS provider, and all support staff will receive training in the proper procedures.

Support staff will notify the URS Provider immediately upon locking the domain name, via e-mail.

Support staff for the registry will retain all copies of e-mails from the URS providers. Each case or order will be assigned a tracking or ticket number. This number will be used to track the status of each opened URS case through to resolution via a database.

Registry staff will then execute further operations upon notice from the URS providers. Each URS provider is required to specify the remedy and required actions of the registry, with notification to the registrant, the complainant, and the sponsoring registrar.

The guidelines provide that if the complainant prevails, the registry "shall suspend the domain name, which shall remain suspended for the balance of the registration period and would not resolve to the original web site. The nameservers shall be redirected to an informational web page provided by the URS Provider about the URS. The WHOIS for the domain name shall continue to display all of the information of the original Registrant except for the redirection of the nameservers. In addition, the WHOIS shall reflect that the domain name will not be able to be transferred, deleted or modified for the life of the registration." We will execute the DNS re-pointing required by the URS guidelines, and the domain and its WHOIS data will remain unaltered until the domain expires, as per the ICANN requirements.

8.0. ONGOING RIGHTS PROTECTION MECHANISMS - UDRP

As per ICANN policy, all domains in the TLD will be subject to a Uniform Dispute Resolution Process (UDRP). (Sunrise domains will first be subject to the ICANN-mandated Sunrise SDRP until the Sunrise Challenge period is over, after which those domains will then be subject to UDRP.)

9.0  ADDITIONAL RIGHTS PROTECTION MECHANISMS NOT REQUIRED BY ICANN

All Donuts TLDs have two new trademark protection mechanisms developed specifically for the new TLD program.  These mechanisms exceed the extensive protections mandated by ICANN. These new protections are:

9.1    Claims Plus:  This service will become available at the conclusion of the Trademark Claims service, and will remain available for at least the first five years of registry operations.  Trademark owners who are fully registered in the Trademark Clearinghouse may obtain Claims Plus for their marks. We expect the service will be at low or no cost to trademark owners (contingent on Trademark Clearinghouse costs to registries).  Claims Plus operates much like Trademark Claims with the exception that notices of potential trademark infringement are sent by the registry to any registrar whose customer performs a check-command or Whois query for a string subject to Claims Plus.  Registrars may then take further implementation steps to advise their customers, or use this data to better improve the

customer experience.  In addition, the Whois at the registry website will output a full Trademark Claims notice for any query of an unregistered name that is subject to Claims Plus.   (Note:  The ongoing availability of Claims Plus will be contingent on continued access to a Trademark Clearinghouse.  The technical viability of some Claims Plus features will be affected by eventual Trademark Clearinghouse rules on database caching).

9.2        Domain Protected Marks List:  The DPML is a rights protection mechanism to assist trademark holders in protecting their intellectual property against undesired registrations of strings containing their marks.  The DPML prevents (blocks) registration of second level domains that contain a trademarked term (note:  the standard for DPML is "contains"— the protected string must contain the trademarked term).   DPML requests will be validated against the Trademark Clearinghouse and the process will be similar to registering a domain name so the process will not be onerous to trademark holders.  An SLD subject to DPML will be protected at the second level across all Donuts TLDs (i.e. all TLDs for which this SLD is available for registration).  Donuts may cooperate with other registries to extend DPML to TLDs that are not operated by Donuts.  The cost of DPML to trademark owners is expected to be significantly less than the cost of actually registering a name.

10.0 ABUSIVE USE POLICIES AND TAKEDOWN PROCEDURES

In our response to Question #28, we describe our anti-abuse program, which is designed to address malware, phishing, spam, and other forms of abuse that may harm Internet users. This program is designed to actively discover, verify, and mitigate problems without infringing upon the rights of legitimate registrants. This program is designed for use in the open registration period. These procedures include the reporting of compromised websites/domains to registrars for cleanup by the registrants and their hosting providers. It also describes takedown procedures, and the timeframes and circumstances that apply for suspending domain names used improperly. Please see the response to Question #28 for full details.

We will institute a contractual obligation that proxy protection be stripped away if a domain is proven to be used for malicious purposes. For details, please see "Proxy/Privacy Service Policy to Curb Abuse" in the response to Question 28.

11.0. REGISTRY-REGISTRAR CODE OF CONDUCT AS RELATED TO RIGHTS PROTECTION

We will comply fully with the Registry Code of Conduct specified in the New TLD Registry Agreement, Specification 9.   In rights protection matters, we will comply by establishing an adequate "firewall" between the operations of any registrar we establish and the operations of the registry. As the Code requires, we will not "directly or indirectly show any preference or provide any special consideration to any registrar with respect to operational access to registry systems and related registry services". Here is a non-exhaustive list of specific steps we will take to accomplish this:

- We will evaluate and execute upon all rights protection tasks impartially, using the same criteria and procedures, regardless of a domain's sponsoring registrar.
- Any registrar we establish or have established at the time of registry launch will not receive preferential access to any premium names, any auctions, etc.  Registry personnel and any registrar personnel that we may employ in the future will be prohibited from participating as bidders in any auctions for Landrush names.
- Any registrar staff we may employ in the future will have access to data and records relating only to the applications and registrations made by any registrar we establish, and will not have special access to data related to the applications and registrations made by other registrars.
- If a compliance function is involved, the compliance staffer will be responsible to the registry only, and not to a registrar we own or are "affiliated" with.  For example, if a compliance staff member is assigned to conduct audits of WHOIS data, that staffer will not have duties with the registrar business. The staffer will be free of conflicts of interest, and will be enabled to discharge his or her duties to the registry effectively and impartially, regardless of the consequences to the registrar.

12.0   ADDITIONAL PROTECTIONS

Due to the level of end-user trust potentially associated with this string Donuts will employ these additional four protections to minimize abuse:

1. For this string, to supplement the periodic audit documented above, a deeper and more extensive verification of Whois data accuracy, with associated remediation and takedown processes;

2. Exclusion of registrars with a history of poor compliance;

3. Regular monitoring by the registry of registered domains for pharming, phishing, spam, botnets,

copyright infringement and other forms of abuse, and remediation and takedown processes; and

4. In addition to registry-based procedures, requirements that registrars have a $^{24}/_7/_{365}$ abuse contact, and remediation and takedown processes.


13.0. RESOURCING PLAN

Overall management of RPMs is the responsibility of Donuts' VP of Business Operations.  Our back-end registry operator will perform the majority of operational work associated with RPMs, as required by our agreement with them.  Donuts VP of Business Operations will supervise the activity of this vendor.

Resources applied to RPMs include:

1. Legal team
a. We will have at least one legal counsel who will be dedicated to the registry with previous experience in domain disputes and Sunrise periods and will oversee the compliance and support teams with regard to the legal issues related to Sunrise and RPM's
b. We have outside counsel with domain and rights protection experience that is available to us as necessary
2. Dispute Resolution Provider (DRP): The DRP will help formulate Sunrise Rules and Policy, Sunrise Dispute Resolution Policy. The DRP will also examine challenges, but the challenger will be required to pay DRP fees directly to the DRP.
3. Compliance Department and Tech Support: There will be three dedicated personnel assigned to these areas. This staff will oversee URS requests and abuse reports on an ongoing basis.
4. Programming and technical operations. There are four dedicated personnel assigned to these functions.
5. Project Manager: There will be one person to coordinate the technical needs of this group with the registry IT department.

13.0. ENDNOTES

1 "Regional" is understood to be a trans-national trademark registry, such as the European Union registry or the Benelux Office for Intellectual Property.


# 30(a). Security Policy: Summary of the security policy for the proposed registry

Q30a  SV  Char:   19960

1.0      INTRODUCTION

Our Information Security (IS) Program and associated IS Policy, Standards and Procedures apply to all Applicant entities, employees, contractors, temps, systems, data, and processes. The Security Program is managed and maintained by the IS Team, supported by Executive Management and the Board of Directors.

Data and systems vary in sensitivity and criticality and do not unilaterally require the same control requirements. Our security policy classifies data and systems types and their applicable control requirements. All registry systems have the same data classification and are all managed to common security control framework. The data classification applied to all registry systems is our highest classification for confidentiality, availability and integrity, and the supporting control framework is consistent with the technical and operational requirements of a registry, and any supporting gTLD string, regardless of its nature or size. We have the experienced staff, robust system architecture and managed security controls to operate a registry and TLD of any size while providing reasonable assurance over the security, availability, and confidentiality of the systems supporting critical registry functions (i.e., registration services, registry databases, zone administration, and provision of domain name resolution services).

This document describes the governance of our IS Program and the control frameworks our security program aligns to (section 1.0), Security Policy requirements (section 2.0); security assessments conducted (see section 3.0), our process for executive oversight and visibility of risks to ensure continuous improvement (section 4.0), and security commitments to registrants (section 5). Details regarding how these control requirements are implemented, security roles and responsibilities and resources supporting these efforts are included in Security Policy B response.

2.0. INFORMATION SECURITY PROGRAM

The IS Program for our registry is governed by an IS Policy aligned to the general clauses of ISO 27001 requirements for an Information Security Management System (ISMS) and follows the control objectives where appropriate, given the data type and resulting security requirements. (ISO 27001 certification for the registry is not planned, however, our DNS/DNSSEC solution is 27001 certified). The IS Program follows a Plan-Do-Check-Act (PDCA) model of continuous improvement to ensure that the security program grows in maturity and that we provide reasonable assurance to our shareholders and Board of Directors that our systems and data are secure.

The High Security Top Level Domain (HSTLD) control framework incorporates ISO 27002, the code of practice for implementing an ISO 27001 ISMS. Therefore, our security program is already closely aligned to the HSTLD control framework. Furthermore, we agree to abide by the HSTLD Principle 1 and criteria 1.1 - 1.3. (See specifics in Security Policy B response):

Registry systems will be in-scope for Sarbanes-Oxley (SOX) compliance and will follow the SOX control framework governing access control, account management, change management, software development life cycle (SDLC), and job monitoring of all systems. Registry systems will be tested frequently by the IS team for compliance and audited by our internal audit firm, Protiviti, and external audit firm, Price Waterhouse Coopers (PWC), for compliance.

2.1. SECURITY PROGRAM GOVERNANCE

Our Information Security Program is governed by IS Policy, supported by standards, and guided by procedures to ensure uniformed compliance to the program. Standards and associated procedures in support of the policy are shown in Attachment A, Figure 1. Security Program documents are updated annually or upon any system or environment change, new legal or regulatory requirements, and/or findings from risk assessments. Any updates to security program are reviewed and approved by the Executive Vice President of IT, the General Counsel, and the EVP of HR before dissemination to all employees.

All employees are required to sign the IS Policy upon hire, upon any major changes, and/or annually. By signing the IS Policy, employees agree to abide by the supporting Standards and Procedures applicable to their job roles. To enable signing of the IS Policy, employees must pass a test to ensure competent understanding of the IS Policy and its key requirements.

3.0. INFORMATION SECURITY POLICY

3.1. INFORMATION ASSET CLASSIFICATION

The following data classification is applied to registry systems: High Business Impact (HBI): Business Confidential in accordance with the integrity, availability and confidentiality requirements of registry operations. All registry systems will follow Security Policy requirements for HBI systems regardless of the nature of the TLD string, financial materiality or size. HBI data if not properly secured, poses a high degree of risk to the registry and includes data pertaining to the registry's adherence to legal, regulatory and compliance requirements, mergers and acquisitions (M&A), and confidential data  inclusive of, but is not limited to: Personally Identifiable Information (PII) (credit card data, Social Security Numbers (SSN) and account numbers); materially important financial information (before public disclosure), and information which the Board of Directors (BoD)/Executive team deems to be a trade secret, which, if compromised, would cause grave harm to the execution of our business model.

HBI safeguards are designed, implemented and measured in alignment with confidentiality, integrity, availability and privacy requirements characterized by legal, regulatory and compliance obligations, or through directives issued by the BoD and Executive team. Where guidance is provided, such as the Payment Card Industry (PCI) Data Security Standard (DSS) Internal Audit Risk Control Matrices (RCMs), local, state and federal laws, and other applicable regulations, we put forth the appropriate level of effort and resources to meet those obligations. Where there is a lack of guidance or recommended safeguards, Risk Treatment Plans (RTP's) are designed in alignment with our standard risk management practices.

Other data classifications for Medium Business Impact (MBI): Business Sensitive and Low Business Impact (LBI): Public do not apply to registry systems.

3.2. INFORMATION ASSET MANAGEMENT

All registry systems have a designated owner and/or custodian who ensure appropriate security classifications are implemented and maintained throughout the lifecycle of the asset and that a periodic review of that classification is conducted. The system owner is also responsible for approving access and the type of access granted. The IS team, in conjunction with Legal, is responsible for defining the legal, regulatory and compliance requirements for registry system and data.

## 3.3. INFORMATION ASSET HANDLING, STORAGE & DISPOSAL

Media and documents containing HBI data must adhere to their respective legal, regulatory and compliance requirements and follow the HBI Handling Standard and the retention requirements within the Document Retention Policy.

## 3.4. ACCESS CONTROL

User authentication is required to access our network and system resources. We follow a least-privileged role based access model. Users are only provided access to the systems, services or information they have specifically been authorized to use by the system owner based on their job role. Each user is uniquely identified by an ID associated only with that user. User IDs must be disabled promptly upon a user's termination, or job role change.

Visitors must sign-in at the front desk of any company office upon arrival and escorted by an employee at all times. Visitors must wear a badge while on-site and return the badge when signing out at the front desk. Dates and times of all visitors as well as the name of the employee escorting them must be tracked for audit purposes.

Individuals permitted to access registry systems and HBI information must follow the HBI Identity & Access Management Standard. Details of our access controls are described in Part B of Question 30 response including; technical specifications of access management through Active Directory, our ticketing system, physical access controls to systems and environmental conditions at the datacenter.

## 3.5. COMMUNICATIONS & OPERATIONAL SECURITY

### 3.5.1. MALICIOUS CODE

Controls shall be implemented to protect against malicious code including but not limited to:
- Identification of vulnerabilities and applicable remediation activities, such as patching, operating system & software upgrades and/or remediation of web application code vulnerabilities.
- File-integrity monitoring shall be used, maintained and updated appropriately.
- An Intrusion Detection Solution (IDS) must be implemented on all HBI systems, maintained & updated continuously.
- Anti-virus (AV) software must be installed on HBI classified web & application systems and systems that provide access to HBI systems. AV software and virus definitions are updated on a regular basis and logs are retained for no less than one year.

### 3.5.2. THREAT ANALYSIS & VULNERABILITY MANAGEMENT

On a regular basis, IS personnel must review newly identified vulnerability advisories from trusted organizations such as the Center for Internet Security, Microsoft, SANS Institute, SecurityFocus, and the CERT at Carnegie-Mellon University. Exposure to such vulnerabilities must be evaluated in a timely manner and appropriate measures taken to communicate vulnerabilities to the system owners, and remediate as required by the Vulnerability Management Standard. Internal and external network vulnerability scans, application & network layer penetration testing must be performed by qualified internal resource or an external third party at least quarterly or upon any significant network change. Web application vulnerability scanning is to be performed on a continual basis for our primary web properties applicable to their release cycles.

### 3.5.3. CHANGE CONTROL

Changes to HBI systems including operating system upgrades, computing hardware, networks and applications must follow the Change Control Standard and procedures described in Security Policy question 30b.

### 3.5.4. BACKUP & RESTORATION

Data critical to our operations shall be backed up according to our Backup and Restoration Standard. Specifics regarding Backup and Restoration requirements for registry systems are included in questions 37 & 38.

## 3.6. NETWORK CONTROLS

 - Appropriate controls must be established for ensuring the network is operated consistently and as planned over its entire lifecycle.

- Network systems must be synchronized with an agreed upon time source to ensure that all logs correctly reflect the same accurate time.
- Networked services will be managed in a manner that ensures connected users or services do not compromise the security of the other applications or services as required in the HBI Network Configuration Standard. Additional details are included in Question 32: Architecture response.

## 3.7. DISASTER RECOVERY & BUSINESS CONTINUITY

The SVP of IT has responsibility for the management of disaster recovery and business continuity. Redundancy and fault-tolerance shall be built into systems whenever possible to minimize outages caused by hardware failures. Risk assessments shall be completed to identify events that may cause an interruption and the probability that an event may occur. Details regarding our registry continuity plan are included in our Question 39 response.

## 3.8 SOFTWARE DEVELOPMENT LIFECYCLE

Advance planning and preparation is required to ensure new or modified systems have adequate security, capacity and resources to meet present and future requirements. Criteria for new information systems or upgrades must be established and acceptance testing carried out to ensure that the system performs as expected. Registry systems must follow the HBI Software Development Lifecycle (SDLC) Standard.

## 3.9. SECURITY MONITORING

Audit logs that record user activities, system errors or faults, exceptions and security events shall be produced and retained according to legal, regulatory, and compliance requirements. Log files must be protected from unauthorized access or manipulation. IS is responsible for monitoring activity and access to HBI systems through regular log reviews.

## 3.10. INVESTIGATION & INCIDENT MANAGEMENT RESPONSE

Potential security incidents must be immediately reported to the IS Team, EVP of IT, the Legal Department and/or the Incident Response email alias. The Incident Response Team (IRT) is required to investigate: any real or suspected event that could impact the security of our network or computer systems; impose significant legal liabilities or financial loss, loss of proprietary data/trade secret, and/or harm to our goodwill. The Director of IS is responsible for the organization and maintenance of the IRT that provides accelerated problem notification, damage control, investigation and incident response services in the event of security incidents. Investigation and response processes follow the requirements of the Investigation and Incident Management Standard and supporting Incident Response Procedure (see Question 30b for details).

## 3.11. LEGAL & REGULATORY COMPLIANCE

All relevant legal, regulatory and contractual requirements are defined, documented and maintained within the IS Policy. Critical records are protected from loss, destruction and falsification, in accordance with legal, contractual and business requirements as described in our Document Retention Policy. Compliance programs implemented that are applicable to Registry Services include:

- Sarbanes Oxley (SOX): All employees managing and accessing SOX systems and/or data are required to follow SOX compliance controls.
- Data Privacy and Disclosure of Personally Identifiable Information (PII): data protection and privacy shall be ensured as required by legal and regulatory requirements, which may include state breach and disclosure laws, US and EU Safe Harbor compliance directives.

Other compliance programs implemented but not applicable to Registry systems include the Payment Card Industry (PCI) Data Security Standard (DSS), Office of Foreign Assets Control (OFAC) requirements, Copyright Infringement & DMCA.

## 4.0. SECURITY ASSESSMENTS

Our IS team conducts frequent security assessments to analyze threats, vulnerabilities and risks associated with our systems and data. Additionally, we contract with several third parties to conduct independent security posture assessments as described below. Details of these assessments are provided in our Security Policy B response.

## 4.1. THIRD PARTY SECURITY ASSESSMENTS

We outsource the following third party security assessments (scope, vendor, frequency and remediation

requirements of any issues found are detailed in our Security Policy B response); Web Application Security Vulnerability testing, quarterly PCI ASV scans, Sarbanes-Oxley (SOX) control design and operating effectiveness testing and Network and System Security Analysis.

## 4.2. INTERNAL SECURITY ASSESSMENTS

The IS team conducts routine and continual internal testing (scope, frequency, and remediation requirements of any issues found are detailed in our Security Policy B response) including; web application security vulnerability testing, external and internal vulnerability scanning, system and network infrastructure penetration testing, access control appropriateness reviews, wireless access point discovery, network security device configuration analysis and an annual comprehensive enterprise risk analysis.

## 5.0. EXECUTIVE OVERSIGHT & CONTINUOUS IMPROVEMENT

In addition to the responsibility for Information Security residing within the IS team and SVP of IT, risk treatment decisions are also the responsibility of the executive of the business unit responsible for the risk. Any risk with potential to impact the business financially or legally in a material way is overseen by the Incident Response Management team and/or the Audit Committee. See Figure 2 in Attachment A. The Incident Response Management Team or Audit Committee will provide assistance with management action plans and remediation.

## 5.1. GOVERNANCE RISK & COMPLIANCE

We have deployed RSA's Archer Enterprise Governance Risk and Compliance (eGRC) Tool to provide an independent benchmarking of risk, compliance and security metrics, assist with executive risk reporting and reduce risk treatment decision making time, enforcing continuous improvement.  The eGRC provides automated reporting of registry systems compliance with the security program as a whole, SOX Compliance, and our Vulnerability Management Standard. The eGRC dashboard continuously monitors risks and threats (through automated feeds from our vulnerability testing tools and third party data feeds such as Microsoft, CERT, WhiteHat, etc.) that are actionable. See Attachment A for more details on the GRC solutions deployed.

## 6.0. SECURITY COMMITMENTS TO REGISTRANTS

We operate all registry systems in a highly secured environment with appropriate controls for protecting HBI data and ensuring all systems remain confidential, have integrity, and are highly available. Registrants can assume that:

1. We safeguard the confidentiality, integrity and availability of registrant data through access control and change management:
 - Access to data is restricted to personnel based on job role and requires 2 factors of authentication.
 - All system changes follow SOX-compliant controls and adequate testing is performed to ensure production pushes are stable and secure.
2. The network and systems are deployed in high availability with a redundant hot datacenter to ensure maximum availability.
3. Systems are continually assessed for threats and vulnerabilities and remediated as required by the Vulnerability Management Standard to ensure protection from external malicious acts.
 - We conduct continual testing for web code security vulnerabilities (cross-site scripting, SQL Injection, etc.) during the development cycle and in production.
4. All potential security incidents are investigated and remediated as required by our Incident Investigation & Response Standard, any resulting problems are managed to prevent any recurrence throughout the registry.

We believe the security measures detailed in this application are commensurate with the nature of the TLD string being applied for. This string might be considered by some to have public trust implications (as discussed in Guidebook Q30), accordingly, the following additional security measures will be implemented to protect consumers using this TLD including, but not limited to:

1.      Periodic audit of Whois data for accuracy.
2.      Deeper and more extensive verification of Whois data accuracy, with associated remediation and takedown processes.
3.      Regular monitoring of registered domains for pharming, phishing, spam, botnets, copyright infringement and other forms of abuse, and remediation and takedown processes.
4.      A new Domain Protected Marks List (DPML) product for trademark protection;
5.      A new Claims Plus product for trademark protection;
6.      Terms of use that prohibit illegal or abusive activity;

7.      Limitations on domain proxy and privacy service;
8.      Published policies and procedures that define abusive activity
9.      Require that registrars have a $^{24}/_{7}/_{365}$ abuse contact and a remediation / takedown processes.
10.     Exclusion of registrars with a history of poor compliance.
11.     Proper resourcing for all of the functions above.


7.0     RESPONSIBILITY OF INFORMATION SECURITY
See Question B Response Section 10.

# EXHIBIT AC-104

| Application ID: | 1-1527-54849 |
|---|---|
| Applied-for String: | WEB |
| Priority Number: | 1218 |
| Applicant Name: | Ruby Glen, LLC |

## Overall Initial Evaluation Summary

| Initial Evaluation Result | Pass |
|---|---|

Congratulations!

Based on the review of your application against the relevant criteria in the Applicant Guidebook (including related supplemental notes and advisories), your application has passed Initial Evaluation.

## Background Screening Summary

| Background Screening | Eligible |
|---|---|

Based on review performed to-date, the application is eligible to proceed to the next step in the Program. ICANN reserves the right to perform additional background screening and research, to seek additional information from the applicant, and to reassess and change eligibility up until the execution of the Registry Agreement.

## Panel Summary

| String Similarity | Pass - Contention |
|---|---|

The String Similarity Panel has determined that your applied-for string is visually similar to another applied-for gTLD string, creating a probability of user confusion. Based on this finding and per Sections 2.2.1.1 and 2.2.1.2 of the Applicant Guidebook, your application was placed in a string contention set.

| DNS Stability | Pass |
|---|---|

The DNS Stability Panel has determined that your application is consistent with the requirements in Section 2.2.1.3 of the Applicant Guidebook.

| Geographic Names | Not a Geographic Name - Pass |
|---|---|

The Geographic Names Panel has determined that your application does not fall within the criteria for a geographic name contained in the Applicant Guidebook Section 2.2.1.4.

| Registry Services | Pass |
|---|---|

The Registry Services Panel has determined that the proposed registry services do not require further review.

| Technical & Operational Capability | Pass |
|---|---|

The Technical & Operational Capability Panel determined that:

Your application meets the Technical & Operational Capability criteria specified in the Applicant Guidebook.

| Question | Score |
|---|---|
| 24: SRS | 1 |
| 25: EPP | 1 |
| 26: Whois | 2 |
| 27: Registration Life Cycle | 1 |
| 28: Abuse Prevention and Mitigation | 1 |
| 29: Rights Protection Mechanism | 2 |
| 30: Security Policy | 2 |
| 31: Technical Overview of Registry | 1 |
| 32: Architecture | 2 |
| 33: Database Capabilities | 2 |

| | | |
|---|---|---|
| 34: Geographic Diversity | 2 | |
| 35: DNS Service | 1 | |
| 36: IPv6 Reachability | 1 | |
| 37: Data Backup Policies & Procedures | 1 | |
| 38: Data Escrow | 1 | |
| 39: Registry Continuity | 2 | |
| 40: Registry Transition | 1 | |
| 41: Failover Testing | 1 | |
| 42: Monitoring and Fault Escalation | 2 | |
| 43: DNSSEC | 1 | |
| 44: IDNs (Optional) | 1 | |
| Total | 29 | |
| Minimum Required Total Score to Pass* | 22 | |

*No zero score allowed except on optional Q44*

| **Financial Capability** | | **Pass** |
|---|---|---|

The Financial Capability Panel determined that:

Your application meets the Financial Capability criteria specified in the Applicant Guidebook.

| Question | Score |
|---|---|
| 45: Financial Statements | 1 |
| 46: Projections Template | 1 |
| 47: Costs and Capital Expenditures | 2 |
| 48: Funding and Revenue | 1 |
| 49: Contingency Planning | 2 |
| 50: Funding Critical Registry Functions | 3 |
| Total | 10 |
| Minimum Required Total Score to Pass** | 8 |

**No zero score allowed on any question*

# EXHIBIT AC-105

# HIGHLY CONFIDENTIAL-
# ATTORNEYS' EYES ONLY

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTER FOR DISPUTE RESOLUTION

| | |
|---|---|
| AFILIAS DOMAINS NO. 3 LTD., | ICDR CASE NO: 01-18-0004-2702 |
| Claimant, | |
| and | |
| INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, | |
| Respondent, | |
| and | |
| VERISIGN, INC. and NU DOTCO, LLC. | |
| *Amicus Curiae*. | |

**VERISIGN, INC.'S PRE-HEARING BRIEF (PHASE II)**

**26 June 2020**

**HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY**

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# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Page(s)**

## I.    INTRODUCTION

*Amicus* VeriSign, Inc. ("Verisign") submits this Brief in opposition to the claims of Afilias Domains No. 3 LTD ("Afilias") in this Independent Review Process ("IRP").  Verisign further specifically joins in Sections II and III.A of the Brief of *amicus* NU DOTCO, LLC ("NDC"), respectively, setting forth (i) the background facts to this IRP and (ii) the scope of this Panel's authority, including the issues properly presented to the Panel for decision.

As set forth in NDC's Brief, Section 4.3(o) of the Bylaws of the Internet Corporation for Assigned Names and Numbers ("ICANN") defines the scope of this Panel's authority, as pertinent here, as follows: "Declare whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws."[1]  According to ICANN, the Board exercised its business judgment to defer a decision on Afilias' objections to the .WEB auction pending the outcome of accountability and other proceedings.[2]  Thus, the only question properly before the Panel here is whether ICANN violated its Bylaws when it decided to defer a decision on Afilias' objections.  It is not within the Panel's authority to determine the merit or lack of merit of Afilias' objections or to order that NDC be disqualified and .WEB awarded to Afilias.

To the extent the Panel were to consider the merits of Afilias' objections to the delegation of .WEB to NDC -- an issue that ICANN has stated it has ***not*** considered[3] and that ICANN and *Amici* submit cannot properly be decided in the first instance by this Panel -- this Brief addresses, in order, the reasons why (1) the Domain Acquisition Agreement between Verisign and NDC ("DAA") fully complies with the Guidebook for the new gTLD program, and (2) there is no basis for refusing to delegate .WEB based on ICANN's mandate to promote competition.

If the Panel considers Afilias' objections to the potential delegation of .WEB to NDC, in Section II of the Brief, we explain (i) the proper interpretation of the Guidebook's limitations on transfers under the new gTLD program, (ii) that the DAA complies with the Guidebook, (iii) that

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[1] Afilias C-1 (ICANN Bylaws, § 4.3(o), *available at* https://www.icann.org/resources/pages/governance/bylaws-en).
[2] ICANN Rejoinder Memorial, ¶ 3.
[3] *Id.*, ¶ 117.

the DAA is fully consistent with industry practices under the new gTLD program, and (iv) that

Afilias' arguments of improper transfer or failure to amend NDC's application are without merit

and contrary to Afilias' own conduct.  In Section III of the Brief, we explain that (v) ICANN has

no regulatory authority, including over matters of competition, and (vi) there is no threat or

injury to competition by Verisign's potential operation of the .WEB registry.

## II.     THE DAA DOES NOT CONSTITUTE A RESALE, ASSIGNMENT OR TRANSFER OF RIGHTS OR OBLIGATIONS UNDER THE APPLICATION

### A.     Summary of Argument

1.      It is clear from the explicit terms of the DAA that it does not constitute a resale,

assignment or transfer of rights or obligations with respect to NDC's .WEB Application.  Afilias'

argument to the contrary ignores the plain language of the DAA, misstates governing contract

law, and misconstrues the Guidebook.  As set forth below, the DAA is fully compliant with the

Guidebook and also consistent with common industry practices under the new gTLD program.

2.      Redacted - Third Party Designated Confidential Information

. "In determining whether an assignment has been made,

'the intention of the parties as manifested in the instrument is controlling.'"  AA-9 (*Cal. Ins.

Guarantee Assn. v. Workers' Comp. Appeals Bd.*, 203 Cal. App. 4th 1328, 1335 (2012)).[6]

3.      *Second*, the rights and obligations established under the DAA ***are inconsistent***

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[4] Livesay Ex. H (Domain Acquisition Agreement Supplement ("DAA Supplement") (July 26, 2016), ¶ D).
[5] Livesay Ex. D (DAA (Aug. 25, 2015) § 7(a), Ex. A, § 1(k)); Sect. II.D.1, *infra*.
[6] In addressing the DAA, Afilias repeatedly fails to address the DAA Supplement executed between Verisign and NDC, pursuant to express provisions of the DAA, in response to false rumors of a sale of NDC spread by Afilias and those acting in concert with it.  (Sect. II.D, *infra*).  Afilias thus ignores contractual terms that form a part of the DAA, undoubtedly because, like the original DAA, the DAA Supplement is a clear contradiction of Afilias' claims.

*with an assignment or transfer* of rights or obligations under the Application.[7] A fundamental

principle of applicable law is that "[o]nce an assignment has been made, 'the assignor no longer

has a right to enforce the interest because the assignee has obtained *all* rights to the thing

assigned.'"[8] Following execution of the DAA, NDC retained all rights to enforce its interests

under the Application, and remained fully obligated to comply with it. If, as Afilias contends,

NDC had assigned or transferred rights under the Application to Verisign, Verisign would

instead hold all rights and obligations under the Application -- which it does not.

4.      *Third*, the only resale, assignment or transfer contemplated in the DAA is a

*possible <u>future and conditional</u>* assignment *of an as yet unexecuted registry agreement*, *<u>not the</u>*

*<u>Application</u>*. Specifically, the DAA provides that, in the event NDC were to prevail in the

auction and to sign a registry agreement with ICANN, NDC *thereafter* would apply to *ICANN*

*for its consent* to assign the "registry agreement" to Verisign.[9] Thus, the DAA provides nothing

more than an expectation of a possible future assignment of the registry agreement -- not a

present transfer of the rights and obligations under the Application. If the DAA constituted an

assignment or transfer of rights under the Application, Verisign currently would possess the right

to execute the registry agreement in its own name upon the auction award.[10] Verisign does not

possess that right, nor is it alleged to possess that right by any party in the IRP.

5.      *Fourth*, the interpretation of the Guidebook that is urged by Afilias as the basis

for its claim *is contrary to common industry practices and completely divorced from reality*.

There exists a robust secondary marketplace with respect to the new gTLD program.[11] Registry

agreements for new gTLDs regularly are assigned pursuant to pre- and post-delegation contracts,

including as part of pre-delegation financing contracts. Afilias' interpretation of the Guidebook

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[7] As discussed *infra* (Section II.C), the Guidebook uses the terms resell, assignment and transfer interchangeably, as in common usage. *E.g.*, AA-27 (*Restatement (Second) of Contracts* § 316 (1981) at *infra* note 21).

[8] AA-24 (*One Call Prop. Servs. Inc. v. Sec. First Ins. Co.*, 165 So. 3d 749, 752 (Fla. Dist. Ct. App. 2015) (quoting AA-11 (*Continental Cas. Co. v. Ryan Inc. E.*, 974 So. 2d 368, 376 (Fla. 2008) (emphasis added))). *See also* note 23.

[9] Livesay Ex. D (DAA, *supra* note 5, at Ex. A, § 3).

[10] *See, e.g.*, AA-19 (*Merchants Serv. Co. v. Small Claims Court of City & Cty. of San Francisco*, 35 Cal. 2d 109, 114 (1950)); AA-21 (*Modern Law of Contracts* § 21:6), *infra* at note 23.

[11] Afilias itself has long been active in the New gTLD Program secondary market – buying and selling new gTLDs and providing services necessary to the preparation and performance of new gTLD applications (Sect. II.D.3, *infra*).

cannot be reconciled with these common transactions, and would render highly uncertain the meaning of relevant Guidebook provisions. If adopted by the Panel, it would put in question numerous gTLD applications and past delegations -- which could be subject to collateral attack -- and could significantly damage the New gTLD Program. Indeed, under Afilias' interpretation, it would be difficult to imagine how there could be a successful new gTLD program at all. Either ICANN would have to re-write the Guidebook to establish new disclosure requirements and a regime to approve all applicants; third party contracts, which would be infeasible, *or* countless new gTLD applications and delegations potentially would be subject to collateral attack.

6. *Fifth*, in drafting the Guidebook, ICANN rejected proposed limits on post-delegation assignments proposed by Microsoft, which argued that "[t]he possibility of an active secondary market in gTLDs raises significant concerns."[12] In doing so, ICANN explained that the existing assignment provisions in the new gTLD registry agreement were sufficient to address any post-delegation assignment of registry agreements to new operators.[13] Afilias' argument here is essentially the same as Microsoft's proposal – *i.e.*, that the Guidebook should be read to include limitations on future assignments of new gTLDs. The Panel should not read into the Guidebook a limitation rejected by ICANN during the Guidebook drafting process.

7. *Sixth*, as Afilias itself has argued, ***any attempted transfer would, by operation of law, be of no force or effect*** because the Guidebook does not grant applicants transfer rights. As Afilias states, "VeriSign's interest in the VeriSign/NDC Agreement could not give VeriSign any rights" in NDC's Application, and thus all rights in the Application remain with NDC.[14]

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[12] AC-35 (ICANN, "New gTLDs Applicant Guidebook April 2011 Discussion Draft, Public Comment Summary and Analysis" (April–May 2011), at 89, *available at* https://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv6-30May11-en.pdf).
[13] *Id.*
[14] Afilias' *Amici* Opposition, ¶ 85; *see* AA-36 (International Institute for the Unification of Private Law (UNIDROIT), Principles of International Commercial Contracts (2016) at 314 ("The assignment of a right . . . is ineffective if it is contrary to an agreement between the assignor and the obligor limiting or prohibiting the assignment.")). Afilias also states:

> VeriSign has no rights in NDC's .WEB application, nor can it: the application's Terms and Conditions specifically prohibit NDC from reselling, assigning, or transferring *any* of NDC's rights or obligations in connection with its application to any third party . . . VeriSign appears to rely on its interest in its wholly separate agreement with NDC . . . . VeriSign's interest in the VeriSign/NDC Agreement could not give VeriSign any rights in either NDC's .WEB application (which, as noted above, is prohibited by the terms and conditions of that application) or in any future registry agreement that NDC might conclude with ICANN. (Afilias' *Amici* Opposition, ¶¶ 83–85 (emphasis added)).

8.    *Finally*, in a common refrain by Afilias in this IRP, Afilias attacks provisions of the DAA as sinister, much as Afilias has attacked ICANN's actions before and after the auction as sinister and in furtherance of various conspiracies.[15]  Afilias offers no evidence to support its conspiracy theories -- because none exists.  The DAA provisions that Afilias attacks mean what they say, and not what Afilias alleges them to mean.  They are common contractual undertakings in anticipation of Verisign's financing of NDC's bid and a possible future transfer of the .WEB registry agreement.  Afilias' insinuations about secret alliances or partiality in the interactions between ICANN and Verisign similarly are unfounded.  There were never any communications between ICANN and Verisign or NDC in relation to .WEB for any purpose other than responding to ICANN's requests for information in its investigations of Afilias' claims.[16]

**B.    Afilias Misapprehends The Guidebook's Assignment and Resale Limitations**

**1.    New gTLDs Are Commonly Transferred by Applicants**

9.    Hundreds of new gTLDs have been transferred from original applicants to new registry operators.  As explained more fully in Section II.D.3 *infra*, these transfers have included assignments pursuant to both pre- and post- delegation agreements, including pre-delegation agreements to finance auction bids in exchange for post-delegation assignments if the bids are successful.  These transactions have been reported following resolution of the contention sets and ICANN has approved the registry agreement assignments.  Accordingly, the DAA contemplates nothing more than that which has occurred many times before under the new gTLD program.

10.    Disregarding these common industry practices, Afilias rests its complaints about the DAA on a non-sensical interpretation of a single phrase in the Guidebook that limits the resale, assignment or transfer of an application -- ***not*** transfer of future rights under a registry

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The DAA itself expressly states that NDC has not and cannot assign or transfer its rights to the .WEB Application to any party (including Verisign). *See, e.g.*, Livesay Ex. H (DAA Supplement, *supra* note 4, ¶ C (NDC has not and "will not in the future sell, assign or transfer any . . . rights or obligations" in the Application)).

[15] *See* AC-48 (Jonathan Robinson, ".WEB Is ICANN's First Test of Accountability" (Oct. 28, 2016), *available at* https://afilias.info/blogs/web-icanns-first-test-accountability); AC-70 (Paul Livesay, Circle ID, "Afilias' Cynical Attempt to Secure a Windfall at Community Expense" (Nov. 7, 2016), *available at* http://www.circleid.com/posts/20161107_afilias_cynical_attempt_to_secure_a_windfall_at_community_expense/).

[16] Redacted - Th rd Party Des gnated Conf dent a  Informat on

agreement. Notwithstanding ICANN's approval of hundreds of post-delegation transfers of new gTLDs, this sentence of the Guidebook (to *amici's* knowledge) has never been applied by ICANN to find a violation of the Guidebook or to challenge the transfer of a new gTLD.

**2.      The Language of Section 10 Does Not Support Afilias' Claims**

11.      Section 10 of Module 6 of the Guidebook is intended to limit -- or, if taken literally, to exclude -- the acquisition of rights by an applicant by virtue of its gTLD application. It provides that an applicant would only acquire rights with respect to the subject gTLD upon execution of a post-delegation registry agreement with ICANN.  Section 10 provides in full:

> 10.      ***Applicant understands and agrees that it will acquire rights in connection with a gTLD only in the event that it enters into a registry agreement with ICANN***, and that applicant's rights in connection with such gTLD will be limited to those expressly stated in the registry agreement. In the event ICANN agrees to recommend the approval of the application for applicant's proposed gTLD, applicant agrees to enter into the registry agreement with ICANN in the form published in connection with the application materials. (Note: ICANN reserves the right to make reasonable updates and changes to this proposed draft agreement during the course of the application process, including as the possible result of new policies that might be adopted during the course of the application process). ***Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application.***[17]

12.      The last sentence of Section 10 adds that the applicant may not resell, assign or transfer the applicant's rights or obligations with respect to an application.  There is no other reference to these terms in the hundreds of pages of the Guidebook or related documentation. Nor has this provision ever been applied to disqualify an application for a new gTLD.

13.      Neither Section 10, nor any other section of the Guidebook, relevant ICANN policy, Bylaw, or other documentation, defines the terms "resell, assign or transfer."[18]  The Guidebook also does not specify what, if any, rights an applicant has that could possibly be subject to a resale, assignment or transfer, at least prior to the execution of a registry agreement. Indeed, the first sentence of Section 10 expressly states that the applicant has ***no rights*** in

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[17] Afilias C-3 (ICANN Guidebook, at Module 6, § 10 (emphasis added)).
[18] The terms "resell," "assign" and "transfer" are not separately used or defined anywhere in the Guidebook.  Both in the Guidebook and common usage, the terms are used interchangeably without any distinction among them.  They also are used interchangeably in this brief for the reasons explained in more detail in Section II.C, *infra.*

connection with a gTLD until a registry agreement has been executed, and even then, an

applicant shall have only those rights expressly granted in the registry agreement. There is no

dispute that a registry agreement was never executed with respect to .WEB. Taken literally, it is

unclear under the language of Section 10 that NDC had any rights subject to the prohibition on

transfer, except possible ownership of rights that may exist in the Application itself.[19]

14. Nevertheless, it is this limited phrase at the end of Section 10 -- that applicant

shall not "resell, assign or transfer" its application rights -- upon which Afilias bases this IRP.

As explained below, Afilias' claims that the DAA violates this provision are meritless.[20]

  **C. The Terms "Resell, Assign or Transfer" Refer to a Present (*Not* Future)
Transfer of the Ownership of Rights and Obligations Under an Application**

15. Common usage, the context here, industry practice and well settled principles of

contract interpretation each requires that the phrase "resell, assign or transfer" be interpreted to

mean the present transfer in ownership of rights or obligations under an application, divesting the

applicant of those rights or obligations, and vesting them in a third party. A different

construction of these terms would create significant uncertainties in the interpretation of the

Guidebook while failing to serve any of the purposes sought to be achieved by the Guidebook.

16. As in common usage, the Guidebook uses the terms resell, assign or transfer

interchangeably, and does not make any distinction among them.[21] They are found only in the

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[19] The Guidebook provides even further limits on an applicant's rights, at the same time providing substantial discretion, or business judgment, for ICANN under the Guidebook:

> 3. Applicant acknowledges and agrees that *ICANN has the right to determine not to proceed with any and all application* for new gTLDs . . . . 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 law or policy . . . ." (*Id.* at Module 6, § 3 (emphasis added)).

[20] Afilias has added a claim that NDC improperly failed to update its Application, a claim that ultimately depends on Afilias' claims that the DAA constitutes an unauthorized transfer under Section 10. Sect. II.F.3, *infra*.

[21] "If you want to *transfer* your contractual rights to another person, you will need to make an *assignment* . . . . After an assignment takes place, full contractual rights will be *transferred* to the *assignee*. These will be the exact same rights as enjoyed by the original contracted party." AA-38 (Upcounsel, "Transfer of Rights Contract: Everything You Need to Know," *available at* https://www.upcounsel.com/transfer-of-rights-contract (emphasis added)); *see, e.g.*, AA-27 (*Restatement (Second) of Contracts* § 316, cmt. c (1981) ("In this Chapter rights are said to be 'assigned'; duties are said to be 'delegated.' . . . '*Assignment'* is the *transfer* of a right by the owner (the obligee or assignor) to another person (the assignee)." (emphasis added))); AA-7 (*Brewer Corp. v. Point Ctr. Fin., Inc.*, 223 Cal. App. 4th 831, 842 (2014), *as modified on denial of reh'g* (Feb. 27, 2014) ("An *assignment* is defined as a '*transfer* of rights or property.'" (quoting AA-6 (Black's Law Dict. (9th ed. 2009), at 136 (emphasis added)))); AA-16 (*Johnson v. J.G. Wentworth Originations, LLC*, 391 P.3d 865, 868–69 (Or. App. 2017) ("[W]e conclude that Met Tower was entitled to enforce the anti-*assignment* clause in the structured settlement agreement, barring the *transfer*" (emphasis added)); *see also* AA-15 (*In re Foreman*, 850 N.E.2d 387, 389–90 (Ill. App. 2006)).

single phrase at the end of Section 10 and, as noted above, are not separately defined or used. While not defined by ICANN, the terms resell, assign and transfer do have an established legal meaning with corresponding legal requirements. Importantly, to resell, transfer or assign a right requires a *present* transfer of the ownership of a right.[22] Once a transfer has occurred, the transferor is divested of ownership of the right, and the transferee stands in the shoes of the transferor.[23] The terms of the DAA are inconsistent with these requirements. Section II.C, *infra*.

17.  Afilias' position in this IRP is based on an untenable interpretation of the term "transfer." It takes the view that even where a contract expressly disclaims a transfer or assignment of rights, the contract nevertheless violates Section 10 if it includes among its terms an obligation of the applicant, or a right in a third party, that may affect or indirectly limit the performance by the applicant of any of its obligations or rights with respect to the application. Afilias equates such a third party contract with an actual resale, assignment or transfer of the new gTLD application itself in contravention of Section 10.[24] Were Afilias correct, Section 10 would make it impossible for new gTLD applicants to enter into a wide range of important and necessary contracts such as financing arrangements, contracts for services, and security agreements, ***without creating a risk of invalidating their gTLD application***. Under Afilias' construction, such contracts would create obligations to third parties that could indirectly limit or affect an applicant's exclusive control over rights or obligations under its gTLD application, and therefore amount to a conveyance of that application in violation of the Guidebook.[25]

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[22] AA-31 (*Springfield Int'l Rest., Inc. v. Sharley*, 44 Or. App. 133, 140 (1980) ("A contract to assign a right in the future is not an assignment." (citing AA-26 (*Restatement (First) of Contracts*, § 166(1) (1932))). "To 'assign' ordinarily means to transfer title or ownership of property, but an assignment, to be effective, must include manifestation to another person by the owner of his intention to transfer the right, without further action, to such other person or to a third person." AA-18 (*McCown v. Spencer*, 8 Cal. App. 3d 216, 225 (1970) (emphasis added) (internal citation omitted)).

[23] *See* Authorities at note 8, *supra*; AA-19 (*Merchants Serv. Co.*, 35 Cal. 2d at 114 (an assignment contemplates that the former "extinguished his right . . . and this right was transferred to the company, so that it thereafter stood in the place of" the assignor)); AA-21 (*Modern Law of Contracts* § 21:6 ("An assignor must show an intention to divest himself of a property interest and to vest indefeasible title to that property interest in an assignee . . . . Once the assignment is made, the assignee stands in the shoes of the assignor and may assert rights under the contract the same as the assignor. The assignor no longer has the right or power to enforce the assigned interest.")); AA-29 (*Sierra Equity Grp., Inc. v. White Oak Equity Partners, LLC*, 650 F. Supp. 2d 1213, 1227 (S.D. Fla. 2009) ("'An assignment is a transfer of all the interests and rights to the thing assigned. Following an assignment, the assignee 'stands in the shoes of the assignor' and the 'assignor retains no rights to enforce the contract' at all.'")).

[24] Afilias' Amended IRP Request, ¶¶ 64–67.

[25] *Id.* Section II.D.3, *infra*.

18.     As described in detail in Section II.D.3, *infra*, Afilias' interpretation of the Guidebook limitations on transfers is contrary to industry practice, including Afilias' own conduct. It is also contrary to provisions of the Guidebook, among others, that expressly recognize that contention set members may at any time (other than during the Blackout Period) consider "post-auction ownership transfer arrangements" (Afilias C-4, Auction Rules for New gTLDs (Feb. 24, 2015), § 68) and may form joint ventures with respect to the gTLD while an application is pending (Afilias C-3, ICANN Guidebook, at Module 4, § 4.1.3).

19.     Afilias' attempt to interject uncertainty regarding the term "transfer" is also contrary to the Guidebook's purposes. As ICANN has explained, the Guidebook's limitation on an applicant's transfer of rights is meant to ensure that the gTLD operator has the technical and financial ability to operate the registry.[26] ICANN also has explained that this same criteria is used to approve a post-delegation request for assignment of a registry agreement -- specifically, whether the applicant possesses the financial and technical ability to operate the gTLD.[27]

20.     It is well-established that restrictions on the assignment or transfer of contract or property rights are to be narrowly construed consistent with the purposes of the contract or, here, the Guidebook.[28] It is likewise settled that such terms should be construed narrowly to avoid a forfeiture, such as the forfeiture that Afilias seeks to achieve through this IRP.[29]

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[26] ICANN Response to Amended IRP Request, ¶¶ 21, 27, 29.
[27] *Id.*, ¶ 26; Willett Stmt. (May 31, 2019), ¶ 38; *see also* Section II.D.5, *infra* (ICANN rejection of Guidebook limits on post-delegation assignments because ICANN's right to consent to any assignment under the standard form registry agreement is sufficient to protect the community's interests). It was specifically on this basis that ICANN approved – for Afilias – the post-delegation transfer of .MEET from Afilias to Google and the transfers to Afilias of .PROMO, .ARCHI, .BIO and .SKI. (ICANN Opposition to Request for Emergency Panelist and Interim Measures of Protection, ¶¶ 27–30). It is beyond dispute that Verisign has the technical and financial ability to operate the .WEB registry.
[28] *See, e.g.*, AA-12 (*Creditors Adjustment Bureau, Inc. v. IBT Media Inc.*, 2019 WL 3082845, at \*2 (N.D. Cal. July 15, 2019) (court narrowly construed the contractual prohibitions on the assignment of "rights," holding that it did not prohibit an assignment of the right to assign a claim for damages for a breach of contract)); AA-5 (*Benton v. Hofmann Plastering Co.*, 24 Cal. Rptr. 268, 273 (Ct. App. 1962) ("The area of limitations on assignments is, of course, one in which the courts strictly construe such restrictions just as they jealously guard the right to transfer property in general.")); AA-16 (*J.G. Wentworth Originations*, 391 P.3d at 868–69 ("[P]ublic policy strongly favors the free transferability of property")); AA-30 (*Spingola v. Whitewater Mountain Resorts of Connecticut, Inc.*, 2002 WL 31894720, at \*4 (Conn. Super. Ct. Dec. 10, 2002) ("[A]nti-assignment clauses are construed narrowly whenever possible")); AA-39 (*Wonsey v. Life Ins. Co. of N. Am.*, 32 F. Supp. 2d 939, 943 (E.D. Mich. 1998) ("As the latest Restatement makes clear, the *modern trend* with respect to contractual prohibitions on assignments is to interpret these clauses narrowly, as barring only the delegation of duties, and not necessarily as precluding the assignment of rights from assignor to assignee" (emphasis in original)).
[29] AA-20 (*Milenbach v. Comm'r*, 318 F.3d 924, 936 (9th Cir. 2003) ("Forfeitures are not favored, however, and courts must strictly construe forfeiture provisions against the party on whose behalf they are invoked."); AA-17

**D. The Express Terms of the DAA Establish that It Does Not Transfer Rights or Obligations with Respect to the Application**

21.     The DAA consists of two documents.  The first is an executory agreement as of August 25, 2015 between NDC and Verisign, pursuant to which:

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> (iii) if NDC prevailed as the winner of the Contention Set and ultimately entered into a registry agreement with ICANN for the .WEB gTLD, then NDC would apply to ICANN for its consent to assign the registry agreement to Verisign Redacted - Third Party Designated Confidential Information [32]

22.     The DAA is explicit and unambiguous that the parties contemplated only a possible contingent, future assignment of the registry agreement following (i) resolution of the contention set, (ii) execution of a registry agreement, and (iii) ICANN's consent to the assignment.[33]  Rights and obligations under the Application were never assigned by the DAA.

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The false rumors were spread by Afilias and other Contention Set members in an effort to coerce NDC to agree to a private auction or otherwise interfere with a

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(*Maples v. SolarWinds, Inc.*, 50 F. Supp. 3d 1221, 1228 (N.D. Cal. 2014) ("[A] court has a duty to construe a contract to avoid a forfeiture, if at all possible." (citing AA-8 (Cal. Civ. Code § 1442))); AA-3 (*Ballard v. MacCallum*, 15 Cal. 2d 439, 444 (1940) ("We have two possible constructions, one of which leads to a forfeiture and the other avoids it.  In such a case the policy and rule are settled, both in the interpretation of ordinary contracts and instruments transferring property, that the construction which avoids forfeiture must be made if it is at all possible.")).
[30] Livesay Ex. D (DAA, *supra* note 5, at 1).
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] Livesay Ex. H (DAA Supplement, *supra* note 4).
[35] Redacted - Th rd Party Des gnated Conf dent a Informat on

public auction of .WEB.  *See* NDC Brief at § II.B.5.

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### 1. The DAA Provides Only for Financing and a Contingent Future Assignment of the Registry Agreement Upon ICANN's Consent

24.    The DAA did not sell, assign, or transfer the Application or its rights or

obligations.  The DAA provides only for a possible future assignment of a registry agreement

upon ICANN's prior consent, Redacted - Third Party Designated Confidential Information

NDC remains the applicant today.

25.    The provisions of the DAA regarding a potential future assignment of the registry

agreement are clear and unambiguous:

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Contrary to Afilias' claims, the DAA provides only for a future, conditional assignment of the

*registry agreement --* **not** the Application -- upon consent by ICANN.

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[36] Livesay Ex. H (DAA Supplement, *supra* note 4, ¶¶ A & C).
[37] Livesay Ex. D (DAA, *supra* note 5, at Ex. A, § 3(c) (emphasis added)).
[38] *Id.* at Ex. A, § 3(h) (emphasis added).
[39] *Id.*, § 3 (emphasis added).
[40] *Id.*, § 5(a)(iv) (emphasis added).

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29. Redacted - Third Party Designated Confidential Information

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[41] *Id.*, § 4(c).
[42] *Id.*, § 4(a)(i).
[43] *Id.*, § 9.
[44]

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[45] *Id.* at Ex. A, § 3(b).
[46] *Id.* at Ex. A, § 3(c)–(d).
[47] Livesay Ex. H (DAA Supplement, *supra* note 4, ¶ C).
[48] Livesay Ex. D (DAA, *supra* note 5, at Ex. A, § 9).
[49] Contrary to Afilias' argument, NDC remained the applicant and the DAA could terminate according to its terms and NDC end up as the registry operator for .WEB. *See* Livesay Stmt. (June 1, 2020), ¶ 23; Sect. II.D.6, *infra.*
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30.     Redacted - Third Party Designated Confidential Information

31.     None of these terms would have been necessary if NDC's rights or obligations in the Application had been resold, assigned or transferred to Verisign by virtue of the DAA. Stated differently, the DAA's numerous contingencies, default, and termination provisions were antithetical to a present assignment or transfer of the Application.  Section II.D, *supra*.

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### 2.     The DAA Supplemental Agreement Confirms that There Was No Assignment or Transfer

32.     Afilias' attempt to interfere with the public auction of .WEB began before the auction, before Afilias knew that Verisign was providing financing to NDC, and before Afilias knew of the DAA.  As explained in more detail in the NDC Brief at Section II.B.5¸ Afilias worked in concert with other Contention Set members to force a "private auction" that would fix the results of the auction before it occurred, including by offering to "guarantee" the payment of $17.02 million to NDC for losing the auction.  Afilias tried further to prevent a public auction by

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[50] Livesay Ex. D (DAA, *supra* note 5, at Ex. A, § 1(k) (emphasis added)).
[51] *Id.* at Ex. B.

falsely claiming to ICANN that there had been a change in ownership or management of NDC.[52]

33.     As a result of Afilias' pre-auction conduct, rumors began circulating that NDC had sold or transferred control of the company to an unknown third party -- rumors that were later proven untrue.[53]  As noted above, on becoming aware of these rumors, Verisign requested assurances of performance by NDC under the terms of the DAA entitling it to such assurances at any time.[54]

34.     Redacted - Third Party Designated Confidential Information

### 3.     The DAA is Fully Consistent with Industry Practices Under the Guidebook, Including Assignments of gTLDs Approved by ICANN

35.     The DAA is consistent with industry practices in acquiring and assigning gTLDs

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[52] Rasco Stmt. (June 1, 2020), ¶¶ 75–81.
[53] Livesay Ex. H (DAA Supplement, *supra* note 4, ¶ A).
[54] *Id.*; Livesay Ex. D (DAA, *supra* note 5, at § 4(k)).
[55] *Id.*, ¶ C (emphasis added).
[56] *Id.*, ¶ D (emphasis added).
[57] *Id.*, ¶ F (emphasis added).

as part of the new gTLD program, including assignments pursuant to pre- and post- auction agreements. Many of these transactions have been publicly reported following resolution of the relevant contention sets, and post delegation assignments have been approved by ICANN. As explained in the Livesay and Rasco Witness Statements, Verisign and NDC were aware of these transactions before they executed the DAA.[58]

36.     According to ICANN, approximately 1,200 new gTLDs have been delegated and are operational under the New gTLD Program. *Hundreds* of these gTLDs have been assigned or transferred by the original applicant to a new operator for financial gain or other reasons. In many instances, the gTLDs were assigned prior to being operated by the original applicant and with the intent that they be operated for purposes other than those specified by the original applicants in their applications. ICANN has approved these transfer requests so long as the assignee has the requisite financial and technical capability to operate a TLD.[59]

37.     Transactions like the DAA are commonplace. ICANN has never rejected a transfer request on the ground that the assignment agreement was executed prior to resolution of the contention set or because the purpose of the TLD would change following the assignment.[60]

38.     **Afilias' Own Purchases and Sales of .MEET, .PROMO, .ARCHI, .BIO, .SKI and other New TLDs.** As ICANN has described:

> Afilias Limited applied for .MEET in 2012, stating that it planned to make it "the most popular, accessible, and innovative destination on the Internet where people seeking online dating and companionship services can learn about dating, companionship services and registrars that offer .MEET domain names." On 16 January 2014, ICANN and Afilias Limited entered into a .MEET Registry Agreement. But before launching .MEET -- *i.e.,* before serving a single customer --Afilias Limited sought to transfer the .MEET Registry Agreement to Charleston Road Registry Inc. d/b/a/ Google Registry ("Google") in October 2014. According to the transfer application, Google planned on converting .MEET from a dating platform to a gTLD that provided "web-based business meetings." *Because ICANN determined that Google had the technical and financial ability to operate .MEET, ICANN approved the transfer even though the new objective for the gTLD was radically different than that expressed in the Afilias application*.

[58] Livesay Stmt. (June 1, 2020), ¶¶ 8–10; Rasco Stmt. (June 1, 2020), ¶¶ 42–45.
[59] ICANN Opposition to Request for Emergency Panelist and Interim Measures of Protection, ¶¶ 25–30; *supra* at Section II.D.3.
[60] Willett Stmt. (May 31, 2019), ¶ 18.

29.    Likewise, in 2015, the entity that entered into a Registry Agreement with ICANN to operate .PROMO requested that ICANN approve a transfer of .PROMO to Afilias plc prior to delegation of .PROMO. *Although Afilias did not originally apply to operate .PROMO, ICANN approved the transfer based on a demonstration that Afilias was qualified to operate the gTLD*.

30.    Finally, as described on its own corporate website, "Afilias has an active program for acquiring new Top Level Domains." For instance, in 2016, Afilias plc announced its acquisition of StartingDot, which had become the registry operator for .ARCHI, .BIO and .SKI through the Program. In Afilias plc's words, "[t]he acquisition agreement is part of Afilias' ongoing program of acquiring new TLDs to add to its portfolio." *ICANN approved the transfer of those TLDs to Afilias plc based on its technical and financial ability to operate them.*"[61]

39.    **Afilias' "We Buy Any Car" Campaign to Acquire New gTLDs.**  At roughly the same time that the DAA was signed, Afilias was promoting "an overt campaign to snap up struggling new gTLDs at bargain basement prices."[62]  According to Afilias' Chief Marketing Officer, Afilias could potentially buy tens of gTLDs during 2015, comparing its strategy "to the 'We Buy Any Car' business model."[63]  Afilias' interest in acquiring new gTLDs was promoted in ICANN meeting halls and advertised in industry journals.[64]  Afilias' claims here stand in stark contrast to its own practices in acquiring and assigning new gTLDs outside this proceeding.

40.    **Assignment of .BLOG in Exchange for Pre-Delegation Financing.**  Afilias participated in the contention set for the .BLOG gTLD.  WordPress, another registry operator, acquired rights to the .BLOG gTLD based on an application submitted by Primer Nivel S.A.[65]  The parties waited until after Primer Nivel prevailed in the auction for .BLOG, and had executed the .BLOG registry agreement, before requesting assignment to WordPress.[66]  According to press reports, *WordPress financed Primer Nivel's winning auction bid but "wanted to stay*

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[61] ICANN Opposition to Request for Emergency Panelist and Interim Measures of Protection, ¶¶ 28–30 (emphasis added).

[62] AC-64 (Kevin Murphy, Domain Incite, "Afilias Wants to Buy Your Failed gTLD" (July 7, 2015), *available at* http://domainincite.com/18898-afilias-wants-to-buy-your-failed-gtld).

[63] *Id.* ("'There are entrants in the market who . . .  for whatever other reason they're coming to the conclusion this isn't the business they should be in and they're looking for options,' [Afilias Chief Marketing Officer] LaPlante said.").

[64] *Id.* Examples of Afilias' advertisements are Exhibits AC-45, AC-46, and AC-47 hereto.

[65] AC-1 (.blog Registry Agreement ICANN-Primer Nivel, *available at* https://www.icann.org/sites/default/files/tlds/blog/blog-agmt-pdf-14may15-en.pdf); AC-2 (.blog Assignment and Assumption Agreement Primer Nivel-WordPress, *available at* https://www.icann.org/sites/default/files/tlds/blog/blog-assign-pdf-29apr16-en.pdf).

[66] *Id.*

***stealth while in the bidding process and afterward in order not to draw too much attention.****[67]

WordPress financed Primer Nivel's bid in exchange for an assignment of the .BLOG gTLD following the auction. Primer Nivel did not disclose the terms of its financing from WordPress prior to the auction. ICANN consented to the assignment.[68] Afilias, as part of the contention set, did not object. There was no claim of any violation of the Guidebook.

41. **Assignments by Donuts in Exchange for Pre-Delegation Financing.** Donuts is another very active player in the new gTLD program and secondary market, and a member of the .WEB Contention Set. It entered into an agreement with RightSide Media Group Limited ("Rightside"), pursuant to which Rightside provided financing for Donuts' acquisitions of multiple gTLDs in exchange for the right to an assignment of those gTLDs to Rightside in the event Donuts were to succeed in obtaining rights to them.[69] Numerous new gTLDs acquired by Donuts subsequently were transferred to Rightside with ICANN's consent.[70]

42. **Acquisition of .TECH Contingent on Successful Auction.** There are countless variations in pre-delegation contracts to acquire new gTLDs post-auction. Radix acquired the rights to the .TECH gTLD by means of a pre-auction agreement with one of the applicants, Dot Tech, LLC ("Dot Tech"), contingent upon Dot Tech subsequently prevailing in an auction for the TLD.[71] Dot Tech won the auction and thereafter Dot Tech's application was updated to add

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[67] Livesay Ex. F (Alan Dunn, NameCorp, "Knock Knock WordPress Acquires Blog for 19 Million" (May 15, 2016), *available at* https://namecorp.com/knock-knock-wordpress-acquires-blog-for-19-million/ (emphasis added)). Verisign believes that neither Primer Nivel nor WordPress disclosed the financing of Primer Nivel's auction bid to ICANN or others before the auction. ICANN's gTLD application does not require applicants to disclose the source(s) of funds for their bids. Thus, an applicant securing a new source of funding can hardly be characterized as a "change[] in financial position" necessitating an update to a pending application under Section 1.2.7, which clearly is intended only to ensure that ICANN is made aware of reasons why an applicant may no longer be financially capable of carrying out its obligations as registry provider.

[68] Livesay Ex. G (.blog Registry Agreement ICANN-Primer Nivel (webpage), *available at* https://www.icann.org/resources/agreement/blog-2015-05-14-en) ("On 14 May 2015, ICANN and PRIMER NIVEL S.A., entered into a Registry Agreement under which PRIMER NIVEL S.A., operated the .blog top-level domain. Effective 29 April 2016, the Registry Agreement was assigned by PRIMER NIVEL S.A. to Knock Knock WHOIS There, LLC which now operates the .blog top-level domain.")).

[69] AC-50 (Demand Media SEC Filing (May 10, 2013), at 19).

[70] For example, under the Rightside/Donuts pre-delegation agreements, multiple TLDs were assigned in exchange for financing auction bids. The pre-delegation agreements were reported in the press and SEC filings and the subject of specific correspondence to ICANN from Eric Stoler. *Amici* believe that ICANN approved all of the assignments. AC-50 (Demand Media SEC Filing (May 10, 2013), at 19); AC-51 (Rightside SEC Filing (2014)); Rasco Stmt. (June 1, 2020), ¶ 43.

[71] Livesay Stmt. (June 1, 2020), ¶ 14; Rasco Stmt. (June 1, 2020), ¶ 44.

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Radix personnel and to substitute Radix for Dot Tech's former parent company.[72]  To *amici's* knowledge, these transactions were not disclosed to ICANN or the .TECH contention set.

43.      **Other Contracts Regarding New gTLD Applications.**  Afilias contends that third-party contracts that may affect or limit the sole and exclusive control over rights or obligations of an applicant are a violation of Section 10.[73]  This argument is inconsistent with the practices of numerous providers of services -- including Afilias -- in support of applicants.  For example, Afilias advertises on its website that "[a]s one of the leaders in TLD registry services, we'd be happy to ***help you with the application and technology needed for the next round***" of gTLD applications.[74]   In this IRP, however, Afilias claims that entering into such contracts violates the Guidebook.[75]  Valideus advertises a range of services, including advice and assistance in "the preparation of the required Financial, Technical and Operational plans," "draft[ing] answers and prepar[ing] supporting documents" for the gTLD application, and providing advice on "strategies for bidding" in gTLD auctions.[76]  (*Compare with* Afilias' claims at Section II.D.6, *infra*).   CentralNic specifically advertises financing services for new gTLD applicants wishing to participate in auctions.[77]  (*Compare with* Afilias' claims at Section II.D.6, *infra*).   FairWinds Partners advertises that, among other services, it "[l]iaises with ICANN to document and report the results of clients' pre-delegation testing . . .".[78]  (*Compare with* Afilias' claims at Section II.D.6, *infra*).

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[72] Rasco Stmt. (June 1, 2020), ¶ 44; Rasco Ex. E (.TECH Application (Revised) (Oct. 23, 2014)); Livesay Stmt. (June 1, 2020), ¶ 14.

[73] Afilias Reply Memorial, ¶ 54.

[74] AC-44 (Afilias, "New TLDs: Top Level Domain Registry Services," *available at* https://afilias.info/global-registry-services/new-tlds (emphasis added)).

[75] An entire industry of service providers has built up around the new gTLD application process, with third-party companies providing applicants with services addressing every step of the process, including filling out the initial application, arranging financing for the gTLD, providing backend registry services, and even assisting applicants to respond to follow-up questions from ICANN regarding a filed application.  *See* AC-63 (Kevin Murphy, Domain Incite, "You might be surprised how many new gTLDs have changed hands already" (July 1, 2015), *available at* http://domainincite.com/18849-you-might-be-surprised-how-many-new-gtlds-have-changed-hands-already); AC-64 ("Afilias Wants to Buy Your Failed gTLD," *supra* note 62); AC-44 ("New TLDs: Top Level Domain Registry Services," *supra* note 74).

[76] AC-55 (Valideus, "New gTLD Application Management," *available at* http://www.valideus.com/services/new-gtld-application-management).

[77] AC-56 (CentralNic, "A Different Take on New TLDs from the CEO of a Well Established Company With a Big Footprint in Both .Com AND New TLD Camps" (May–June 2012), *available at* https://www.centralnic.com/company/news/2012/a-different-take-on-new-tlds-from-a-company-with-a-big-footprint-in-both-dotcom-and-new-tld-camps).

[78] AC-54 (FairWinds Partners, "Services," *available at* https://www.fairwindspartners.com/services/).

44.     None of these contractual arrangements violate the Guidebook.  Under such arrangements, the applicant remains the party ultimately responsible to ICANN for fulfilling any application obligations.  The service provider is not substituted as the applicant and has no rights with respect to the application.  The same is true with respect to the DAA.

45.     Likewise, Afilias' attack on Verisign's financing of NDC's bid cannot be squared with Afilias' admission that it used undisclosed third party financing in its own bid for .WEB and that its lenders exercised their control to limit the amount Afilias could bid at the auction, resulting in its loss of the auction and the award of .WEB to NDC.  This bid limitation in Afilias' financing agreement appears to be the reason why, during the Blackout Period, Afilias tried to bribe NDC to agree to a private auction, and to *lose the auction,* for the specific amount of $17.02 million.[79]

*     *     *

46.     There is no way around the fact that, under the DAA, NDC must seek ICANN's consent to any assignment of .WEB.  By entering the DAA, NDC and Verisign did not gain any advantage or avoid any scrutiny in the auction's administration, the award, or the execution of a registry agreement for .WEB.  (Section II.D.6, *infra*.)  It would be fundamentally unfair and a violation of the equal treatment required under ICANN's Bylaws if ICANN or this Panel were to adopt a new interpretation of the anti-assignment provision of the Guidebook that, contrary to industry practice, would render the DAA subject to collateral attack by Afilias.[80]

### 4.     "Fundamental Principles" of the New gTLD Program do not Prohibit Post-Application Assignments of Applications, as Afilias Contends

47.     Although there was not an assignment of NDC's Application, Afilias argues in its Reply that the public comment period for New gTLD applications requires that Rule 10 be interpreted as imposing an absolute bar against the resale, transfer, or assignment of an

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[79] The proposed auction agreement specified that the auction proceeds would be shared among losing bidders.  *See* NDC Brief at Sect. II.B.5.  The financing agreement undoubtedly placed numerous restrictions on Afilias with respect to its application and security for the lender.  Section II.F.3, *infra*.  Afilias' Amended IRP Request, ¶ 35 ("Under the terms of its bank financing agreements, Afilias was able to bid up to USD 135 million for .WEB . . . short of the USD 142 million needed to progress to the next round.").
[80] Afilias C-1 (Bylaws, *supra* note 1, § 1.1(a)(v) (ICANN will "[m]ake decisions . . . without singling out any particular party for discriminatory treatment . . . ")).

application.[81] Afilias' argument rests on the assumption that the public comment period allows objections to New gTLD applications based on the identity of the applicant or its alleged market position,[82] *and* that such comments would have an impact on the evaluation process. In fact, the Guidebook provides to the contrary.

48.     While anyone may submit a comment regarding a new gTLD application, only comments that are relevant to *evaluation criteria* may be considered in evaluating an application. There is no prohibition on Verisign participating in the New gTLD Program, and competition is not an evaluation criteria in the Guidebook. *See infra* at III.A.4. Thus, comments Afilias assumes would have been lodged with respect to NDC's application, had Verisign's role been known, would have had no relevance to ICANN's evaluation of NDC's application.[83]

### 5.     The Drafting History of the Guidebook Contradicts Afilias' Claims

49.     In drafting the Guidebook, ICANN 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 approve such assignment. Microsoft, for example, submitted a comment to the April 2011 Discussion Draft of the Guidebook arguing that "[t]he possibility of an active secondary market in gTLDs raises significant concerns."[84] To address its concern, Microsoft argued that "ICANN should revise section 7.5 of the Registry Agreement to prohibit assignments within a defined period (12-18 months) after delegation, which would decrease 'gTLD flipping'" and that "ICANN should develop 'Assignment Guidelines' that set forth the conditions and criteria that a proposed gTLD

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[81] Afilias Reply Memorial (May 4, 2020), ¶¶ 31–32.

[82] *Id.*, ¶ 31 ("The AGB's public comments section underscores the fundamental requirement that the identity of each applicant – and its intentions for obtaining rights to the gTLD in question – be disclosed to the public . . .").

[83] Afilias also argues that NDC's purported transfer or assignment of its Application render other "key elements of the application process . . . meaningless," including (i) the evaluation criteria concerning the applicant's business plan; (ii) applicant's ability to engage in private auctions; and (iii) the requirement that "Qualified Applicants" bid on their own behalf. (*Id.*, ¶ 63). *None* of these are "key elements" of the application process. As discussed *infra* at Section II.F.4, the "Mission/Purpose" of a new gTLD is not part of ICANN's evaluation criteria. There is no fundamental right to participate in a private auction; each applicant has an unfettered right to refuse to participate in a private auction. *See* Afilias C-3 (Guidebook, *supra* note 17, at Module 4, § 4.1.3). And the qualified bidder language misconstrued by Afilias is in the Bidder Agreement, applicable *only* after the evaluation process has been completed. In short, there is nothing "key" about any of the supposed program requirements identified by Afilias.

[84] AC-35 ("New gTLDs Applicant Guidebook April 2011 Discussion Draft, Public Comment Summary and Analysis," *supra* note 12, at 89).

Assignee must satisfy to obtain ICANN's approval of the proposed assignment."[85] Microsoft

added that "[such] conditions and criteria at a minimum must be the equivalent of the full range

of evaluation for new gTLD applicants."[86] Microsoft's concern was, *inter alia*, that the

Guidebook be revised to ensure that "participants do not successfully evade the examination and

objection process."[87]

50.     ICANN rejected Microsoft's proposal ***based on the assignment provisions of the***

***registry agreement***, stating that "Section 7.5 of the Registry Agreement provides that Registry

Operator must give certain notices and obtain ICANN's written consent in connection with an

assignment or change of control transaction," and the ***"criteria and Qualifications [for***

***evaluating assignments of the Registry Agreement] would include the evaluation criteria for***

***new gTLD applicants."***[88] ICANN concluded "[t]here is no compelling reason, ***given ICANN's***

***ability to evaluate and approve assignment transactions***, to impose an initial time-based

complete bar on such transactions."[89]

51.     The position Afilias takes in this IRP is a variation on the Microsoft proposal that

was rejected by ICANN.  Like Microsoft, Afilias asks the Panel to read into the Guidebook a

limitation on agreements for future assignments of new TLDs and to impose other limiting

conditions on future assignments.  The Guidebook rejects such proposals.  Also like Microsoft,

Afilias' rationale for such restrictions is that an applicant otherwise would "evade the

examination and objection process."[90]  The Guidebook similarly rejects this rationale for limiting

registry agreement assignments.  As ICANN explained, its ability to approve or disapprove

assignments under Section 7.5 of the Registry Agreement is sufficient to protect the

community's interests.  Under basic principles of legal construction, the Panel may not read a

requirement into the Guidebook that ICANN expressly considered and rejected.[91]

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[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.* (emphasis added).
[89] *Id.* (emphasis added).
[90] *Id.*
[91] *See* AA-1 (*Avila v. Spokane School Dist.*, 852 F.3d 936, 943–44 (9th Cir. 2017) (holding statute should be interpreted to adopt "discovery rule" instead of "occurrence rule" where occurrence rule appeared in initial draft of

**6.    The Provisions of the DAA Cited by Afilias Do Not Manifest a
Transfer of Rights or Obligations Under the Application**

52.    In an attempt to contrive support for its contention that NDC sold the Application to Verisign, Afilias takes out of context select obligations of NDC in the DAA to protect Verisign's loan of funds to NDC for the auction.  However, such provisions of the DAA: (i) do not assign or transfer NDC's rights or obligations under the Application, and (ii) are expressly limited by any action required of NDC to comply fully with the Guidebook, Application, or requests of ICANN.  Discussed below in turn are each of the specific obligations in the DAA that Afilias mischaracterizes as evidence of improper assignment of the Application to Verisign.[92]

> *At AR 64, Afilias complains that NDC agreed that it*
> Redacted - Third Party Designated Confidential Information        [93]

53.    Redacted - Third Party Designated Confidential Information

The subject provision was not an assignment of rights.

> *At AR 65, Afilias complains that NDC* Redacted   Third Party Designated Confidential  nformation
>
> [96]

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statute but was removed from final draft)); AA-14 (*Edwards v. Symbolic Int'l Inc.*, 414 F. App'x 930, 931 (9th Cir. 2011) (holding pre-contract negotiations rejecting a lengthy time period for payment refuted defendant's interpretation that time was not of the essence in contract)).

[92] Afilias' claims are referenced by the numbered paragraphs in the Amended IRP Request ("AR") and Reply in which they are made.

[93] Afilias' Amended IRP Request, ¶ 64.

[94] Livesay Ex. D (DAA, *supra* note 5, at Ex. A, § 1(k) (emphasis added)).

[95] Livesay Ex. H (DAA Supplement, *supra* note 4, ¶ F).

[96] Afilias' Amended IRP Request, ¶ 65.

54.    Redacted - Third Party Designated Confidential Information

Equally fundamental, as explained more fully in the Livesay and Rasco Witness Statements, the Guidebook allows every applicant the unqualified right to participate in a public auction.[97]  There is no requirement that an applicant agree to a private auction because other members of the contention set want a private auction.

Redacted - Third Party Designated Confidential Information                    Private auctions among competitors can raise significant legal issues, especially where, as here, competitors propose secret agreements as to who may win and who will lose the auction, and guarantee payments to pre-selected competitors to lose the auction, as Afilias and other competitor-members of the contention set proposed for a .WEB private auction.[98]

> *At AR 66, Afilias complains that Verisign had a right under the DAA to participate in "ICANN's process to move the delegation of .web forward."*[99]

55.    The claim that Verisign's participation in moving the process forward constitutes an assignment of the Application in violation of the Guidebook is absurd on its face.  Any support by Verisign to move the delegation forward necessarily and obviously could only be done with ICANN's knowledge and consent.

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[97] Rasco Stmt. (June 1, 2020), ¶ 66; Livesay Stmt. (June 1, 2020), ¶ 31.

[98] The U.S. Department of Justice has refused to provide a "no action letter" for private auctions, raising the specter of an antitrust violation by such a private auction.  *See* AC-57 (Kevin Murphy, Domain Incite, "DOJ Says New gTLD Private Auctions Might Be Illegal" (Mar. 19, 2013), *available at* http://domainincite.com/12308-breaking-doj-says-new-gtld-private-auctions-might-be-illegal).

[99] Afilias' Amended IRP Request, ¶ 66.

[100] Livesay Ex. D (DAA, *supra* note 5, at Ex. A, § 1(k)).

[101] Livesay Ex. H (DAA Supplement, *supra* note 4, ¶ F).  Numerous companies -- like Afilias -- are in the business of providing support services to develop and process new gTLD applications, such as Valideus and FairWinds Partners, both of whom contract with applicants to provide all of these services, including serving as liaison with ICANN.  (Section II.D.3, *supra*).

*At AR 67, Afilias complains that* Redac ed  Third Par y Designa ed Con iden ial  nforma ion

56.     Redacted - Third Party Designated Confidential Information

57.     Contrary to Afilias' argument, in the event of termination of the DAA, including if that were to occur today, NDC would remain the applicant with the right to pursue the Application.  Redacted - Third Party Designated Confidential Information

. The Guidebook does not preclude NDC from entering other transactions following the auction to raise money to repay Verisign (e.g., a joint venture or a loan).  And the Guidebook does not address, let alone dictate, the terms upon which a registry operator, which NDC would be at that point, might transfer its interest in a new gTLD.[105]

> *At AR 70, Afilias contends that because NDC's bid was*
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58.     This claim is based on a misconstruction of both the Guidebook and DAA.  NDC made the bids for itself as applicant as required by the auction rules.  Verisign participated in the

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[102] Afilias' Amended IRP Request, ¶ 67.
[103] Livesay Ex. D (DAA, *supra* note 5, at Ex. A, §§ 9–10).
[104] *Id.*, at Ex. A, § 9.
[105] Redacted - Th rd Party Des gnated Conf dent a  Informat on

[106] Afilias' Amended IRP Request, ¶ 70.

auction because it was funding the bids.  Redacted - Third Party Designated Confidential Information

NDC

always has owned all rights under its .WEB Application.

> *At AR 71, Afilias separately complains that NDC's bid was invalid*
> Redacted - Third Party Designated Confidential Information    .[109]

59.    Redacted - Third Party Designated Confidential Information

60.    Redacted - Third Party Designated Confidential Information

The auction

process itself was very complex, including numerous rounds of bidding across two auction

days.[111]  Redacted - Third Party Designated Confidential Information

The provisions about which Afilias complains would be reasonably

required to protect any lender in such a bidding process.

61.    Of course, in a private auction, there are no preset bidding rules and neither the

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[107] Rasco Stmt. (June 1, 2020), ¶ 99.
[108] *Id.*, ¶ 100.  Indeed, rumors were spread before the auction by Afilias and Donuts that NDC had transferred control over the company, resulting in the execution of the assurances of performance.  (Sect. II.D, *supra*).
[109] Afilias' Amended IRP Request, ¶ 71.
[110] Livesay Stmt. (June 1, 2020), ¶¶ 32–33.  NDC is a small company and was seeking to bid substantial funds, over $100 million as it turned out, and Verisign was loaning money for the bid.  The terms regarding the conduct of the auction and the payment of any award were included as protections for the financing.
[111] In an ICANN public auction, a price is set in each round and applicants must enter a bid amount that is equal to or greater than the set price to continue to the next round.  Although applicants know how many parties are participating in each round, they do not know which parties remain at any time or the limits of each party's financing or interest in the gTLD.  Afilias C-3 (Guidebook, *supra* note 17, at Module 4, §§ 6–7).

Guidebook nor ICANN provides oversight.  ICANN's interest is only to ensure that the resulting

registry operator -- by public or private auction or post-auction assignment -- is financially and

technically capable of operating the registry.  (Section II.C, *supra*.)

> *At Reply 56, Afilias contends that NDC*
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>
> [112]

62.     There is no requirement in the Guidebook or Application that NDC disclose

Verisign's support in the resolution of the Contention Set.  (Section II.F.3, *infra*.)

Confidentiality in such matters is common (section II.F.3, *supra*) and certainly does not represent

a resale, assignment, or transfer of the Application, as Afilias contends.  Afilias never disclosed

who was financing its bid.[113]  Nor did Afilias complain when Wordpress financed the winning

bid for .BLOG as part of a pre-auction agreement to assign the registry agreement.  (Section

II.D.3, *supra*.)  Afilias' complaint was invented for this IRP and this IRP alone.

<div align="center">*     *     *</div>

63.     Redacted - Third Party Designated Confidential Information

**E.      There Could Not Be a Violation of the Guidebook Because Any Attempted
Resale, Assignment, or Transfer Would Have Been a Nullity**

64.     The Guidebook excludes any right of an Applicant to assign or transfer the

Application.  As Afilias itself has argued in this IRP, any attempt by NDC to assign the

Application to Verisign would be void and a nullity purely by operation of law.  Thus, the DAA

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[112] Afilias' Reply Memorial, ¶ 56.
[113] *See* Section II.F.3, *supra*.
[114] Livesay, Ex. D (DAA, *supra* note 5, §§ 4(b)(iii)–(iv), (g), (h), and 7(a)).

could not possibly effectuate an assignment or transfer of rights from NDC to Verisign.[115]

### F. Afilias' Arguments of Non-Disclosure in the Application Have No Merit

#### 1. The Guidebook Requires an Amendment Only When *Previously Submitted* Information Becomes *"Untrue or Inaccurate"*

65. Afilias claims that NDC violated the disclosure requirements of Section 1.2.7 of the Applicant Guidebook. That Section 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 via submission of the appropriate forms. This includes applicant-specific information such as changes in financial position and changes in ownership or control of the applicant."[116] Section 1.2.7 further provides that "[f]ailure to notify ICANN of any change of circumstances that would render any information provided in the application false or misleading *may result* in denial of the application."[117] Afilias also cites to Guidebook Module 6 (Terms and Conditions) which sets forth a warranty by applicants that "the statements and representations in the application . . . are true and accurate and complete in all material respects" and that "Applicant agrees to notify ICANN in writing of any change in circumstances that would *render any information provided in the application false or misleading*."[118]

66. Afilias contends that NDC's application was "incomplete" or "untrue or misleading" because NDC did not amend it to disclose the DAA.[119] Afilias identifies three previously provided responses by NDC that Afilias alleges became "untrue" or "inaccurate"

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[115] *See* AA-36 (UNIDROIT Principles of International Commercial Contracts at 314 ("The assignment of a right . . . is ineffective if it is contrary to an agreement between the assignor and the obligor limited or prohibiting the assignment.")); AA-35 (*Travertine Corp. v. Lexington-Silverwood,* 683 N.W.2d 267, 273 (Minn. 2004) ("When a contract prohibits assignment in very specific and unmistakable terms, any purported assignment is void.")); AA-32 (*STS Refills, LLC v. Rivers Printing Sols., Inc.*, 896 F. Supp. 2d 364, 373 (W.D. Pa. 2012) ("[W]here contractual language restricts or prohibits assignment, any assignment made contrary to that language is ineffective and void")); AA-23 (*Neuroaxis Neurosurgical Assocs., PC v. Costco Wholesale Co.*, 919 F. Supp. 2d 345, 352 (S.D.N.Y. 2013) ("[U]nambiguous contract provisions that limit a party's ability to assign its rights under the contract render any purported assignment void" (internal citations omitted))); AA-4 (*Bank of Am., N.A. v. Moglia*, 330 F.3d 942, 948 (7th Cir. 2003) ("[T]he modern view, expressed in *Restatement (Second) of Contracts* § 322(2) (1981), that an anti-assignment provision in a contract is unenforceable against an assignee 'unless a different intention is manifested.' Magic words are not required. . ." (citing AA- 28 (*Restatement (Second) of Contracts* § 322(2) (1981)))).
[116] Afilias C-3 (Guidebook, *supra* note 17, at Module 1, § 1.2.7 (emphasis added)).
[117] *Id.* (emphasis added). In fact, ICANN has *never* disqualified an application because of a change in control. Willett Stmt. (June 1, 2020), ¶ 18.
[118] *Id.* at Module 6, Terms and Conditions, ¶ 1 (emphasis added).
[119] Afilias' Amended IRP Request, ¶ 56.

27

following NDC's entry into the DAA: (i) the name of the "applicant" for .WEB; (ii) the names and positions of the officers and directors, and shareholders, for the applicant entity; and (iii) the "Mission/Purpose" for .WEB.[120] But Afilias never engages the applicable standard set out in Section 1.2.7, which requires amendment only *to the extent* that information *previously submitted* by an applicant *becomes untrue or inaccurate*.[121] Contrary to Afilias' claims, none of NDC's responses were rendered false or misleading by the DAA. (Section II.F.2, *infra*).

67. Afilias' citation to ICANN's Change Request Criteria is inapposite.[122] Those criteria are only relevant to ICANN's review of a change request submitted by an applicant – which presupposes that a change request is required under the Guidebook.[123] Even where those criteria do apply, they do not require, as Afilias asserts,[124] that any change that would "affect other third parties," "particularly other applicants," be denied by ICANN.[125] Rather, those criteria consider whether the change would have an impact on another party's *application*, such as a change to a community-based application, which clearly does not apply here.[126]

### 2. The DAA did not Make Verisign the Owner of the Application

68. Afilias contends that the DAA "fundamentally changed the nature of NDC's application" because Verisign had "become the real party-in-interest behind its application."[127] Afilias implies that this "fundamental change" rendered specific answers provided by NDC regarding its owners, principals, and the entity applying for .WEB false or misleading.[128]

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[120] Afilias' Amended IRP Request, ¶ 56.
[121] Notably, Afilias makes no claim that NDC's application was "untrue" or "inaccurate" when originally submitted.
[122] *Id.*, ¶ 17.
[123] *See* AC-36 (ICANN, "Change Request Criteria," *available at* https://newgtlds.icann.org/en/applicants/advisories/change-request-set-05sep14-en).
[124] Afilias' Amended IRP Request, ¶ 17.
[125] The Change Request Criteria also do not override the discretion afforded ICANN to make the ultimate determination whether to deny an application based on a change of circumstances that renders information provided in the application false or misleading. Afilias C-3 (Guidebook, *supra* note 17, at Module 1, § 1.2.7).
[126] For example, a change to the community definition in a community-based application is material because it impacts other parties' decision whether to file a community objection and the basis for determining the merits of a community objection. Or a change to a community application from a standard application would affect the priority of other applications in a contention set. *See* AC-36 (ICANN, "Change Request Criteria," *supra* note 123). Such changes affect third party *applications*. The relevant impact on third parties under the change request criteria plainly is not, as Afilias absurdly suggests, the desire of other applicants to know the financial wherewithal of other applicants to bid competitively for the TLD.
[127] Afilias' Amended IRP Request, ¶¶ 55, 57.
[128] *Id.*, ¶ 55.

28

69.     Afilias' non-disclosure argument is just a repackaging of its assignment argument. That is, Afilias' claim that Verisign became the "real party-in-interest" is simply another way of arguing that NDC assigned or transferred the rights in its .WEB Application to Verisign by entering into the DAA.  Under U.S. federal law, "real party in interest" refers to the party with the right to bring a claim, which can include a party to whom a claim or the underlying contract or asset has been unequivocally assigned.[129]  Thus, Afilias' "real party in interest" argument would only have merit if NDC had assigned or transferred its rights in its .WEB Application to Verisign.[130]  As set forth *supra*, Afilias' assignment claim is meritless, as Afilias elsewhere has admitted.[131]  It's "real party-in-interest" argument is meritless for the same reasons.

70.     Afilias does not – and cannot – claim that NDC's ownership or corporate structure **actually** changed.  NDC remains the applicant for .WEB, with the same owners, principals, directors and officers as identified in its Application.[132]

71.     Finally, under Afilias' disclosure theory, its own .WEB application and those of other members of the .WEB Contention Set also would be "untrue, inaccurate, false, and/or misleading" because they conceal the "real party-in-interest" supporting such applications. Afilias' operating entity is Afilias, Inc., headquartered in Horsham, Pennsylvania.  Yet Afilias chose to file its .WEB application in the name of a special purpose entity, formed solely for the purpose of applying for .WEB, called "Afilias Domains No. 3 Limited."[133]  Afilias then limited its application disclosures regarding officers, directors, etc. to information for Afilias Domains No. 3 Limited, rather than completing the application with information applicable to Afilias, Inc., the entity financially responsible for supporting the application.[134]  Afilias' own application, therefore, cannot withstand the "rationale" of its claims against NDC, which further

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[129] *See* AA-13 (*Dubuque Stone Prods. Co. v. Fred L. Gray Co.*, 356 F.2d 718, 723 (8th Cir. 1966)).
[130] *See* AA-34 (*Thomas-Bonner Co. v. Hooven, Owens & Rentscheller*, 284 F. 377, 383 (S.D. Ohio 1920) (an alleged assignee becomes the "real party in interest" only when "a thing in action . . . is absolutely assigned, so that the ownership interest passes to the assignee, without conditions or reservations . . .")).
[131] Afilias' *Amici* Opposition, ¶¶ 82–85 (quoted at note 14, *supra*).
[132] Rasco Stmt. (June 1, 2020), ¶¶ 11, 78.
[133] Afilias JMR-12 (Afilias Domains NDC 3 Limited, New gTLD Application (.web) (June 13, 2012)).
[134] *Id*.  Similarly, Donuts Inc. applied for .WEB in the name of "Ruby Glen LLC" and further obscured its ownership by forming "Covered TLD Inc." as Ruby Glen's parent company.  AC-22 (Ruby Glen, LLC, New gTLD Application (.web) (June 13, 2012)).

demonstrates the lack of merit to its allegations.

### 3. NDC Was Not Required to Disclose the DAA with Verisign

72.     Afilias contends that NDC violated Section 1.2.7 by failing to disclose the DAA, because the DAA purportedly represents a change in financial position that NDC was required to report to ICANN. Afilias also complains that it was not fair to other applicants for NDC to arrange financing for its auction bid and not disclose that information to the Contention Set.[135]

73.     Afilias misrepresents Verisign's and NDC's Agreement, and misstates NDC's obligations under Section 1.2.7. First, there is no requirement that auction financing be disclosed in ICANN's application form for new gTLDs. Second, all application financial disclosures are confidential and *not disclosed* by ICANN publicly or to other members of the contention set.

74.     As explained above, the new information -- here, Verisign's Agreement to fund NDC's participation in an auction for .WEB -- would need to render ***prior financial disclosures untrue or inaccurate*** for an obligation to disclose the Agreement to arise. ICANN's new gTLD application requires applicants to provide certain financial information to ICANN.[136] ICANN's Evaluation Procedures[137] make clear that these requests for financial information all relate to an applicant's financial ability to ***operate*** a gTLD registry, ***not*** its ability to bid to win an auction to ***acquire*** a gTLD registry. As Section 2.2.2.2 of the Guidebook explains, "[i]n its application, the applicant will respond to a set of questions (see questions 45-50 in the Application Form) intended to gather information about the applicant's financial capabilities for ***operation of a gTLD registry*** and its financial planning in preparation for long-term stability of the new gTLD."[138] A future loan of funds to use at an auction is not a required financial disclosure and

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[135] *See* Afilias' Amended IRP Request, ¶ 55 ("It would be absurd to suggest that NDC believed that its agreement with Verisign would not be material relevant to other applicants, the Internet community, and, indeed, to ICANN."); Kane Decl. (Oct. 15, 2018), ¶ 38 (arguing that NDC's financing arrangement with Verisign needed to be disclosed under the Guidebook). This contention was explicit in Afilias' original IRP. (Afilias' Original IRP Request, ¶ 46 (asserting that other applicants were entitled to know about the DAA because Verisign was "larger and better-funded" than NDC)).
[136] *See* Afilias C-3 (Guidebook, *supra* note 17, at Module 1, § 1.2.2 (All applicants must submit "audited or independently certified financial statements for the most recently completed fiscal year for the applicant . . .").
[137] *Id.*, at Module 2.
[138] *Id.*, at Module 2, § 2.2.2.2 (emphasis added). The emphasis on an applicant's financial condition for ***operation*** of a gTLD registry, rather than its financial ability to bid to ***acquire*** a new gTLD, is consistent with the purpose of ICANN's evaluation process, which is to ensure that applicants have the technical and operational capabilities to operate a secure and stable registry. An applicant's financial ability to meet these operational criteria is relevant to

does not render any of NDC's previously given financial information untrue or inaccurate.

75.	Further**, *all*** of the financial disclosures required by ICANN in Questions 45–50 are designated as confidential and ***not subject*** to public posting.[139]  Thus, even if it is assumed that auction financing is a disclosure item in the new gTLD application form (which it is not), none of the Contention Set members, including Afilias, were entitled to see that information.[140]

76.	Afilias' own actions demonstrate its awareness that the Guidebook does not require disclosure -- let alone public disclosure -- of auction financing arrangements.  In its original IRP, Afilias admits that it arranged outside financing for the .WEB auction.  (Afilias' Original IRP Request, ¶ 30 ("Due to its financing arrangements, Afilias was able to bid up to USD 135 million" for .WEB)).  Yet Afilias never submitted an application change request to ICANN to update its financial disclosures, and certainly did not advise the other Contention Set members that it had obtained third-party financing.  As Afilias recognizes, changes to an applicant's financial condition that do not negatively reflect on an applicant's qualifications to operate the gTLD are not subject to disclosure under the new gTLD application process.

### 4.	NDC Was Not Required to Amend the "Mission/Purpose" of .WEB

77.	Afilias claims that NDC's Agreement with Verisign required NDC to amend its description of the "Mission/Purpose" of .WEB in NDC's application.  According to Afilias, "NDC's business plan was that it intended to acquire .web for itself, to operate .web itself, and to market .web itself," and that "[a]s of [the date of NDC's agreement with Verisign], none of these

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the application process.  An applicant's ability to win a future auction – that may never take place, depending on the circumstances – to acquire a gTLD is not.

[139] Attachment 2 has a column identifying whether the applicant's responses would be "[i]ncluded in public posting," "Y" or "N."  Questions 45-50 are all marked "N."  *Id.*, at Attachment to Module 2, "Evaluation Questions and Criteria," questions 45–50.

[140] ICANN is aware that changes in an applicant's relationship with third parties may occur.  However, such changes do not require re-evaluation, so long as previously submitted statements do not become inaccurate as a result.  For example, ICANN discourages applicants from resolving string contention by forming joint ventures with other applicants, cautioning that "[i]t is understood that applicants may seek to establish joint ventures in their efforts to resolve string contention.  However, material changes in applications (for example, combinations of applicants to resolve contention) may require re-evaluation . . . .  Applicants are encouraged to resolve contention by combining in a way that does not materially affect the remaining application.  Accordingly, new joint ventures must take place in a manner that does not materially change the application, to avoid being subject to re-evaluation."  *Id.*, at Module 4, § 4.1.3.  As discussed *supra*, a post-application funding commitment such as NDC's Agreement with Verisign is a change that does not require disclosure to ICANN.

things were true."[141]  Afilias is wrong.  Unless and until a registry agreement is executed

between ICANN and NDC, and ICANN approves a request for assignment to Verisign, NDC's

mission remains the same.  Equally fundamental, the Guidebook specifically provides that the

Mission Statement is *not* used to evaluate an application, but rather only to support the future

consideration of the new gTLD program generally.

78.    As set forth in the Rasco Witness Statement, NDC was attempting to acquire

.WEB for itself.[142]  In the event of a termination of the DAA before the auction --

Redacted - Third Party Designated Confidential Information                      -- NDC clearly would

remain the applicant entitled to participate in the auction or other resolution of the Contention

Set.  If a termination occurred following the auction, or ICANN failed to consent to an

assignment of the registry agreement, NDC clearly would remain the owner of any rights to

operate the TLD, subject to its entry into an alternative transaction.[143]

79.    Thus, as of today, NDC's Mission Statement remains true and accurate.  If a

requested assignment were to change the registry's mission -- as is commonplace (Section II.D.3,

*supra*) -- ICANN would have an opportunity to consider that change.  As Afilias knows, registry

agreements are regularly assigned with ICANN's approval to such changes.

80.    Afilias' position is further undermined by the fact that the Mission Statement is

irrelevant to evaluation of a new gTLD application.[144]  First, as explained in the Guidebook

materials, the Mission Statement had no effect on ICANN's evaluation of NDC's .WEB

application.  NDC's Mission Statement was provided in response to Question 18 in the

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[141] Afilias' Amended IRP Request, ¶ 60.
[142] Rasco Stmt. (June 1, 2020), ¶¶ 9, 59, 100.
[143] Section II.D.6, *supra*.
[144] Afilias cites references in the Evaluation Questions and Criteria attached to Module 2 of the Guidebook to ICANN's alleged desire to "diversify the namespace" and support "different registry business models" as purported support for its contention that the "Mission/Purpose" of a new gTLD is relevant to ICANN's evaluation.  Afilias Reply Memorial (May 4, 2020), ¶ 35 ("By their plain terms, the *Evaluation Questions and Criteria* refute the assertion made at various times by ICANN, Verisign and NDC that ICANN was interested only in an applicant's financial and technical ability to operate a gTLD.").  Afilias intentionally distorts ICANN's evaluation criteria to support its argument.  Contrary to Afilias' claims, the sections it cites from the evaluation criteria explicitly are concerned only with an applicants' technical and financial ability to operate a gTLD.  ICANN references "different registry business models" as a reminder to evaluators to be flexible in evaluating technical and financial criteria – *not* for the purpose of identifying the applicant's business model as an evaluation criteria.  Afilias C-3 (Guidebook, *supra* note 17, at Attachment to Module 2).

application form.  An attachment to Module 2 of the Guidebook sets forth the new gTLD

application questions along with clarifying notes from ICANN explaining the nature or purpose

of the questions.[145]  The note accompanying Question 18 clearly states that information provided

in response to that question will be used only for evaluation of the New gTLD Program itself,

*but "[t]his information is not used as part of the evaluation or scoring of the application."*[146]

81.	Thus, even if NDC's Mission Statement were inaccurate -- which it was not – any

such inaccuracy would be *irrelevant* to ICANN's evaluation of NDC's .WEB application.

Indeed, it would be a violation of the Guidebook to disqualify NDC on the basis of information

that ICANN states would *not* to be considered in evaluating gTLD applications.

82.	Second, NDC's responses to the Mission Statement questions were, and remain,

accurate statements of NDC's intent.  Question 18(a) of the application asked applicants to

"Describe the mission/purpose of your proposed gTLD."[147]  In its response, NDC truthfully

described the mission of .WEB, including that it "is to provide the internet community . . . an

alternative 'home domain' for their online presence."[148]  NDC also predicted that, "through

strategic marketing campaigns designed to brand the domain, [.WEB] will become a premium

online namespace for a variety of businesses and websites," and that .WEB "will provide new

registrants with better, more relevant alternatives to the limited options remaining for the current

commercial TLD names."[149]  As stated in the Rasco Witness Statement, this description was, and

still is, accurate:  "Regardless of who operates the .web gTLD, NDC's description of the mission

and purpose of .web remains true:  .web will be an alternative domain for users; with proper

marketing it will become a premium online namespace for many businesses and websites; and it

is a better, more relevant alternative than many other currently available gTLDs."[150]

83.	Similarly, Question 18(b) asked applicants to state "How [the] proposed gTLD

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[145] Afilias C-3 (Guidebook, *supra* note 17, at Attachment to Module 2).
[146] *Id.*, at Attachment to Module 2, Question 18 (emphasis added).
[147] *Id.*
[148] Rasco Ex. A (Nu Dot Co LLC, New gTLD Application (.web) (June 13, 2012), at Question 18(a)).
[149] *Id.*
[150] Rasco Stmt. (June 1, 2020), ¶ 4.

will benefit registrants, Internet users, and others."[151]  Again, NDC's response truthfully

answered that question.  NDC described the expected benefits of .WEB for registrants and

internet users, including that .WEB would be "a reliable, trusted and secure" gTLD that would

"provide an opportunity for new entrants to compete effectively for internet users' attention."[152]

That description was, and still is, accurate, and Afilias has proffered no evidence to the contrary.

84.     Third, Afilias claims that it knew that NDC did not intend to operate .WEB.  If

Afilias is taken at its word, it could not have been misled by NDC's statements.[153]

85.     Fourth, Afilias itself has made changes to the Mission/Purpose of other TLDs

without amending those applications.  Yet again, Afilias demands that NDC make disclosures

from which Afilias has exempted itself.[154]  Afilias' self-contradictions aside, according to Ms.

Willett, ICANN has **never** attempted to block assignment of a TLD registry agreement on the

basis that the "Mission/Purpose" in the original application had changed.[155]

86.     In any event, contingent upon ICANN's consent to an assignment of the registry

agreement to Verisign, Verisign intends to operate .WEB as a general TLD available worldwide

in accordance with ICANN's policies – just as NDC described in its application.  Thus, the DAA

could not under any circumstances have rendered NDC's Mission Statement inaccurate.

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87.     For the foregoing reasons, even if the Panel had authority to decide Afilias'

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[151] Afilias C-3 (Guidebook, *supra* note 17, at Attachment to Module 2, Question 18 (emphasis added)).
[152] Rasco Ex. A (NDC, New gTLD Application, *supra* note 148, at Question 18(b)).
[153] According to Afilias, the purported change in mission and purpose was materially relevant to Afilias and the public.  Afilias' Amended IRP Request, ¶ 55.  Afilias' assertions contradict its own declarants, however.  According to John Kane, Afilias plc's Vice President of Corporate Services, *he knew that NDC never intended to operate .web*: "[G]iven my discussion with NDC during the Voluntary Notification Period, *it seemed clear to me that they were in it for the payout*, which necessitated participating in a private auction."  Kane Stmt. (Oct. 15, 2018), ¶ 25 (emphasis added).  Afilias' claims of harm on behalf of "the public" rings hollow.  Only Afilias has chosen to file an IRP and claim that it was misled by NDC's application.
[154] As described in ICANN's Opposition Memorandum, Afilias has both transferred gTLDs to third parties shortly after delegation (.MEET) and been the recipient of such a transfer request (.PROMO) as part of the new gTLD Program.  In neither instance was the "Mission/Purpose" for the gTLD amended to reflect the "Mission/Purpose" of the new operator.  Section II.D.3, *supra*; ICANN Opposition to Request for Emergency Panelist and Interim Measures of Protection, ¶¶ 29–30; AC-5 (.meet Assignment and Assumption Agreement, Afilias Limited to Charleston Road Registry (Feb. 6, 2015), *available at* https://www.icann.org/sites/default/files/tlds/meet/meet-assign-pdf-06feb15-en.pdf); (.promo Assignment and Assumption Agreement, Play.PROMO Oy to Afilias plc (Dec. 14, 2015), *available at* https://www.icann.org/sites/default/files/tlds/promo/promo-assign-pdf-14dec15-en.pdf).
[155] Willett Stmt. (May 31, 2019), ¶ 18.

claims regarding NDC's conduct (which is denied), the Panel should conclude that NDC did not violate the Guidebook and that the DAA did not resell, assign, or transfer NDC's Application.

## III. THE DAA DOES NOT PROVIDE GROUNDS FOR ICANN TO DISQUALIFY NDC BASED ON ITS COMPETITION MANDATE

88.     Afilias contends that ICANN's alleged decision to finalize a registry agreement with NDC, while knowing that the agreement may be assigned to Verisign, violates ICANN's mandate to promote competition.[156]  Afilias contends that Verisign intends to acquire .WEB to shut it down and/or limit its competitive potential in order to preserve Verisign's purported monopoly in the .COM gTLD – a false assertion – and that ICANN must prevent Verisign from operating .WEB on the basis of this purported concern.[157]

89.     Afilias' argument fundamentally misunderstands ICANN's competition mandate. ICANN is an administrator of the Domain Name System ("DNS"), not a competition regulator, and ICANN has no legal authority to bar Verisign from operating .WEB on competition grounds.

90.     The narrow scope of ICANN's Bylaws' commitment to promote and enable competition in Internet-related markets is reflected in the New gTLD Program itself.  ICANN's Board approved the New gTLD Program, in part, to enhance competition and improve consumer choice for registry services.[158]  At the same time, the Board did not include competition as an evaluation criteria for new gTLD applications.[159]  ICANN's "competition mandate" was fulfilled by the New gTLD Program itself, which has had the desired effect of increasing competition in the domain name market.[160]  The Department of Commerce ("DOC") has recognized that the introduction of new gTLDs has created an increasingly dynamic marketplace.[161]

91.     Nonetheless, Afilias asserts that ICANN's Bylaws require that it bar Verisign

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[156] Afilias' Amended IRP Request, ¶¶ 79–83.
[157] Afilias' Reply Memorial, ¶ 130; *see also* Afilias' Amended IRP Request, ¶ 82.
[158] Burr Stmt. (May 31, 2019), ¶ 27.
[159] *See generally*, Afilias C-3 (Guidebook, *supra* note 17).
[160] *See* Murphy Ex. KM-28 (ICANN *2018 Competition, Consumer Trust, and Consumer Choice Review* ("CCT"), Final Report, (Sept. 8, 2018), at 5 ("The CCT Review Team found that while the New gTLD Program is quite new and the data are incomplete, on balance the expansion of the DNS marketplace has demonstrated increased competition and consumer choice . . .")).  The CCT was convened by ICANN in January 2016 to examine the extent to which the New gTLD Program "has promoted competition, consumer trust and consumer choice . . .".  (*Id.* at 26).
[161] Kneuer Ex. L (Cooperative Agreement, Am. 35, NCR 92-18742, DOC-Verisign, at 1 (Oct. 26, 2018), *available at* https://www.ntia.doc.gov/files/ntia/publications/amendment_35.pdf).

from operation of a new gTLD in order to "break VeriSign's monopoly."[162]  ICANN's policies

reserve regulatory action of the type that Afilias seeks through this IRP for competition

authorities like the United States Department of Justice ("DOJ").  ICANN is a private actor and

has neither the legal authority nor the technical competence to act as a competition regulator.

ICANN's policies provide that any competition concerns are to be referred to a competent

competition authority.[163]  Here, the DOJ Antitrust Division investigated Verisign's potential

acquisition of .WEB[164] and closed that investigation without further action.[165]

92.    ***If undertaken at all, this Panel's competition analysis should end here.***

93.    Verisign nevertheless addresses Afilias' competition allegations in the event that

the Panel were to decide to consider them in substance.  Afilias' claims of competitive harm are

based on critical yet faulty assumptions that (i) Verisign is a "monopolist"; (ii) .WEB would

significantly increase competition in the domain name industry; (iii) .WEB is uniquely well-

positioned to compete with Verisign for domain name registrations; and (iv) Verisign seeks to

acquire .WEB "to protect its dominant market position"[166] by eliminating a potential strong

competitor to .COM.  As discussed *infra*, none of these assumptions are supported by Afilias'

evidence and each is contradicted by the economic evidence.

### A.    ICANN Is Not An Economic Regulator

94.    Afilias contends that ICANN violated a Core Value to promote competition by

failing to disqualify NDC from the .WEB contention set.[167]  The Core Value to which Afilias

refers states that ICANN shall ***"[w]here feasible and appropriate, depend[] on market***

***mechanisms to promote and sustain a competitive environment in the DNS market***."[168]

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[162] Afilias' Amended IRP Request, ¶ 79.
[163] *See* Kneuer Ex. I (Cooperative Agreement, Am. 30, NCR 92-18742, DOC-VeriSign, § 3.1(d)(iv)(E) (Nov. 29, 2006), *available at* https://www.ntia.doc.gov/files/ntia/publications/amend30_11292006.pdf); Exhibit J (.com Registry Agreement (2006), ICANN-VeriSign, § 3.1(d)(iv)(E)) (Mar. 1, 2006, amended Sept. 22, 2010), *available at* https://www.icann.org/resources/unthemed-pages/registry-agmt-com-2010-09-22-en).
[164] *See* AC-67 (Andrew Allemann, Domain Wire, "DOJ closes investigation on Verisign running .web" (January 11, 2018), *available at* https://domainnamewire.com/2018/01/11/department-justice-closes-investigation-verisign-running-web/).
[165] *Id.*
[166] Afilias' Amended IRP Request, ¶ 82.
[167] *Id.*, ¶ 79.
[168] Afilias C-1 (Bylaws, *supra* note 1, § 1.2(b)(iii) (emphasis added)).

Reduced to its essence, Afilias' argument is that ICANN is required to act like a government regulator to block transactions that allegedly would impact competition. Nothing in the Bylaws, ICANN's history, or the New gTLD Program supports Afilias' position.

### 1. ICANN Lacks Authority to Regulate Competition and is Prohibited from Doing So by Its Bylaws

95.     The Bylaws make clear that "ICANN does not hold any governmentally recognized regulatory authority."[169] The Bylaws are explicit that "ICANN *shall not* regulate (*i.e.*, impose rules and restrictions on) services that use the Internet's unique identifiers or the content that such services carry or provide outside the express scope of Section 1.1(a)."[170] Section 1.1(a), which defines the scope of ICANN's Mission, does not identify regulation of competition as part of ICANN's Mission.[171] ICANN's Bylaws further provide that ICANN "shall not act outside its Mission," which is limited to ensuring "the stable and secure operation of the Internet's unique identifier systems."[172]

96.     The limited scope of ICANN's Mission – and, thus, its authority – derives from the manner of its creation. As explained by ICANN Board Member J. Beckwith Burr, ICANN was created as part of a plan by the United States government to remove itself from direct administration of the DNS and instead to have the technical infrastructure of the DNS administered by a private, non-governmental entity.[173] That plan did not include any transfer of regulatory authority to ICANN, including the authority to act as a competition regulator.[174]

97.     ICANN explicitly was not intended to supplant existing legal structures by setting up a new system of Internet governance. ICANN's more tailored purpose was and is to handle the technical management of Internet names and addresses.[175]

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[169] *Id.*, §§ 1.1(c), 1.2(b)(iii).
[170] *Id.*, § 1.1(c).
[171] *Id.*, § 1.1(a).
[172] *Id.*, § 1.1(b).
[173] Burr Stmt. (May 31, 2019), ¶ 25.
[174] *Id.*
[175] Kneuer, Ex. S (Department of Commerce ("DOC"), Statement of Policy on the Management of Internet Names and Addresses (the "White Paper"), 63 Fed. Reg. 31741, at 6 (June 5, 1998), *available at* https://www.ntia.doc.gov/federal-register-notice/1998/statement-policy-management-internet-names-and-addresses) (ICANN was "not intended to displace other legal regimes (international law, *competition law*, tax law and principles of international taxation, intellectual property law, etc." (emphasis added)).

## 2. The Relationship Among the DOC, ICANN and Verisign Confirms That ICANN Does Not Possess Authority to Police Competition

98.     Afilias' competition argument rests on the false premise that "one of the principal purposes" for ICANN's formation was to "break VeriSign's monopoly."[176]  The history of ICANN's relationship with Verisign, however, demonstrates that authority over competition matters rests with the DOC, and was never vested in ICANN.

99.     As discussed in the Kneuer Report, the DOC, not ICANN, has always retained authority over competition matters with respect to the .COM registry.[177]  This authority is reflected both in (i) Verisign's Cooperative Agreement with the DOC ("Cooperative Agreement") and (ii) Verisign's .COM registry agreements with ICANN, which dates back to their original 1999 agreement.[178]  The 2006 .COM Registry Agreement includes provisions requiring ICANN to refer competition issues relating to registry services to an appropriate competition authority.[179]  That provision remains part of the .COM Registry Agreement (as well as the standard gTLD registry agreement[180]) to this day.

100.     As discussed *infra*, the DOC and Verisign entered into Amendment 35 to the Cooperative Agreement in October 2018, pursuant to which DOC agreed, among other things, to loosen price caps on .COM registrations and certain other restrictions in light of the substantial changes to the competitive landscape since Verisign acquired NSI in 2000.[181]  Amendment 35 also confirms that registry operations by Verisign other than .COM shall not be subject to the restrictions contained in the Cooperative Agreement.[182]

101.     Since ICANN was formed, DOC – *and not ICANN* – has exercised direct control over competition matters.  In other words, the U.S. government has exercised regulatory

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[176] Afilias' Amended IRP Request, ¶ 79.
[177] Kneuer Stmt. (May 29, 2020), ¶ 4.
[178] Kneuer Ex. D (Cooperative Agreement, NCR 92-18742, NSF-NSI, (Jan. 1, 1993), *available at* https://archive.icann.org/en/nsi/coopagmt-01jan93.htm) & Ex. F (Registry Agreement (1999), ICANN-NSI, (Nov. 10, 1999), *available at* https://archive.icann.org/en/nsi/nsi-registry-agreement-04nov99.htm).
[179] Kneuer Ex. J (.com Registry Agreement (2006), ICANN-VeriSign, § 3.1(d)(iv)(E) (Mar. 1, 2006, amended Sept. 22, 2010), *available at* https://www.icann.org/resources/unthemed-pages/registry-agmt-com-2010-09-22-en).
[180]  Afilias C-26 (ICANN, New gTLD Registry Agreement, *available at* https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-31jul17-en.html).
[181] Kneuer Ex. L (Cooperative Agreement, Am. 35, *supra* note 161, ¶ 2).
[182] *Id.*, ¶ 3.

authority over Verisign for competition issues, not ICANN, which has no such authority under law or agreement with Verisign. Afilias' assertion that ICANN's Bylaws permit – or demand – that ICANN instead exercise regulatory authority contradicts over 20 years of DNS history.

### 3. ICANN Promotes a Competitive DNS Market Consistent With Its Mission and the Bylaws – It Does Not Regulate That Market

102. While ICANN is not a regulator with authority to police competition, it has taken steps to "enable competition and open entry in Internet-related markets."[183] ICANN has acted on its commitment to enable competition by helping to create the conditions for a competitive DNS, and by referring competition issues to relevant competition authorities, such as the DOJ.

#### a. Facilitating a Competitive DNS

103. Consistent with its Bylaws Commitments, ICANN has focused on facilitating new entry in Internet-related markets in the DNS. In particular, beginning in 2000, and continuing through the New gTLD Program launched in 2012, ICANN has approved the introduction of well over 1,000 new gTLDs.[184]

104. By any measure, the New gTLD Program has been a success. Since the launch of the New gTLD Program in 2013, it has resulted in the delegation of over 1,200 new gTLDs that are now available to consumers for registration of domain names.[185] These new gTLDs rapidly have become a substantial presence in the domain name market, accounting for 30% of new domain name registrations since 2013.[186] This level of consumer choice, in addition to the competition from legacy gTLDs and ccTLDs, is evidence of a highly competitive market.

#### b. ICANN's Role is Limited to Referring Appropriate Concerns Regarding Competition to the Proper Government Authorities

105. ICANN historically has referred competition concerns to a competent competition authority. An example of this process is set forth in ICANN's Registry Services Evaluation Policy ("RSEP"), which is a mechanism registry operators use to request ICANN's approval to

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[183] Afilias C-1 (Bylaws, *supra* note 1, § 1.2(a)).
[184] *See* Murphy Ex. KM-28 (CCT Final Report, *supra* note 160, at 29–31).
[185] Carlton Report (May 30, 2019), ¶ 20.
[186] Murphy Report (May 28, 2020), ¶ 28.

change Registry Services.[187]  Under the RSEP process, ICANN evaluates a proposed Registry

Service "for potential significant security, stability, and competition issues."[188]  While ICANN

itself assesses security and stability issues, the same is not true for competition issues.

106.    ICANN is authorized to prohibit the introduction of a new Registry Service that

ICANN reasonably determines would pose a threat to the stability and security of the DNS.[189]

ICANN has no such authority with respect to a service that may pose competition concerns.  In

such circumstances, ICANN's authority is limited to a referral of the issue to an appropriate

competition authority.[190]  The Guidebook similarly provides for a referral to a competition

authority in the event that an ICANN accredited registrar's potential operation of a new gTLD

registry raises competition concerns, stating that "ICANN reserves the right to refer any

application to the appropriate competition authority relative to any cross-ownership issues."[191]

Nothing in the Guidebook authorizes ICANN to assess competition issues itself.

107.    ICANN's established policies demonstrate that it ***does not*** act as a competition

regulator or make determinations regarding the potential competitive impact of specific

transactions or services, and instead defers to governmental authorities in such matters.

### 4.      Verisign Is Not Barred from Participating in the New gTLD Program

108.    Afilias asserts that one of the principal purposes of the New gTLD Program was

to "introduce and promote competition, including, specifically, competition that would break

VeriSign's monopoly."[192]  If Afilias' contention were true, one would expect that the New gTLD

Guidebook would prohibit or say something regarding Verisign's participation in the New gTLD

Program. ***But it does not even mention Verisign***.  Instead, the New gTLD Program expressly is

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[187] *See* Kneuer Ex. AA (ICANN, "Registry Services Evaluation Policy," *available at*
https://www.icann.org/resources/pages/registries/rsep/policy-en).  ICANN's New gTLD Registry Agreement
describes "Registry Services" in Section 2.1 of Specification 6 to that agreement.  *See* Afilias C-26 (New gTLD
Registry Agreement, *supra* note 180).
[188] ICANN, "RSEP Process," https://www.icann.org/resources/pages/rsep-2014-02-19-en; *see also* Burr Stmt.
(May 31, 2019), ¶ 24.
[189] *See* Kneuer Ex. AA ("Registry Services Evaluation Policy," *supra* note 187, § 2.7).
[190] *Id.*, § 2.5 (ICANN "shall refer the issue to the appropriate governmental competition authority with jurisdiction
over the matter . . ."); Burr Stmt. (May 31, 2019), ¶ 24.
[191] Afilias C-3 (Guidebook, *supra* note 17, at Module 1, § 1.2.1); *see also id.* at Module 5, §5.1(4) ("ICANN retains
the right to refer an application to a competition authority prior to entry into the registry agreement if it is
determined that the registry-registrar cross-ownership arrangements might raise competition issues.").
[192] Afilias' Amended IRP Request, ¶ 79; Sadowsky Report (Mar. 20, 2019), ¶ 17.

open to ***all applicants*** who qualify to apply for a new gTLD, including Verisign.[193]

109.　　The Guidebook and its associated application form set forth a discrete list of objective information required from new gTLD applicants.[194]  Missing from this list is ***any criteria*** based on the impact on competition from the new registry or operation of the registry by the applicant.  Moreover, while the Guidebook allows ICANN to refer competition concerns arising from registrar-registry cross-ownership to a competition authority, the Guidebook contains ***no other reference to competition and certainly no references to potential exclusion from the Program based on competition concerns***.

110.　　In fact, Verisign has participated in the New gTLD Program.  Verisign applied for and has been delegated 13 new gTLDs, most of which are internationalized variants of .COM or .NET (*e.g.*, the Korean equivalent of .COM).[195]  Verisign also is the registry infrastructure backend services provider for more than 130 new gTLDs operated by third parties.[196]  To Verisign's knowledge, neither ICANN nor any other party objected to Verisign's participation.

### 5.　The DOJ Investigated Verisign's Potential Operation of .WEB and Closed the Investigation Without Action

111.　　The DOJ Antitrust Division investigated the DAA transaction and closed its investigation without action.  The DOJ focused on the potential competitive effects of Verisign's operation of .WEB.[197]  Having evaluated the very concerns raised by Afilias, the DOJ's investigation of the DAA and decision not to pursue action against Verisign should conclusively resolve any claim that ICANN's consent to a .WEB assignment would violate its Bylaws.

### B.　Economic Evidence Is Contrary to Afilias' Competition Claims

112.　　Afilias has submitted ***no economic evidence*** to support its claims of competitive

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[193] Afilias C-3 (Guidebook, *supra* note 17, at Module 1, § 1.2).
[194] *Id.*, at Attachment to Module 2, "Evaluation Questions and Criteria."
[195] *See* IANA, "Root Zone Database," *available at* https://www.iana.org/domains/root/db.
[196] *See* nTLD Stats, "Registry Backend Overview," *available at* https://ntldstats.com/backend.
[197] AC-31 (Letter from Kent Brown, U.S. Department of Justice, Antitrust Division, to Thomas Indelicarto, Executive Vice President, Verisign, "Civil Investigative Demand No. 28931," (Jan. 6, 2017) at 13 (defining the "Transaction," under investigation as "the agreement, and all conduct undertaken in furtherance of that agreement, between the Company [Verisign] and Nu Dot [NDC] according to which the Company would provide Nu Dot with the funds for Nu Dot's bid for the .web gTLD and, in return, Nu Dot would assign the .web registry agreement to the Company upon the consent of ICANN.")).

harm. In fact, all economic evidence demonstrates unequivocally that no such harm exists.

### 1. Verisign Does Not Have a Dominant Position in the Market

Afilias contends that Verisign has a "dominant position" in the industry, and asserts that this supposed "fact" justifies barring Verisign from future operation of .WEB.[198] Afilias focuses heavily on market conditions during the 1990s when there were just seven gTLDs and Verisign's predecessor NSI was the "sole source of generic domains."[199] It is indefensible to base assertions about competition, as Afilias does, on decades-old circumstances that have long since changed. Rarely has any industry been as dynamic and rapidly changing as the Internet.

113. Current market conditions – with more than 1,200 gTLDs, globally marketed ccTLDs, and competition from TLD-agnostic channels, such as Google Chrome's search box, social media platforms, and mobile applications, in addition to the competition from other legacy gTLDs and ccTLDs in the global marketplace – bear no resemblance to the pre-turn-of-the-century DNS on which Afilias focuses. In short, Verisign does not have a dominant market position,[200] and is not a "monopoly," as alleged by Afilias.[201] Absent evidence of a monopoly – for which Afilias offers no economic support – Afilias' position entirely collapses.

114. The objective economic evidence in the expert report of Professor Kevin Murphy of the University of Chicago shows that Verisign does not have a dominant position,[202] Verisign does not have the power to raise prices to supra-competitive levels,[203] and Verisign cannot restrict the entry of or drive out competitors.[204]

### a. Verisign's Market Share is Not Dominant

115. There are two basic ways to establish monopoly power. The first is to prove a

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[198] Sadowsky Report (Mar. 20, 2019), ¶ 32.
[199] Zittrain Report (Sept. 26, 2018), ¶ 22.
[200] "Numerous cases hold that a market share of less than 50 percent is presumptively insufficient to establish market power." AA-22 (*MRO Commc'ns, Inc. v. Am. Tel. & Tel. Co.*, 2015 F.3d 1351, at *1 (9th Cir. 1999)).
[201] Afilias' Amended IRP Request, ¶ 79.
[202] Murphy Report (May 28, 2020), ¶ 14.
[203] *Id.*, ¶ 35. Monopoly power is the power to raise prices to supra-competitive levels or . . . the power to exclude competition . . . by restricting entry of new competitors or by driving existing competitors out of the market." AA-37 (*U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 994 (11th Cir. 1993) (internal quotation omitted)). In fact, Verisign's prices are lower than most registries, including Afilias'. Murphy Report (May 28, 2020), ¶ 35.
[204] Murphy Report (May 28, 2020), ¶¶ 25–28.

dominant market share of over 50% plus barriers to entry. The second is to directly prove power over pricing or the ability to exclude competitors.[205] Afilias cannot do either.

116. First, Afilias cannot show that Verisign has a dominant market share or the existence of barriers to entry. Verisign has less than a 50% share[206] of a properly defined relevant market.[207] The relevant market is global and Verisign competes with all ccTLDs, legacy TLDs, and New gTLDs worldwide for new domain name registrations.[208] Verisign's market share is below 50% as a percentage of existing registrations, gross adds (the number of new registrations annually),[209] and net adds (the year over year change in registrations).[210] In 2018, Verisign had only a 35% share of gross adds, versus 65% for competitors.[211] Further, Verisign's share is declining, from 49% of existing domain name registrations in 2012 to 44% in 2018.[212]

117. Even these already modest market share figures overstate Verisign's "ability to reduce the total output in the market," because Verisign does not have the ability to prevent other firms to "enter [or] expand . . . [to] counteract a reduction in output by [Verisign]."[213] Verisign did not block the creation of the more than 1,200 gTLDs that now compete with Verisign.[214] Verisign also cannot block ccTLD from marketing themselves as global alternatives to .COM, such as, for example, the .CO ccTLD which has now captured 2.2 million registrations.[215] Legacy TLDs can also market their domains as an alternative to Verisign's domains.[216] And ICANN could further expand the set of more than 1,200 gTLDs at any time.[217]

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[205] *See* note 203.
[206] *Id.*, ¶ 17.
[207] A market has both a geographic and product component. "[T]the relevant geographic market, for antitrust purposes, comprises that area within which the sellers of a commodity effectively compete, and in which prospective purchasers are effectively offered a choice as among alternative sources of supply." AA-10 (*City of Cleveland v. Cleveland Elec. Illuminating Co.*, 538 F. Supp. 1306, 1318 (N.D. Ohio 1980)). As to the product component, "the outer boundaries of a relevant market are determined by reasonable interchangeability of use." AA-25 (*Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 437 (3d Cir. 1997) (internal quotation and citation omitted)).
[208] Sadowsky Report (Mar. 20, 2019), ¶¶ 32–33; Murphy Report (May 28, 2020), ¶¶ 15–21, 23, 26–27.
[209] Murphy Report (May 28, 2020), ¶ 16.
[210] Since 2013, Verisign has accounted for only 32% of net adds. *Id.*, ¶ 18.
[211] *Id.*, ¶ 16.
[212] *Id.*, ¶ 17.
[213] AA-2 (*Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1335 (7th Cir. 1986)).
[214] Murphy Report (May 28, 2020), ¶ 28.
[215] *Id.*, ¶ 26.
[216] *Id.*
[217] *Id.*, ¶ 30.

118.     Second, Afilias cannot show that Verisign has power over price or the power to exclude rivals.  Verisign's pricing is regulated by the DOC and the Cooperative Agreement includes specific provisions as to when and by how much Verisign can raise prices.[218]  The wholesale price of .COM domain name registrations is set at the price cap permitted under the Cooperative Agreement, suggesting that .COM pricing is in fact below competitive levels.[219]  Moreover, Verisign's wholesale prices typically are lower than other legacy TLDs and new gTLDs.[220]  Also, as discussed *supra*, Verisign does not have the power to exclude existing rivals, prevent the entry of new rivals, or prevent any of these competitors from expanding.

119.     Furthermore, Verisign has no power to stop industry trends that compete with TLDs or reduce the significance of a website in a particular TLD.  For example, while Afilias focuses on 1990's era browsers that automatically appended .COM onto entries in the URL bar,[221] most browsers today, like Google's, combine an integrated URL and search bar.[222]  These browsers do not append .COM to terms, and the results of Google searches do not favor .COM websites over other TLD websites.[223]  Additionally, businesses and individuals are increasingly relying on social media platforms, blog and website hosting services, and mobile apps, for their online presence.[224]  As the DOC stated in loosening restrictions on Verisign in Amendment 35, "new gTLDs, and the use of social media have created a more dynamic DNS marketplace."[225]

### b.     The Cooperative Agreement Confirms a Competition DNS

120.     Afilias relies on the United States historically having required ICANN to impose price caps for .COM, and contends that such actions reflect the DOC's conclusion that Verisign "maintains a dominant position in the supply of registry services."[226]  But, in fact, the U.S. government has taken exactly the opposite position about today's market.

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[218] Kneuer Ex. L (Cooperative Agreement, Am. 35, *supra* note 161, ¶ 2).
[219] Murphy Report (May 28, 2020), ¶ 35.
[220] *Id.*
[221] Zittrain Report (Sept. 26, 2018), ¶ 17.
[222] Murphy Report (May 28, 2020), ¶ 32.
[223] *Id.*
[224] *Id.*, ¶ 33.  None of these platforms require a second level domain registration and thus provide a costless or nearly costless alternative to consumers if Verisign ever decided to charge supra-competitive prices for .COM registrations.
[225] Kneuer Ex. L (Cooperative Agreement, Am. 35, *supra* note 161, at 1).
[226] Sadowsky Report (Mar. 20, 2019), ¶ 36.

121.     The price caps Afilias cites stem from an amendment entered in 2006 to the Cooperative Agreement between NSI and the DOC.[227]  In adopting Amendment 35 to the Cooperative Agreement in October 2018, the DOC confirmed that today's competitive landscape has changed significantly since 2000[228] and that, as a result of a "more dynamic DNS marketplace . . .[,] it is appropriate to amend the Cooperative Agreement to provide pricing flexibility for the registration and renewal of domain names in the .com registry."[229]

122.     Moreover, the existence of price regulation undercuts Afilias' contention that Verisign would seek to "bury" .WEB so as to divert registrations away from .WEB and toward .COM.  As noted, Verisign's wholesale pricing for .COM is below market levels.  Thus, Verisign has every incentive to drive registrations to the market priced .WEB rather than to the below market priced .COM, *i.e.*, to do exactly the opposite of what Afilias asserts would happen.

### 2.     .WEB is Unlikely to Have a Significant Impact on Competition

123.     The economic evidence demonstrates that Verisign's acquisition of .WEB is unlikely to have any substantial impact on competition.  The New gTLD Program's domain base has grown rapidly from 0 in 2013, to 3.6 million in 2014, 10.9 million in 2015, and 23.8 million in 2018.[230]  To date, eight new gTLDs have domain name bases of over 1 million registrations.[231]  The .top new gTLD by itself has a domain base of over 3.8 million.[232]  Since 2013, new gTLDs account for 17% of gross adds and 30% of cumulative net adds.[233]

124.     Besides the new gTLDs, legacy TLDs have large domain name bases, including .ORG (10.2 million) and .INFO (4.8 million).[234]  The over 300 ccTLDs account for an additional 150 million total global registrations.[235]  Moreover, all of those domains must now compete against social media, second-level TLD hosting platforms, and mobile apps as a means to

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[227] Kneuer Ex. D (Cooperative Agreement, *supra* note 178).
[228] Kneuer Ex. L (Cooperative Agreement, Am. 35, *supra* note 161).
[229] *Id.* at 1.
[230] Murphy Report (May 28, 2020), ¶ 28.
[231] *Id.*, ¶ 29.
[232] *Id.*
[233] *Id.*, ¶ 28.
[234] *Id.*, ¶ 26.
[235] *Id.*, ¶ 27.

establish an Internet presence.[236]  The addition of .WEB into this environment is not likely to generate a significant competitive impact.[237]

## C.    .WEB Is Not Uniquely Positioned To Compete Against .COM

125.    Afilias contends that ".WEB is widely seen as the best potential competitor to .COM."[238]  Afilias' expert Dr. Sadowsky opines that "the only new domain that is likely to compete strongly with .com is .web, due to properties inherent in its name,"[239] which allegedly are "affinity" and "community" rather than "commercialism" and "business."[240]  Afilias also cites to statements by industry participants touting .WEB and the auction price for .WEB as purported evidence of .WEB's unique competitive significance.

126.    Verisign's and ICANN's economists both have concluded that there is no evidence that .WEB will be a particularly significant competitive check on .COM.[241]  Afilias' "evidence"[242] to the contrary is unqualified speculation by industry participants.  Likewise, the auction price for .WEB does not prove .WEB is a particularly significant competitor – in fact, it establishes the opposite.  (*See infra* at III.C.3).

### 1.    .WEB's Alleged Characteristics Do Not Distinguish it from Other Available gTLDs

127.    Afilias' expert Dr. Sadowsky identifies three alleged characteristics of .WEB that he subjectively asserts makes .WEB attractive for future registrants:  (i) universality (*i.e.*, .WEB is easy to pronounce and remember); (ii) .WEB domain names will be available while many .COM domain names already have been taken; and (iii) people identify the term ".web" with the Internet.[243]  Sadowsky identifies no evidence to support these conclusions, or any educational or professional background that would give him expertise on these matters, and certainly no

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[236] *Id.*, ¶ 33.
[237] Indeed, as discussed in Section III.C.3, *infra*, the $135 million auction price for .WEB indicates that the market anticipates .WEB will acquire only a 1% share of the market.  *Id.*, ¶ 57.  This minimal share of the market does not raise competitive concerns.  AA-33 (*Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 333 (1961) (20 year contract that captured 1% of the coal market was "quite insubstantial" for antitrust purposes)).
[238] Afilias' Amended IRP Request, ¶ 82.
[239] Sadowsky Report (Mar. 20, 2019), ¶ 39.
[240] *Id.*
[241] Murphy Report (May 28, 2020), ¶ 46; Carlton Report (May 30, 2019), ¶ 28.
[242] Sadowsky Report (Mar. 20, 2019), ¶ 54.
[243] *Id.*, ¶ 41.

evidence that .WEB is different along these dimensions than many other competitors.

128.    Universality:  Dr. Sadowsky appears to equate "universality" of a TLD with being comprised of three letters, associated with the Internet, having no semantic limitations, and being memorable and easy to pronounce.[244]  .WEB is not unique in having these characteristics.  Many TLDs are short and memorable, including legacy TLDs such as .ORG, .INFO, and .BIZ, ccTLDs such as .CO, and new gTLDs such as the top three new gTLDs .XYZ, .ICU and .TOP.[245]  Nor is .WEB the only new gTLD that is a "generic" label with no semantic limitations of scope.  .XYZ, for example, has no meaning at all, and is the third most popular new gTLD with nearly three million domain name registrations.[246]  Afilias further provides no evidence to support its assumption that a "generic" label without semantic limitation is a relevant criteria for gTLD success, and the available evidence contradicts Afilias' assumption.  .ICU, .CLUB, and .WORK all have clear semantic meanings, yet they are in the top ten of new gTLDs.[247]  Finally, as discussed in the Murphy Report, there is no economic basis to assume that a TLD is universal – and, thus, likely to be successful – because Afilias believes the TLD relates to the Internet.[248]

129.    Availability:  Afilias contends that desirable domain names are much more likely to be available in .WEB than .COM because so many names have already been taken by .COM registrants.[249]  That may be true, but the availability of domain names compared to .COM hardly is a unique characteristic of .WEB; all new gTLDs possess the same advantage over .COM.[250]

130.    Identity and Affinity:  Afilias asserts that Internet users will identify with .WEB because .WEB "is more directly and strongly associated with use of the Internet for a wide range of purposes" than .COM.[251]  But the fact that .COM is *not* intrinsically associated with the Internet – as Dr. Sadowsky admits[252] – directly contradicts this assertion.  It is equally plausible

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[244] *Id.*
[245] Murphy Ex. KM-12 (nTLD Stats, New gTLDs, *available at* https://ntldstats.com/tld).
[246] *Id.*
[247] *Id.*
[248] Murphy Report (May 28, 2020), ¶¶ 41–42; Zittrain Report (Sept. 26, 2018), ¶¶ 17–18.
[249] Sadowsky Report (Mar. 20, 2019), ¶ 41(2).
[250] *Id.*, ¶ 40; Murphy Report (May 28, 2020), ¶ 74.
[251] Sadowsky Report (Mar. 20, 2019), ¶ 41(3).
[252] *Id.*, ¶ 39.

that Internet users will prefer domain names specific to their particular interests (*e.g.*, "Joes.Photography") rather than a generic TLD.[253]  Moreover, as already noted, many new gTLDs have Internet associations, including .ONLINE, .WEBSITE, and .SITE, among others. Some of these TLDs have proven to be quite successful while others have not, suggesting that their success has little to do with any "Internet association" inherent in the particular TLD.[254]

### 2. Industry Participant and Analyst Statements Regarding .WEB

131.  In his report, Sadowsky claims that .WEB is uniquely positioned to challenge .COM's dominance, and quotes statements by industry participants and analysts to bolster his claim.[255]  These statements are pure subjective opinion without evidentiary support.  Sadowsky also ignores that industry participants and analysts have made similar claims about other TLDs. As discussed in the Carlton Report, industry participants routinely have touted the competitive potential of other gTLDs prior to launch,[256] yet none of these TLDs – according to Afilias' apparent but unsubstantiated assessment – have become significant competitors to .COM.[257]

### 3. .WEB's Valuation Disproves its Competitive Significance

132.  Afilias and Dr. Sadowsky assert that the $135 million price for .WEB demonstrates its significance relative to other new TLDs.[258]  Neither Afilias nor the Sadowsky Report provide any economic evidence to support this assertion, nor can they.  The available economic evidence in fact demonstrates the opposite – the $135 million price for .WEB shows that it will likely be a small player in the domain name market.

133.  The Murphy Report models multiple economic scenarios to assess Afilias' claim that the $135 million price shows that .WEB will be a substantial competitor.  ***None of these scenarios*** indicate that .WEB is likely to have a significant market share, let alone a share that would pose a substantial competitive threat to .COM.

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[253] Murphy Report (May 28, 2020), ¶¶ 3(c), 45.
[254] *Id.*, ¶ 48; Murphy Ex. KM-12 (nTLD Stats, *supra* note 245).
[255] Sadowsky Report (Mar. 20, 2019), ¶¶ 40–41.
[256] Carlton Report (May 30, 2019), ¶ 36.
[257] *Id.*, ¶¶ 36–37.
[258] Sadowsky Report (Mar. 20, 2019), ¶ 46; Afilias' Amended IRP Request, ¶ 26.

134.    These conclusions are supported by a comparison to other, recent substantial TLD

transactions.

                                                                        This is

further evidence that a $135 million bid price for .WEB implies only that .WEB could become

one of many TLDs with registrations in the low single digit millions and does not in any way

suggest that .WEB is a particularly significant competitor to .COM.[262]

### D.    Verisign Has Every Incentive to Grow .Web Aggressively

135.    Afilias claims without evidence that Verisign seeks to acquire .WEB for the

purpose of eliminating a potential competitor to .COM and that .WEB is more likely to succeed

if operated by Afilias.[263]  In fact, Verisign has every incentive and ability to make .WEB a

success.  By contrast, the evidence suggests Afilias would be a worse operator of .WEB.

136.    Verisign needs a new TLD like .WEB for growth.[264]  Verisign's growth rate has

declined in recent years, largely due to many names in .COM already having been taken and

increased competition from new gTLDs and ccTLDs that have superior name availability.[265]

137.    Even Afilias' own experts concede that the .COM name space effectively is

taken.[266]  Numerous other industry participants have noted that most of the "good" names in

.COM already are taken.[267]  The exhaustion of space in .COM contradicts Afilias' claim that

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[259] Murphy Report (May 28, 2020), ¶ 56.
[260] *Id.*, ¶¶ 59–62.
[261] *Id.*, ¶ 62.
[262] *Id.*
[263] Afilias' Amended IRP Request, ¶ 82.
[264] Murphy Report (May 28, 2020), ¶ 75.
[265] *Id.*, ¶¶ 73–74.
[266] *Id.*, ¶ 74 (citing Zittrain Report (Sept. 26, 2018), ¶ 47; Sadowsky Report (Mar. 20, 2019), ¶ 22).
[267] *See, e.g.*, Murphy Ex. KM-42 (Alan Dunn, Quartz, "The world is running out of domain names – what will we do when they're all gone?" (June 2, 2017), *available at* https://qz.com/994698/domain-name-regitrtion-problems-are-going-to-become-a-lot-worse-when-we-run-out-of-names/ ("The world is nearly out of good '.com' domain names . . . As global internet usage rises, .com naming is going to get more and more complicated.")); Murphy Ex. KM-45 (Radix, "Radix Announces .Website Launch Timeline" (June 16, 2014), *available at* http://www.circleid.com/posts/20140616_radix_announces_website_launch_timeline/  ("There are more than 113 million .com domain names registered, according to current market research, making it extremely difficult to secure a first-choice .com domain name.  In fact, 65% of all checks for .com domain name availability fail and half of all customers buying a new domain name have to try two or more times to register a name of their choosing.  The

Verisign wants to acquire .WEB to "protect" .COM.  No value would be obtained from discouraging registrations of "good" names in .WEB when those "good" names are not available in .COM.  Verisign needs new name space to grow, and .WEB would provide that.

138.　　Verisign is well-positioned to maximize .WEB's potential.  Verisign has an unmatched record of security and stability in registry operations – expertise that it can and would bring to .WEB.[268]  Verisign also has been consistent regarding its intentions to promote .WEB and the benefits Verisign's operation would bring to the TLD.[269]

139.　　Afilias' recent track record suggests that it is less likely to be able to grow .WEB into a competitive force than Verisign.  Afilias operates .INFO, .PRO, and .MOBI, along with several new gTLDs.[270]  Afilias' recent experience with these gTLDs suggests that Afilias would not be an effective operator of .WEB.  Afilias has priced these TLDs at levels well above .COM.  Afilias' TLDs have been shrinking, not growing.[271]  Afilias is even less likely to be successful with .WEB, which will be competing against over 1,200 new gTLDs, while Afilias' other TLDs reached their peak market position prior to the introduction of new gTLDs.

## CONCLUSION

140.　　Based on ICANN's Rejoinder, it is clear that the only question before this Panel is whether ICANN properly exercised its reasonable business judgment to defer a decision on Afilias' claims regarding the .WEB auction.  To the extent, however, that this Panel considers the substance of Afilias' claims regarding .WEB, for the reasons set forth herein and in NDC's Brief, those claims are meritless and should be rejected.

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frustratingly limited .com space makes new domain options like .website a top priority in the digital marketplace, and for Radix.")).
[268] Murphy Report (May 28, 2020), ¶ 78.
[269] *See, e.g.*, Murphy Ex. KM-51 (Verisign, "Verisign Press Release" (Aug. 1, 2016) ("Our expertise, infrastructure, and partner relationships will enable us to quickly grow .web and establish it as an additional option for registrants worldwide in the growing TLD marketplace . . . . And these users, along with our global distribution partners, will benefit from the many new domain name choices .web will offer.")); Murphy Ex. KM-52 (Verisign, Verisign FQ3 2016 Earnings Call Transcript (Oct. 27, 2016) ("[W]e are excited about the .web opportunity as we believe we are well positioned to make it successful.")); Murphy Ex. KM-53 (Verisign, Verisign FQ4 2016 Earnings Call Transcript (Feb. 9, 2017) ("We strongly believe Verisign is well positioned to grow and widely distribute .web to provide an additional option to the marketplace given our proven track record of reliability and security.")); Carlton Report (May 30, 2019), ¶ 57.
[270] Murphy Report (May 28, 2020), ¶ 66.
[271] *Id.*, ¶ 67.

Dated:  June 26, 2020                    ARNOLD & PORTER KAYE SCHOLER LLP

By:  */s/ Ronald L. Johnston*

Attorney for *Amicus Curiae* VeriSign, Inc.

# EXHIBIT AC-106

# CONFIDENTIAL

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


**AFILIAS DOMAINS NO. 3 LIMITED,**

*Claimant*

**v.**

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

*Respondent*


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

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**REPLY MEMORIAL IN SUPPORT OF AMENDED REQUEST BY**
**AFILIAS DOMAINS NO. 3 LIMITED FOR INDEPENDENT REVIEW**

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4 May 2020
(Revised, 6 May 2020)

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**TABLE OF CONTENTS**

## I. INTRODUCTION AND OVERVIEW OF AFILIAS' REPLY MEMORIAL

1. In ICANN's Response (the "**Response**") to Afilias' Amended IRP Request (the "**Amended Request**"), ICANN portrays itself as a mere California not-for-profit corporation with a narrow, limited purpose—to "oversee[] the technical coordination of the Internet's domain system ('DNS') on behalf of the Internet community."[1] ICANN suggests its role is simply to enter into contracts with entities that "operate generic top-level domains ('gTLDs')...."[2] According to ICANN, it is "caught in the middle of this dispute between powerful and well-funded businesses."[3] ICANN tells this Panel that because Afilias' claims are "fiercely contested by NDC and Verisign,"[4] ICANN's Board determined—at some unspecified time and in some unspecified manner—to defer "consideration" of Afilias' claims "until this Panel renders its final decision...."[5] ICANN further asserts that once this Panel issues its final decision, the ICANN Board "will seriously consider and evaluate this Panel's findings to determine what action, *if any*, is appropriate in order to make .WEB finally available to consumers."[6] In other words, ICANN tells this Panel that its final decision in this IRP will be merely advisory—to be followed (or not) as the Board deems fit within "the realm of reasonable business judgment."[7]

2. For an organization that is required by its own Articles of Incorporation and Bylaws to operate according to principles of openness, transparency, neutrality, fairness, good faith and accountability, ICANN's misrepresentations of its Mission, the IRP process, and the record of its conduct in this matter are truly stunning. We must therefore begin this Reply by recalling several basic facts and principles.

3. *First*, ICANN serves as the de facto international regulator and gatekeeper to the Internet's DNS space, with no government oversight. ICANN—and ICANN alone—decides which companies obtain the exclusive gTLD registry rights that typically carry extraordinary value (whether measured financially, culturally, politically, or otherwise). As recognized by the Panel in the first IRP, *ICM v. ICANN*—and by numerous IRP Panels since then—"ICANN *is no ordinary non-profit California corporation*. *The Government of the United States vested regulatory authority of vast dimension and pervasive global*

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*reach in ICANN.*"[8] As discussed further below, since the *ICM* case, the U.S. government has now transferred virtually *all* regulatory authority over the DNS to ICANN.

4.     According to ICANN's own Articles of Incorporation, ICANN exercises sweeping power over the DNS on a global basis:

> In furtherance of … [its] purposes, **and in recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization, [ICANN] shall** … pursue the charitable and public purposes of **lessening the burdens of government and promoting the global public interest in the operational stability of the Internet** by carrying out the mission set forth in the bylaws of the Corporation ("**Bylaws**").[9]

Consistent with the global reach of its powers as a regulator and gatekeeper, ICANN's Articles require ICANN to "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.**"[10]

5.     As stated in ICANN's Bylaws, ICANN's Mission goes far beyond simply "oversee[ing] the technical coordination of the Internet's domain system ('DNS') on behalf of the Internet community" (as stated in its Response[11]). ICANN's Mission includes "**[c]oordinating the _allocation_ and assignment of names in the root zone of the [DNS] and coordinat[ing] the development and implementation of policies concerning the registration of second-level domain names in generic top-level domains ('gTLDs')**."[12] In allocating thousands of gTLD names, ICANN distributes billions of dollars in international property rights around the world.[13]

6.     *Second*, as recognized by other IRP Panels, despite ICANN's sweeping powers, "the IRP is the only accountability mechanism by which ICANN holds itself accountable through *independent third-party review* of its actions or inactions."[14] For that reason, IRP Panels have consistently rejected ICANN's assertions that IRP decisions and declarations are advisory, that IRP Panels must review ICANN's actions

or inaction with deference, and that IRP Panels may not order affirmative declaratory relief.[15] As the IRP

Panel held in *ICM v. ICANN*—and as numerous IRP Panels have since confirmed—the "business judgment

rule" with respect to ICANN is "to be treated as a default rule that might be called upon *in the absence of*

*relevant provisions of ICANN's Articles and Bylaws and of specific representations of ICANN* … *that*

*bear on the propriety of its conduct*."[16]

7.        *Third*, in anticipation of the complete transfer of the Internet Assigned Numbers Authority

("**IANA**") functions from the U.S. Commerce Department to ICANN in 2016, a Cross-Community Working

Group for Accountability (the "**CCWG**") was established to revise and improve ICANN's constitutive

documents—including its Bylaws and the accountability mechanisms required by its Bylaws—to provide for

greater accountability for ICANN in light of the transition. As stated in the CCWG's Supplemental Final

Proposal in February 2016:

> This effort is integral to the transition of the United States' stewardship of the IANA functions to the global Internet community, reflecting the ICANN community's conclusion that *improvements to ICANN's accountability were necessary in the absence of the accountability backstop that the historical contractual relationship with the United States government provided*.[17]

As a result of the CCWG's recommendations, the drafters of ICANN's new Bylaws significantly strengthened

IRPs—in part to prevent the type of arguments that ICANN had made in past IRP cases (and which ICANN

nonetheless tries to make here).

8.        This is the first case brought under ICANN's new Bylaws, which were adopted on 1 October

2016. As discussed in the Sections below (and contrary to many of the assertions in ICANN's Response),

there is no longer any doubt concerning this Panel's standard of review (an "objective, de novo examination

of the Dispute"[18]) or the Panel's mandate, which is to achieve a "binding" and "final" resolution of the Dispute

that is "consistent with international arbitration norms" and "enforceable in any court with proper jurisdiction."[19]

In addition, while prior versions of the Bylaws limited IRPs to actions or inactions only of the ICANN Board,

the new Bylaws specifically provide for IRPs to apply to "any actions or failures to act by or within ICANN

committed by the Board, *individual Directors, Officers, or Staff members* that gives rise to a Dispute"[20]—

which include claims that such actions or failures to act violated the Articles or Bylaws. Contrary to ICANN's

Response, this IRP is not just about the ICANN Board's supposed determination to defer "consideration" of

Afilias' claims until after this Panel has issued its final decision—and whether any such determination was

"within the realm of reasonable business judgment."[21] It is about ICANN Staff's flawed analysis of the New

gTLD Program Rules,[22] its biased and inadequate investigation of NDC's and Verisign's conduct, its

recommendation (if one was made) to the ICANN Board to take no action, its decision without Board approval

or oversight to proceed with contracting (quite likely relying on the cover provided by Verisign's and NDC's

submissions in the context of the so-called investigation), and the Board's complete abdication of its

responsibility to ensure implementation of the New gTLD Program Rules in accordance with ICANN's Articles

and Bylaws. As stated by other IRP Panels in evaluating ICANN actions and inactions in the New gTLD

Program (albeit under earlier versions of the Bylaws), the question is whether ICANN's actions or failures to

act "are in fact consistent with the Articles, Bylaws, and [New gTLD Program Rules]," which the Panel must

address "independently, and without any presumption of correctness."[23]

        9.      ICANN fails in its Response to engage seriously with any of the claims stated in Afilias'

Amended Request, but the record before this Panel no longer leaves any doubt. In August 2016, after NDC

improperly won the ICANN Auction for the registry rights for .WEB, ICANN apparently received for the first

time a copy of the Domain Acquisition Agreement (the "**DAA**") that Verisign and NDC had entered into in

August 2015.[24] The DAA plainly demonstrated that NDC had committed numerous material breaches of the

New gTLD Program Rules, which—based on the plain terms of the New gTLD Program Rules and ICANN's

Articles and Bylaws—required ICANN to disqualify NDC's bid and application. ICANN never disclosed the

DAA to Afilias until December 2018, when the Emergency Arbitrator ordered its production to Afilias in this

IRP.[25] After Afilias raised concerns about NDC's application and bid (which were based only on incomplete

but still troubling public statements made by Verisign), ICANN committed in September 2016 to undertake

an investigation (an "informed resolution") of Afilias' concerns and to keep Afilias apprised of the status of .WEB. ICANN's investigation, consisting of a single questionnaire based largely on information that Verisign had provided to ICANN, was neither fair nor neutral, transparent or in good faith, its ultimate objective being to create a documentary record to protect ICANN, Verisign and NDC from criticism.

10. In January 2018—after a year-long hiatus resulting from the U.S. Department of Justice's ("**DOJ's**") investigation into whether the DAA violated U.S. antitrust laws (during which the DOJ asked ICANN to take no action concerning .WEB)—ICANN secretly began to take steps to delegate .WEB to NDC (and hence Verisign). Despite numerous requests by Afilias to ICANN as to the status of its investigation—and its intentions with respect to .WEB—ICANN refused to provide Afilias with any information (even after Afilias filed a DIDP Request[26] seeking the information in February 2018, which ICANN denied almost in its entirety). On 6 June 2018, ICANN—without warning or explanation—provided notice to Afilias that it had taken the .WEB contention set off-hold. Afilias initiated ICANN's Cooperative Engagement Process ("**CEP**") on 18 June 2018. When ICANN terminated the CEP on 13 November 2018, Afilias commenced this IRP the next day.

11. In **Section II** below, we set forth the proper standard of review for the IRP, which ICANN has completely misstated in its Response. In **Section III**, we demonstrate that ICANN violated its Bylaws and Articles by not disqualifying NDC's application and bid upon receiving the DAA, and by instead proceeding to contract with NDC (and therefore Verisign) for the .WEB Registry Agreement. In **Section IV**, we explain that ICANN's exercise of any discretion it has to remedy NDC's breaches must be consistent with ICANN's mandate to promote competition. In **Section V**, we show that ICANN's time-bar defense is entirely without merit. In **Section VI**, we explain the proper relief to be ordered by the Panel in this IRP. We state our Conclusion in **Section VII**. For the avoidance of doubt, with respect to Afilias' Rule 7 claim, we rely on our prior submissions concerning that claim, consistent with the Panel's Phase I Decision.[27]

## II. STANDARD OF REVIEW

12. ICANN's Response includes a brief section on the Panel's "Standard of Review" that is

inaccurate and incomplete. ICANN's "Standard of Review" section states in its entirety:

> 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. But with respect to IRPs challenging the ICANN Board's exercise of its fiduciary duties, an IRP Panel is not empowered to substitute its judgment for that of ICANN. Rather, the core task of an IRP panel is to determine whether ICANN has exceeded the scope of its Mission or otherwise failed to comply with its foundational documents and procedures.[28]

13.    ICANN's statement concerning the "Standard of Review" in this IRP seriously misstates the Panel's mandate.

14.    Rule 11 of ICANN's Interim Procedures[29] ("Standard of Review")—which repeats almost *verbatim* Section 4.3(i) of the Bylaws—states in relevant part:

> Each IRP PANEL shall conduct **an objective, de novo examination** of the DISPUTE.
>
> a.    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 ICANN'S Articles or Bylaws**.
>
> b.    All DISPUTES **shall be decided in compliance with ICANN'S Articles and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions**.
>
> c.    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.[30]

15.    In its Response, ICANN omits nearly all of the relevant provisions of its own "Standard of Review" requirements for IRPs, as stated both in its Bylaws and Interim Procedures. ICANN only partially cites the provisions with respect to the Board's exercise of its fiduciary duties—and even there leaves out the *proviso* that the Panel will not replace the Board's "reasonable judgment **so long as the Board's action or inaction is within the realm of reasonable business judgment**".

16.    As stated above, this case does not involve the Board's exercise of its fiduciary duties. There is no evidence in this case that ICANN's Board exercised or attempted to exercise any fiduciary duties—or that the Board did anything at all with respect to the .WEB contention set. ICANN says as much. Rather,

6

Afilias claims that ICANN's "Covered Actions" (defined in the Bylaws "as any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members"[31]) violated ICANN's Articles and Bylaws. Afilias' principal claim is that ICANN's failure to disqualify NDC's application and bid for the .WEB Registry Agreement—based on NDC's material violations of the New gTLD Program Rules—violated (*inter alia*) the requirement in the Bylaws that ICANN "[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment…."[32] By August 2016, ICANN had all the information it needed to determine that NDC's application and bid had to be disqualified. ICANN failed to take the required action, and moreover, failed to disclose any of the information it had received. Instead, ICANN officers and staff led Afilias to believe that ICANN was investigating Afilias' claims, and then undertook a superficial investigation that is best described as an attempted cover-up by ICANN of its own failings and of Verisign's and NDC's subterfuge.

17.     Therefore—contrary to the assertion in ICANN's Response—the Standard of Review in this IRP has nothing to do with whether the Panel is "empowered to substitute its judgment for that of ICANN." Rather, ICANN's constituent documents require this Panel to conduct "an objective, de novo examination of the DISPUTE" (*i.e.*, that actions or failures to act committed by the ICANN Board, individual Directors, Officers, or Staff members violated ICANN's Articles of Bylaws). The Panel must then make "findings of fact to determine whether the COVERED ACTION" (*i.e.*, the actions or failures to act committed by the Board, individual Directors, Officers, or Staff members) "constituted an action or inaction that violated ICANN's Articles or Bylaws." The Panel must then decide the DISPUTE "in compliance with ICANN's Articles and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions."

18.     As discussed further below in Section VI (addressing the relief to which Afilias is entitled in this IRP), the Panel's decision "shall reflect a well-reasoned application of how the DISPUTE was ***resolved in compliance with ICANN's Articles and Bylaws***"[33]—including, *inter alia*, the Bylaws' requirement that IRPs "[l]ead to ***binding, final resolutions consistent with international arbitration norms that are***

*enforceable in any court with proper jurisdiction*."[34]

### III. ICANN VIOLATED ITS BYLAWS AND ARTICLES BY NOT DISQUALIFYING NDC'S APPLICATION AND BID AND IN PROCEEDING TO CONTRACT WITH NDC (AND THEREFORE VERISIGN) FOR THE .WEB REGISTRY AGREEMENT

19.     In its Amended Request, Afilias described the various violations of the New gTLD Program Rules[35] by NDC—which *required* ICANN to disqualify NDC's application and bid when ICANN learned of the violations in August 2016.[36] ICANN offers no substantive response. ICANN does not explain why, based on the plain language of the New gTLD Program Rules and the requirements of ICANN's Articles and Bylaws, it did not have to disqualify NDC's application and bid, or must be considered to have acted within its reasonable discretion in not doing so, but rather proceeded to contracting with NDC (and hence effectively Verisign) in spite of NDC's obvious and material violations of the New gTLD Program Rules.

20.     Instead, ICANN offers various baseless and self-contradictory defenses. *First*, ICANN states that it "complied with its Articles, Bylaws and internal policies and procedures in facilitating the .WEB auction and in handling the disputes regarding .WEB since the auction."[37] It does not explain how it complied, or indeed reveal what "internal" policies and procedures it followed. *Second*, after claiming to have appropriately "handled" Afilias' concerns, ICANN asserts that at some point in time (which it never identifies), the ICANN Board decided on "[d]eferring such consideration [*i.e.*, of Afilias' concerns] until this Panel renders its final decision…."[38] There is no evidence of any decision by the Board to "defer" consideration of Afilias' concerns (and ICANN never notified Afilias of any such decision) or the bases for Staff's apparent recommendation to the Board to take no action. Yet ICANN maintains that the Board's decision was "well within the realm of reasonable business judgment"[39]—apparently because Afilias' concerns "are vigorously denied by NDC and Verisign."[40] This is not a sufficient reason for the Board to have decided (if it did) not to take any action or not to have looked in to whether Staff were acting strictly in accordance with the New gTLD Program Rules. In so arguing, ICANN ignores, *inter alia*, its mandate to "[m]ake decisions by applying documented policies consistently, neutrally, objective, and fairly…."[41] ICANN is not permitted to arbitrarily "defer" decisions in

response to the "vigor" with which arguments are made—or because (as in this case) they are made by the largest and most powerful Internet registry in the world. *Third*, ICANN asserts that none of the violations Afilias identified "call for automatic disqualification." [42] ICANN does not pretend to base that assertion on the New gTLD Program Rules. Instead, it asserts that "automatic disqualification" would have been inappropriate "due to the pendency of government investigations and Accountability Mechanisms, *including this IRP*."[43] This IRP, however, claims that ICANN was required to disqualify NDC's application and bid in August 2016 when ICANN first learned of NDC's violations, whether as a matter of automatic disqualification pursuant to the applicable standards, or as a matter of the reasonable exercise of ICANN's discretion pursuant to those same standards (*i.e.*, those set out in the new gTLD Program Rules and ICANN's Articles and Bylaws).

21.      As set out below, ICANN violated its Articles and Bylaws by not disqualifying NDC's Application and bid (Section III(A)) and by its self-serving "investigation" of Afilias' bid and its decision to proceed to contracting with NDC for the .WEB gTLD Registry Agreement (Section III(B)).

### A.      ICANN's Failure To Disqualify NDC's Application and Bid

22.      ICANN's "Mission" includes "coordinat[ing] the development and implementation of policies concerning the registration of second-level domain names in generic top-level domains ('gTLDs')," ensuring that the policies are "developed through a bottom-up consensus-based multistakeholder process," and implementing those policies consistent with the requirements of its Articles and Bylaws.[44] ICANN's allocation of gTLD rights through the New gTLD Program goes to the heart of its Mission. ICANN has described the program as constituting "by far ICANN's most ambitious expansion of the Internet's naming system."[45]

23.      Section 1.2 of ICANN's Bylaws states that "[i]n performing its Mission, ICANN will act in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values, each as described below."[46] Of particular relevance here, ICANN is required to:

> [m]ake 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)[.][47]

9

The prohibition against discriminatory or preferential treatment in ICANN's application of its documented rules and policies is stated in Section 2.3 of the Bylaws:

> 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.[48]

Furthermore, in all of its activities—including the enforcement of its rules and policies:

> ICANN and its constituent bodies shall operate **to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness**[.][49]

24.     As recognized by other IRP Panels, and as acknowledged by ICANN itself, the new gTLD Program Rules arose from years of "'carefully deliberated policy development work' by the ICANN community."[50] In developing the New gTLD Program Rules, ICANN implemented "'an application and evaluation process for new gTLDs that is **aligned with policy recommendations** and provides **a clear roadmap** for **applicants** to reach delegation, including Board approval.'"[51] The New gTLD Program Rules— and in particular, the AGB—are "'**the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs**.'"[52]

25.     As described by the IRP Panel in *Gulf Cooperation Council (GCC) v. ICANN*:

> The Guidebook, running to almost 350 pages, sets out **comprehensive procedures** for the gTLD application and review process. It includes instructions for applicants, procedures for ICANN's evaluation of applications, and procedures for objections to applications. In line with ICANN's policies of transparency and accountability, applications for new gTLDs are posted on the ICANN website for community review and comment.[53]

26.     Pursuant to ICANN's Articles and Bylaws, the New gTLD Program Rules **must** be applied and enforced "in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values."[54] Thus, ICANN committed and represented to applicants that the New gTLD Program Rules would be implemented consistently, neutrally, objectively, fairly, non-discriminatorily, and transparently. Pursuant to its Articles, ICANN must also "carry[] out its activities in conformity with relevant principles of international law," which fundamentally requires "good faith."[55] Applicants thus had the legitimate expectation

that the New gTLD Program Rules and the application review and gTLD delegation process would be conducted and implemented by ICANN consistently, neutrally, objectively, fairly, non-discriminatory, transparently, and in good faith.

27.     Pursuant to this compact between ICANN and applicants, the New gTLD Program Rules are not precatory; they are mandatory. It is not within ICANN's "discretion" to overlook material violations of the New gTLD Program Rules for particular applicants (or non-applicants). Nor is it within ICANN's discretion to decide that certain applicants must follow the "clear roadmap … to reach delegation", but that non-applicants (such as Verisign)—are free to circumvent the roadmap and reach delegation by enlisting a shill like NDC, who won the .WEB Auction on Verisign's behalf through multiple and material violations of the New gTLD Program Rules. Moreover, to the extent that the New gTLD Program Rules provide ICANN with discretion, ICANN must exercise that discretion in strict compliance with its Articles and Bylaws.[56]

28.     We review below the specific material violations committed by NDC in light of ICANN's Response, as well as arguments offered by ICANN, Verisign, and NDC in prior submissions in this IRP. NDC's disqualifying violations include:

- Its violation of the AGB's prohibition against the resale, transfer, or assignment of NDC's rights or obligations in connection with its .WEB Application (Section III(A)(1));

- Its failure to amend its .WEB Application to reveal that Verisign had acquired rights and obligations in NDC's application, and would effectively control in all material respects that application, and that the information contained in its application regarding NDC's plans for developing and marketing .WEB were no longer true, accurate, complete, and not false or misleading in all material respects (Section III(A)(2));

- NDC's violation of the Auction Rules that precluded NDC from submitting bids on behalf of any entity other than itself (Section III(A)(3)).

    1.     **ICANN Improperly Ignored NDC's Sale, Transfer or Assignment of its Application to Verisign**

        (i)     *The Prohibition against the Resale, Transfer or Assignment of Rights and Obligations in a New gTLD Application*

29.     Module 6 of the AGB is entitled "Top-Level Domain Application—Terms and Conditions." It

prohibits the resale, assignment, or transfer of any of an applicant's rights or obligations in connection with its application:

> Applicant **may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application**.[57]

The prohibition does not provide for any exceptions, consistent with the ICANN's Board's Resolution that requires "process fidelity" to the New gTLD Program Rules.[58]

30.     The AGB's rule against an applicant reselling, assigning, or transferring "any" of its rights or obligations in connection with its application reflects the fundamental premise of transparency upon which the New gTLD Program and this specific rule are based—mirroring the obligations of openness and transparency enshrined in ICANN's Articles and Bylaws. Transparency was required not only to ensure the stability and security of the Internet, but also so that the entire Internet community would know the identity of each applicant that was seeking to obtain the registry rights to a particular gTLD—and why they were seeking to obtain them. Again, as stated by the IRP Panel in *GCC v. ICANN*: "**In line with ICANN's policies of transparency and accountability, applications for new gTLDs are posted on the ICANN website for community review and comment**."[59] An applicant who sells, transfers, or assigns its application rights to a non-applicant (particularly where, as here, it does so in secrecy) violates the plain terms of the New gTLD Program Rules and eviscerates the fundamental principles on which they are based.

31.     The AGB's public comments section underscores the fundamental requirement that the identity of each applicant—and its intentions for obtaining rights to the gTLD in question—be disclosed to the public, in fulfillment of ICANN's Commitments and Core Values of openness and transparency. Thus, as stated in the AGB:

> ICANN will post the public portions of all applications considered complete and ready for evaluation within two weeks of the close of the application submission period. …
>
> **Public comment mechanisms are part of ICANN's policy development, implementation, and operational processes**. As a private-public partnership, ICANN is dedicated to: preserving the operational security and stability of the Internet, promoting

competition, achieving broad representation of global Internet communities, and *developing policy appropriate to its mission through bottom-up, consensus-based processes*. *This necessarily involves the participation of many stakeholder groups in a public discussion*.

ICANN will open a comment period (the Application Comment period) at the time applications are publicly posted on ICANN's website (refer to subsection 1.1.2.2). *This period will allow time for the community to review and submit comments on posted application materials* (referred to as 'application comments'). …

In the new gTLD application process, *all applicants should be aware that comment fora are a mechanism for the public to bring relevant information and issues to the attention of those charged with handling new gTLD applications*. Anyone may submit a comment in a public comment forum. …

A general public comment forum will remain open through all stages of the evaluation process, *to provide a means for the public to bring forward any other relevant information or issues*.[60]

32.     If an applicant were permitted to resell, assign, or transfer its rights or obligations in connection with its application—and especially if it could do so without disclosing that fact until *after* the application process ended—the fundamental principles underlying the New gTLD Program, and ICANN's Articles and Bylaws, would be gutted. Thus, the only good faith interpretation of the rule, consistent with ICANN's Articles and Bylaws, is that it imposes an absolute bar against the resale, assignment or transfer of any of an applicant's rights or obligations in connection with its application. Even assuming *arguendo* that ICANN has discretion to waive this prohibition, it could not have properly done so consistent with its Articles and Bylaws (particularly where, as here, NDC never asked for a waiver, and, to the contrary, affirmatively concealed that it had sold, transferred, or assigned its rights and obligations under its Application).

### (ii)     NDC's Application

33.     NDC submitted its Application for .WEB on or about 13 June 2012. ICANN posted the public portions of the NDC Application the same day.[61] NDC identified itself as a limited liability company established under Delaware law, with its principal place of business in Miami, Florida.[62] It stated that it had three directors: Jose Ignacio Rasco III; Juan Diego Calle; and Nicolai Bezsonoff.[63] When asked to identify its officers or

partners, NDC identified the same three individuals.[64] NDC identified two shareholders as owning at least 15% of its shares.

34.     As called for by the application, NDC made extensive representations concerning its "Mission/Purpose" in seeking the registry rights to .WEB. ICANN in its Response—and Verisign and NDC— suggest that the only relevant criteria in which ICANN was interested in was whether the applicant had the "requisite financial and technical ability to operate a gTLD."[65] The AGB explicitly rejects any such suggestion.

35.     Module 2 of the AGB ("Evaluation Procedures") sets forth the *Evaluation Questions and Criteria*.[66] The AGB's *Evaluation Questions and Criteria* explained that the evaluation process for applications would, among other things, consider whether applicants had "provide[d] ***a thorough and thoughtful analysis*** of the technical requirements to operate a registry ***and the proposed business model***."[67] As the *Evaluation Questions and Criteria* plainly stated, ICANN intended the New gTLD Program to promote its mandate "to maintain and build on processes ***that will ensure competition and consumer interests***":

> [A]n important objective of the new TLD process is ***to <u>diversify the namespace, with different registry business models</u>*** and target audiences. …
>
> ICANN is not seeking to certify business success but ***instead seeks to encourage innovation*** while providing certain safeguards for registrants.[68]

By their plain terms, the *Evaluation Questions and Criteria* refute the assertion made at various times by ICANN, Verisign, and NDC that ICANN was interested only in an applicant's financial and technical ability to operate a gTLD.

36.     No doubt with the AGB's actual criteria in mind, the public portions of NDC's .WEB Application made extensive representations about NDC's proposed "business model" and NDC's unique capabilities and experience to innovate and diversify the Internet name space if it could add .WEB to its existing "product portfolio."[69] NDC further represented itself as being strongly positioned to market .WEB as an alternative to .COM. According to NDC's Application:

The mission of .WEB is to provide the internet community at-large **with an alternative 'home domain' for their on-line presence**…. This general domain will provide new registrants with **better, more relevant alternatives to the limited options remaining for current commercial TLD names**.[70]

37.     In a thinly veiled reference to commercial website names using the .COM TLD—essentially to Verisign itself—NDC asserted that "[c]ongestion in the current availability of commercial TLD names **fundamentally advantages older incumbent players**."[71] NDC touted its experience in having launched and operated the .CO ccTLD—which was intended (and remains) as the country-code TLD for Colombia, but which has also become an increasingly popular alternative to .COM.[72] Thus, NDC's application asserted:

Prospective users [will] benefit from **the long-term commitment of a proven executive team that has a track-record of building and successfully marketing affinity TLD's (e.g., .CO targeting innovative business and entrepreneurs)**. …

**The experienced team behind this application initially launched and currently operates the .CO cc TLD. 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 [i.e. NDC's] experience and expertise in marketing and branding TLD properties**.[73]

38.     Indeed, NDC specifically relied on its experience in marketing .CO **as an alternative to .COM**—and represented that NDC would do the same if it obtained the registry rights for .WEB:

Since its launch, .CO's marketing has primarily focused on developing a worldwide ecosystem of innovative small businesses and entrepreneurs…. **In addition, .CO has become <u>the standard secondary option to .COM</u> for the leading global registrars, having the most conversions when presented with a non-.COM option**. …

.CO has differentiated itself from other existing TLDs by combining innovative branding with the highest standards in trademark protection, unprecedented marketing campaigns, and pro-active security monitoring. **We plan to implement a very similar strategy for .WEB in its launch, operation, promotion and growth.**[74]

39.     The public comment period closed on 26 September 2012.[75] At that point, the Internet community understood that the applicant behind NDC's .WEB Application was the company identified and portrayed in its application: *i.e.*, a relatively small but ambitious and innovative limited liability company that had publicly represented, *inter alia*, the "long-term commitment" of its "proven executive team" to aggressively market .WEB as an alternative to .COM, its "intention" to add .WEB to ".CO's product portfolio," and its "plan

to implement a very similar strategy for .WEB in its launch, operation, promotion and growth." No mention was made of Verisign. However, we do now know that on 25 August 2015, NDC and Verisign entered in to the DAA—approximately a year before the .WEB contention set resolution commenced.

40. Prior to the .WEB Auction in July 2016, no one knew that NDC had in fact sold, transferred, and assigned virtually all of its rights in its .WEB Application to Verisign—by far the largest registry in the world, which already dominates the TLD space with .COM and .NET—nearly one year earlier.[76] When it entered into the DAA and failed to notify ICANN and the Internet community that it had done so, NDC turned the public posting and comment process—designed to advance ICANN's guiding principles of openness, transparency, and accountability—into a mechanism for concealment. The public portions of NDC's Application, left unchanged, affirmatively deceived the Internet community in a significant and material way as to the identity and motivations of the true party-in-interest behind the Application. As discussed further below, ICANN—despite being fully aware of all of the relevant facts in August 2016—did nothing to redress this deceit and everything to help NDC and Verisign.

### (iii) NDC's Sale, Transfer, and Assignment of its Rights and Obligations in the .WEB Application to Verisign through the DAA

41. It bears repeating that Afilias only obtained a copy of the DAA from ICANN in December 2018, after the Emergency Arbitrator ordered ICANN to produce it in this IRP. As the Panel will recall, on 28 July 2016 (the day after the .WEB Auction), Verisign filed a 10-Q Statement with the U.S. Securities and Exchange Commission (the "**SEC**"), which stated 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."[77] Since that time, and continuing into this IRP, Verisign and NDC have repeatedly mischaracterized the DAA as an "executory" or "conditional" contract, which merely provides for the assignment of the .WEB Registry Agreement *if* NDC enters the Agreement with ICANN and *if* ICANN thereafter approves the Agreement's assignment to Verisign. ICANN has mischaracterized the DAA in this

IRP in the same manner.[78] We have seen no disclosure from ICANN as to whether this is how Staff construed the DAA prior to this IRP or how it represented the import of that document to the Board.

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42.      As acknowledged in its Response, ICANN has a different set of procedures for the situation in which a registry operator has already entered into a Registry Agreement with ICANN, and then seeks ICANN's permission to transfer and assign that Registry Agreement to a different registry operator. That is not remotely what happened in this case, and the rules and procedures for seeking assignment of an executed gTLD registry agreement are not at issue in this case.[79] Here, long before NDC made it through the application and bidding process, NDC secretly sold, transferred, and assigned its rights and obligations in the application to a non-applicant (*i.e.*, Verisign), in plain violation of the Terms and Conditions of the AGB, including that "Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application."[80] Below, we identify the relevant rights and obligations at issue in Subsection A(1)(iii)(a). We then show that NDC plainly and impermissibly sold, assigned, and transferred those rights and obligations to Verisign through the DAA in Subsection A(1)(iii)(b), which ICANN completely chose to ignore.

### (a)      Rights and Obligations under the Application

43.      The New gTLD Program Rules clearly set out the various rights and obligations that applicants have in connection with their new gTLD application in detail. Under the AGB, applicants are required to submit their applications by "**23:59 UTC 12 April 2012**."[81] Applicants are also required to register in the TLD Application System ("**TAS**"). According to the AGB, TAS user registration—which created a TAS user profile for each applicant—"requires submission of preliminary information, *which will be used to validate the identity of the parties involved in the application*."[82] The AGB provides that "[a]n application will not be considered, in the absence of exceptional circumstances, if:"

- "It is received after the close of the application period."

- "The application form is incomplete (either the questions have not been fully answered or required supporting documents are missing). *Applicants will not ordinarily be permitted to supplement their applications after submission.*"[83]

Thus, an entity such as Verisign—which did not submit an application by the deadline—could not be an applicant for .WEB unless it had submitted its own application in the first instance.

44. The "Terms and Conditions" section of the AGB provides additional obligations in connection with a new gTLD application. That section opens with the following language:

> By submitting this application through ICANN's online interface for a generic Top Level Domain (gTLD) (this application), applicant (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any and all others acting on its behalf) *agrees to the following terms and conditions* (these terms and conditions) *without modification*. Applicant understands and agrees that *these terms and conditions are binding on applicant and are a material part of this application*.[84]

In other words, in exchange for being allowed to apply and be considered for a gTLD, the applicant "agree[d]" to be bound by the terms and conditions set forth in this section "without modification"—and agreed that the terms and conditions were not only "binding" but also "material."

45. In addition to the requirement that "Applicants may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application," the AGB's Terms and Conditions set forth other obligations and commitments on the part of applicants. For example:

- "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*."[85]

- "Applicant agrees to notify ICANN in writing of *any change in circumstances* that would render any information provided in the application *false or misleading*."[86]

- "Applicant hereby authorizes ICANN *to publish on ICANN's website*, and to disclose or publicize in any other manner, any materials submitted to, or obtain or generated by, ICANN and the ICANN Affiliated Parties in connection with the application…."[87]

All of these obligations were mandated by ICANN's obligations of openness, transparency, fairness, and

accountability.

46.     The New gTLD Program Rules also provided that applicants had certain rights. Of particular relevance to this case, the AGB recognized that there would be instances when more than one applicant would successfully make it through the application process (including the public notice and comment period and the evaluation process)—resulting in a "contention set" of qualified applicants. The New gTLD Program Rules therefore provided applicants with rights to settle contention sets in various ways. Indeed, the AGB specifically "encouraged" applicants to settle "string contention" among themselves.

47.     Thus, the AGB specifically provided that applicants had the right to enter arrangements in which one or more applicant withdrew their applications and/or entered into joint ventures or royalty or revenue sharing agreements. The only restriction on such arrangements was that they could not materially change the application—as such changes would violate the principles of transparency and accountability that were supposed to govern the New gTLD Program. According to the AGB:

> Applicants that are identified as being in contention are encouraged to reach a settlement or agreement among themselves that resolves the contention. This may occur at any stage of the process, once ICANN publicly posts the applications received and the preliminary contention sets on its website.

> Applicants may resolve string contention [sets] in a manner whereby one or more applicants withdraw their applications. An applicant may not resolve string contention by selecting a new string or by replacing itself with a joint venture. It is understood that applicants may seek to establish joint ventures in their efforts to resolve string contention [sets]. ***However, material changes in applications*** (for example, combinations of applicants to resolve contention) ***will require re-evaluation***.[88]

48.     Contention set members could also resolve their competing claims by a "private" auction administered by the contention set, provided that all members of the contention set agreed to do so.[89] Each applicant involved in a contention set, therefore, had the right to propose a private auction as a means to resolve the contention, the right to join in any such private auction, or the right to refuse to do so. The vast majority of contention sets have been resolved through such private auctions.[90] If, however, the members of a contention set cannot resolve the string contention among themselves, they then proceed to an ICANN-

administered auction (in which the auction proceeds are paid to ICANN, rather than distributed to the losing bidders, as in a private auction).

49.    Participation in an ICANN Auction also creates obligations for the applicants. Among other things, the AGB specifically states: "Only bids that comply with all aspects of the auction rules will be considered valid."[91] The Auction Rules—under the heading "Validity of Bids"—provide that "the Bid *must* be placed by a Bidder for its Application in an Open Contention set."[92] The Auction Rules further provide that "[a] Bid represents a price, which a Bidder is willing to pay to resolve string contention within a Contention Set in favor of its Application."[93] The Auction Rules define "Bidder" as a "Qualified Applicant or its Designated Bidder…."[94] The Auction Rules define a "Qualified Applicant" as:

> An entity that has submitted an Application for a new gTLD, has received all necessary approvals from ICANN, and which is included within a Contention Set to be resolved by Auction.[95]

The Rules define a "Designated Bidder" as "[a] party designated by a Qualified Applicant to bid on its behalf in an Auction."[96] Thus, an Applicant is obligated to submit bids only on its own behalf and in an amount that the Applicant itself is willing to pay—or to designate a Designated Bidder—the identity of which would have to be disclosed—to do so on the Applicants' behalf. (As discussed below, NDC did neither in this case.)

50.    The Auction Rules, in tandem with the New gTLD Program Rules, also confer rights on the applicant. Specifically, the applicant who submits the highest, valid bid is declared the "Winner" in the contention set. Its application is declared as the "Winning Application"—*i.e.*, the "Application that prevails contention."[97] The applicant with the Winning Application is entitled to proceed to negotiate and (if negotiations are successful) to enter a Registry Agreement with ICANN for the gTLD in question.[98]

51.    In reviewing the terms of the DAA with these rights and obligations in mind, there is no question that NDC impermissibly sold, assigned, and transferred them to Verisign through the DAA, and that ICANN should have recognized as much and acted to disqualify NDC's application and bids. As we show below, and as the Panel will gather from its own review of the DAA, through the DAA, Verisign secretly

became the .WEB Applicant, and NDC became nothing but a cloak to conceal that fact.

**(b)     The DAA**

52.     Verisign and NDC executed the DAA on 25 August 2015. Under the DAA, Verisign agreed

to pay NDC:

- Redacted - Third Party Designated Confidential Information
[99]

- Redacted - Third Party Designated Confidential Information

[100] and

- Redacted - Third Party Designated Confidential Information
[101]

53.     We will address the argument that Verisign/NDC has made in the past that the DAA was

"executory" with respect to the future assignment of the .WEB registry agreement, if and when they make in

their *Amici* submission. But there can be no serious question—and ICANN should have immediately

recognized as much—that upon the execution of the DAA in August 2015, NDC—Redacted   hird Party Designated Confidential Informa

—sold, assigned, and transferred some if not all of the various rights and obligations NDC had in its

.WEB Application to Verisign, in violation of the Terms and Conditions of the AGB, which are expressly

"binding on applicant and are a material part of th[e] application."[102]

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54.     Following its entering into the DAA with Verisign, NDC could no longer fulfill key obligations

associated with the .WEB Application, because NDC had sold, assigned, and transferred complete control

over the Application to Verisign in all material respects. Nor did NDC have any material rights left in its

Application. Those, too, had been sold, assigned, and transferred to Verisign. Thus, as described above, the

AGB's "Terms and Conditions" obligated each applicant to warrant that the statements in its application "are

true and accurate and complete in all material respects, and that ICANN may rely on those statements and

representations in fully evaluating this application."[105] The AGB's "Terms and Conditions" further obligated

NDC to notify ICANN in writing of ***any change in circumstances*** that would render ***any information***

provided in the application ***false or misleading, whether by way of an affirmative representation or as a***

***result of an omission of information***.[106]

        55.      Under the DAA, however, NDC could no longer fulfill those obligations.

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        56.      Redacted - Third Party Designated Confidential Information

        Those obligations were of

course unfulfilled, as Verisign/NDC kept Verisign's acquisition of NDC's .WEB application a secret from the

Internet community (including, apparently, ICANN) until after the ICANN Auction. If, indeed, as ICANN, Verisign, and NDC claim, there was nothing improper about the arrangement agreed between NDC and Verisign, or that the arrangement did not constitute a material change to NDC's application, it bears asking why NDC and Verisign did not disclose the DAA to ICANN when it was concluded. ICANN certainly appears not to have entertained this obvious question at all.

57.      Nor did NDC have any rights under the Application, or any control over how .WEB would be pursued, after it entered into the DAA.      Redacted - Third Party Designated Confidential Information

Thus, Verisign had stepped into NDC's shoes and became the true applicant and the true "Bidder" for .WEB,      Redacted - Third Party Designated Confidential Information

it became Verisign's undisclosed agent, with the sole purpose of secretly pursuing the .WEB Application solely for the benefit of Verisign, a non-applicant for the .WEB gTLD.

58.      Redacted - Third Party Designated Confidential Information

59.     As discussed in Afilias' Amended Request (and discussed further below), Verisign evidently determined that NDC should not participate in a Private Auction, and instead should proceed to an ICANN Auction—where ICANN would receive all of the proceeds (as opposed to a private auction, where the proceeds are allocated among the other bidders).

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60.     In the event that NDC won the .WEB Auction—which seemed a likely scenario, given Verisign's deep pockets and the fact that none of the other Applicants knew that Verisign was in the competition (which would likely have changed their bidding strategy)—

61.     Thus, by entering the DAA, NDC impermissibly sold, transferred, and assigned virtually all of its rights and obligations in the .WEB Application to Verisign. As of August 2015, NDC was falsely holding itself out as the applicant—seeking to obtain the rights to .WEB for its own benefit and for the purposes set forth in its Application. In reality, NDC was acting "exclusively" for "the benefit of Verisign" and solely to advance Verisign's undisclosed purposes to obtain the rights to .WEB for itself as a non-applicant. Verisign had become the true applicant for .WEB—with full control over all of the rights and obligations of NDC's .WEB Application—despite never having submitted an application, never having gone through the notice and comment period and the application process, and never having disclosed to the Internet community that it was seeking to acquire .WEB.

62.     The DAA prevented any scenario under which NDC could or would retain any role or ownership interest in .WEB—whether during or after the application and auction process—except as a recipient of the money that Verisign was contractually obligated to pay to NDC in exchange for having sold, assigned, and transferred its rights and obligations in its .WEB application.

63.    In sum, there is no remotely plausible argument under which NDC did not sell, assign, or transfer rights and obligations in connection with the .WEB Application to Verisign, which, again, was a "binding" and "material" term of the New gTLD Program Rules.[123] ICANN Staff should have easily recognized this. There is nothing anywhere in the language of the New gTLD Program Rules to suggest that ICANN has "discretion" to enforce the rule that an "Applicant may not resell, assign, or transfer any of the applicant's rights or obligations in connection with the application." Even if the New gTLD Program Rules provided ICANN with such discretion, ICANN could not exercise such discretion consistent with its Articles and Bylaws under the circumstances of this case. The manner in which NDC sold, assigned, and transferred its rights and obligations in the .WEB application to Verisign rendered key elements of the application process meaningless, including: the public notice and comment period; the evaluation criteria concerning the applicant's business plan and its intentions in seeking the gTLD registry rights; the ability for Qualified Applicants to resolve contention sets amicably and among themselves; and the requirement that Qualified Applicants bid on their own behalf (so as not to render the prior steps in the process meaningless). Both the plain language of the Rule, and the Bylaw's mandate that ICANN perform its Mission openly and transparently—and by making "decisions by applying documented policies consistently, neutrally, objectively, and fairly"—required ICANN to disqualify NDC's application for this violation. ICANN breached its Articles and Bylaws by failing to do so.

**2. NDC's Failure to Amend its Application to Correct False, Misleading, and Incomplete Information**

*(i)      The AGB's Disclosure Requirements*

64.      Applicants such as NDC were required to warrant that all of the statements in their applications were true, accurate, and complete, and agreed to notify ICANN "promptly" 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. As stated in Module 6 of the AGB ("Top-Legal Domain Application – Terms and Conditions"):

> ***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 these statements and representations fully in evaluating this application. ***Applicant acknowledges that any material misstatement or misrepresentation (<u>or omission of material information</u>) 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 in circumstances that would render any information provided in the application false or misleading***.[124]

*(ii)      The DAA Constituted Material Information that NDC was Required to Disclose*

65.      As soon as NDC entered into the DAA with ICANN, almost *none* of the information in NDC's .WEB Application—and certainly, almost none of the information that had been posted for public comment—was true, accurate, or complete. Nor were the statements made by NDC's representatives, in phone calls and in writing, to ICANN. There can be little argument that NDC's failure to update its application constituted an "omission of material information" that rendered its application to be false and certainly misleading.

66.      As discussed above, the AGB stated that an important application criterion was the presentation of "a thorough and thoughtful analysis" of the "proposed business model" for the new gTLD. The AGB said that ICANN was not merely seeking "to certify business success." In addition, "an important objective of the new TLD process" was "to <u>diversify the name space</u>, with different registry business models and target audiences."[125] According to the AGB, ICANN was not merely seeking "safeguards for registrants";

27

it was also seeking "to encourage innovation."[126] Most of the public portion of NDC's .WEB application was dedicated to addressing these specific issues. Thus, NDC made the representations not only to ICANN; NDC made them to the entire Internet community as part of ICANN's public comment mechanism, which, as explained above, are meant to "involve[] the participation of many stakeholder groups in a public discussion," "allow time for the community to review and submit comments on posted application materials," and "provide a means for the public to bring forward any other relevant information or issues."[127]

67.     Yet after NDC's entry into the DAA, all of NDC's representations on these issues—concerning, for example, NDC's proposed business plan, NDC's "proven executive team" with the "long-term commitment" to execute the plan, and the manner in which NDC's team intended to implement the plan—became false or misleading, whether by omission or commission. For example:

- 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.[128] After entering the DAA, this representation was false and misleading.

- NDC represented that if its Application prevailed, NDC's "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."[129] After entering the DAA, this representation was false and misleading.

- 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*."[130] After entering the DAA, this representation was false and misleading.

- 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*."[131] After entering the DAA, this representation was false and misleading.

- NDC represented that if its Application prevailed: "We [i.e., NDC] plan to foster the community of users of .WEB via a combination [of] community engagement and outreach, use-case development and direct marketing to base."[132] After entering the DAA, this representation was false misleading.

68.     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, through the DAA, the entire premise underlying the 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. NDC gave up virtually all of its rights in the .WEB Application, along with any possibility of obtaining the .WEB registry rights for itself.

69.     The DAA plainly constituted a "change of circumstances" that rendered "information provided in the application false or misleading."[133] Indeed, it would be difficult to imagine a change of circumstances more dramatic than that represented by the DAA—in which an entirely different entity (and one vastly different in every respect from NDC) was taking over all of the rights in the application. Yet NDC did not, as required, "notify ICANN in writing" about this "change in circumstances" that rendered its application false or misleading. In fact, as previously mentioned, Redacted   Third Party Designated Confidential  nformation

[134] Thus, under the DAA, NDC was no longer able to comply with its obligations in connection with the .WEB Application; and NDC plainly failed to do so.[135]

### *(iii)     Material Misstatements by NDC's Representative*

70.     The Terms and Conditions for Top-Level Domain Applications also expressly applied to the Applicant's "oral statements made and confirmed in writing in connection with the application."[136] Such statements also had to be "true and accurate and complete in all material respects."[137] NDC also violated this "binding" and "material" requirement of the New gTLD Program Rules.

71.     As set forth in Afilias' Amended Request, shortly before the private auction that was scheduled for 15-16 June 2016, NDC informed other members of the .WEB contention set that NDC would not be participating in the private auction and would insist on proceeding to the ICANN Auction. Mr. Rasco indicated that it was not his—or even NDC's decision—as to whether to participate in the private auction or

the ICANN Auction. Mr. Rasco's comments to that effect were consistent with NDC's obligations to Verisign

under DAA. Redacted - Third Party Designated Confidential Information

[138] Thus, on 6 June 2016, Jon Nevett, an executive at Ruby

Glen (a .WEB applicant owned by Donuts Inc.), wrote to Mr. Rasco, as well as to Messrs. Juan Diego Calle

and Nicolai Bezonoff. (As stated above, NDC's .WEB Application listed Rasco, Calle, and Bezonoff as NDC's

three "directors" and also as its three "officers and partners.") Mr. Nevett 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?[139]

Mr. Rasco responded (with Mr. Calle in copy) in relevant part:

> 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 [we] 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.[140]

72.     Rasco's response led Ruby Glen to complain to ICANN that a third party (as represented by

the other "powers that be") was likely controlling NDC. In response, on 27 June 2016, an official in ICANN's

New gTLD Operations, Mr. Jared Erwin, wrote to Mr. Rasco of NDC:

> We would like to confirm that that there have not been **changes to your application or the [NDC] organization that need to be reported to 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 or directors, application contacts).[141]

73.     Recalling that the AGB also prohibits the "omission of material information," Rasco's

carefully crafted answer only addressed part of ICANN's inquiry: "I can confirm that there have been no

changes to the [NDC] organization that would need to be reported to ICANN."[142] While stating that there had

been no changes to NDC's organization, however, Mr. Rasco failed to address ICANN's inquiry as to whether

there was "any information that is no longer true and accurate in the application." As set forth above, there were now numerous representations in NDC's application that were patently false. Again, the entire premise of the application—*i.e.,* that NDC was seeking .WEB for its own benefit, to be deployed pursuant to the business plan and for the reasons described in the application—was no longer remotely "true and accurate." It was now an outright lie.

74.     On 7 July 2016, ICANN's Ombudsman contacted Mr. Rasco, again focusing on whether there had been any changes to the NDC organization. The Ombudsman wrote:

> I have been shown an email which suggests that one of your directors is no longer taking an active part in the application, and that there are other directors now involved. The complainant also suggested that your shareholders have now changed since the original application. It was suggested that this would change the auction by making knowledge of your applicant company different, and therefore it was unfair to the other applicants. I'm sure you can clarify this.[143]

75.     This time, Mr. Rasco specifically misrepresented to the ICANN Ombudsman that nothing had changed about NDC's .WEB application, and misrepresented that he (Rasco) and NDC's other "Members (i.e. shareholders)"—who had "never changed"—were still making all of NDC's "major decisions":

> ***There have been no changes to the [NDC] application.*** Neither the governance, management nor the ownership … has changed. In an LLC, there are no directors, it is a manager managed company, as designated by Members of the LLC within the Operating Agreement of the Limited Liability Company. There has never been an amendment to that operating agreement. There are no new "directors," nor have any left the company, and while the managers are ultimately responsible for the LLC, as a Manager, ***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***. I hope this clarification puts the matter to rest.[144]

76.     There is simply no way to reconcile Mr. Rasco's representations to the ICANN Ombudsman with the terms of the DAA. At this point, under the terms of the DAA, neither Mr. Rasco nor the other Managers of NDC were making any "major decisions" (or even minor ones) in connection with NDC's .WEB Application. Verisign was making all such decisions.

77.     On 8 July 2016, Ms. Christine Willett (Vice President, gTLD Operations, Global Domains

Division) apparently followed up with Mr. Rasco by telephone.[145] In Ms. Willett's summary of the telephone conversation, which she sent to the ICANN Ombudsman later the same day, she advised the Ombudsman that Mr. Rasco had assured her that NDC's "application materials were still true and accurate."[146] Regarding Mr. Rasco's representation to other applicants that he (Rasco) had not made the decision for NDC to skip the private auction, Mr. Rasco apparently advised Ms. Willett that he had intentionally misled these other applicants. Ms. Willett summarized Mr. Rasco's account as follows:

> [Rasco] was contacted by a competitor [i.e., Ruby Glen] who took some of his words out of context and [was] using them as evidence regarding the alleged change in ownership. In communicating with that competitor, he used language to give the impression that the decision to not resolve the contention privately was not entirely his. ***However, this decision was in fact his***.[147]

78. To the contrary, based on the DAA, Mr. Rasco's representation to Mr. Nevett of Ruby Glen that other "powers" had decided that NDC would skip the private auction and proceed to the ICANN Auction was closer to the truth than the blatant falsehoods that Rasco was now serving up to ICANN.

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79.     Redacted - Third Party Designated Confidential Information

This, for the reasons set forth above, was not true. Redacted - Third Party Designated Confidential Information

80.     The assertion that "NDC has not sold, assigned or transferred its rights or obligations in the Application to any party, including Verisign, and will not in the future sell, assign, or transfer any such rights or obligations" does not withstand even modest scrutiny.

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81.     ICANN Staff should have recognized that 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."[154] 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."[155] When expressly given the opportunity to notify ICANN that NDC's application had in fact undergone a dramatic change in circumstances—rendering virtually all of the public statements in the

application to be false and misleading—NDC (via Mr. Rasco) responded by lying to and misleading ICANN. Mr. Rasco's oral assertions—which he confirmed to ICANN in writing—that there had been no changes to NDC's application, and that he (Rasco) was continuing to make all "major decisions" in connection with the .WEB application—were plainly and demonstrably false and misleading. This should all have been readily apparent to ICANN, yet ICANN did nothing.

### (iv) ICANN's Failure to Disqualify NDC's Application

82.     Based on an even cursory analysis of the DAA—let alone one based on a good faith application of the New gTLD Program Rules in accordance with ICANN's obligations pursuant to its Articles and Bylaws—ICANN knew that NDC had committed these material breaches of the New gTLD Program Rules by (at the latest) August 2016, when Verisign provided ICANN with the DAA (and also the 26 July 2016 letter from Mr. Livesay to Mr. Rasco). Yet ICANN failed to act in accordance with the New gTLD Program Rules and its Articles and Bylaws.

83.     Here, 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."[156] Both ICANN and the *Amici* have suggested that the word "may" provides ICANN with discretion on whether to reject the application for a material misstatement, misrepresentation, or omission. But again, ICANN must exercise any discretion that it has consistent with its Articles and Bylaws. The breaches here 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."[157]

84.     ICANN must operate consistently with its Articles and Bylaws not only for its own sake, but for the sake of the entire Internet community. By failing to disqualify NDC's application and bid for its material misstatements, misrepresentations, and omissions, ICANN allowed NDC and Verisign to deceive not only ICANN, but the entire Internet community that ICANN is meant to serve—ranging from the other applicants

for .WEB 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.

85.     Moreover, 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.[158] Other applicants in the .WEB contention set—who followed the "clear roadmap"[159] 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 interest in the .WEB gTLD until *after* the contention set was resolved in favor of its agent, NDC.

86.     ICANN's failure to disqualify NDC's application and bid resulted in an application and auction process that was devoid of transparency, openness, and accountability; that failed to enable competition and open entry in Internet-related markets; that failed to apply documented polices consistently, neutrally, objective, and fairly; and that failed to apply standards, policies, or practices in a non-discriminatory manner. For all of these reasons, ICANN violated its Articles and Bylaws when it failed to disqualify NDC's bid and application upon receiving the DAA in August 2016.

### 3.     ICANN Staff Failed to Disqualify NDC's Bids

#### (i)     The Auction Rules

87.     We briefly summarized the Auction Rules above regarding NDC's rights and obligations in

connection with its .WEB Application in the section above. Like the rest of the New gTLD Program Rules, the

Auction Rules were meant to advance, *inter alia*, ICANN's governing principles of transparency, fairness, and

accountability. They were designed to ensure that Applicants were bidding on their own behalf—not on behalf

of a non-applicant, concealing itself behind the Applicant.

88.     As stated above, the AGB provides: "***Only*** bids that comply with ***all aspects of the auction***

***rules will be considered valid***."[160] The Auction Rules state at the outset, under the heading "**Participation**

**in the Auction**," who is eligible to participate in an ICANN Auction:

> Prior to the scheduling of an Auction, an Intent to Auction notice will be provided to all members of an eligible Contention Set via the ICANN Customer Portal. ***To be eligible to receive an Intent to Auction notice from ICANN, requirements a-d below must be met***:

> All active applications in the Contention Set have:

> a)      Passed evaluation

> b)      Resolved any applicable GAC advice

> c)      Resolve any objections

> d)      No pending ICANN Accountability Mechanisms[161]

89.     Here, Verisign was never subjected to and did not pass any evaluation. More broadly, if a

non-applicant were allowed to conceal its "indirect" participation in an application <sup>Redacted    hird Party Designated Confidential Information</sup>

,[162] there would be no opportunity for GAC advice, objections, or ICANN Accountability Mechanism

based on the non-applicant's concealed identity and purposes in seeking the TLD. Here, too, Verisign's and

NDC's deceptive conduct rendered the Auction Rules' "participation" requirements meaningless.

90.     The Auction Rules further stipulated that "***[p]articipation in an Auction is limited to***

***Bidders***."[163] The Auction Rules defined "Bidders" as either: (1) a "Qualified Applicant"; or (2) a "Designated

Bidder" of a Qualified Applicant.[164]

91.     Under the Auction Rules, 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."[165] At the risk of stating the obvious, Verisign did not submit an application for .WEB, did not receive any approvals from ICANN, and was not part of the .WEB contention set. Verisign was not a Qualified Applicant.

92.     The Auction Rules define a "Designated Bidder" as "[a] party designated by a Qualified Applicant to bid *on its behalf* in an Auction."[166] NDC does not appear to have designated a "Bidder" for the .WEB Auction, but any such "Designated Bidder" would not have been bidding on NDC's behalf, but rather on Verisign's. In any event, NDC certainly did not designate and disclose any Designated Bidder prior to the .WEB Auction.

93.     Lest there be any doubt, the Auction Rules also provided (under the heading "**Validity of Bids**") that each "Bid must be placed *by a Bidder for its Application in an Open Contention Set*[.]"[167] The Auction Rules provided further that a Bidder may only "bid on *its behalf*" and that all such bids must reflect "a price, which the *Bidder* is willing to pay to resolve string contention within a Contention Set in favor of its Application."[168]

94.     Moreover, the Auction Rules required each Bidder to enter a Bidder Agreement with the Auction Manager (appointed by ICANN to conduct the ICANN Auction). The new gTLD Auctions Bidder Agreement also provided that that "the Qualified Applicant will place bids in the Auction *on its own behalf or may designate an agent ("Designated Bidder") to enter bids in the Auction on the Qualified Applicant's behalf*."[169]

95.     Thus, the prohibition against bids being made on behalf of any entity other than a Qualified Applicant was stated plainly and repeatedly throughout the Auction Rules. A simple review of the DAA's terms demonstrate that they *required* NDC to violate and subvert the Auction Rules—which is precisely what NDC did. NDC—the "Qualified Applicant"—was *not* making bids "on its own behalf." Nor could it appoint a "Designated Bidder" to bid on NDC's behalf. Redacted - Third Party Designated Confidential Information

96.      Through the DAA, Verisign and NDC turned the terms and conditions of the Auction Rules and the Bidder Agreement upside down—emptying them of the basic principles they were designed to secure. Instead of a Qualified Applicant being able to appoint a Designated Bidder to act as the Qualified Applicant's agent to enter bids on its behalf, the DAA enabled Verisign—a non-qualified, non-applicant, hiding from the Internet community under the cover of NDC's application—to use NDC as its undisclosed agent to make bids exclusively on Verisign's behalf and solely for Verisign's benefit. Needless to say, since NDC bore no economic risk in submitting any of its bids at the .WEB Auction, each of the bids NDC submitted necessarily reflected an amount that Verisign was willing to pay for .WEB, and which Verisign was obligated to pay under the DAA.

> **(ii)     ICANN was Required to Automatically Disqualify NDC's Bid for Violating the Auction Rules**

97.      Each bid that NDC placed on Verisign's behalf was therefore an invalid bid under the New gTLD Program Rules.[172] 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."[173] In other words, under the New gTLD Program Rules, 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, and 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 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***.[174]

98.     The Auction Rules provided further:

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 (with applications that have not been withdrawn from the new gTLD Program) ***will receive offers to have their Applications accepted, one at a time, in descending order of and subject payment of its Exit Bid***. In this way, ***the next Bidder would be declared the Winner subject to payment of its Exit Bid***.[175]

99.     Therefore, the New gTLD Program Rules plainly required ICANN to declare NDC's bids in default and award the .WEB TLD to Afilias as the next highest bidder. There is nothing in the New gTLD Program Rules to suggest that ICANN may overlook the requirement that only a "Qualified Applicant" (or its "Designated Bidder") may place bids in an ICANN Action. Nor is there anything in the Rules to suggest that ICANN may overlook the requirement that a Qualified Applicant "will place bids in the Auction "on its own behalf," or "designate an agent ('Designated Bidder') to enter bids in the Auction on the Qualified Applicant's behalf." Similarly, there is nothing in the New gTLD Program Rules to allow ICANN to ignore the rule that "[o]nly bids that comply with all aspects of the auction rules will be considered valid"—and that that an invalid bid must be treated as "an exit bid at the start-of-round price for the current auction round."

100.     Even assuming *arguendo* that the language of the rules are not plainly mandatory—and that ICANN had discretion in their application—ICANN could not choose to overlook these violations in the context of this case. Allowing NDC secretly to bid on Verisign's behalf rendered all of the preceding steps in the application process meaningless. ICANN was not permitted by its Articles and Bylaws to overlook such a violation, which again made the bidding process inconsistent with the same requirements as stated above with respect to NDC's violation of the no resale, assignment, or transfer rules, and NDC's failure to correct the material misstatements, misrepresentations, and omissions in its application.

101.    Similarly, nothing in the New gTLD Program Rules suggests that ICANN has any discretion in enforcing the provision in the Auction Rules that states that if a Winner is declared in default, or is determined to be ineligible to sign a Registry Agreement for Domain at any time following the conclusion of an Auction, then "the remaining Bidders (with applications that have not been withdrawn from the New gTLD Program), will receive offers to have their Applications accepted, one at a time, in descending order of and subject to payment of its respective Exit Bid." Again, this rule—and ICANN's lack of discretion in enforcing it—is 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. There is nothing in the New gTLD Program Rules to suggest that ICANN can in its "discretion" ignore or deviate from these plainly stated procedures. Moreover, because the Auction Rules apply the "second-highest-bid" principle—*i.e.*, that the "Winning Bidder" pays the bid amount of the second highest bid—ICANN is required to offer .WEB to Afilias at the second highest bid after NDC's bid is disqualified.[176]

**B.      ICANN's Self-serving and Superficial Investigation of Afilias' Concerns and Decision to Proceed to Contracting with NDC and Verisign Breached the Articles and Bylaws**

102.    Instead of disqualifying NDC's application and auction bids, as it was required to under the New gTLD Program Rules and Articles and Bylaws, ICANN took steps to protect itself (*i.e.*, cover-up), NDC and Verisign from criticism. It did so under the pretext of seeking information from certain contention set members (Ruby Glen, NDC, and Afilias) and Verisign for the purposes of making an "informed resolution" of various concerns that had been raised by Afilias and Ruby Glen. As described below, ICANN was far from open and transparent in how it handled this information gathering exercise, and its actions far from neutral,

objective, fair, non-discriminatory, or in good faith.

### 1.  ICANN Receives the DAA on 23 August 2016

103.  Assuming *arguendo* that ICANN did not know about Verisign's involvement in NDC's .WEB application prior to the ICANN Auction on 27 July 2016, it did not take long for ICANN to find out. As the Panel is by now aware, Verisign filed a 10-Q statement with the U.S. Securities and Exchange Commission on 28 July 2016 that stated in a footnote:

> Subsequent to June 30, 2016, [Verisign] incurred a commitment to pay approximately $130.0 million for the future assignment of contractual rights, which are subject to a third-party consent.[177]

Verisign's disclosure was incomplete and inaccurate. Redacted - Third Party Designated Confidential Information

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104.  Verisign's "disclosure" caught the attention of the press, which issued headlines like: *It looks like Verisign bought .Web domain for $135 million (SEC Filing)*;[178] *Verisign likely $135 million winner of .web gTLD*;[179] and *Someone (cough, cough, VeriSign) just gave ICANN $135m for the rights to .web*.[180] According to one such press article: "Industry speculation is that the owner of the dot-com registry, Verisign, is secretly behind Nu Dot Co and plans to purchase .web in order to remove what could be a serious competitor to its dot-com crown."[181]

105.  A few days following Verisign's 10Q, on 31 July 2016, NDC's Jose Ignacio Rasco emailed ICANN's Christine Willett. The Panel will recall that, several weeks earlier, Mr. Rasco had assured Ms. Willett

that NDC's "application materials were still true and accurate." He had also made representations about

NDC's application and who controlled it to ICANN's Ombudsman.[182]

106.     ICANN has produced no documents to identify the person(s) from Verisign who contacted

Mr. Atallah, or what they discussed (although ICANN's privilege log shows that Mr. Atallah was involved in

multiple communications about .WEB during this time frame—all of which ICANN claims are privileged[185]).

But on 1 August 2016, Verisign issued its press release, in which Verisign simply stated:

> [Verisign] entered into an agreement with [NDC] wherein [Verisign] provided funds for
> [NDC's] bid for the .web TLD. We are pleased that the [NDC] bid was successful.
>
> We anticipate that [NDC] will execute the .web Registry Agreement with [ICANN] and will
> then seek to assign the Registry Agreement to Verisign upon consent from ICANN.[186]

Once again, Verisign's description of its "agreement" with NDC was at best incomplete and misleading. To

mention just one material omission: Verisign made no mention of the date that it had entered in to its

agreement with NDC, let alone provide any other details of the transaction.

107.     On 8 August 2016, in light of Verisign's press release, Mr. Scott Hemphill, Afilias' Vice

President and General Counsel, wrote to Mr. Atallah to state Afilias' concerns based on the public reports

concerning Verisign's involvement in NDC's application. Mr. Hemphill did not at this point know the terms of

the DAA (and indeed, would not know them until December 2018 after ICANN produced the DAA pursuant

to a document production order by the Emergency Arbitrator in this IRP). Mr. Hemphill stated in his letter:

> We have not been able to review a copy of the agreement(s) between NDC and Verisign
> with respect to [their reported] arrangement, but it appears likely, given the public statements
> of VeriSign, that [NDC] and VeriSign entered into an agreement in the form of an option or
> similar arrangement with respect to the rights and obligations of NDC regarding its .WEB
> application.[187]

Mr. Hemphill observed—based on the limited information available to him—that the reported arrangement

likely violated numerous provisions of the New gTLD Program Rules. For example, Mr. Hemphill wrote: "[T]he

type of option agreement that apparently exists between NDC and Verisign likely constitutes a change in

control of the applicant. A change in control can be effected by contract as well as by changes in equity

ownership."[188] Accordingly, Mr. Hemphill requested on behalf of Afilias that "ICANN promptly undertake an

investigation of the matters set forth in this letter and take appropriate action against NDC and its .WEB

application for violations of the Guidebook…."[189] Shortly thereafter, Mr. Hemphill also lodged a complaint on

behalf of Afilias with the ICANN Ombudsman.[190]

108.    On 23 August 2016, Mr. Ronald L. Johnston of Arnold & Porter (acting for Verisign) wrote a

lengthy letter to Mr. Eric Enson of Jones Day (acting for ICANN),[191] Redac ed - Third Par y Designa ed Confiden ial  nforma ion

[192] Afilias has not had sight of ICANN's "request for information" and does not

know when it was sent, its contents, or its genesis. Notwithstanding ICANN's agreement in this IRP to search

for and produce the "request for information" to which Mr. Johnston's letter was apparently responding,

ICANN has failed to produce the request (or any other communications between Verisign and ICANN prior

to 23 August 2016 for that matter).[193]

109.    Redacted - Third Party Designated Confidential Information

Anyone at ICANN who

had actually read the DAA would have recognized that Mr. Johnston's description of the agreement was

woefully incomplete.

Moreover, anyone familiar with the New gTLD Program Rules would have recognized that even under the

incomplete description of the DAA as provided by Mr. Johnston, NDC had still violated its material obligations

as an applicant, as discussed above in Section III.A.

110.    As discussed in Section III.A above, once ICANN learned of the terms of the DAA, it was

required to disqualify NDC's application and bid. Instead, ICANN proceeded to commence an "investigation"

designed to protect itself.

### 2.    ICANN's "Investigation" of Afilias' Concerns

111.    Having received no response to his 8 August 2016 letter, Mr. Hemphill wrote again to

Mr. Atallah on 9 September 2016, asking him, *inter alia*, to confirm that ICANN would not enter into a Registry

Agreement with NDC for .WEB until the Ombudsman had completed its investigation, the ICANN Board had

reviewed the matter, and that any ICANN accountability mechanisms had been completed.[197] There would

be no response to this letter until the end of September.

112.    On 16 September 2016, Ms. Willett sent a letter with a series of detailed questions (the

"**Questionnaire**") to representatives of Afilias, Verisign, NDC, and Ruby Glen. Ms. Willett stated in her letter:

> In various fora, Ruby Glen LLC (Ruby Glen) and Afilias Domains No. 3 Limited (Afilias) have raised questions regarding, among other things, whether NU DOT CO LLC (NDC) should have participated in the 27-28 July 2016 auction for the .WEB contention set and whether NDC's application for the .WEB gTLD should be rejected. ***To help facilitate informed resolution of these questions, ICANN would find it useful to have additional information***.[198]

113.    At this point, ICANN was already in possession of Mr. Johnston's lengthy 23 August 2016 letter to Mr. Enson, the DAA, and other documents that had been submitted with Mr. Johnston's letter. Remarkably, Ms. Willett's letter made no mention of these documents or provided any hint that ICANN had already sought and received input from Verisign. To state the obvious, the deck was stacked: Verisign and NDC knew why Ms. Willett was writing and the substantive motivations behind the questions she was asking. Afilias and Ruby Glen did not.

114.    With the advantage of now having the DAA in our possession[199]—and knowing that ICANN had had the DAA in its possession for several weeks before dispatching the Questionnaire—it is apparent that the Questionnaire was designed to elicit answers that would not only help Verisign's cause if its arrangement with NDC was challenged at a later date, but would also protect ICANN from the type of criticism and concerns being raised in Afilias' letters.[200] ICANN already knew in the main what Verisign's and NDC's responses would be. The exercise of the questionnaire was thus a pure artifice intended to create the impression that ICANN was engaging in a fair and balanced process.

115.    The questions included, for example:

- "Please provide or describe any evidence of which you are aware regarding whether ownership or control of NDC changed after NDC applied for the .WEB gTLD [(*sic*)]?"

- "Do you think that a change regarding only one of many activities of an applicant constitutes a change in ownership and control within the meaning of AGB Section 1.2.7? Please explain why or why not?"

- "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 of control' of the applicant?"[201]

116.    Many other questions are argumentative and/or misleading on their face with respect to Afilias, given that Afilias did not know the contents of the DAA. Indeed, many questions reflected the self-serving arguments that Mr. Johnston had stated in his 23 August 2016 letter to Mr. Enson, all of which adopted Verisign's incorrect reading of the substance of the DAA wholesale. For example:

- "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?"

- "Do you think that AGB Module 6, Paragraph 10 would be violated by a contractual promise by an applicant to request ICANN's consent to transfer to another party any registry agreement it receives as the result of its application?"

- "Do you think that AGB Module 6, Paragraph 10 would be violated by a contractual promise by an applicant to seek to transfer to another party, but only upon the consent of ICANN, any registry agreement it receives as the result of its application?"[202]

117.    On 7 October 2016, Afilias submitted its answers to Ms. Willett's Questionnaire.[203] Until ICANN's recent document production in this IRP in April 2020, Afilias knew nothing about the contents of Verisign and NDC's responses (even though Afilias sought their responses through DIDP requests in 2018). ICANN's April 2020 document production included Verisign's response dated 7 October 2016 and NDC's response dated 10 October 2016.[204] For the most part, Verisign's and NDC's responses elaborated on the arguments in Mr. Johnston's 23 August 2016 letter to Mr. Enson.[205]

118.    There is no indication in the record of this IRP, or through publicly available sources, that ICANN did anything with the responses to Ms. Willett's Questionnaire, or what steps it took to reach the "informed resolution" of the concerns raised by Afilias (as promised in Ms. Willett's 16 September 2016 letter). All we know, based on ICANN's Response in this IRP is that at some unspecified time and in some unspecified manner, "ICANN decided not to make a determination on the merits of Afilias' contentions against Verisign and NDC until accountability mechanisms had concluded."[206] This assertion, however, is

inconsistent with the fact that on 6 June 2018, ICANN decided to take the .WEB contention set off hold status and to commence the registry agreement contracting process with NDC and Verisign—which suggests that ICANN had in fact "made a determination on the merits of Afilias' contentions" and had done so in NDC's and Verisign's favor. When or on what basis it did so is still a mystery; or perhaps Ms. Willett's Questionnaire had served its intended cover-up purpose.

### 3. ICANN Proceeds Toward Contracting with NDC (and Hence Verisign) for the .WEB Registry Agreement

119. Following the United States Department of Justice's closure of its investigation in January 2018, Afilias and its counsel at Dechert made repeated requests to ICANN for updates on whether it had reached any decision on how it intended to proceed with .WEB.[207] Redac ed   Third Par y Designa ed Con iden ial  nforma ion

[208]

120. On 28 April 2018, ICANN's counsel responded to Afilias' counsel that "***the .WEB contention set is on hold***. When the contention set is updated, your client – along with all other members of the contention set – will be notified promptly[.]"[209] ICANN's counsel also rejected Afilias' contention that ICANN was not being transparent as to how it was proceeding with respect to the .WEB contention set. In response to that letter, Afilias' counsel wrote on 1 May 2018:

> [W]e do not understand the basis for your assertion that 'in this particular matter, ICANN has been quite transparent' about its conduct. To date, ICANN has provided ***no*** information about the investigation (if any) it has undertaken regarding the concerns raised by Afilias – *viz.*, that the bid for .WEB that NDC supposedly made on its own behalf was in fact secretly funded by and made for the benefit of Verisign.[210]

121. Afilias never received a response to this letter. Instead, on 6 June 2018, ICANN notified Afilias that it had decided to remove the .WEB contention set from its on-hold status—signaling that it intended to proceed with the delegation of .WEB to NDC, and therefore to Verisign.[211] And on 14 June 2018,

ICANN in fact sent NDC the .WEB registry agreement—which NDC signed and returned to ICANN.[212]

## IV. ICANN'S EXERCISE OF ANY DISCRETION IT HAS TO REMEDY NDC'S BREACHES MUST BE CONSISTENT WITH ICANN'S MANDATE TO PROMOTE COMPETITION

122. ICANN's main argument is that the "Guidebook gives ICANN discretion to determine … what consequence, if any, should follow from a failure" to comply with the New gTLD Program Rules.[213] In earlier sections we have addressed why that discretion is constrained by ICANN's Bylaws-based obligations of transparency, neutrality, non-discrimination, fairness, objectivity and good faith. In this section we discuss why it is also constrained by ICANN's Bylaws-based duty to act and make decisions consistently with its competition mandate. That is, why ICANN must exercise its discretion insofar as application of the New gTLD Program Rules is concerned to promote competition, not inhibit its growth.

123. ICANN's Bylaws are unambiguous and compulsory in respect of its competition promotion mandate: "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 open entry in Internet-related markets***."[214] Further, ICANN's "core values should also guide [its] decisions and actions."[215] Among those "core values" is ICANN's mandate to "[i]ntroduc[e] and promot[e] 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."[216] ICANN's mandate to promote competition is thus "woven into ICANN's ongoing work."[217]

124. In sum, and as the ICANN Board has previously opined, ICANN's competition mandate means that "***ICANN's 'default' position should be for creating more competition*** as opposed to having rules that restrict the ability of Internet stakeholders to innovate."[218] Accordingly, ICANN's "default position" here should be (and should have been) to create more competition for Verisign's dominant .COM registry. Any exercise of ICANN's discretion that would result in Verisign controlling the .WEB registry is wholly

inconsistent with ICANN's affirmative mandate to promote competition.

### A. The New gTLD Program Was Created to Realize ICANN's Competition Mandate

125.     ICANN admits in its Response that it, at least in part, "fulfills its competition mandate by enacting policies that promote competition."[219] Indeed, the New gTLD Program was specifically and expressly developed to realize ICANN's competition mandate, as evidenced by the undisputed and contemporaneous 2010 Congressional testimony of those who oversaw its development:

> ***The launch of the new gTLD program was part of ICANN's founding mandate*** when it was formed by the U.S. Government over 12 years ago. ***That mandate is to introduce competition and choice into the domain name system*** in a stable and secure manner…. The Board's approval … is consistent with ICANN's mission to increase consumer choice, competition and innovation…. After years of policy and implementation work, the Internet community and Board determined that the launch of the ***new gTLD program was necessary and important in order to increase competition and innovation in the DNS***--and I strongly believe this remains the right decision.[220]

126.     The ICANN Board's Rationales for approving the launch of the New gTLD Program confirm the views expressed at the Congressional hearing. First, the ICANN Board observed that, under the *status quo*, competition was constrained:

> The launch of the new generic top-level domain (gTLD) program will allow for more innovation, choice and change to the Internet's addressing system, now constrained by only 22 gTLDs.[221]

The adoption of policies and processes to introduce and promote competition, was therefore fundamental to ICANN's core mission.

> When ICANN was formed in 1998…, [its] purpose was to promote competition in the DNS marketplace, including by developing a process for the introduction of new top-level domains while ensuring internet security and stability. The introduction of new top-level domains into the DNS has thus been ***a fundamental part of ICANN's mission from its inception***, and was specified in ICANN's Memorandum of Understanding and Joint Project Agreement with the U.S. Department of Commerce.[222]

> The launch of the new gTLD program is in fulfillment of a core part of ICANN's Bylaws: the introduction of competition and consumer choice in the DNS.[223]

In approving and adopting the New gTLD Program, the Board repeatedly stressed that the various processes

set forth in the Guidebook should be followed both in letter and in spirit.

> The Board determined that the evaluation and section procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. [224]

Indeed, the Board specifically cautioned that "***process fidelity*** is given priority."[225]

127.     As the ICANN Board also noted in its Resolutions adopting the New gTLD Program, "economic studies indicate[] that, while benefits accruing from innovation are difficult to predict, the introduction of new gTLDs will bring benefits in the form of increased competition, choice and new services to Internet users."[226] These studies were conducted by Dr. Dennis Carlton, ICANN's economic expert in this IRP. In his 2009 reports, Dr. Carlton opined on the various competitive benefits that ICANN sought to achieve by introducing new gTLDs to the DNS. For example, Dr. Carlton opined:

> ICANN's plan to introduce new gTLDs is likely to benefit consumers … and ***mitigate market power associated with .com*** and other major TLDs and to increase innovation.
>
> …
>
> ***Removing entry barriers also is likely to foster innovation.*** In the absence of competition from new gTLDs, registries and registrars that serve .com and other major TLDs face limited incentives to develop new technologies and/or improved services that may help attract new customers. However, absent restrictions on new gTLDs, potential new entrants will be motivated to ***develop new technologies and methods as a way to overcome .com's first mover advantage***.[227]

128.     Promoting competition—and specifically constraining the market power of .COM—was thus the primary motivating policy underlying the New gTLD Program.

129.     Dr. Carlton further warned that restricting opportunities for new gTLDs to enter the market and compete with .COM would have the ***necessary effect*** of "preserving the profits" of the .COM registry controlled by Verisign:[228]

> The DOJ, for example, speculates that "the network effects that make .com registrations so valuable to consumers will be difficult for other TLDs to overcome." However, any market power associated with .com will attract entrants with strategies built around bringing new registrants to the new gTLDs. ***Restricting the opportunity for entrants to compete for such profits necessarily has the effect of protecting and preserving the profits of the .com registry and its registrars***.[229]

130. ICANN's actions here breach the Board's commitment to "process fidelity" in the New gTLD Program. Worse still, ICANN's decision to ignore NDC's willful process violations would allow .WEB, the most promising new gTLD, to fall under the control of the entity that controls .COM. ICANN's decision to exercise its discretion to benefit Verisign is a complete perversion of ICANN's Bylaws, the Board's stated intention for adopting the New gTLD Program, and the entire purpose of the Program itself.[230]

**B.     The United States' Department of Justice's Investigation Is Irrelevant to Deciding this IRP**

131. ICANN's Bylaws provide that ICANN must apply standards, policies, procedures, and practices equitably and not single out any entity for disparate treatment, unless, specifically, disparate treatment is justified by ICANN's "promotion of effective competition."[231] Ironically, ICANN has exercised its discretion here to provide disparate and favorable treatment for Verisign.

132. ICANN justifies exercising its discretion to favor Verisign here because (1) "Afilias' alleged competition concerns were addressed in [the DOJ] year-long investigation of the NDC/Verisign agreement," (2) the DOJ's decision to "close[] its investigation without taking any action … typically is interpreted as meaning the government did not find a threat to competition that warranted further action," and (3) ICANN may defer to the DOJ's decision here.[232] ICANN is wrong.

133. *First*, the standard that guided the DOJ review of Verisign's proposed acquisition of .WEB is materially different from ICANN's mandate to affirmatively promote competition in the DNS that is discussed above. While some U.S. agencies are granted broad authority to act "in the public interest" where the United States Congress has determined that government control will produce better outcomes than the free market,[233] other U.S. agencies are granted narrower and more limited regulatory authority, such as the DOJ's authority to enforce the antitrust laws.[234] These more circumscribed forms of law enforcement "are intended to operate essentially at the periphery of the markets affected. Their role is generally conceived as one of maintaining the institutions *within* whose framework the free market can continue to function…."[235]

134.    Accordingly, under governing U.S. antitrust law, the DOJ is authorized to challenge acquisitions only where the DOJ can prove that such acquisitions may "***substantially lessen competition***" in the relevant market.[236] The DOJ's "default position" is thus one of non-intervention, consistent with its law enforcement mandate. ICANN, in contrast to the DOJ, has an affirmative mandate to promote competition—ICANN's "default position" is to act to create more competition. In short, Afilias' competition concerns, that ICANN is not acting in a manner consistent with its "default position" to create more competition, was not the subject of the DOJ's investigation.

135.    *Second,* ICANN and its expert impermissibly infer from the DOJ's decision to close its .WEB investigation without taking any action that the agency determined that Verisign's proposed acquisition of .WEB did not pose any threat to competition. In fact, and contrary to the representations made by Dr. Carlton, the DOJ's official policy is that "no inference should be drawn from the [DOJ]'s decision to close an investigation into a merger without taking further action."[237] This DOJ policy is the necessary consequence of the practical limits of the agency's enforcement capabilities: even if the evidence adduced during the course of an investigation reveals competitive concerns, the DOJ may decline to take an enforcement action due to competing demands on the agency's limited resources or for some other reasons completely unrelated to the merits of a given case.

136.    *Finally*, ICANN represents in its Response that "ICANN, as an administrator of the DNS, fulfills its competition mandate … by deferring to an appropriate government regulator – such as [the DOJ] – for investigation of potential competition issues."[238] This is clearly not true. In fact, and contrary to ICANN's representation that it defers to government antitrust authorities' opinions on competition law issues, ICANN implemented its New gTLD Program in 2012 over the objections of the DOJ. In connection with the development of the New gTLD Program, the DOJ was asked to provide its opinion on the competitive merits of introducing new gTLDs to the DNS. The DOJ opined that the introduction of new gTLDs were unlikely to produce competitive benefits that outweighed the competitive harm caused by forcing companies to purchase

"defensive registrations" in each of the myriad new registries.[239] ICANN disagreed with the DOJ and ignored the DOJ's recommendations. It seems, therefore, that ICANN only defers to the DOJ when it suits ICANN to do so. Such inconsistent deference is hardly sufficient to fulfill ICANN's competition mandate.

## V. AFILIAS' CLAIMS ARE NOT TIME-BARRED

137.    The lack of merit in ICANN's time-bar argument is underscored by its assertion that "Afilias' claims are, in a sense, premature, and in another sense, overdue."[240] At the risk of stating the obvious, they cannot be both. ICANN asserts that the claims are "premature in that the ICANN Board has not fully evaluated Afilias' allegations that NDC violated the Guidebook…."[241] But, ICANN says, Afilias' claims are also time-barred because they should have been asserted sometime in 2016. Just as the Panel rejected ICANN's time-bar argument regarding Rule 7 in its Phase I decision, so too should the Panel reject ICANN's time-bar argument regarding the rest of Afilias' claims.[242]

138.    As the Panel will recall, the issue is governed by Rule 4 of the Interim Procedures, which states that a "CLAIMANT shall file a written statement of a DISPUTE … no more than 120 days after a CLAIMANT *becomes aware of the material effect of the action or inaction giving rise to the DISPUTE*[.]"[243] The Bylaws expressly provide for IRPs based on ICANN Staff actions and decisions, a fact which was affirmed by this Panel in its Phase I Decision.[244] As explained by this IRP Panel,[245] an IRP is a process "intended to hear and resolve Disputes" in order to achieve certain purposes, including ICANN's compliance with its Articles and Bylaws.[246] There are several different types of "Disputes" that can be resolved in an IRP; this IRP concerns a "Dispute" involving "[c]laims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws."[247] Covered Actions are expressly defined 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*."[248] As set out above, Afilias' various claims are based on actions or failures to act by or within ICANN *by* the Board and ICANN Staff.

139.    The chronology of events relevant to ICANN's time-bar defense is not in dispute, but it is

worth recalling the key events here. As an overview, the chronology leading up to Afilias' invocation of the

CEP falls essentially in to three distinct phases: (1) **August 2016 through the end of 2016**, when, after the

ICANN Auction, Afilias requested that ICANN investigate the Verisign-NDC arrangement, and ICANN

represented that it would seek the "informed resolution" of Afilias' concerns and keep Afilias informed of the

outcome; (2) **January 2017 to January 2018**, during which the DOJ was conducting its antitrust investigation

of the Verisign-NDC arrangement, and asked ICANN to take no action on .WEB; and (3) **January 2018 to**

**June 2018**, when, after the DOJ closed its investigation, Afilias repeatedly asked ICANN for information

about the status of .WEB—which ICANN failed to provide, before notifying Afilias by email that it had taken

the .WEB contention set off-hold. The key dates and events within these three phases include the following:

> **1 August 2016:** Following the ICANN Auction in late July, Verisign issued its press statement, revealing for the first time that it had entered into an agreement with NDC, but without providing any details of the date of entry or substance of the agreement.[249]

> **8 August 2016:** Afilias' General Counsel (Mr. Hemphill) wrote to the President of ICANN's Global Domains Division (Mr. Atallah) and, based on publicly available information, "request[ed] that ICANN promptly undertake an investigation of the matters set forth in this letter and take appropriate action against NDC and its .WEB application for violations of the Guidebook as we have requested."[250]

> **23 August 2016:** Verisign's counsel (Mr. Johnston) wrote to ICANN's counsel on behalf of Verisign and NDC, providing the DAA (and various other documents), and purporting to rebut the assertions in Mr. Hemphill's 8 August 2016 letter. ICANN did not disclose these materials to Afilias (or at all for that matter)—and did not even acknowledge that it had the DAA in its possession—until required to do so by the Emergency Arbitrator in the IRP in *December 2018*.[251]

> **9 September 2016:** Mr. Hemphill again wrote to Mr. Atallah reiterating Afilias' concerns, and asking for ICANN's assurances that ICANN would not enter into a .WEB Registry Agreement until after the ICANN Board had reviewed the matter and any ICANN accountability mechanisms had been completed.[252]

> **16 September 2016:** ICANN's Vice President for gTLD Operations (Ms. Willett) dispatched ICANN's Questionnaire to representatives of Afilias, Verisign, NDC, and Ruby Glen, stating that its purpose is to assist ICANN to "*facilitate informed resolution*" of the concerns raised by Afilias and Ruby Glen.[253] Nothing in that letter even hinted at the fact that ICANN had the DAA and related information in its possession.

**30 September 2016:** Mr. Atallah responded to Mr. Hemphill's 8 August and 9 September 2016 letters. He assured Afilias that "[a]s an applicant in the contention set, the primary contact for Afilias' application *will be notified of [any] future changes to the contention set status or updates regarding the status of relevant Accountability Mechanisms*" and that ICANN "*will continue to take Afilias' comments, and other inputs we have sought, into consideration as we consider this matter*."[254]

**7 October 2016:** Afilias submitted its answers to ICANN's Questionnaire.[255]

**Early 2017:** The DOJ commenced its antitrust investigation into the Verisign and NDC arrangement and requested that ICANN take no action on .WEB during the pendency of the investigation.[256]

**January 2018:** The DOJ closed its antitrust investigation.[257]

**February-May 2018:** Beginning with its 23 February 2018 letter and DIDP, Afilias repeatedly requested "an update on ICANN's investigation of the .WEB contention set" and also requested documents such as Verisign's and NDC's responses to ICANN's Questionnaire. ICANN consistently refused to provide any information, even as it proceeded to contract with NDC for the .WEB registry.[258]

**June 2018:** ICANN notified Afilias that it was removing the .WEB contention set's hold status.

140. When ICANN removed the .WEB contention set from its on-hold status on 6 June 2018—without any warning or explanation—Afilias believed it had no choice but to invoke the CEP. ICANN is disingenuous at best when it asserts in its Response that the claims asserted by Afilias in this IRP "are precisely the same alleged Guidebook violations" that Mr. Hemphill complained of in his 8 August 2016 letter to Mr. Atallah.[259] They are not.

141. In Mr. Hemphill's 8 August letter, he specifically acknowledged that Afilias' concerns were based on public information and requested that ICANN "undertake an investigation."[260] In his 9 September 2016 letter, Mr. Hemphill asked that ICANN not enter a .WEB Registry Agreement until the ICANN Board had reviewed the matter and ICANN accountability mechanisms had been completed. Afilias was entitled to rely on the subsequent representations by Ms. Willett and Mr. Atallah that ICANN would seek an "informed resolution" of the questions raised by Afilias; that ICANN would "consider" Afilias' concerns; and that Afilias would "be notified of any changes to the contention status set or updates regarding the status of .WEB…."[261]

142.     ICANN has still failed to explain the basis (if any) on which and when it decided to take the .WEB contention set off-hold on 6 June 2018 and proceeded to contract with NDC for the .WEB registry agreement. But until ICANN "notified [Afilias] of any changes to the contention set or updates regarding the status of .WEB" (to use Mr. Atallah's words), Afilias had no basis to "become aware of the material effect of the action or inaction giving rise to the DISPUTE."

143.     ICANN's Bylaws "strongly encourage" potential IRP claimants to engage in the CEP, which is intended to "resolve and/or narrow the Dispute."[262] That is why the invocation of the CEP tolls the time to file an IRP Request. According to ICANN's CEP rules, after engaging in a CEP that does not resolve all of the issues in dispute, then "***the requestor's time to file a request for independent review designated in the Bylaws shall be extended for each day of the cooperative engagement process***, but in no event, absent mutual written agreement by the parties, shall the extension be for more than fourteen (14) days.[263] Here, Afilias commenced the CEP on 18 June 2018—eleven days after learning that ICANN had removed the .WEB contention set from its on-hold status.

144.     ICANN terminated the CEP on 13 November 2018.[264] When doing so, ICANN expressly recognized its policy for extending the time limitation to account for the CEP and informed Afilias that: "***ICANN will grant Afilias an extension of time to 27 November 2018 (14 days following the close of CEP) to file an IRP*** … this extension will not alter any deadlines that may have expired before the initiation of the CEP."[265] Afilias commenced this IRP on 14 November 2018—the very next day. Given the stay that existed under the CEP Rules, Afilias filed its IRP Request within twelve days of becoming "aware of the material effect of the action or inaction giving rise to the DISPUTE." Specifically, ICANN became aware that, although ICANN was required by its Articles and Bylaws to disqualify NDC's application and bid and proceed to award .WEB to Afilias, ICANN had nonetheless taken the contention set off-hold—signaling that it was proceeding to contract with NDC (and thus Verisign).

145.     Finally, although we do not believe that it is possible to conclude that Afilias was "aware of

the material effect of the action or inaction giving rise to the DISPUTE" *before* ICANN took the .WEB

contention set off-hold on 6 June 2018, ICANN would nonetheless be estopped from invoking the time-bar

where, as here, ICANN affirmatively represented to Afilias that it was seeking "informed resolution" of its

concerns, that Afilias would be "notified of future changes to the contention set status or update regarding

the status of [.WEB]," and that ICANN would "continue to take Afilias' comments, and other inputs we have

sought, into consideration as we consider this matter."[266] As stated by the IRP Panel in *GCC v. ICANN*, in

considering ICANN's prior iteration of its time-bar rule (which provided for a 30-day rather than 120-day IRP

deadline):

> It suffices to record that, under an equitable reliance theory, a requesting party should be
> allowed to request an IRP after expiry of the 30-day IRP Deadline if that party can show
> reliance on a representation or representations by ICANN inviting or allowing extension of
> the IRP Deadline.[267]

In other words, even if someone could somehow conclude that Afilias became aware of the material effect of

ICANN's failure to comply with its Articles and Bylaws before 6 June 2018, ICANN cannot be allowed to

benefit from its own misrepresentations and lack of transparency—in violation of its Articles and Bylaws—in

order to invoke the time-bar defense.

146.     For the foregoing reasons, the Panel should reject ICANN's time-bar defense to Afilias' other

claims, just as it did with respect to Afilias' Rule 7 claim.

## VI.     THE PROPER RELIEF TO BE ORDERED BY THE PANEL

147.     Just as ICANN misstated the Standard of Review for this IRP (*see* Section II above), ICANN

also misstates the relief that the Panel may order.

148.     ICANN asserts—incorrectly and misleadingly—that "Afilias' requested relief from this IRP

Panel goes far beyond what is permitted by ICANN's Bylaws and calls for the Panel to decide issues that are

reserved to the discretion of the ICANN Board."[268] According to ICANN, this Panel can only offer its views on

the subject matter. Thereafter, ICANN's Board will "seriously consider and evaluate" the Panel's final decision

before it determines, in its discretion, "what action, *if any*, is appropriate in order to make .WEB finally available to consumers."[269] In other words, ICANN argues that the Panel has no power to order affirmative declaratory relief—and, moreover, that the ICANN Board can exercise its "business judgment" to ignore the Panel's decision in any event. This is simply incorrect.

149. As it has done throughout this entire matter—from its failure to disqualify NDC on receiving the DAA through the defense of this IRP—ICANN again makes a mockery of the basic principles according to which ICANN is *required* to operate, based on the plain terms of its own constitutive documents.

150. As stated at the outset of this Reply, ICANN revised its Bylaws—including the sections of the Bylaws governing IRPs—in connection with the transition of IANA functions from the U.S. Department of Commerce to ICANN. As part of that transition, the CCWG concluded that the IRP process had to be strengthened, to leave no doubt that Panels can "hear *and resolve* claims that ICANN, through its Board of Directors or staff, has acted (or has failed to act) in violation of its Articles of Incorporation or Bylaws[,]" and to issue decisions that "***shall be binding on ICANN***."[270] The drafters of the new Bylaws incorporated virtually all of the CCWG's recommendations in order to obtain that goal.

151. Thus, Section 4.3 ("INDEPENDENT REVIEW PROCESS FOR COVERED ACTIONS") provides that "[t]he IRP is intended to hear *and resolve* Disputes" in order to achieve the following "Purposes of the IRP," *viz.*, to:

- "***Ensure*** that ICANN does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws."

- "***Empower*** the global Internet community and Claimants ***to enforce compliance*** with the Articles of Incorporation and Bylaws through meaningful, affordable and accessible expert review of Covered Actions…."

- "Ensure that ICANN is accountable to the global Internet community and Claimants."

- "***Reduce Disputes by creating precedent*** to guide and inform the Board, Officers (as defined in Section 15.1), Staff members, Supporting Organizations, Advisory Committees, and the global Internet community in connection with policy development and implementation."

- "Secure the accessible, transparent, efficient, coherent, and just resolution of Disputes."

- "Lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction."

- Provide a mechanism for the resolution of Disputes, as an alternative to legal action in the civil courts of the United States or other jurisdictions."[271]

Section 4.3(a) provides further that "[t]his Section 4.3 shall be construed, implemented, and administered in a manner consistent with these Purposes of the IRP."[272]

152.    Lest there be any doubt, Section 4.3(x) provides further that "[t]he IRP is ***intended as a final, binding arbitration process***[,]"[273] and that:

- "IRP Panel decisions are binding final decisions to the extent allowed by law…."

- "IRP Panel decisions … are intended to be enforceable in any court with jurisdiction over ICANN…."

- "ICANN intends, agrees, and consents to be bound by all IRP Panel decisions of Disputes of Covered Actions as a final, binding arbitration."[274]

As stated in Section 4.3's provisions applicable to the IRP's "Rules of Procedures," the IRP Rules must "***conform with international arbitration norms***," and, moreover, must be "administered by ***a well-respected international dispute provider***…."[275]

153.    Even under previous versions of the Bylaws and IRP Procedural Rules, IRP Panels consistently rejected ICANN's arguments that IRP Panels lack authority to issue affirmative declaratory relief and that IRP decisions are merely advisory.[276] As stated by the IRP Panel in *DotConnectAfrica Trust v. ICANN*:

> One of the hallmarks of international arbitration is the binding and final nature of the decisions made by the adjudicators. Binding arbitration is the essence of what the ICDR Rules, the ICDR itself and its parent, the [AAA], offer. The selection the ICDR Rules as the baseline set of procedures for IRP's, therefore, points to a binding adjudicative process.[277]

After further analysis of the text of the Bylaws and procedural rules in place at the time, the *DotConnectAfrica* Panel stated that its conclusion that IRP decisions and declarations are binding rested on two additional

factors—which are just as relevant now:

> 1) the exclusive nature of the IRP whereby the non-binding argument would be clearly in contradiction with such a factor; and, 2) the special, unique, and publicly important function of ICANN. As stated before, ICANN is not an ordinary private non-profit entity deciding for its own sake who it wishes to conduct business with, and who it does not. ***ICANN rather, is the steward of a highly valuable and important international resource***.[278]

As the Panel in *GCC v. ICANN* succinctly stated, based on the reasoning in DotConnectAfrica: "***[W]e do not accept ICANN's position that we lack authority to include affirmative relief***."[279]

154. The weight of these prior decisions, combined with the far more robust and definitive language of the new Bylaws as quoted above, leave no doubt that this Panel's mandate is to issue a "binding" and "final" "resolution" of this dispute—one that is "consistent with international arbitration norms" and that is "enforceable in any court with jurisdiction over ICANN." The scope and effect of the Panel's mandate is further underscored in this case in light of ICANN's apparent decision to take no action against NDC and Verisign.

155. Here, the Panel's mandate necessarily requires the Panel to issue a final decision declaring that ICANN breached its Articles and Bylaws by: (a) failing to disqualify NDC's application and bid upon receiving the DAA in August 2016; (b) failing to offer Afilias the rights to .WEB, as the next highest bidder, as provided for in the New gTLD Program Rules; and (c) following a biased, superficial and self-serving investigation, proceeding to contract with NDC (and hence Verisign) for the .WEB registry agreement, notwithstanding NDC's disqualifying violations. To ensure that this dispute is finally resolved—and that its decision is "enforceable in any court with jurisdiction over ICANN"—the Panel must also order affirmative declaratory relief: specifically, the Panel must declare that the New gTLD Program Rules, applied consistently with ICANN'S Articles and Bylaws, *require* ICANN to disqualify NDC's application and bid and to offer Afilias the rights to .WEB, as provided for in the New gTLD Program Rules.

## VII.    CONCLUSION

156.    For the foregoing reasons, and those stated in Afilias' other submissions, the Tribunal should grant Afilias' the relief requested in its Amended Request.

Respectfully submitted,

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## ENDNOTES

1    ICANN's Response to Amended Request for Independent Review Process (31 May 2019) ("**ICANN's Response to Amended IRP**"), ¶ 1.

2    *Id*.

3    *Id*. ¶ 4.

4    *Id*. ¶ 7.

5    *Id*. ¶ 66.

6    *Id*. ¶ 10 (emphasis added).

7    *See id*. ¶¶ 65-66.

8    *ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, Declaration of the Independent Review Panel (19 Feb. 2010) ("***ICM v. ICANN*, Declaration**"), **[Ex. CA-1]**, ¶ 136 (some emphasis in original; some emphasis added); *quoted with approval by Booking.com B.V. v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration (3 Mar. 2015) ("***Booking.com B.V. v. ICANN*, Final Declaration**"), **[Ex. CA-11]**, ¶ 112; *see also DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50 2013 001083, Final Declaration (9 July 2015) ("***DotConnectAfrica v. ICANN*, Final Declaration**"), **[Ex. CA-15]**, ¶ 66 ("ICANN is not an ordinary California nonprofit organization. Rather, it has an international purpose and responsibility to coordinate and ensure the stable and secure operation of the Internet's unique identifier systems.").

9    ICANN, Articles of Incorporation (approved on 9 Aug. 2016, filed on 3 Oct. 2016) ("**Articles**"), **[Ex. C-2]**, Art. II (emphasis added).

10   *Id*. Art. III (emphasis added).

11   *See* ICANN's Response to Amended IRP Request, ¶ 1.

12   ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018) ("**Bylaws**"), **[Ex. C-1]**, Sec. 1.1(a)(i) (emphasis added).

13   According to its most recent Annual Report, ICANN itself has over half-a-billion dollars in assets. *See* ICANN Annual Report for FY2019, **[Ex. C-89]**, p. 45. For its fiscal years 2019, ICANN reported approximately USD 140 million in expenses—around half of which goes to its approximately 390 employees. *Id.* p. 42. Senior officers at this non-for-profit corporation often make salaries in excess of USD 500,000 per year. *See* ICANN, Remuneration Practices - FY2020 (as of 1 July 2019), **[Ex. C-90]**.

14   *Corn Lake, LLC v. ICANN*, ICDR Case No. 01-15-0002-9938, Final Declaration (17 Oct. 2016) ("***Corn Lake v. ICANN*, Final Declaration**"), **[Ex. CA-16]**, ¶ 8.16 (quoting *Vistaprint Ltd. v. ICANN*, ICDR Case No. 01-14-0000-6505, Final Declaration of the Independent Review Panel (9 Oct. 2015), **[Ex. CA-2]**, ¶ 124) (emphasis in original).

15   *See, e.g.*, *DotConnectAfrica v. ICANN*, Final Declaration, **[Ex. CA-15]**, ¶ 23 ("Various provisions of ICANN's Bylaws and the Supplementary Procedures support the conclusion that the Panel's decisions, opinions and declarations *are binding*".) (emphasis added); *Booking.com v. ICANN*, Final Declaration, **[Ex. CA-11]**, ¶ 111 (rejecting the assertion "that the IRP Panel may only review ICANN Board actions or inactions under the deferential standard advocated by ICANN…," and holding that ICANN's "***conduct be appraised independently, and without any presumption of correctness.***") (emphasis added); *Gulf Cooperation Council (GCC) v. ICANN*, ICDR Case No. 01-14-0002-1065, Partial Final Declaration of the Independent Review Process Panel (19 Oct. 2016) ("***GCC v. ICANN*, Final Partial Declaration**"), **[Ex. CA-17]**, ¶ 146 ("***[W]e do not accept ICANN's position that we lack authority to include affirmative declaratory relief.***") (emphasis added).

16   *ICM v. ICANN*, Declaration, **[Ex. CA-1]**, ¶ 136 (some emphasis in original; some emphasis added); *accord Dot Sport Ltd. v. ICANN*, ICDR Case No. 01-15-0002-9483, Final Declaration (31 Jan. 2017), **[Ex. CA-18]**, ¶ 7.19; *Booking.com v. ICANN*, Final Declaration, **[Ex. CA-11]**, ¶ 112.

17   CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), **[Ex. C-91]**, ¶ 2 (at p. 5) (emphasis added).

18   Bylaws, **[Ex. C-1]**, Sec. 4.3(i).

19   *Id.* Sec. 4.3(a)(viii).

20   *Id.* Sec. 4.3(b)(ii) (emphasis added).

21    ICANN's Response to Amended IRP Request, ¶ 66.

22    As used herein, the term "New gTLD Program Rules" shall refer to the gTLD Applicant Guidebook ("**AGB**") **[Ex. C-3]**, the Auction Rules for New gTLDs: Indirect Contention Edition ("**Auction Rules**") **[Ex. C-4]**, and other rules related to the New gTLD Program. *See* Amended Request by Afilias for Independent Review Process (21 Mar. 2019) ("**Afilias' Amended IRP Request**"), p. i ("Glossary of Defined Terms").

23    *Corn Lake v. ICANN*, Final Declaration (17 Oct. 2016), **[Ex. CA-16]**, ¶ 8.17 (quoting *Booking.com v. ICANN*, Final Declaration, **[Ex. CA-11]**, ¶ 111).

24    Domain Acquisition Agreement between Verisign and NDC (25 Aug. 2015) ("**DAA**"), **[Ex. C-69]**.

25    Because ICANN designated the DAA as "Highly Confidential," no one at Afilias other than its General Counsel knows of its terms.

26    As used herein, the term "DIDP" shall refer to ICANN's Documentary Information Disclosure Policy. *See* Afilias' Amended IRP Request, p. i ("Glossary of Defined Terms"). Pursuant to this policy, a member of the Internet community can request that ICANN disclose documents in its "possession, custody, or control [that concern its operational activities] … unless there is a compelling reason for transparency." This request is referred to as a "DIDP Request." ICANN Documentary Information Disclosure Policy (25 Feb. 2012), *available at* https://www.icann.org/resources/pages/didp-2012-02-25-en (last accessed 4 May 2020), **[Ex. C-92]**.

27    In its Response, in arguing the Verisign and NDC should be allowed to participate in this IRP as *Amici* because they deny Afilias' claims about their violations of the New gTLD Program Rules, ICANN also asserts that "[f]or their part, NDC and Verisign claim that Afilias violated the .WEB Auction rules and should itself be disqualified by ICANN." ICANN's Response to Amended IRP Request, ¶ 63. This is not a claim that ICANN itself has actually made in this case (or anywhere else). Nor would it be proper for ICANN to do so. An IRP is an *ICANN* accountability mechanism to assess whether ICANN has complied with its Articles and Bylaws—not a mechanism for ICANN to assert claims against a claimant (which, again, ICANN's Response does not even purport to do). Moreover, Verisign and NDC first raised the "claim" in 2016. ICANN has never done anything about it. If ICANN seeks to press this claim in its next submission, or the *Amici* raise the matter in theirs, Afilias reserves the right to address it in our response to the *Amici*'s submission or in a supplemental response.

28    ICANN's Response to Amended IRP Request, ¶ 55 (citations omitted).

29    As used herein, the term "Interim Procedures" shall refer to the Interim Supplementary Procedures for ICANN IRP. *See* Afilias' Amended IRP Request, p. i ("Glossary of Defined Terms").

30    Interim Supplementary Procedures for IRP (25 Oct. 2018), **[Ex. C-59]**, Rule 11(a)-(c) (emphasis added). Subsections (d) and (e) of Rule 11 address the standard of review for claims that ICANN has not enforced its contractual rights with respect to the IANA Naming Function Contract and are therefore irrelevant to this IRP.

31    Bylaws, **[Ex. C-1]**, Sec. 4.3(b)(ii).

32    *See* Afilias' Amended IRP Request, ¶¶ 75-78; Bylaws, **[Ex. C-1]**, Sec. 1.2(a)(v).

33    Interim Supplementary Procedures for IRP (25 Oct. 2018), **[Ex. C-59]**, Rule 13(c) (emphasis added).

34    Bylaws, **[Ex. C-1]**, Sec. 4.3(a)(viii).

35    As in Afilias' Amended Request, the New gTLD Program Rules refer to the gTLD Applicant Guidebook ("**AGB**") **[Ex. C-3]**, the Auction Rules for New gTLDs: Indirect Contention Edition ("**Auction Rules**") **[Ex. C-4]**, and other rules related to the New gTLD Program. *See* Afilias' Amended IRP Request, p. i ("Glossary of Defined Terms").

36    Afilias' Amended IRP Request, ¶¶ 53-74.

37    ICANN's Response to Amended IRP Request, ¶ 6.

38    *Id.* ¶ 66.

39    *Id.* ¶ 66.

40    *Id.* ¶ 56.

41    Bylaws, **[Ex. C-1]**, Sec. 1.2(a)(v).

42    ICANN's Response to Amended IRP Request, Section B.

43    *Id.* ¶ 56 (emphasis added).

44    Bylaws, **[Ex. C-1]**, Secs. 1.1(a)(i), 1.1(d)(ii) and 1.2.

45    *See Booking.com v. ICANN*, Final Declaration, **[Ex. CA-11]**, ¶ 16 (*quoting* ICANN's Response, ¶ 14).

46    Bylaws, **[Ex. C-1]**, Sec. 1.2. ICANN's "Mission" is broadly described in Section 1.1(a) of the Bylaws. ICANN's Mission includes, *inter alia*, "coordinat[ing] the development and implementation of policies." *Id.* Sec. 1.1(a)(i).

47    *Id.* Sec. 1.2(a)(v) (emphasis added).

48    *Id.* Sec. 2.3 (emphasis added). Section 2.3 is also applicable in this IRP to ICANN's failure to follow its Competition Mandate, as discussed in **Section IV**.

49    *Id.* Sec. 3.1 (emphasis added).

50    *Booking.com v. ICANN*, Final Declaration, **[Ex. CA-11]**, ¶ 11 (*quoting* AGB, *Preamble*).

51    *Id.* ¶ 14 (*quoting* AGB, *Preamble* (emphasis added)).

52    *Id.* ¶ 54 (*quoting with approval* Claimant's Request, ¶ 13 (emphasis added)).

53    *GCC v. ICANN*, Partial Final Declaration, **[Ex. CA-17]**, ¶ 12 (emphasis added).

54    Bylaws, **[Ex. C-1]**, Sec. 1.2.

55    Articles, **[Ex. C-2]**, Art. III.

56    As discussed further in **Section IV**, ICANN cannot overlook material misstatements, misrepresentations, or omissions where to do so would violate its Core Principles and Commitments.

57    *See* AGB, **[Ex. C-3]**, p. 6-6. Under both California and international law, the term "may not" is prohibitive, not permissible. "May not" is the equivalent of "shall not." *See, e.g.*, *De Haviland v. Warner Bros. Pictures*, 67 Cal. App. 2d 225, 232 (1944), **[Ex. CA-19]** ("*[t]he words 'may not' as used are mandatory*) (emphasis added); *Woolls v. Superior Court*, 127 Cal. App. 4th 197, 208-09 (2005), **[Ex. CA-20]** (the term *'may not' is prohibitory, as opposed to permissive*.") (internal citation omitted) (emphasis added); *Sustainability, Parks, Recycling & Wildlife Def. Fund v. Dep't of Res. Recycling & Recovery*, 34 Cal. App. 5th 676, 684 (Ct. App. 2019), as modified (Apr. 22, 2019), **[Ex. CA-21]** ("A 2011 amendment substituted 'shall not' for 'may not.' … This did not change the meaning; 'may' can be mandatory where permissive use would render a statute's criteria illusory."). Similarly, in the context of international law, the term "may not" can be found, for example, in Article 27 Vienna Convention on the Law of Treaties: "A party may not invoke the provisions of its internal law as justification to perform a treaty." Vienna Convention on the Law of Treaties (1969), 1155 U.N.T.S. 18232, **[Ex. CA-22]**, Art. 27. According to the *travaux*, this article was introduced "to add to the principle of *pact sunt servanda* the additional principle that no party to treaty might invoke the provisions of its constitution or its law as an excuse for its failure to perform the international obligation undertaken." U.N. Conference on the Law of Treaties, 13th Plenary Meeting, U.N. Doc. A/CONF.39/SR.13 (6 May 1969), **[Ex. CA-23]**. The International Court of Justice has consistently held that the term "may not" as used in Article 27 is obligatory, not permissive. *See, e.g.*, *Fisheries Case (United Kingdom v. Norway)*, Judgment, 1951 ICJ Rep. 116, **[Ex. CA-24]**, p. 132; *Nottebohm Case (Liechtenstein v. Guatemala) (Preliminary Objections)*, Judgement, 1953 I.C.J. Rep. 111, **[Ex. CA-25]**, p. 123; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, 1988 I.C.J. Rep. 12, **[Ex. CA-26]**, ¶ 57.

58    ICANN Board Rationales, **[Ex. C-9]**.

59    *GCC v. ICANN*, Partial Final Declaration, **[Ex. CA-17]**, ¶ 12 (emphasis added).

60    AGB, **[Ex. C-3]**, pp. 1-5 to 1-7 (emphasis added).

61    ICANN, New gTLD Application Submitted to ICANN by NU DOTCO LLC, Application ID: 1-1296-36138 (13 June 2012) ("**NDC Application**"), **[Ex. C-24]**.

62    NDC Application, **[Ex. C-24]**, pp. 1, 3.

63    *Id.* p. 4.

64    *Id.*

**ENDNOTES**

65. *See, e.g.*, ICANN's Response to Amended IRP Request, ¶ 26; *see also* Verisign's Supplemental Brief in Support of Its Request to Participate as *Amicus Curiae* in Independent Review Process (27 Sep. 2019); NDC's Supplemental Brief in Support of Its Request to Participate as *Amicus Curiae* (27 Sep. 2019).

66. AGB, **[Ex. C-3]**, *Attachment to Module 2: Evaluation Questions and Criteria*.

67. *Id.* p. A-1 (emphasis added).

68. *Id.* pp. A-1, A-2 (some emphasis in original; some emphasis added).

69. For instance, NDC's application represented that Neustar would serve as its "backend provider." NDC Application, **[Ex. C-24]**, p, 5. This is no longer the case.

70. *Id.* p. 6 (emphasis added).

71. *Id.* (emphasis added).

72. An "increasingly popular alternative to .COM" must of course be taken in context. There are an estimated 145.4 million .COM registrations, compared with an estimated 2,370,371 .CO registrations. *See* Verisign, "The Verisign Domain Report," 17(1) *Domain Name Industry Brief* (Mar. 2020), **[Ex. C-93]**, p. 2; Domain Name Stat, Domain name registrations in Country TLDs, *available at* https://domainnamestat.com/statistics/tldtype/country (last accessed 1 May 2020), **[Ex. C-94]**.

73. NDC Application, **[Ex. C-24]**, p. 7 (emphasis added).

74. *Id.* (emphasis added).

75. ICANN, New gTLD, Comments & Feedback, *available at* https://newgtlds.icann.org/en/program-status/comments.

76. Prior to producing documents in this IRP, ICANN requested that Afilias enter a Stipulated Protective Order. Documents marked "Highly Confidential" may only be shown to outside counsel and others (such as experts). Documents marked as "Confidential" may be shown to personnel of the Parties, but only to the extent they are assisting counsel in the proceedings. ICANN marked the DAA as "Highly Confidential" (although it agreed that Afilias' outside counsel could show the DAA to Afilias' General Counsel, Scott Hemphill). But because of the "Highly Confidential" designation, the public is entirely unaware of the terms of the DAA—and the extent to which NDC was acting as a shill for Verisign. Afilias reserves the right to challenge ICANN's designations as this IRP proceeds.

77. *See* Afilias' Amended IRP Request, ¶ 37 (*quoting* VeriSign, Inc., *Form 10-Q (Quarterly Report)* (28 July 2016), **[Ex. C-45]**, n. 11 (at p. 13)).

78. *See, e.g.*, ICANN's Response to Amended IRP Request, ¶¶ 26-28.

79. ICANN states in its Response: "Assignments and transfers to operate gTLDs must be approved by ICANN, and ICANN follows a known procedure in evaluating such requests. ICANN also has published materials explaining how a Registry Agreement can be assigned from one registry to another." Afilias' Amended IRP Request, ¶ 26 (endnotes omitted). But these rules and procedures are not, or at least should not be, before this Panel. To the extent that ICANN has effectively approved the transfer and assignment of NDC's .WEB registry agreement—when NDC has not yet entered such an agreement and has not yet requested transfer and assignment—ICANN has breached its Articles and Bylaws by, *inter alia*, failing to apply these documented policies consistently, neutrally, objectively, and fairly, and without singling out any party for disparate treatment.

80. AGB, **[Ex. C-3]**, p. 6-6.

81. *Id.* p. 1-3 (emphasis in original).

82. *Id.* p. 1-38 (emphasis added).

83. *Id.* p. 1-3 (emphasis added). The AGB further provided that applications would not be considered if the applicant failed to pay the application fee of USD 185,000 before the deadline. *Id.* p. 1-42.

84. *Id.* p. 6-2 (emphasis added).

85. *Id.* (emphasis added).

86. *Id.* (emphasis added). An action is "false" if it is untrue, not factual or factually incorrect. It is "misleading" if it is deceptive, or tending to mislead or create a false impression. "False" means "not true; not conformable to truth; expressing what is contrary to fact or truth; incorrect; wrong; mistaken; as a *false* report." Merriam-Webster Dictionary (on-line version), **[Ex. C-95]**.. "Misleading" means "leading or tending to lead into error; causing to err; deceiving." *Id.*

87 AGB, **[Ex. C-3]**, p. 6-4 (emphasis added). The AGB provided an exception to this requirement "to the extent that this Applicant Guidebook expressly states that such information will be kept confidential, except as required by law or judicial process." *Id.* p. 6-5.

88 *Id.* p. 4-6 (emphasis added).

89 *See* Afilias' Amended IRP Request, ¶ 21; AGB, **[Ex. C-3]**, p. 4-6.

90 *See* Afilias' Amended IRP Request, ¶ 21. *See also* ICANN, New gTLD, Auction Results, available at https://gtldresult.icann.org/applicationstatus/auctionresults (last accessed 1 May 2020).

91 AGB, **[Ex. C-3]**, p. 4-22.

92 Auction Rules, **[Ex. C-4]**, Rule 40(b) (emphasis added).

93 *Id.* Rule 32.

94 *Id.* p. 16.

95 *Id.* p. 19.

96 *Id.* p. 17.

97 *Id.* p. 20.

98 AGB, **[Ex. C-3]**, pp. 4-25, 4-26 & 4-27.

99 DAA, **[Ex. C-69]**, p. 1.

100 *Id.* p. 19.

101 *Id.* p. 20.

102 AGB, **[Ex. C-3]**, p. 6-2.

103 DAA, **[Ex. C-69]**, p. 7.

104 *Id.* pp. 16, 19.

105 AGB, **[Ex. C-3]**, p. 6-2.

106 *Id.* (emphasis added).

107 DAA, **[Ex. C-69]**, p. 2 (emphasis added).

108 *Id.* p. 7 (emphasis added).

109 *Id.* (emphasis added).

110 *Id.*

111 *Id.* p. 16 (emphasis added).

112 *Id.* p. 20.

113 *Id.* p. 4.

114 *Id.* p. 17 (emphasis added).

115 *Id.* (emphasis added).

116 *Id.* (emphasis added).

117 *Id.* p. 18 (emphasis added).

118 *Id.* p. 16. Redacted - Th rd Party Des gnated Conf dent a Informat on

119 *See id.* p. 18. Redacted - Th rd Party Des gnated Conf dent a Informat on

ENDNOTES

120  *Id.* p. 21.

121  *Id.* p. 19.

122  *Id.* p. 10.

123  AGB, **[Ex. C-3]**, pp. 6-2 and 6-6.

124  *Id.* p. 6-2 (emphasis added). *See also id.* Sec. 1.2.7 (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).

125  *Id.* p. A-1 (emphasis in original).

126  *Id.* p. A-2.

127  *Id.* pp. 1-5 to 1-7.

128  NDC Application, **[Ex. C-24]**, p. 6.

129  *Id.* p. 7.

130  *Id.*

131  *Id.*

132  *Id.*

133  AGB, **[Ex. C-3]**, p. 6-2.

134  DAA, **[Ex. C-69]**, p. 7.

135  As set forth in Afilias' Amended Request, and also discussed below, NDC also made oral statements to ICANN concerning the Application in July 2016, when another applicant raised a complaint prior to the ICANN Auction that NDC had undergone a change in control. *See* Afilias' Amended IRP Request, ¶¶ 53-74.

136  AGB, **[Ex. C-3]**, p. 6-2.

137  *Id.* p. 6-2.

138  DAA, **[Ex. C-69]**, p. 17.

139  Email communications between J. Nevett (Donuts, Inc.) and J. I. Rasco (NDC) (6 & 7 June 2016), **[Ex. C-35]**.

140  *Id.* (emphasis added). Similarly, as set forth in Afilias' Amended Request, Mr. Rasco told Afilias' John Kane on or around 1 June 2016 that his "board [had] instructed [him] to skip [the private auction] and proceed to [the] ICANN auction." Afilias' Amended IRP Request, ¶ 30. *See also* Email from J. Kane (Vice President, Afilias' Corporate Services) to H. Lubsen (CEO, Afilias) (7 July 2016), **[Ex. C-34]**.

141  Emails from J. Erwin (ICANN) to J. Rasco (NDC) (27 June 2016), **[Ex. C-96]**.

142  *Id.*

143  Email communications between C. LaHatte (ICANN Ombudsman) and J. Rasco (NDC) (7 July 2016), **[CAW (May 20 WS), Ex. E]**.

144  *Id.* (emphasis added).

145  Witness Statement of Christine Willett (20 May 2019), ¶ 26.

146  Email communications from C. LaHatte (ICANN Ombudsman) to C. Willett (ICANN) (July 2016), **[CAW (May 20 WS), Ex. D]**, p. 2.

147  *Id.* (emphasis added).

148  Letter from P. Livesay (Verisign) to J. Rasco (NDC) (26 July 2016), **[Ex. C-97]**, pp. 1-2.

149  *Id.* p. 1 (emphasis added).

[150] Redacted - Th rd Party Des gnated Conf dent a Informat on

[151] Letter from P. Livesay (Verisign) to J. Rasco (NDC) (26 July 2016), **[Ex. C-97]**, p. 2.

[152] *Id.* p. 2.

[153] Redacted - Th rd Party Des gnated Conf dent a Informat on

[154] AGB, **[Ex. C-3]**, p. 6-2.

[155] *Id.*

[156] *Id.* (emphasis added).

[157] AGB, **[Ex. C-3]**, p. 1-5.

[158] *See, e.g.*, *Booking.com v. ICANN*, Final Declaration, **[Ex. CA-11]**, ¶¶ 11, 14 (*quoting* AGB, **[Ex. C-3]**, *Preamble*).

[159] *See, e.g.*, *id.*, ¶ 14 (*quoting* AGB, **[Ex. C-3]**, *Preamble*).

[160] AGB, **[Ex. C-3]**, p. 4-22 (emphasis added).

[161] Auction Rules, **[Ex. C-4]**, ¶ 8 (at pp. 1-2) (emphasis added).

[162] DAA, **[Ex. C-69]**, p. 7 Redacted - Th rd Party Des gnated Conf dent a Informat on

[163] Auction Rules, **[Ex. C-4]**, ¶ 12 (at p. 2) (emphasis added).

[164] *Id.* p. 16) (emphasis added).

[165] *Id.* p. 19 (emphasis added).

[166] *Id.* p. 17 (emphasis added).

[167] *Id.* ¶ 40(b) (at p. 7) (emphasis added).

[168] *Id.* ¶¶ 12, 32 (emphasis added).

[169] Auctions Bidder Agreement, **[Ex. C-5]**, p. 1 (emphasis added).

[170] DAA, **[Ex. C-69]**, p. 17 (emphasis added).

[171] *Id.*

[172] AGB, **[Ex. C-3]**, p. 4-22 ("[o]nly bids that comply with all aspects of the rules will be considered valid").

[173] *Id.* p. 4-23.

[174] Auction Rules, **[Ex. C-4]**, ¶¶ 58-59 (emphasis added).

[175] *Id.* ¶ 62 (emphasis added).

[176] *See id.* Rule 47 (at pp. 9-10).

[177] VeriSign, Inc., *Form 10-Q (Quarterly Report)* (28 July 2016), **[Ex. C-45]**, n. 11 (at p. 13).

[178] A. Allemann, "It looks like Verisign bought .Web domain for $135 million (SEC Filing)," *Domain Name Wire* (28 July 2016), **[Ex. C-77]**.

[179] K. Murphy, "Verisign likely $135 million winner of .web gTLD," *Domain Incite* (1 Aug. 2016), **[Ex. C-30]**.

[180] K. McCarthy, "Someone (cough, cough VeriSign) just gave ICANN $135m for the rights to .web," *The Register* (28 July 2016), **[Ex. C-43]**. We know from ICANN's recent document production that these headlines were sent via Google alert to the emails of the ICANN Ombudsman and Ms. Christine Willett. *See, e.g.*, Email from Domain Name Wire to ICANN Ombudsman (28 July 2016), **[Ex. C-98]** and Email from Google Alerts to C. Willett (ICANN) (28 July 2016), **[Ex. C-99]**.

181    K. McCarthy, "Someone (cough, cough VeriSign) just gave ICANN $135m for the rights to .web," *The Register* (28 July 2016), **[Ex. C-43]**, pp. 2-3.

182    Email communications from C. LaHatte (ICANN Ombudsman) to C. Willett (ICANN) (July 2016), **[CAW (May 20 WS), Ex. D]**, p. 2.

183    Emails from J. Rasco (NDC) to C. Willett (ICANN) (*various dates*), **[Ex. C-100]**, pp. 1-2.

184    *Id.* p. 1.

185    ICANN's privilege log shows that from 29 July 2016 (the day after Verisign's 10Q "disclosure") and through the month of August, Mr. Atallah was the recipient (either as the addressee or on copy) of 17 communications, all of which ICANN claims to be privileged.

186    Verisign Statement Regarding .Web Auction Results (1 Aug. 2016), **[Ex. C-46]**.

187    Letter from S. Hemphill (Afilias) to A. Atallah (ICANN) (8 Aug. 2016), **[Ex. C-49]**, p. 1. Given that Mr. Hemphill did not request confidential treatment for his 8 August 2016 letter, ICANN posted it on its website.

188    *Id.* p. 2.

189    *Id.* p. 2.

190    Email from H. Waye (ICANN Ombudsman) to S. Hemphill (Afilias) (19 Sep. 2016), **[Ex. C-101]**. For reasons that remain unclear to us, ICANN's Ombudsman ultimately declined to investigate the matters that Mr. Hemphill had raised.

191    Letter from R. Johnston (Arnold & Porter) to E. Enson (Jones Day) (23 Aug. 2016), **[Ex. C-102]**. The letter, on Arnold & Porter letterhead, said that it was submitted jointly by Mr. Johnston and Brian Leventhal, who, at the time, was apparently acting for NDC. *See id*. pp. 1 & 8.

192    *Id.* p. 1 (emphasis added). In contrast to Mr. Hemphill's 8 August 2016 letter, Mr. Johnston's 23 August 2016 letter asserted that the letter and all of its attachments contained "**CONFIDENTIAL BUSINESS INFORMATION**" that was not to be disclosed.

193    In Afilias' Redfern Schedule, Afilias requested communications before 23 August 2016 between ICANN and Verisign and/or NDC concerning Verisign's interest or involvement in acquitting rights in the .WEB gTLD, including, without limitation, ICANN's "request for information" referred to on page 1 of the letter dated 23 August from Mr. Ronald L. Johnston of Arnold & Porter to Mr. Eric Enson of Jones Day." ICANN stated that it would "conduct a reasonable search and produce non-privileged documents" in response to this request—and the Panel specifically "noted" ICANN's response. *See* Afilias' Redfern Schedule, Request No. 2, pp. 14-17. Yet ICANN has produced no such documents.

194    Letter from R. Johnston (Arnold & Porter) to E. Enson (Jones Day) (23 Aug. 2016), **[Ex. C-102]**, p. 1.

195    *Id.* pp. 1-2.

196    DAA, **[Ex. C-69]**, p. 7.

197    Letter from S. Hemphill (Afilias) to A. Atallah (ICANN) (9 Sep. 2016), **[Ex. C-103]**.

198    *See* Letter from C. Willett (ICANN) to J. Kane (Afilias) (16 Sep. 2016), **[Ex. C-50]**, p. 1. On 2 July 2016, Ruby Glen had commenced a lawsuit alleging that ICANN "used its authority and oversight to unfairly benefit an application who is in admitted violation of a number of provisions of the Applicant Guidebook." *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Cal.), Complaint (22 July 2016), **[Ex. C-104]**, ¶ 2. Ruby Glen amended its complaint on 8 August 2016 to further allege that ICANN failed to fairly and properly administer the New gTLD Program, including by allowing Verisign to acquire NDC's application rights. *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Cal.), Amended Complaint (8 Aug. 2016), **[Ex. C-105]**, ¶¶ 1-4, 56-62. The court dismissed Ruby Glen's lawsuit because of the litigation waiver contained in the AGB. *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Cal.), Civil Minutes Supporting Judgment on Motion to Dismiss (28 Nov. 2016), **[Ex. C-106]**, pp. 4-8; *and Ruby Glen, LLC v. ICANN*, Case No. 16-56890 (9th Cir. 2018), Memorandum Order, **[Ex. C-107]**, pp. 2-4. On 2 August 2016, Ruby Glen provided notice to ICANN of its intent to initiate the CEP process, though Ruby Glen did not file an IRP against ICANN. ICANN, Cooperative Engagement and Independent Review Processes, Status Update (8 Aug. 2016), **[Ex. C-108]**. Afilias had no involvement in any of Ruby Glen's proceedings.

199    As noted above, given the "Highly Confidential" designation that ICANN has placed on the DAA, only Afilias' outside counsel and its General Counsel, have been able to review the DAA since receiving it in December 2018.

[200] Rather than serve legitimate "investigative purposes," the questions appear more like "contention interrogatories"—the term used in U.S. litigation for written questions that a litigant serves on its opposing party, typically in an effort to frame the opposing party's contentions in a manner favorable to the litigant that is serving them.

[201] Letter from C. Willett (ICANN) to J. Kane (Afilias) (16 Sep. 2016), **[Ex. C-50]**, Questions 1-4.

[202] *Id.* Questions 5, 12, 17-18. *See also* Letter from R. Johnston (Arnold & Porter) to E. Enson (Jones Day) (23 Aug. 2016), **[Ex. C-102]**.

[203] Letter from J. Kane (Afilias) to C. Willett (ICANN) (7 Oct. 2016), **[Ex. C-51]**.

[204] Verisign's 7 October 2016 Response, **[Ex. C-109]**; NDC's 10 October 2016 Response, **[Ex. C-110]**.

[205] To the extent that ICANN has relied on those arguments in its Response, we have tried to address them here. However, to the extent ICANN relies on these arguments further in its Rejoinder, and to the extent the *Amici* reply on them in their submissions, Afilias reserves the right to address those arguments in its Response to the *Amici* submissions.

[206] *See, e.g.*, Procedural Order No. 2 (27 Mar. 2020), Attachment A, p. 35 (ICANN Response or Objection to Afilias' Document Request No. 11 (seeking, as reformulated by the Panel, the documents evidencing, constituting or referring to the "informed resolution" of these questions).

[207] Letter from A. Ali (Counsel for Afilias) to ICANN Board (23 Feb. 2018), **[Ex. C-78]**; Letter from A. Ali (Counsel for Afilias) to ICANN Board (23 Apr. 2018), **[Ex. C-79]**; Letter from A. Ali (Counsel for Afilias) to ICANN Board (21 Dec. 2018), **[Ex. C-111]**; Letter from A. Ali (Counsel for Afilias) to ICANN (1 Apr. 2019), **[Ex. C-112]**; Letter from A. Ali (Counsel for Afilias) to ICANN Board (16 Apr. 2018), **[Ex. C-113]**; Letter from A. Ali (Counsel for Afilias) to J. LeVee (Counsel for ICANN) (1 May 20018), **[Ex. C-114]**.

[208] *See* Email J. Hooper (Verisign) to K. Hakansson (ICANN) (17 Jan. 2018), **[Ex. C-115]**.

[209] Letter from J. LeVee (Counsel for ICANN) to A. Ali (Counsel for Afilias) (28 Apr. 2018), **[Ex. C-80]**, p. 1 (emphasis added).

[210] Letter from A. Ali (Counsel for Afilias) to J. LeVee (Counsel for ICANN) (1 May 20018), **[Ex. C-114]**, p. 1 (emphasis added).

[211] Email from ICANN Global Support to J. Kane (Afilias) (7 June 2018), **[Ex. C-62]**.

[212] NDC's Supplemental Brief in Support of Its Request to Participate as *Amicus Curiae* (27 Sep. 2019), ¶ 18.

[213] ICANN's Response to Amended IRP Request, ¶ 21.

[214] Bylaws, **[Ex. C-1]**, Sec. 1.2(a) (emphasis added).

[215] *Id.* Sec. 1.2(b).

[216] *Id.* Sec. 1.2.(b)(iv).

[217] Statement of Kurtz Pritz (ICANN Senior Vice President for Shareholder Relations) *in* S. Hrg. 112-394, ICANN's Expansion of Top Level Domains, Hearing before the Committee on Commerce, Science, and Transportation, U.S. Senate, 112th Congress, First Session, December 8, 2011 ("**December 2011 Senate Hearing**"), **[Ex. JZ-2]**, p. 21. The origin of ICANN's competition mandate is discussed at length in the report submitted by Dr. Zittrain. Expert Report of Jonathan Zittrain (26 Sep. 2018), pp. 27-31.

[218] ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (20 June 2011) ("**ICANN Board Rationales**"), **[Ex. C-9]**, p. 62 (emphasis added).

[219] ICANN's Response to Amended IRP Request, ¶ 70.

[220] Statement of Kurtz Pritz (ICANN Senior Vice President for Shareholder Relations), *in* December 2011 Senate Hearing), **[Ex. JZ-2]**, pp. 8, 11 (emphasis added).

[221] ICANN Board Rationales, **[Ex. C-9]**, p. 4.

[222] *Id.*

[223] *Id.* p. 7.

[224] *Id.* p. 9.

[225] *Id.* p. 20.

226 *Id.* p. 4.

227 Dennis Carlton (Compass Lexecon), Report regarding ICANN's Proposed Mechanism for Introducing New gTLDs (5 June 2009) ("**Carlton Report**"), **[Ex. JZ-47]**, ¶¶ 6, 23, 29 (emphasis added).

228 The DOJ had objected to ICANN's proposed New gTLD Program on the grounds that it would do more harm than good to competition in the DNS.

229 Carlton Report, **[Ex. JZ-47]**, ¶ 25 (emphasis added)

230 We note that ICANN's Board recently resolved to deny an application to transfer .ORG to a new registry provider. In part, the ICANN Board based its decision on .ORG's unique history and role in the broader ferment of the DNS.

231 Bylaws, **[Ex. C-1]**, Sec. 2.3.

232 ICANN's Response to Amended IRP Request, ¶¶ 6, 50, 70.

233 Alfred E. Kahn, *The Economics of Regulation:  Principles and Institutions* (1988), **[Ex. C-116]**, pp. 3, 9.

234 As explained by the current head of the DOJ's Antitrust Division, Makan Delrahim: "*antitrust is law enforcement, it's not regulation*. At its best, it supports reducing regulation, by encouraging competitive markets that, as a result, require less government intervention." U.S. Department of Justice, Assistant Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association's Antitrust Law Section Fall Forum (Washington, DC, 16 Nov. 2017), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar (last accessed 28 Apr. 2020) ("**Delrahim 2017 Keynote Address**"), **[Ex. C-117]**, p. 1.

235 Alfred E. Kahn, *The Economics of Regulation:  Principles and Institutions* (1988), **[Ex. C-116]**, p. 2 (emphasis in original).

236 15 U.S.C. § 18 (1996) (emphasis added).

237 *Steves & Sons, Inc. v. JELD-WEN, Inc.*, No. 19-1397 (4th Cir. 2019), Brief for the United States of America as *Amicus Curiae* in Support of Appellee Steves and Sons, Inc. (23 Aug. 2019) ("**DOJ *Amicus* Brief**"), **[Ex. C-118]**, p. 1. *See also Steves & Sons, Inc. v. JELD-WEN, Inc.*, Case 3:16-cv-00545-REP (E.D. VA.), Statement of Interest of the United States of America Regarding Equitable Relief (6 June 2018) ("**DOJ Statement of Interest**"), **[Ex. C-119]**, n. 1 ("[T]he Antitrust Division confirms that it investigated this transaction, and did not take any enforcement action. As the Division has explained, however, no inference should be drawn in this private action based upon the Antitrust Division's decision not to take enforcement action.").

238 ICANN's Response to Amended IRP Request, ¶ 70. Afilias notes that ICANN, in fact, did not solicit the DOJ's opinion on whether Verisign's proposed acquisition of .WEB would violate U.S. antitrust law. The correct procedure, if that was truly ICANN's intent, would have been to submit a business review letter pursuant to 28 C.F.R. Section 50.6. By doing so, ICANN would have formally solicited the DOJ to issue a statement of its current enforcement intentions with respect to proposed acquisition pursuant to the Department's Business Review Procedure.

239 Carlton Report, **[Ex. JZ-47]**, ¶ 19.

240 ICANN's Response to Amended IRP Request, ¶ 7.

241 *Id.* ¶ 7.

242 Decision on Phase I (12 Feb. 2020), ¶ 137.

243 Interim Supplementary Procedures for IRP (25 Oct. 2018), **[Ex. C-59]**, Rule 4 (emphasis added).

244 Decision on Phase I (12 Feb. 2020), ¶ 132 ("To the extent that Afilias' Rule 7 claim impugns the actions of ICANN's Staff and asserts that these actions violated the Articles of Incorporation or Bylaws, it falls within both the definition of Covered Actions and the jurisdiction of the Panel in this IRP.").

245 *Id.* ¶¶ 114-17.

246 Bylaws, **[Ex. C-1]**, Sec. 4.3(a)(i).

247 *Id.* Sec. 4.3(b)(iii)(A).

248 *Id.* Sec. 4.3(b)(ii) (emphasis added).

249 Verisign Statement Regarding .Web Auction Results (1 Aug. 2016), **[Ex. C-46]**, p. 1.

# ENDNOTES

250   *Id.* p. 2.

251   Letter from J. LeVee (Counsel for ICANN) to A. Ali (Counsel for Afilias) (18 Dec. 2018), **[Ex. C-120]**, p. 1 (producing documents "as required by the Emergency Panelist's Decision On Afilias' Request For Production Of Documents In Support Of Its Request For Interim Measures," including the DAA).

252   Letter from S. Hemphill (Afilias) to A. Atallah (ICANN) (9 Sep. 2016), **[Ex. RE-12]**.

253   Letter from C. Willett (ICANN) to J. Kane (Afilias) (16 Sep. 2016), **[Ex. C-50]**, p. 1.

254   Letter from A. Atallah (ICANN) to S. Hemphill (Afilias) (30 Sep. 2016), **[Ex. C-61]**, p. 1.

255   Letter from J. Kane (Afilias) to C. Willett (ICANN) (7 Oct. 2016), **[Ex. C-51]**.

256   ICANN's Response to Amended IRP Request, ¶ 137. The DOJ apparently issued its first Civil Investigative Demands in the investigation on 1 February 2017. *See id*.

257   ICANN's Response to Amended IRP Request, ¶ 137.

258   Letter from A. Ali (Counsel for Afilias) to ICANN Board (23 Feb. 2018), **[Ex. C-78]**, p. 1 (requesting "an update on ICANN's investigation of the .WEB contention set"); Letter from A. Ali (Counsel for Afilias) to ICANN Board (16 Apr. 2018), **[Ex. C-113]**, p. 4 (writing directly to the ICANN Board in order to "request[] information on the current status of ICANN's investigation of the .WEB contention set" because "Afilias has received no information from ICANN regarding the investigation"); Letter from A. Ali (Counsel for Afilias) to J. LeVee (Counsel for ICANN) (1 May 20018), **[Ex. C-114]**, pp. 1, 3 (seeking an update because "[t]o date, ICANN has provided no information about the investigation").

259   *See* ICANN's Response to Amended IRP Request, ¶ 41.

260   Letter from S. Hemphill (Afilias) to A. Atallah (ICANN) (8 Aug. 2016), **[Ex. C-49]**, pp. 1-2.

261   Letter from C. Willett (ICANN) to J. Kane (Afilias) (16 Sep. 2016), **[Ex. C-50]**, p. 1; Letter from A. Atallah (ICANN) to S. Hemphill (Afilias) (30 Sep. 2016), **[Ex. C-61]**, p. 1. Moreover, a comparison of the concerns raised in Mr. Hemphill's 8 August 2016 letter with the asserted in this IRP demonstrates that they are not the same. Although Mr. Hemphill correctly predicted that NDC violated the provisions of the New gTLD Program Rules that prohibited an applicant from re-selling, assigning, or transferring rights and obligations in its application, and that allow ICANN to disqualify an applicant for material misstatements, misrepresentations, or omissions, Mr. Hemphill simply did know the details of the DAA at that point. Again, ICANN received the DAA shortly after Mr. Hemphill sent his 8 August 2016 letter, but never disclosed that fact (let alone the terms of the DAA) until this IRP.

262   Bylaws, **[Ex. C-1]**, Sec. 4.3(e)(i) (emphasis added). Indeed, Bylaws expressly provides that "the IRP Panel shall award to ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees," if the claimant does not participate "in good faith in the CEP" and ICANN prevails in the IRP. *Id*. Sec. 4.3(e)(ii).

263   ICANN, Cooperative Engagement Process - Request for Independent Review (11 Apr. 2013), **[Ex. C-121]**, pp. 1-2 (emphasis added). *See also GCC v. ICANN*, Partial Final Declaration, **[Ex. CA-17]**, ¶ 69 ("*The IRP Deadline is tolled if the parties are engaged in a Cooperative Engagement Process*.") (emphasis added).

264   Email from ICANN Independent Review to A. Ali and R. Wong (Counsel for Afilias) (13 Nov. 2018), **[Ex. C-54]**.

265   *Id.*

266   Letter from C. Willett (ICANN) to J. Kane (Afilias) (16 Sep. 2016), **[Ex. C-50]**, p. 1; Letter from A. Atallah (ICANN) to S. Hemphill (Afilias) (30 Sep. 2016), **[Ex. C-61]**, p. 1.

267   *GCC v. ICANN*, Partial Final Declaration, **[Ex. CA-17]**, ¶ 81.

268   ICANN's Response to Amended IRP Request, ¶ 83.

269   *Id.* ¶ 10 (emphasis added).

270   CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), **[Ex. C-91]**, ¶ 177 (p. 34); CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Annex 07 – Recommendation #7: Strengthening ICANN's Independent Review Process (23 Feb. 2016), **[Ex. C-122]**, ¶¶ 2, 16 (pp. 1, 6).

271   Bylaws, **[Ex. C-1]**, Sec. 4.3(a)(i)-(iii) & (vi)-(ix) (emphasis added).

73

272   *Id.* Sec. 4.3(a) (emphasis added).

273   *Id.* Sec. 4.3(x) (emphasis added).

274   *Id.* Sec. 4.3(x)(i)-(iii) (emphasis added).

275   *Id.* Secs. 4.3(m)(i), 4.3(n)(i) (emphasis added).

276   *See, e.g.*, *DotConnectAfrica v. ICANN*, Final Declaration, **[Ex. CA-15]**, ¶¶ 118-33; *GCC v. ICANN*, Partial Final Declaration, **[Ex. CA-17]**, p. 44.

277   *DotConnectAfrica v. ICANN*, Final Declaration, **[Ex. CA-15]**, ¶ 23 (*quoting* its earlier Declaration on the IRP Procedure, ¶ 105).

278   *Id.* ¶ 23 (*quoting* its prior Declaration on the IRP Procedure, ¶ 111).

279   *GCC v. ICANN*, Partial Final Declaration, **[Ex. CA-17]**, ¶ 146 (emphasis added).

# EXHIBIT AC-107

# HIGHLY CONFIDENTIAL-
# ATTORNEYS' EYES ONLY

# Exhibit RE-3

# Confidential Information Redacted

# EXHIBIT AC-108

**17A C.J.S. Contracts § 420**

Corpus Juris Secundum | May 2022 Update

Contracts
Francis C. Amendola, J.D.; James Buchwalter, J.D.; Paul M. Coltoff, J.D.; Cecily Fuhr, J.D.; Lonnie E. Griffith, Jr., J.D.; Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.; John Kimpflen, J.D.; William Lindsley, J.D.; Karl Oakes, J.D.; Kimberly C. Simmons, J.D.; and Eric C. Surette, J.D.

X. Construction and Operation

A. General Rules of Construction

3. Construction of Contract as a Whole

# § 420. Recitals in context of construction of contract

Topic Summary | References | Correlation Table

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**West's Key Number Digest**

- West's Key Number Digest, Contracts🔑160

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**Recitals in a contract generally do not create binding obligations, unless the operative provisions of the contract refer to them; however, recitals may be considered in determining the proper construction of the contract and the parties' intention.**

Recitals in a contract, such as "whereas" clauses, are merely explanations of the circumstances surrounding the execution of the contract, and are not binding obligations, unless the operative provisions of the contract refer to them.[1] However, recitals in a contract should be reconciled with the operative clauses of the contract, and given effect, to the extent possible.[2] Thus, although "whereas" clauses do not control over the express provisions of a contract, they may be read in conjunction with the contract's operative portions to ascertain the parties' intention,[3] where the operative clauses are ambiguous.[4]

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**Footnotes**

1         Conn.—Dornemann v. Dornemann, 48 Conn. Supp. 502, 850 A.2d 273 (Super. Ct. 2004).

Ill.—McMahon v. Hines, 298 Ill. App. 3d 231, 232 Ill. Dec. 269, 697 N.E.2d 1199 (2d Dist. 1998).

Mo.—G.H.H. Investments, L.L.C. v. Chesterfield Management Associates, L.P., 262 S.W.3d 687 (Mo. Ct. App. E.D. 2008).

**Recital of fact giving rise to estoppel**
Haw.—GGS Co., Ltd. v. Masuda, 82 Haw. 96, 919 P.2d 1008 (Ct. App. 1996).

2         Ala.—City of Birmingham v. I.E. Morris & Associates, 256 Ala. 273, 54 So. 2d 555 (1951).

Mont.—Stowers v. Community Medical Center, Inc., 2007 MT 309, 340 Mont. 116, 172 P.3d 1252 (2007).

Tenn.—Circle C Construction, LLC v. Nilsen, 484 S.W.3d 914 (Tenn. 2016).

Tex.—Country Community Timberlake Village, L.P. v. HMW Special Utility Dist. of Harris, 438 S.W.3d 661 (Tex. App. Houston 1st Dist. 2014).

3         U.S.—KMS Fusion, Inc. v. U.S., 36 Fed. Cl. 68 (1996), aff'd, 108 F.3d 1393 (Fed. Cir. 1997).

Mont.—Stowers v. Community Medical Center, Inc., 2007 MT 309, 340 Mont. 116, 172 P.3d 1252 (2007).

**Reflect parties' intent and how parties construe contract**
Ill.—Hagene v. Derek Polling Const., 388 Ill. App. 3d 380, 327 Ill. Dec. 883, 902 N.E.2d 1269 (5th Dist. 2009).

4         Ala.—Gwaltney v. Russell, 984 So. 2d 1125 (Ala. 2007).

Mo.—G.H.H. Investments, L.L.C. v. Chesterfield Management Associates, L.P., 262 S.W.3d 687 (Mo. Ct. App. E.D. 2008).

Tex.—All Metals Fabricating, Inc. v. Ramer Concrete, Inc., 338 S.W.3d 557 (Tex. App. El Paso 2009).

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# EXHIBIT AC-109

351 F.3d 1067
United States Court of Appeals, Eleventh Circuit.

WHETSTONE CANDY COMPANY,
INC., Plaintiff–Appellant,
v.
KRAFT FOODS, INC., a Delaware
corporation, Defendant–Appellee,
Kraft Foods UK, Ltd., a wholly owned
subsidiary of Kraft Foods, Inc., Defendants.

No. 03–10272
|
Nov. 25, 2003.

**Synopsis**

Manufacturer of confectionary products brought action against competitor with which manufacturer had previously entered settlement agreement after trade dress dispute, seeking declaratory judgment of its rights under agreement, alleging interference with business relationships, and seeking injunctive relief. The United States District Court for the Middle District of Florida, No. 01-00862-CV-J-21-HTS, Ralph W. Nimmons, Jr., J., granted summary judgment for competitor, and manufacturer appealed. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) competitor's British subsidiary was not bound by settlement agreement; (2) competitor was not estopped from denying that subsidiary was bound by agreement; (3) subsidiary was not bound under theory of agency; (4) piercing subsidiary's corporate veil was not warranted; (5) manufacturer suffered no damages as result of statements allegedly made by competitor to customer; and (6) Court of Appeals lacked jurisdiction over claim that subsidiary was improperly dismissed from suit.

Affirmed in part and dismissed in part.

**Procedural Posture(s):** On Appeal; Motion for Summary Judgment.

West Headnotes (23)

**[1]** **Trademarks** Form, Features, or Design of Product as Marks; Trade Dress

"Trade dress" is a term that refers to the total image of a product and may include features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques.

1 Cases that cite this headnote

**[2]** **Trademarks** Form, Features, or Design of Product as Marks; Trade Dress

While term trade dress is most frequently used to indicate the packaging or labeling of goods, the design of the product itself may also constitute protectable trade dress under the Lanham Act.

Lanham Trade–Mark Act, § 43, 15 U.S.C.A. § 1125.

1 Cases that cite this headnote

**[3]** **Contracts** Duties and liabilities of third persons

Under Florida law, a contract generally does not bind one who is not a party to the contract, or who has not in some manner agreed to accept its terms.

27 Cases that cite this headnote

**[4]** **Compromise, Settlement, and Release** Persons Participating in Settlement or Release; Parties

Under Florida law, "whereas" clause in settlement agreement entered by chocolate manufacturer and competitor to resolve trade dress dispute, providing, "WHEREAS, [competitor] or one of its subsidiaries have been involved in the production and marketing of" product at issue, did not make agreement binding upon competitor's British subsidiary that manufactured product imported by competitor; "whereas" clause was true statement of facts, competitor, as importer, had nonmanufacturing interest in protecting its trade dress rights, and agreement, by its terms, was between competitor and manufacturer. Lanham Trade–Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

**[5]** **Trademarks** Persons entitled to sue

Lanham Act does not limit the right to bring a trade dress infringement action to those manufacturing a product. Lanham Trade–Mark Act, § 43(a), 🚩 15 U.S.C.A. § 1125(a).

**[6]  Contracts**  👌 Recitals

Under Florida law, "whereas" clauses are not binding when a contract is otherwise unambiguous; they are merely prefatory recitations of the facts that lead the parties to enter the agreement.

4 Cases that cite this headnote

**[7]  Corporations and Business Organizations**  👌 Parent and subsidiary corporations

**Corporations and Business Organizations**  👌 Parent and subsidiary corporations

Under Florida law, corporations are separate legal entities, and contracts made by a parent corporation do not bind a subsidiary merely because one corporation owns all of the stock of the other corporation.

17 Cases that cite this headnote

**[8]  Compromise, Settlement, and Release**  👌 Representatives and fiduciaries

Under Florida law, language in settlement agreement entered by chocolate manufacturer and competitor to resolve trade dress dispute, providing that any trade dress claims against manufacturer were waived by competitor and "anyone claiming under, by or through it," did not make agreement binding upon competitor's British subsidiary; term "subsidiary" was used elsewhere in the agreement, but not in connection with waiver, and subsidiary was neither successor, assign, nor legal representative that would be explicitly bound by agreement, but was merely related to competitor through its corporate structure.

1 Cases that cite this headnote

**[9]  Compromise, Settlement, and Release**  👌 Estoppel and waiver

Under Florida law, British subsidiary of competitor did not accept benefits of settlement agreement between competitor and chocolate manufacturer, as would estop subsidiary and competitor from denying that subsidiary was bound by agreement, which was entered by competitor to enforce rights it independently held as importer of product manufactured by subsidiary.

**[10]  Compromise, Settlement, and Release**  👌 Ratification or recognition of validity

**Compromise, Settlement, and Release**  👌 Estoppel and waiver

Under Florida law, where a party accepts the benefits of a settlement agreement or a compromise of his case and knows, or in the exercise of due diligence should have known, the facts concerning that settlement, the party ratifies the settlement by accepting the benefits whether the settlement was in the first instance authorized by him, and he is thereafter estopped from attacking the settlement.

1 Cases that cite this headnote

**[11]  Compromise, Settlement, and Release**  👌 Estoppel and waiver

Under Florida law, British subsidiary of competitor was not equitably estopped from denying that subsidiary was bound by settlement agreement between competitor and chocolate manufacturer, arising from trade dress dispute, based on alleged awareness of dispute and settlement negotiations on part of subsidiary's sole corporate officer, absent evidence that either competitor or subsidiary made any representation to manufacturer that subsidiary would be bound by the agreement or evidence that competitor or subsidiary misled manufacturer to manufacturer's injury.

**[12]  Estoppel**  Nature and Application of Estoppel in Pais

Under Florida law, "equitable estoppel" consists of words or conduct which causes another person to believe a certain state of things exists, and to consequently change his or her position in an adverse way.

4 Cases that cite this headnote

**[13]  Estoppel**  Silence

Under Florida law, equitable estoppel sometimes applies when there is merely silence or inaction, but the doctrine only applies in such circumstances when the other party is misled to his or her injury.

3 Cases that cite this headnote

**[14]  Corporations and Business Organizations**  Estoppel of corporation by acts or declarations

Under Florida law, mere fact that subsidiary received copy of agreement entered by parent company cannot reasonably be said to mislead other party to agreement into believing that the entity receiving a copy of the agreement was thereby bound, for purposes of equitable estoppel claim.

2 Cases that cite this headnote

**[15]  Principal and Agent**  Agency Distinguished from Other Relations

Under Florida law, competitor and its subsidiary had no agency relationship, as would bind subsidiary under settlement agreement entered by competitor and chocolate manufacturer in trade dress dispute; there was no acknowledgment by competitor that it would act for subsidiary, nor evidence that subsidiary controlled competitor during negotiations, notwithstanding alleged communications between the two corporations during the negotiations.

2 Cases that cite this headnote

**[16]  Principal and Agent**  Nature of the relation in general

For actual authority to exist such that the principal is bound, under Florida law, there must be an agency relationship, which requires: (1) the principal to acknowledge that the agent will act for it; (2) the agent to manifest an acceptance of the undertaking; and (3) control by the principal over the actions of the agent.

36 Cases that cite this headnote

**[17]  Principal and Agent**  Settlement

Under Florida law, competitor did not have apparent authority to bind its subsidiary to settlement agreement entered by competitor and chocolate manufacturer in trade dress dispute, even if subsidiary remained silent and failed to object to agreement; because subsidiary had no input into settlement agreement and because agreement resolved only a dispute between competitor and manufacturer, there was no reason to expect subsidiary to object, notwithstanding manufacturer's subjective understanding of other entities' relationship.

2 Cases that cite this headnote

**[18]  Principal and Agent**  Conduct of parties in general

**Principal and Agent**  Implied and Apparent Authority

Under Florida law, "apparent authority" exists when the principal creates the appearance of an agency relationship; the appearance of an agency relationship can be created when the principal knowingly permits the agent to act as if the agent is authorized, or by silently acting in a manner which creates a reasonable appearance of an agent's authority, but cannot arise from the subjective understanding of the person dealing with the purported agent.

27 Cases that cite this headnote

**[19]** **Principal and Agent** 🔑 Estoppel as to third persons

**Principal and Agent** 🔑 Implied and Apparent Authority

Under Florida law, there is no significant difference between doctrine of agency by estoppel and doctrine of apparent authority as would warrant addressing such theories separately.

13 Cases that cite this headnote

**[20]** **Corporations and Business Organizations** 🔑 Torts in general

Under Florida law, neither fact that letter sent by competitor's subsidiary to third party was on letterhead that shared common elements with competitor's letterhead, nor fact that initial public offering (IPO) of competitor's parent corporation stated that competitor owned product manufactured by subsidiary, warranted piercing subsidiary's corporate veil to hold competitor liable in action brought by chocolate manufacturer alleging interference with business relationships.

**[21]** **Torts** 🔑 Business relations or economic advantage, in general

Under Florida law, competitor's alleged statements to customer that competitor might have lawsuit against chocolate manufacturer did not amount to tortious interference with manufacturer's business relationships, where customer subsequently purchased large number of manufacturer's products, thus precluding any showing of damages.

1 Cases that cite this headnote

**[22]** **Federal Courts** 🔑 Requisites and sufficiency; defects

Court of Appeals lacked jurisdiction to review appellant's challenge to dismissal of one defendant for lack of personal jurisdiction, where, in its notice of appeal, appellant gave notice that it was appealing only the district court's summary judgment decision, not the earlier dismissal, and no notice of appeal was sent to any representative of dismissed defendant. F.R.A.P.Rule 3(c)(B), 28 U.S.C.A.

13 Cases that cite this headnote

**[23]** **Federal Courts** 🔑 Requisites and sufficiency; defects

Where an appellant notices the appeal of a specified judgment only, the Court of Appeals has no jurisdiction to review other judgments or issues which are not expressly referred to and which are not impliedly intended for appeal. F.R.A.P.Rule 3(c)(B), 28 U.S.C.A.

18 Cases that cite this headnote

**Attorneys and Law Firms**

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Thomas M. Beverly, Jane A. Lester, Bedell, Dittmar, DeVault, & Pillans, P.A., Jacksonville, FL, for Defendant–Appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before DUBINA, WILSON and KRAVITCH, Circuit Judges.

**Opinion**

KRAVITCH, Circuit Judge:

The main issue in this appeal is one of contract interpretation. We must decide whether a settlement agreement between Kraft Foods North America, Inc. ("Kraft NA") and Whetstone Candy Co. ("Whetstone") binds Kraft NA's subsidiary, Kraft Foods UK, Ltd. ("Kraft UK"). Kraft UK **\*1071** was not a party to the agreement and the express terms of the agreement do not reflect an intention to bind Kraft UK. We, therefore, uphold the express language that the parties agreed upon and conclude that the agreement does not bind Kraft UK. We deny Whetstone's appeal and affirm the district court's grant of summary judgment in favor of Kraft NA on that and all other issues.

I. Background

Whetstone, a Florida corporation with its principal place of business in Florida, manufactures, sells, and delivers confectionary products, including a "Chocolate Orange."

Defendant Kraft NA is a Delaware corporation with its principal place of business in Illinois.[1] Kraft NA manufactures, sells, and distributes food products, including confectionary products. Kraft NA wholly owns its subsidiary, Kraft Foods International, Inc. ("Kraft International"). Kraft International, in turn, owns 99.995% of Kraft Foods UK, Ltd. ("Kraft UK"), originally also a defendant in this action. Kraft UK is a business entity organized under the laws of the United Kingdom and has its principal place of business there. Kraft UK manufactures, sells, and distributes food products, including a chocolate-orange product called "Terry's Chocolate Orange."[2]

 **[1]**   **[2]**   This case involves the legal construction of a settlement agreement between Kraft NA and Whetstone regarding the packaging of Whetstone's chocolate-orange product. The events leading up to the current litigation began in 1999. In June of that year, Kraft NA became aware that Whetstone was preparing to market a chocolate-orange product. Kraft NA asserted that Whetstone's packaging infringed upon Kraft NA's trade dress rights in Terry's Chocolate Orange.[3] Whetstone retained counsel who negotiated a Settlement Agreement with Kraft NA. In the Settlement Agreement, Whetstone agreed to modify the packaging of its chocolate-orange product; in exchange, Kraft NA released Whetstone from any claims it may have against Whetstone regarding a possible trade dress violation.[4]

 **\*1072**   Subsequent to the signing of the Settlement Agreement in 2001, Whetstone attempted to market its chocolate-orange product in the United Kingdom through Hall Pride, Ltd. ("Hall Pride"), a London-based distributor. Upon learning of this plan, representatives from Kraft UK threatened legal action against Hall Pride if Hall Pride did not cease marketing Whetstone's product.[5] In addition, Whetstone alleges that, in the United States, Kraft NA representatives visited one of its customers, Phar–Mor drugstores, and warned that "they [Kraft NA] have a lawsuit against [Whetstone]" and that Whetstone "might not be around to deliver the product." Phar–Mor, however, apparently disregarded the warning and purchased Whetstone's product.

Whetstone filed a three-count complaint based on the above events. In Count I, Whetstone sought a declaratory judgment as to its rights under the Settlement Agreement and judgment for damages in its favor against Kraft NA and Kraft UK. In Count II, Whetstone alleged that Kraft NA and Kraft UK knew about Whetstone's relationship with both Hall Pride and Phar–Mor, and that representatives from  **\*1073**  the Kraft corporations interfered with those business relationships by threatening unjustified legal action against Hall Pride and by telling Phar–Mor that the product was not legitimate. Whetstone sought damages for this alleged tortious interference. Finally, in Count III, Whetstone sought injunctive relief against Kraft NA and Kraft UK to prohibit them from interfering with the sale and distribution of Whetstone's chocolate-orange product.

After receiving the complaint, defendant Kraft UK filed a Motion to Dismiss and, among other arguments, asserted that it was not subject to in personam jurisdiction in the district court. The district court granted Kraft UK's motion and dismissed it from this action for lack of personal jurisdiction. Later in the proceedings, Whetstone filed a Motion for Partial Summary Judgment with respect to Count I. Defendant Kraft NA, at the same time, sought the entry of summary judgment with respect to all counts. The district court concluded that there were no genuine issues of material fact and granted summary judgment in favor of Kraft NA on all issues. Whetstone appeals.[6]

II. Standard of Review

We review a district court's grant of summary judgment de novo. *Pennington v. City of Huntsville,* 261 F.3d 1262, 1265 (11th Cir.2001). Summary judgment is appropriate where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). We view the facts and inferences in the light most favorable to the non-moving party. *Pennington,* 261 F.3d at 1265.

III. Does the Settlement Agreement Bind Kraft UK?

 **[3]**   Generally, a contract does not bind one who is not a party to the contract, or who has not in some manner agreed to accept its terms. *Consolidated Resources*

*Healthcare Fund I, Ltd. v. Fenelus,* 853 So.2d 500, 503–04 (Fla.Dist.Ct.App.2003); *CH2M Hill Southeast, Inc. v. Pinellas County,* 598 So.2d 85, 89 (Fla.Dist.Ct.App.1992). Here, it is undisputed that only Whetstone and Kraft NA signed the Settlement Agreement, but Whetstone advances several arguments positing that Kraft UK is bound by the Settlement Agreement. We consider these arguments in turn and reject each of them. [7]

A. The Plain Language of the Settlement Agreement

1. The "Whereas" Clause

**[4]** Whetstone argues that the first "whereas" clause's reference to Kraft NA's subsidiaries operates to bind Kraft UK to the Settlement Agreement. That clause states: "WHEREAS, Kraft or one of its *subsidiaries* have been involved in the *production and marketing* of a 'Chocolate Orange' confectionery product which is sold in a particular container (the 'Kraft Trade Dress')." (Emphasis added). Whetstone argues that the purpose of the **\*1074** agreement was to redress the perceived invasion of rights possessed by "Kraft or one of its subsidiaries." They allege that the Settlement Agreement included the first "whereas" clause to make clear that Kraft NA entered into the agreement as the manufacturer of the product. Thus, Whetstone maintains that Kraft NA, as the parent corporation of Kraft UK, entered into the agreement on behalf of itself as well as all of its subsidiaries who were manufacturing Terry's Chocolate Orange at the time it entered into the Settlement Agreement. Although some scenarios would allow Kraft NA to bind its subsidiaries, including Kraft UK, [8] such is not the case here.

**[5]** **[6]** First, the "whereas" clause is a true statement of the facts. Kraft UK is a subsidiary of Kraft NA and does produce and market Terry's Chocolate Orange. Consequently, the whereas clause accurately states Kraft NA's production system, but does not suggest that Kraft NA entered into the Settlement Agreement as a manufacturer. Rather, Kraft NA is an importer of Terry's Chocolate Orange and has a nonmanufacturing interest in protecting its own trade dress rights. *See* 15 U.S.C. § 1125(a). [9] Moreover, "whereas" clauses are not binding when the contract is otherwise unambiguous. *Johnson v. Johnson,* 725 So.2d 1209, 1212–13 (Fla.Dist.Ct.App.1999). They are merely prefatory

recitations of the facts that lead the parties to enter the agreement. *Id.*

**[7]** General principles of corporate law also dictate a conclusion that the "whereas" clause does not operate to bind Kraft UK. Corporations are separate legal entities and contracts made by a parent corporation do not bind a subsidiary merely because one corporation owns all of the stock of the other corporation. *St. Petersburg Sheraton Corp. v. Stuart,* 242 So.2d 185, 190 (Fla.Dist.Ct.App.1970); *see Peacock v. General Motors Acceptance Corp.,* 432 So.2d 142, 143 (Fla.Dist.Ct.App.1983). The agreement, according to its terms, was between Kraft NA and Whetstone. Absent facts that would allow us to disregard Kraft UK's status as a separate entity, Kraft NA, acting as an importer alone, has no ability to bind Kraft UK, a separate entity, without Kraft UK's permission. *See Southeast Capital Inv. Corp. v. Albemarle Hotel, Inc.,* 550 So.2d 49, 51 (Fla.Dist.Ct.App.1989) (citing **\*1075** *Dania Jai–Alai Palace, Inc. v. Sykes,* 450 So.2d 1114 (Fla.1984)); *Peacock,* 432 So.2d at 144 (discussing the circumstances under which the corporate form can be disregarded for torts committed by a related entity).

2. "Under, By or Through" Kraft NA

**[8]** Whetstone also argues that the plain language of paragraph 3 of the agreement, the "waiver" clause, binds Kraft UK. That paragraph, in relevant part, states that all claims against Whetstone dealing with the trade dress of its chocolate-orange product are waived by Kraft NA and "anyone claiming under, by or through it." Whetstone alleges that Kraft UK's claim is "under, by or through" Kraft NA and Kraft UK is therefore bound by the agreement. This argument has little merit for several reasons.

First, the Settlement Agreement explicitly uses the term "subsidiary" elsewhere in the agreement and, consequently, we should be reluctant to read this term into the "waiver" clause. Using the words "under, by or through" would be a cryptic method to bind the subsidiaries of Kraft NA, especially when the parties' referred to "subsidiaries" or "affiliates" in: (1) the reference in the first "whereas" clause to the fact that one of Kraft NA's subsidiaries produces Terry's Chocolate Orange; and (2) the first portion of paragraph 3, which discharges the "affiliates" of Whetstone from any infringement of the Kraft NA trade dress. The latter instance is particularly compelling because it appears in the same

paragraph as the "under, by or through it" language that Whetstone argues binds Kraft UK. If the parties had intended to bind the affiliates or subsidiaries of Kraft NA, they would have included language similar to that used with respect to Whetstone.

Second, paragraph 4 shows how the phrase "under, by or through" should be interpreted and lends further support to the conclusion that "under, by or through" does not include Kraft UK. Paragraph 4 states that "[t]he terms and provisions of this Agreement shall inure to the benefit of and bind the successors and assigns and legal representatives of both Kraft and Whetstone." This paragraph identifies the entities, other than the parties, who are bound by the Settlement Agreement. As such, "under, by or through" operates as a release from claims made by the "successors and assigns and legal representatives" of Kraft NA—those who would claim "under, by or through" Kraft NA. The question, therefore, becomes whether Kraft UK is a successor, assign, or legal representative of Kraft NA. We hold that it is not.

A "successor" is "one that follows," especially "one who succeeds to a throne, title, or estate or is elected or appointed to an office, dignity, or other position vacated by another." *Webster's Third New Int'l Dictionary* 2282 (1976); *accord Black's Law Dictionary* 1431 (6th ed. 1990). An "assign," i.e. an assignee, is "one appointed to act for another" or "one to whom a right or property is legally transferred." *Webster's Third New Int'l Dictionary* 132 (1976); *accord Black's Law Dictionary* 118–19 (6th ed. 1990). Thus, successors and assigns are those entities or individuals who have a claim "under, by or through" Kraft NA by virtue of some act or event, such as an appointment or merger. Here, Kraft UK is a subsidiary of Kraft NA and, as a subsidiary, it is merely related to Kraft NA through its corporate structure; it does not succeed Kraft NA and it has not been appointed to act for Kraft NA. Kraft UK, therefore, is not a successor or assign, and no credible argument can be made that it is Kraft NA's legal representative. Thus, any claims that Kraft UK has against Whetstone are **\*1076** not "under, by or through" Kraft NA. [10]

### B. Whetstone's Arguments Based on Estoppel

Whetstone makes several arguments that Kraft NA and Kraft UK are estopped from denying that Kraft UK is bound by the Settlement Agreement. None of these arguments are compelling and we reject them.

### 1. Estoppel by Acceptance of the Benefits of the Contract

**[9]** **[10]** Whetstone argues that Kraft UK accepted the benefits of the Settlement Agreement and is, therefore, bound by its terms. "Where a party accepts the benefits of a settlement agreement or a compromise of his case and knows, or in the exercise of due diligence should have known, the facts concerning that settlement, the party ratifies the settlement by accepting the benefits whether the settlement was in the first instance authorized by him, and he is thereafter estopped from attacking the settlement." *Sea–Land Serv., Inc. v. Sellan,* 64 F.Supp.2d 1255, 1262 (S.D.Fla.1999) (holding that acceptance of a settlement check estops the party from challenging the settlement agreement even when the party did not sign the agreement).

*Sea–Land Serv., Inc.* is inapplicable to this case because Kraft UK accepted nothing. Kraft UK was not a party to the Settlement Agreement and Kraft NA entered into the agreement to enforce rights it independently held as an importer.

### 2. Equitable Estoppel

**[11]** **[12]** Whetstone further contends that Kraft UK is equitably estopped from denying that it is bound by the Settlement Agreement. Equitable estoppel "consists of words or conduct which causes another person to believe a certain state of things exists, and to consequently change his or her position in an adverse way." *Southeast Grove Mgt., Inc. v. McKiness,* 578 So.2d 883, 886 (Fla.Dist.Ct.App.1991); *see Watson Clinic, LLP v. Verzosa,* 816 So.2d 832, 834 (Fla.Dist.Ct.App.2002) (listing the elements of equitable estoppel). [11]

**[13]** **[14]** As a matter of law, Whetstone's equitable estoppel argument fails because Whetstone cannot satisfy the first element. There is no evidence that either Kraft NA or Kraft UK made any representation to Whetstone that Kraft UK would be bound by the agreement. Equitable estoppel sometimes applies when there is, as here, merely silence or inaction, but the doctrine only applies in such circumstances "when the other party is misled to his or her injury." *Southeast Grove Mgt., Inc.,* 578 So.2d at 886. Here, however, there is no evidence that Kraft NA or Kraft UK misled Whetstone

to **\*1077** Whetstone's injury. [12] Consequently, equitable estoppel is inapplicable to this case.

### C. Whetstone's Arguments Based on an Agency Relationship Between Kraft UK and Kraft NA

Whetstone also argues that because Kraft NA acted as the agent of Kraft UK during the settlement negotiations, Kraft UK is bound by the agreement. Alternatively, Whetstone contends that Kraft NA had apparent authority to bind Kraft UK. We hold that Kraft NA was not the agent of Kraft UK and that the doctrine of apparent authority is not applicable to this case.

### 1. Actual Authority

 **[15]**    **[16]**    Whetstone's actual authority argument fails because there was no agency relationship in this case. [13] For actual authority to exist such that the principal is bound, there must be an agency relationship, which requires: (1) the principal to acknowledge that the agent will act for it; (2) the agent to manifest an acceptance of the undertaking; and (3) control by the principal over the actions of the agent. *MeterLogic, Inc. v. Copier Solutions, Inc.,* 126 F.Supp.2d 1346, 1354 (S.D.Fla.2000).

There is no agency relationship here because there was no acknowledgment by Kraft NA that it would act for Kraft UK. Whetstone provides no evidence that the Kraft NA negotiators were actually employees of Kraft UK, nor does Whetstone claim that Kraft UK financed the business venture of Kraft NA, or offer any credible argument that Kraft UK authorized Kraft NA to act on its behalf. *See* *id.* at 1355 (evaluating these factors to determine whether there is acknowledgment). In addition, there is no question that the final element of an agency relationship—control—is lacking here; Whetstone provides no evidence that Kraft UK controlled Kraft NA during the settlement negotiations. [14] As such, we fail to find any evidence that there is an agency relationship between Kraft NA and Kraft UK.

### 2. Apparent Authority

 **[17]**    **[18]**    There was no reasonable basis for Whetstone to believe Kraft NA was the agent of Kraft UK and, consequently, apparent **\*1078** authority is not present in this case. Apparent authority exists when the principal creates the appearance of an agency relationship. *Ja Dan, Inc. v. L–J Inc.,* 898 F.Supp. 894, 900 (S.D.Fla.1995). The appearance of an agency relationship can be created when the principal knowingly permits the agent to act as if the agent is authorized, or "by silently acting in a manner which creates a reasonable appearance of an agent's authority," but cannot "arise from the subjective understanding of the person dealing with the purported agent." *Id.*

 **[19]**    Here, Whetstone argues that Kraft UK, by remaining silent and failing to object to the Settlement Agreement, acted in a manner that reasonably created the appearance of Kraft NA's authority to act for Kraft UK. Because Kraft UK had no input into the Settlement Agreement and because the agreement resolved only a dispute between Kraft NA and Whetstone, there was no reason to expect Kraft UK to object to the agreement. Thus, it was merely the subjective understanding of Whetstone that Kraft NA was the agent of Kraft UK and, as stated above, such an understanding does not create apparent authority. [15]

### IV. Whetstone's Tortious Interference Claims

### A. Claims Involving Hall Pride

 **[20]**    Whetstone claims that Kraft UK tortiously interfered with Whetstone's business relationship with Hall Pride, but asserts that Kraft NA is liable for this tortious interference because the Kraft corporations hold themselves out to the public as one large entity. As support for this allegation, Whetstone alleges (1) that the letter to Hall Pride—the allegedly tortiously interfering act—was sent on "Kraft Foods" letterhead, which, apart from bearing a London address, is the same as the letterhead used during the Settlement Agreement negotiations; and (2) that Kraft Foods Inc.'s Initial Public Offering ("IPO") documents state that Kraft NA owns Terry's Chocolate Orange, as well as other products manufactured by Kraft UK. [16] In order to hold Kraft NA liable for any tortious interference committed by Kraft UK, we must find sufficient evidence such that a reasonable fact finder could pierce Kraft UK's corporate veil. *Peacock v. General Motors Acceptance Corp.,* 432 So.2d 142, 143

(Fla.Dist.Ct.App.1983). There is insufficient evidence to do so in this case.

A review of Whetstone's evidence shows that there is no genuine issue as to whether the letterheads and IPO documents would allow a reasonable fact finder to determine that Kraft NA and Kraft UK are one large entity. First, the letter sent to Hall Pride shares only one thing in common with the letters used during the settlement negotiations—both have the "Kraft" logo (i.e. the word "KRAFT" inside an oval) with the words "Kraft Foods" appearing to the right thereof. Other than that, the letters are different. Whereas the letter to Hall Pride bears a United Kingdom address immediately below the words "Kraft Foods," the letters from Kraft NA bear no address beneath those words where only the sender's name **\*1079** appears. Although, the Kraft NA letters bear a U.S. address, followed by several U.S. telephone numbers at the bottom of each page, the Kraft UK letter bears the legend "Kraft Foods UK Ltd.," followed by the words "Registered and head Office" and the same United Kingdom address that appears at the top of the letter. Neither the letters from Kraft UK nor those from Kraft NA bear the names, logos, or addresses of the other corporation—only the Kraft UK name appears at the top and bottom of the Kraft UK letter, and only the Kraft NA name appears at the bottom of the Kraft NA letters. The similarities between the Kraft UK letter and the Kraft NA letters are greatly outweighed by their differences and are not enough to hold Kraft NA liable for any tortious interference that may have occurred. *See USP Real Estate Inv. Trust v. Discount Auto Parts, Inc.,* 570 So.2d 386, 390 (Fla.Dist.Ct.App.1990) (noting that in order to pierce the corporate veil, "it must be shown not only that the wholly-owned subsidiary is a mere instrumentality of the parent corporation but also that the subsidiary was organized or used by the parent to mislead creditors or to perpetrate a fraud upon them"). The IPO documents add little to this analysis. [17]

### B. Claims Involving Phar–Mor

 **[21]**    Whetstone must show that it was injured to survive a motion for summary judgment based on a claim of tortious interference. *G.M. Brod & Co. v. U.S. Home Corp.,* 759 F.2d 1526, 1534 (11th Cir.1985); *ISS Cleaning Servs. Group, Inc. v. Cosby,* 745 So.2d 460, 462 (Fla.Dist.Ct.App.1999). For summary judgment purposes, we assume that the remarks made to Phar–Mor are tortious and that they can be attributed to Kraft NA. In this case, however, it is undisputed that Phar–Mor purchased a large number of Whetstone's chocolate oranges after any tortious remarks were uttered. Consequently, Whetstone cannot show that it suffered damages as a result of any tortious interference that may have occurred and, therefore, Whetstone's claim fails. *See Sobi v. Fairfield Resorts, Inc.,* 846 So.2d 1204, 1207 (Fla.Dist.Ct.App.2003) (noting that the elements of a tortious interference action require the plaintiff to prove damages).

### V. Personal Jurisdiction Over Kraft UK

 **[22]**    **[23]**    In its brief, Whetstone argues that the district court erred when it dismissed Kraft UK from this action for lack of personal jurisdiction. We do not reach the merits of Whetstone's argument because we do not have jurisdiction to decide the issue. In its Notice of Appeal, Whetstone gave notice that it was appealing only the district court's summary judgment decision. It did not give notice of its intention to appeal the district court's earlier decision to dismiss Kraft UK for lack of personal jurisdiction, and no notice of appeal was sent to any representative of Kraft UK. Where an " 'appellant notices the appeal of a specified judgment only ... this court has no jurisdiction to review **\*1080** other judgments or issues which are not expressly referred to and which are not impliedly intended for appeal.' " *Pitney Bowes, Inc. v. Mestre,* 701 F.2d 1365, 1375 (11th Cir.1983) (quoting *C.A. May Marine Supply Co. v. Brunswick Corp.,* 649 F.2d 1049, 1056 (5th Cir.1981)); *see also* Fed. R.App. P. 3(c)(B) (requiring that the notice of appeal "designate the judgment, order, or part thereof being appealed"); *Cole v. Tuttle,* 540 F.2d 206, 207 (5th Cir.1976) (holding that there is no jurisdiction over a district court's interlocutory decision to dismiss several defendants when the plaintiffs never gave notice that they were appealing that decision). [18]

### VI. Conclusion

For the foregoing reasons, we affirm the district court's decision granting summary judgment to Kraft NA. We conclude that Kraft UK is not bound by the first "whereas" clause of the Settlement Agreement or by the "waiver" clause. In addition, none of the theories of agency or estoppel advanced by Whetstone operate to bind Kraft UK. We hold that Whetstone's tortious interference claims are inadequate as a matter of law. Finally, we dismiss, for lack of subject-matter jurisdiction, Whetstone's appeal regarding personal jurisdiction over Kraft UK.

AFFIRMED IN PART and DISMISSED IN PART.

**All Citations**

351 F.3d 1067, 57 Fed.R.Serv.3d 653, 17 Fla. L. Weekly Fed. C 76

## Footnotes

1 Kraft NA was formerly known as Kraft Foods, Inc.

2 Terry's Chocolate Orange is an orange flavored ball of chocolate that is the size and shape of a small orange. Since at least 1999, Kraft UK has sold Terry's Chocolate Orange to Kraft NA, which imports that product into the United States and sells it here.

3 "Trade dress" is a term that refers to "the total image of a product and may include features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques." *John H. Harland Co. v. Clarke Checks, Inc.,* 711 F.2d 966, 980 (11th Cir.1983). The term "is most frequently used to indicate the packaging or labeling of goods, but the design of the product itself may also constitute protectable trade dress. Trade dress is protected under section 43(a) of the Lanham Act, which prohibits any person from using a term, name, symbol or device, or any combination thereof, which is likely to confuse, mistake or deceive as to the manufacturer, origin or description of a good or service." *Adolfo House Distrib. Corp. v. Traveler's Prop. and Cas. Ins. Co.,* 165 F.Supp.2d 1332, 1338 n. 1 (S.D.Fla.2001) (citations omitted); *see* 15 U.S.C. § 1125.

4 The operative terms of the Settlement Agreement are:

THIS AGREEMENT is by and between Kraft Foods, Inc. [now Kraft NA], ... and the Whetstone Candy Company, Inc....

WHEREAS, Kraft or one of its subsidiaries have been involved in the production and marketing of a "Chocolate Orange" confectionery product which is sold in a particular container (the "Kraft Trade Dress");

WHEREAS, Whetstone has developed a competing Chocolate Orange confectionery product (the "Whetstone Chocolate Orange Product") and a distinctive container for packaging of such product (the "Original Whetstone Container");

WHEREAS, Kraft has advised Whetstone of certain objections to the appearance of the Original Whetstone Container based upon an alleged violation of its rights in and to the Kraft Trade Dress;

WHEREAS, the parties wish to resolve their differences with respect to the appearance of the Original Whetstone Container and agree on a container design which Whetstone will use in the marketplace.

NOW THEREFORE, the Parties agree as follows: ...

3. *Waiver*. In consideration of the changes to the Original Whetstone Container listed in Paragraph 2 hereof, Kraft hereby fully and forever releases and discharges Whetstone, and its respective agents, attorneys, employees, affiliates, successors and assigns (the "Releasees"), of and from any and all responsibilities, duties, obligations, claims, debts, sums of money, accounts or causes of action or actions, costs, losses, damages or liabilities of whatsoever character, nature, kind or designation in law or in equity, absolute or

contingent, matured or unmatured, suspected or unsuspected, known or unknown which Kraft or anyone claiming under, by or through it now has, ever had or could ever have or become entitled to assert against the Releasees by reason of any conduct, matter, course or thing whatsoever involving the original Whetstone Container, as modified according to Paragraph 2 hereof, and the Whetstone Chocolate Orange Product.

4. *Successors and Assigns*. The terms and provisions of this Agreement shall inure to the benefit of and bind the successors and assigns and legal representatives of both Kraft and Whetstone....

7. *Choice of Law*. The parties acknowledge that the law of the State of Florida will govern all procedural and substantive questions relating to or arising out of this Agreement, including, but not limited to, all questions regarding the interpretation of any provisions of this Agreement.

8. *Integration*. This Agreement constitutes the entire agreement among the parties pertaining to the subject matter hereof, and supersedes all prior agreements understandings pertaining thereto. No covenant, representation or condition not expressed in this Agreement shall affect or be deemed to interpret, change or restrict the express provisions hereof.

5   Kraft NA admits that Kraft UK, through its legal advisor and corporate officer, notified Hall Pride in writing that Kraft UK considered the Whetstone chocolate-orange product to infringe upon Kraft UK's registered British and European trademark rights, and threatened legal action against Hall Pride if its marketing efforts continued. Whetstone has not made clear exactly how Kraft NA was involved in this activity, other than by alleging that Kraft NA and Kraft UK hold themselves out to the public as a single entity that uses almost identical letterhead. Whetstone also claims that they hold themselves out as a single entity by alleging that Kraft's Initial Public Offering document's clearly show that they are a single entity.

6   Whetstone's brief also argues that the district court improperly dismissed Kraft UK for lack of personal jurisdiction, but that ruling was not noticed in Whetstone's Notice of Appeal.

7   We note that the district court determined that the Settlement Agreement implicitly contains a geographic limitation that limits the effect of the agreement to the United States. Because of our holding with regard to Whetstone's plain language argument, we need not address whether the agreement implicitly contains a geographic limitation, and we express no view regarding that issue.

8   As discussed below, under Florida law, if the facts allowed us to pierce Kraft NA's corporate veil to reach Kraft UK, or if an agency relationship existed between Kraft NA and Kraft UK, Kraft NA could bind Kraft UK to the terms of the agreement.

9   Because Kraft NA did not enter the agreement as the manufacturer of Terry's Chocolate Orange, we must consider in what capacity Kraft NA did enter the agreement. The answer to that question is found in the Lanham Act, 15 U.S.C. § 1125(a). The act provides that "[a]ny person" guilty of a trade dress violation "shall be liable in a civil action by *any person* who believes that he or she is likely to be damaged by such [violation]." 15 U.S.C. § 1125(a) (emphasis added). The act does not limit the right to bring an action to those manufacturing a product. In this case, Kraft NA is an importer and marketer of Terry's Chocolate Orange and, as such, it does have trade dress rights in the product it imports. *See Carillon Importers Ltd. v. Frank Pesce Group, Inc.,* 913 F.Supp. 1559, 1568 (S.D.Fla.1996), *aff'd* 112 F.3d 1125 (11th Cir.1997); *Maher & Maher, Inc. v. Unisonic Products Corp.,* 719 F.Supp. 161, 164 (S.D.N.Y.1989). Thus, it is likely that Kraft NA entered the Settlement Agreement as an importer and marketer of Terry's Chocolate Orange, and not as the manufacturer of that product. The third "whereas" clause strengthens this conclusion because, in

stating the trade dress rights that are the subject of the Settlement Agreement, the clause refers specifically to the trade dress rights of Kraft NA, and not to any rights possessed by Kraft UK.

10 The former Fifth Circuit interpreted a contract in a very similar manner in a case with facts analogous to those of this case. *See* *Zim v. Western Publ'g Co.,* 573 F.2d 1318 (5th Cir.1978). We acknowledge that *Zim* applied Wisconsin law, but note that the law in Wisconsin and Florida regarding corporate identities appears to be similar.

11 Whetstone argues that equitable estoppel applies to Kraft UK because Kraft UK's sole corporate officer was aware of Kraft NA's dispute with Whetstone and because Kraft UK was aware of the negotiations to settle that dispute. Whetstone states that Kraft UK was "fully informed" about the settlement negotiations, and contends that Kraft UK saw drafts of the agreement before and after its execution. Whetstone further contends that because Kraft UK did not voice any objection to the agreement until Whetstone attempted to sell its product in the United Kingdom that Kraft UK is estopped from claiming that the agreement does not bind Kraft UK. For summary judgment purposes, we assume that all of these facts are true.

12 Contrary to Whetstone's assertion that Kraft UK was "fully informed" regarding the settlement negotiations between Whetstone and Kraft NA, the record shows only that there was some communication between Kraft UK and Kraft NA. The record does not show what the substance of that communication may have been and, moreover, there is no evidence Kraft NA or Kraft UK ever misrepresented to Whetstone that Kraft UK would be bound by the agreement. Finally, the mere fact that Kraft UK received a copy of the agreement cannot reasonably be said to mislead a party into believing that the entity receiving a copy of the agreement is thereby bound.

13 Whetstone claims that Kraft NA is Kraft UK's agent. The agency relationship, according to Whetstone, gave Kraft NA authority to settle the trade dress dispute on behalf of Kraft UK.

14 The fact that there were communications between the two corporations during the negotiations does not establish control. There is no evidence that Kraft UK had any input into the negotiations or into the Settlement Agreement; the mere fact that Kraft NA sent Kraft UK a copy of the agreement does not establish control. *See* *MeterLogic, Inc.,* 126 F.Supp.2d at 1356–57 (noting that, in Florida, to find that a subsidiary corporation is the agent of the parent corporation, there must be a significant amount of control—so much control that the subsidiary has "no separate corporate interests of its own and functions solely to achieve the purposes of the dominant corporation"). Such minor instances of what can be best characterized as the passing on of information between related corporations does not rise to the level of control required for an agency relationship.

15 Whetstone also argues that the doctrine of agency by estoppel applies. That doctrine, however, is so similar to apparent authority "that there is no significant difference between them." *Carolina–Georgia Carpet and Textiles, Inc. v. Pelloni,* 370 So.2d 450, 451 (Fla.Dist.Ct.App.1979). Consequently, we do not consider agency by estoppel separately and hold that it is inapplicable to the facts of this case.

16 Kraft Foods Inc. is the parent corporation of Kraft NA.

17 Contrary to Whetstone's assertion that the IPO documents show that Terry's Chocolate Orange is owned by Kraft NA, both the textual and pictorial references to products produced by Kraft UK are used to illustrate products produced by Kraft Foods Inc. and its subsidiaries, and to illustrate Kraft Foods Inc.'s international holdings. Such references are not, as a matter of law, enough to pierce Kraft UK's corporate veil to hold Kraft NA liable. *See* *Dania Jai–Alai Palace, Inc. v. Sykes,* 450 So.2d 1114, 1120–22 (Fla.1984) (discussing

characteristics of cases that have found sufficient evidence to pierce a corporation's veil, and stating characteristics that show a corporation has an identity separate from that of its parent).

18    Cases decided by the former Fifth Circuit are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (en banc).

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