INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
ICDR CASE NO. 01-20-0000-6787

NAMECHEAP, INC.

v.

INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS

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R-52	ICANN Board Briefing Materials, Reconsideration Request 19-2 (21 November 2019).
R-53	Proposed Determination of the ICANN Board of Directors, Reconsideration Request 19-2 (3 November 2019).
R-54	ICANN New gTLD Program Statistics (31 December 2021).
R-55	Minutes | Board Governance Committee (BGC) Meeting (24 July 2014).

Exhibit	Description
RLA-4	*Lamden v. La Jolla Shores Clubdominium Homeowners Assn*., 21 Cal. 4th 249 (1999).
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ICANN Governmental Advisory Committee (GAC)

The GAC serves as the voice of Governments and International Governmental Organizations in ICANN's multistakeholder representative structure.

The GAC constitutes the voice of Governments and Intergovernmental Organizations (IGOs) in ICANN's multistakeholder structure. Created under the ICANN Bylaws, the GAC is an advisory committee to the ICANN Board. The GAC's key role is to provide advice to ICANN on issues of public policy, and especially where there may be an interaction between ICANN's activities or policies and national laws or international agreements.

Impact

For more than two decades, the GAC has consistently provided information and advice to the ICANN Board and community through **71 Communiqués**, numerous community public comments and many pieces of direct correspondence.

Learn about the role of the GAC

Current Work

GAC participants offer the views of governments and IGOs on many substantive policy topics and operational matters impacting the work of ICANN.

Learn about these work efforts, including **GAC Working Groups** and other **Activities**.

Membership

There are 179 Member governments and 38 Observer organizations in the GAC. The roster of GAC Member representatives is constantly evolving. New government Members are always welcome.

Meet Our **Members and Observers and their representatives**

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ICANN71 GAC Minutes

GAC 2021 Vice Chair Elections

ICANN70 GAC Minutes

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Interested in joining the GAC?

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Upcoming Meetings

JAN 17 2022

GAC Leadership Call - 17 January 2022
Closed Session

See the GAC Calendar

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Top-Level Domains (gTLDs)

Visit the New gTLDs microsite.

Find a complete list of Registry Operators.

Many of the new TLDs are accepting registrations. Go to the InterNIC website for more information.

Introduction

The Internet's domain-name system (DNS) allows users to refer to web sites and other resources using easier-to-remember domain names (such as "www.icann.org") rather than the all-numeric IP addresses (such as "192.0.34.65") assigned to each computer on the Internet. Each domain name is made up of a series of character strings (called "labels") separated by dots. The right-most label in a domain name is referred to as its "top-level domain" (TLD).

The DNS forms a tree-like hierarchy. Each TLD includes many second-level domains (such as "icann" in "www.icann.org"); each second-level domain can include a number of third-level domains ("www" in "www.icann.org"), and so on.

The responsibility for operating each TLD (including maintaining a registry of the second-level domains within the TLD) is delegated to a particular organization. These organizations are referred to as "registry operators", "sponsors", or simply "delegees."

There are several types of TLDs within the DNS:

- TLDs with two letters (such as .de, .mx, and .jp) have been established for over 250 countries and external territories and are referred to as "country-code" TLDs or "ccTLDs". They are delegated to designated managers, who operate the ccTLDs according to local policies that are adapted to best meet the economic, cultural, linguistic, and legal circumstances of the country or territory involved. For more details, see the ccTLD web page on the IANA web site.
- Most TLDs with three or more characters are referred to as "generic" TLDs, or "gTLDs". They can be subdivided into two types, "sponsored" TLDs (sTLDs) and "unsponsored TLDs (uTLDs), as described in more detail below.
- In addition to gTLDs and ccTLDs, there is one special TLD, .arpa, which is used for technical infrastructure purposes. ICANN administers the .arpa TLD in cooperation with the Internet technical community under the guidance of the Internet Architecture Board.

Generic TLDs

In the 1980s, seven gTLDs (.com, .edu, .gov, .int, .mil, .net, and .org) were created. Domain names may be registered in three of these (.com, .net, and .org) without restriction; the other four have limited purposes.

In years following the creation of the original gTLDs, various discussions occurred concerning additional gTLDs, leading to the selection in November 2000 of seven new TLDs for introduction. These were introduced in 2001 and 2002. Four of the new TLDs (.biz, .info, .name, and .pro) are unsponsored. The other three new TLDs (.aero, .coop, and .museum) are sponsored. In 2003, ICANN initiated a process that resulted in the introduction of six new TLDs (.asia, .cat, .jobs, .mobi, .tel and .travel) that are sponsored. Information about that process may be found here.

Generally speaking, an unsponsored TLD operates under policies established by the global Internet community directly through the ICANN process, while a sponsored TLD is a specialized TLD that has a sponsor representing the narrower community that is most affected by the TLD. The sponsor thus carries out delegated policy-formulation responsibilities over many matters concerning the TLD.

A **Sponsor** is an organization to which is delegated some defined ongoing policy-formulation authority regarding the manner in which a particular sponsored TLD is operated. The sponsored TLD has a **Charter,** which defines the purpose for which the sponsored TLD has been created and will be operated. The Sponsor is responsible for developing policies on the delegated topics so that the TLD is operated for the benefit of a defined group of stakeholders, known as the **Sponsored TLD Community**, that are most directly interested in the operation of the TLD. The Sponsor also is responsible for selecting the registry operator and to varying degrees for establishing the roles played by registrars and their relationship with the registry operator. The Sponsor must exercise its delegated authority according to fairness standards and in a manner that is representative of the Sponsored TLD Community.

The extent to which policy-formulation responsibilities are appropriately delegated to a Sponsor depends upon the characteristics of the organization that may make such delegation appropriate. These characteristics may include the mechanisms the organization uses to formulate policies, its mission, its guarantees of independence from the registry operator and registrars, who will be permitted to participate in the Sponsor's policy-development efforts and in what way, and the Sponsor's degree and type of accountability to the Sponsored TLD Community.

Historical Materials

- Information about the new TLD application process held in 2000
  - Topic paper on new TLDs from the March 2001 Melbourne meeting
- Materials on .org Reassignment to Public Interest Registry (in 2002)

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ICANN: Progress in Process for Introducing New Sponsored Top-Level Domains

19 March 2004

ICANN today announced that, in response to a request for proposals, it has received ten applications for new sponsored top-level domains (sTLD's).

Proposed TLD String	Proposed Sponsor	Sponsor Location	Web Address
.asia (/tlds/stld-apps-19mar04/asia.htm)	DotAsia Organisation Limited	Hong Kong, Hong Kong SAR, China	www.dotAsia.org (http://www.dotAsia.org/)
.cat (/tlds/stld-apps-19mar04/cat.htm)	Fundació puntCAT (which would be formed only in case the TLD is delegated)	N/A	www.puntcat.org (//www.puntcat.org/)

Recent Announcements

Join ICANN's Virtual Discussion on Internet-Related Legislation in Canada (/en/announcements/details/j icanns-virtual-discussion-on-internet-related-legislation-in-canada-10-1-2022-en)

ICANN Seeks Input on Supporting Additional Scripts for IDNs (/en/announcements/details/i seeks-input-on-supporting-additional-scripts-for-idns-5-1-2022-en)

Register for ICANN's Next SSAD ODP Project Update

.jobs (/tlds/stld-apps-19mar04/jobs.htm)	The Society for Human Resource Management	Alexandria, Virginia, United States	www.shrm.org (//www.shrm.org/)
.mail (/tlds/stld-apps-19mar04/mail.htm)	The Anti-Spam Community Registry	London, United Kingdom	www.spamhaus.org (//www.spamhaus.org/)
.mobi (/tlds/stld-apps-19mar04/mobi.htm)	Mobi JV (working name)	Helsinki, Finland	www.mtldinfo.com (//www.mtldinfo.com/)
.post (/tlds/stld-apps-19mar04/post.htm)	Universal Postal Union (UPU)	Bern, Switzerland	www.upu.int (//www.upu.int/)
.tel (/tlds/stld-apps-19mar04/tel-pulver.htm)	pulver.com	Melville, New York, United States	www.pulver.com (//www.pulver.com/)
.tel (/tlds/stld-apps-19mar04/tel-telnic.htm)	Telname Limited	London, United Kingdom	www.telname.com (//www.telname.com/)
.travel (/tlds/stld-apps-19mar04/travel.htm)	The Travel Partnership Corporation	New York, New York, United States	www.ttpc.org (//www.ttpc.org/)
.xxx (/tlds/stld-apps-19mar04/xxx.htm)	The International Foundation for Online Responsibility	Toronto, Ontario, Canada	www.iffor.org (//www.iffor.org/)

This sTLD RFP is the first stage of ICANN's strategic initiative to move to a streamlined, fully-globalized process for the introduction of new generic TLDs.

This unique phase is part of the continuing expansion of the domain name system.

The applications were submitted in response to a request for proposals process that was initiated by ICANN on 15 December 2003. The last day to submit applications was 16 March 2004. A public comment period will open 1- 30 April 2004.

The applications will be reviewed by an independent evaluation panel beginning in May 2004. The criteria for evaluation were posted with the RFP. All applicants that are found to satisfy the posted criteria will be eligible to enter into technical and commercial negotiations with ICANN for agreements for the allocation and sponsorship of the requested TLDs.

The seven original gTLDs (.com, .edu, .gov, .int, .mil, .net, and .org) were created in the 1980s. In 2000, ICANN conducted a proof of concept testbed selection of seven new TLDs. Four of those new TLDs (.biz, .info, .name, and .pro) are unsponsored. The other three TLDs from that round (.aero, .coop, and .museum) are sponsored.

An unsponsored TLD operates under policies established by the global Internet community directly through the ICANN process, while a sponsored TLD is a specialized TLD that has a sponsor representing the narrower community that is most affected by the TLD. The sponsor thus carries out delegated policy-formulation responsibilities over many matters concerning the TLD.

For more Press Information please email baker@icann.org (mailto:baker@icann.org), or call at +1 323-691-2812.

You May Also Like

Public Comment: Report of Possible Process Options for Further Consideration of the ICM Application for the .XXX sTLD (/en/announcements/details/public-comment-report-of-possible-process-options-for-further-consideration-of-the-icm-application-for-the-xxx-stld-26-3-2010-en)

Webinar (/en/announcements/details/r for-icanns-next-ssad-odp-project-update-webinar-21-12-2021-en)

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.POST Sponsorship Agreement Posted for Public Comment (/en/announcements/details/post-sponsorship-agreement-posted-for-public-comment-2-11-2009-en)

ICANN and the Universal Postal Union Conclude Negotiation for .POST (/en/announcements/details/icann-and-the-universal-postal-union-conclude-negotiation-for-post-20-10-2009-en)

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Applicant Guidebook

The information on this page is posted for archival purposes only.

The current information on the new gTLD program is available at: http://newgtlds.icann.org/

This page contains all the current and archived versions of the Applicant Guidebook and key documentation related to the proposed application process. Applicants will be able to apply via an online application system called TAS – **T**LD **A**pplication **S**ystem. The details on how to apply for a gTLD through TAS will be available in the upcoming months.

See also:

- Information Center
- Public Comments

Current Version of the Draft Applicant Guidebook

- New gTLD Applicant Guidebook [4.81 MB] *(May 11)*
  - [14.02 MB] العربية
  - 中文 [11.36 MB]
  - Français [9.99 MB]
  - Español [8.37 MB]
  - Русский [10.76 MB]
- Matrix presenting the Applicant Guidebook in full and by module along with Explanatory Memos and Supporting Documents

Archived Draft Applicant Guidebook Versions & Related Public Fora

1. **Applicant Guidebook – April 2011 Discussion Draft *(Apr 11)***
   - Applicant Guidebook – April 2011 Discussion Draft [6.18 MB] *(Apr 11)*
   - Public Comment Forum *(Open 15 Apr – Closed 15 May)*
   - Summary & Analysis [1.1 MB] *(30 May 11)*
   - GAC comments on the Applicant Guidebook (April 15th, 2011 version) [112 KB] *(26 May 11)*

2. **Proposed Final Applicant Guidebook (Nov 10)**
   - Proposed Final Applicant Guidebook [3.1 MB] *(Nov 10)*
   - Public Comment Forum *(Closed on 15 Jan 11)*
   - Summary & Analysis [709 KB]
     - [986 KB] العربية
     - Español [1.33 MB]
     - Français [661 KB]
     - Русский [841 KB]
     - 中文 [841 KB]

3. **Draft Applicant Guidebook, version 4 (May 10)**
   - Draft Applicant Guidebook, version 4 [4.67 MB] *(May 10)*
   - Public Comment Forum *(closed 21 Jul 10)*
   - Summary & Analysis [1.4 MB]

4. **Draft Applicant Guidebook, version 3 (Oct 09)**
   - Full Draft Applicant Guidebook, version 3 [1.6 MB] *(Oct 09)*
   - Public Comment Forum *(closed on 22 Nov 09)*
     Note: this archived public forum also contains explanatory memoranda relating to version 3 of the Draft Applicant Guidebook.
   - Summary & Analysis [1.13 MB]

5. **Excerpts Organized Per Module (May 09)**
   Note: In May 2009, ICANN did not release a version 3 of the Draft Applicant Guidebook. Instead, ICANN released a series of Excerpts organized below per module.
   - Update to Module 2: String Requirement
     Excerpt: String Requirements [139 KB]
   - Update to Module 2: Geographical Names
     Excerpt: Geographical Names [140 KB]

Update to Module 2: Evaluation Criteria
Excerpt: Evaluation Criteria [1.4 MB]

Update to Module 3: Dispute Resolution Procedures
Excerpt: Dispute Resolution [160 KB]

Update to Module 4: Comparative Evaluation (Community Priority)
Excerpt: Comparative Evaluation Criteria [212 KB]

Updates to Module 5: Registry Agreement Specifications
Excerpt: Registry Specifications [162 KB]

- Public Comment Forum (*closed on 20 Jul 09)*
  Note: this archived public forum will also contain explanatory memoranda relating to this version of the Draft Applicant Guidebook.

6. **Draft Applicant Guidebook, version 2 (Feb 09)**

Draft Applicant Guidebook, version 2 [1.46 MB]

Draft Applicant Guidebook, version 2 Redline [1.6 MB]

Draft Applicant Guidebook version 2
Public Comments Analysis Report [1.52 MB]

- Public Comment Forum (*closed on 13 Apr 09)*
  Note: this archived public forum also contains explanatory memoranda relating to version 2 of the Draft Applicant Guidebook.

7. **Draft Applicant Guidebook, version 1 (Oct 08)**

Draft Applicant Guidebook, version 1 [1.24 MB]

Draft Applicant Guidebook, version 1 Public Comments Analysis Report [589 KB] *(Feb 09)*

- Public Comment Forum *(closed on 15 Dec 08)*
  Note: this archived public forum also contains explanatory memoranda relating to version 1 of the Draft Applicant Guidebook.

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Revised New gTLD Registry Agreement Including Additional Public Interest Commitments Specification

Comment/Reply Periods (*)		Important Information Links
Comment Open:	5 February 2013	
Comment Close:	26 February 2013	
Close Time (UTC):	23:59	Public Comment Announcement (/en/news/announcements/announcement-3-05feb13-en.htm)

Reply Open:	27 February 2013	To Submit Your Comments (Forum Closed)	R-32
Reply Close:	20 March 2013	View Comments Submitted (//forum.icann.org/lists/comments-base-agreement-05feb13)	
Close Time (UTC):	23:59	Report of Public Comments (/en/news/public-comment/report-comments-base-agreement-01apr13-en.pdf)	

Brief Overview

Originating Organization:	ICANN		
Categories/Tags:	Top-Level Domains		
Purpose (Brief):	To receive community feedback on the revised New gTLD Registry Agreement that includes certain updates and changes, i		
Current Status:	The current draft of the New gTLD Registry Agreement was published in June 2012 as part of the New gTLD Applicant Guid [PDF, 917 KB]. The New gTLD Registry Agreement requires various updates and changes, including the addition of the Pub		
Next Steps:	ICANN staff will consider public comments on the revised New gTLD Registry Agreement and recommend any additional n		
Staff Contact:	Daniel Halloran	**Email:**	daniel.halloran@icann.org (mailto:daniel.halloran@icann.org?subject=More%20information%20on%20the%20Revised%20New%20gTLD%20Registry%20Agreeme

Detailed Information

Section I: Description, Explanation, and Purpose

The New gTLD Registry Agreement is the contractual document between successful New gTLD Applicants and ICANN, and will

ICANN proposes to revise the New gTLD Registry Agreement in connection with developments since the last posting of the Ap
Among the proposed changes, ICANN has added the Public Interest Commitments Specification.

The Public Interest Commitments Specification will require operators of new gTLDs to use only registrars that are party to the
Specification is also a mechanism to allow registry operators to commit to certain statements made by the registry operator in
transforming such commitments into binding contractual obligations that may be enforced by ICANN through a new dispute r
with such public interest commitments.

Concurrent with this public comment period on the proposed revisions to the agreement, ICANN will also ask each applicant to
applicants regarding the details of submitting Public Interest Commitments Specification. ICANN expects to request applicants
them all posted for public review by 6 March 2013.

The proposed revised New gTLD Registry Agreement is now open for public comment.

Section II: Background

The new generic Top-Level Domain (New gTLD) Program was developed to increase competition and choice by introducing nev
program and provide instructions on the application process. Within the AGB, Module 5 contains the draft New gTLD Registry A
proceeding to the next phase of delegation and will contain the rights and obligations of each New gTLD registry operator. The
certain updates and changes before it can be finalized for use by successful applicants.

Each new gTLD application includes business plans and statements of intent regarding applicant plans for operation of the pro
implement registration restrictions or heightened rights protection mechanisms above those required in the current draft of th
requiring these plans and objectives to be incorporated into the New gTLD Registry Agreement. The GAC's Toronto Communic
commitment and objectives to be transformed into binding contractual commitments, subject to compliance oversight by ICAN
comment period on a proposed Public Interest Commitments Specification as a mechanism to transform application statemen
to heightened public interest commitments. The Public Interest Commitments Specification has been incorporated into the rev
with various other updates and changes to the New gTLD Registry Agreement more specifically described in the Summary of C

Section III: Document and Resource Links

- Revised gTLD Registry Agreement with Public Interest Commitments Specification 2013-02-05 - clean (//newgtlds.icann.org/en/applicants/a
- Revised gTLD Registry Agreement with Public Interest Commitments Specification 2013-02-05 - red-lined (//newgtlds.icann.org/en/applicar
- Summary of Changes 2013-02-05 (//newgtlds.icann.org/en/applicants/agb/base-agreement-specs-summary-changes-05feb13-en.pdf) [PD
- Draft gTLD Registry Agreement 2012-06-04 version: Base Agreement & Specifications (//newgtlds.icann.org/en/applicants/agb/base-agree
- Frequently Asked Questions | Specification 11 of the Revised New gTLD Registry Agreement: Public Interest Commitments (//newgtlds.icar
- Specification 11: Public Interest Commitments:
  - Word Document (//newgtlds.icann.org/en/applicants/agb/base-agreement-spec-11-pic-19feb13-en.docx) [DOCX, 38 KB]
  - PDF Document (//newgtlds.icann.org/en/applicants/agb/base-agreement-spec-11-pic-19feb13-en.pdf) [PDF, 118 KB]
  - Text Document (//newgtlds.icann.org/en/applicants/agb/base-agreement-spec-11-pic-19feb13-en.txt) [TXT, 3 KB]
- ICANN Website for New Generic Top-Level Domains Applicant Guidebook: http://newgtlds.icann.org/en/applicants/agb (//newgtlds.icann.

Section IV: Additional Information

None

(*) Comments submitted after the posted Close Date/Time are not guaranteed to be considered in any final summary, analysis, reporting, or decision-making that takes place once this period lapses.

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Proposed Final New gTLD Registry Agreement

Open Date
29 April 2013 23:59 UTC

Close Date
20 May 2013 23:59 UTC

Staff Report Due
10 June 2013 23:59 UTC

Comments Closed

Report of Public Comments (//www.icann.org/news/public-comment/report-comments-base-agreement-01jul13-en.pdf)

View Comments (//forum.icann.org/lists/comments-base-agreement-29apr13/)

Originating Organization

ICANN

Staff Contact

Daniel Halloran
daniel.halloran@icann.org (mailto:daniel.halloran@icann.org)

Contents

Brief Overview

ICANN is seeking public comment on a revised draft of the New gTLD Registry Agreement that will serve as the contractual document between successful New gTLD Applicants and ICANN, and will govern the rights and obligations of new gTLD registry operators. ICANN has made certain updates and changes to the New gTLD Registry Agreement in response to community feedback on the version of the New gTLD Registry Agreement posted for public comment on 5 February 2013 and discussions of the New gTLD Registry Agreement at the ICANN 46 meeting in Beijing, China 7-11 April 2013.

Original Announcement (/news/announcement-2013-04-29-en)
Report of Public Comments (//www.icann.org/news/public-comment/report-comments-base-agreement-01jul13-en.pdf)

Section I: Description and Explanation

ICANN is posting today for public comment the proposed final New gTLD Registry Agreement that will be entered into between ICANN and successful new gTLD applicants. The proposed final agreement is the result of several months of negotiations, formal community feedback during a public comment forum initiated on 5 February 2013, and meetings with various stakeholders and communities. The proposed final draft also includes feedback from the ICANN community at the ICANN 46 Meeting on 7-11 April 2013 in Beijing. (Note: this version of the agreement does not address the recent Beijing GAC Communiqué.) Included in the proposed revisions are the following:

- **Agreement Amendment Procedures:** The amendment procedures have been substantially reworked to provide greater clarity and procedural safeguards. A new mechanism for bilateral negotiation of amendments to the agreements has been added, including provision for public comment on proposed revisions and potential arbitration of some classes of proposed amendments.
- **Confidentiality Provision:** A new confidentiality provision was inserted to ensure appropriate treatment of confidential information provided by a party to the other under the Agreement.
- **Reserved Names:** Proposed revisions to Specification 5 would clarify the reserved names requirements, including a provision addressing registry operator use of names for the operation or the promotion of the TLD (capped at 100 names).

Section II: Background

After the ICANN Board approves the final terms of the New gTLD Registry Agreement, it will serve as the contractual document between successful New gTLD Applicants and ICANN, and will govern the rights and obligations of new gTLD registry operators.

On 5 February 2013 ICANN posted a proposed "Revised New gTLD Registry Agreement Including Additional Public Interest Commitments Specification (/en/news/announcements/announcement-3-05feb13-en.htm)." In that posting ICANN announced revisions to the agreement in response to developments since the last posting of the Applicant Guidebook in June 2012 and a general review of the contractual needs of the new gTLD program.

Since February 5, ICANN hosted two webinars (//newgtlds.icann.org/en/announcements-and-media/webinars) (6 March 2013 and 26 March 2013), held meetings with stakeholders, and initiated an official public comment period from 5 February 2013 to 20 March 2013 to provide the community opportunities to give feedback on revisions to this key agreement. A summary and analysis of the public comments received can be reviewed at: http://www.icann.org/en/news/public-comment/report-comments-base-agreement-01apr13-en.pdf (//www.icann.org/en/news/public-comment/report-comments-base-agreement-01apr13-en.pdf) [PDF, 508 KB]. An interim revised draft of the agreement was posted for information on the ICANN Blog on 1 April 2013 (//blog.icann.org/2013/04/revised-registry-agreement-posted-for-review/).

(Please note that this version of the agreement does not address the recent Beijing GAC Communiqué (/en/news/correspondence/gac-to-board-18apr13-en.pdf) [PDF, 156 KB]. The community is invited to provide feedback on how the ICANN Board New gTLD Program Committee should address GAC Advice on New gTLDs by submitting a comment to that public comment forum at http://www.icann.org/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm (/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm).)

The Registry Agreement Negotiating Team asked ICANN to publish the following statement:

> "The Registry Agreement Negotiation Team (RA-NT) is an ad-hoc group of volunteers from the Registry SG, NTAG, BRG, and individual applicants. This team was formed during the Beijing ICANN meeting in response to substantial changes proposed by ICANN on April 1, 2013. The RA-NT agreed to review the new gTLD Registry Agreement with ICANN staff in an effort to minimize some of the more controversial aspects of the Agreement for applicants as a whole. While participants reflected a variety of perspectives, the team did not "represent" or have any authority to "speak for" new gTLD applicants generally, or any group of applicants. The team's discussions with ICANN focused on a limited set of the most controversial and broadly applicable aspects of ICANN's proposed changes to the registry agreement published in the final New gTLD Application Guidebook. Applicants may disagree with the way these controversial issues are addressed in the draft, and may have concerns or comments about issues in the proposed agreement that the negotiating team did not discuss with ICANN. Further, not all members of the negotiating team agreed on every point.
>
> "The form of the Registry Agreement may be subject to additional changes in response to the public comment period. Also, as noted in 5.1 of the Applicant Guidebook, 'Applicants may request and negotiate terms by exception; however, this extends the time involved in executing the agreement.' All applicants are encouraged to review this draft."

Section III: Relevant Resources

- Revised gTLD Registry Agreement 2013-04-29 (clean) (//newgtlds.icann.org/en/applicants/agb/base-agreement-specs-29apr13-en.pdf) [PDF, 600 KB]
- Revised gTLD Registry Agreement (redline vs. 5 February 2013 version) (//newgtlds.icann.org/en/applicants/agb/base-agreement-specs-05feb13-redline-29apr13-en.pdf) [PDF, 515 KB]
- Revised gTLD Registry Agreement (redline vs. 4 June 2012 version) (//newgtlds.icann.org/en/applicants/agb/base-agreement-specs-04jun12-redline-29apr13-en.pdf) [PDF, 582 KB] (New: 1 May 2013)
- Summary of Changes (//newgtlds.icann.org/en/applicants/agb/base-agreement-specs-summary-changes-29apr13-en.pdf) [PDF, 278 KB]
- Beijing GAC Communiqué 2013-04-11 (/en/news/correspondence/gac-to-board-18apr13-en.pdf) [PDF, 156 KB]
- Draft gTLD Registry Agreement, 2013-04-01 version (//blog.icann.org/2013/04/revised-registry-agreement-posted-for-review/)
- Draft gTLD Registry Agreement, 2013-02-05 version (/en/news/public-comment/base-agreement-05feb13-en.htm)
- Draft gTLD Registry Agreement, 2012-06-04 version (//newgtlds.icann.org/en/applicants/agb/base-agreement-specs-04jun12-en.pdf) [PDF, 917 KB]
- ICANN Website for New Generic Top-Level Domains Applicant Guidebook (//newgtlds.icann.org/en/applicants/agb)

Section IV: Additional Information

None

Section V: Reports

- Report (//www.icann.org/news/public-comment/report-comments-base-agreement-01jul13-en.pdf)

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Ex. R-34

ICANN DECISION PAPER

TITLE: **Amendment 3 to .COM Registry Agreement, and Binding Letter of Intent between ICANN and Verisign**

EXECUTIVE SUMMARY:

The ICANN organization (ICANN org) and Verisign, Inc. (Verisign), the registry operator of the .COM top-level domain (TLD), have reached a preliminary agreement to amend the .COM Registry Agreement (RA). ICANN org and Verisign have agreed on terms to an amendment to the .COM RA (Amendment 3) and accompanying framework to work together on additional initiatives related to enhancing the security, stability, and resiliency of the Domain Name System (DNS). This framework is included in a proposed binding Letter of Intent (LOI) between ICANN org and Verisign. This preliminary agreement is the result of bilateral negotiations between the two parties.

The proposed Amendment 3 and the proposed binding LOI satisfy the parties' agreement to negotiate certain terms as described in the first amendment to the .COM RA (Amendment 1), dated 20 October 2016. Under Amendment 1, the parties agreed to cooperate and negotiate in good faith to amend the .COM RA as necessary to reflect changes made to Verisign's Cooperative Agreement with the United States Government Department of Commerce (DOC) (Cooperative Agreement), and to amend the terms to preserve and enhance the security and stability of the Internet or the .COM TLD.

ICANN org conducted a Public Comment process on the proposed Amendment 3 and the proposed binding LOI from 3 January 2020 through 14 February 2020. Per ICANN org's standard practice, the comments have been reviewed, summarized, and analyzed into a report which has been shared with the Board for its consideration and published.

The Public Comment forum generated significant input and interest from the community, with over 9000 comments. The vast majority (95 percent) of the comments expressed concern related to the proposed increase to the maximum allowable wholesale price of .COM registry services. These concerns came primarily from existing registrants, including domain investors or "domainers", and registrars.

ICANN org has briefed and consulted with the Board at every stage of the process including prior to negotiations, prior to completing negotiations, and after review of the public comments.

BACKGROUND:

The .COM Registry Agreement and The Cooperative Agreement

The current .COM RA between ICANN org and Verisign was established in December 2012, contains a six-year term, and as amended, expires November 30, 2024, with a presumption of renewal unless a

material uncured breach of the agreement has occurred, including a failure to pay fees to ICANN org, and such breach remains uncured following a determination by an arbitrator or court. The .COM RA is substantially different from the Base gTLD Registry Agreement (Base RA). While both forms of agreement prescribe a fairly common set of obligations on the registry operator and ICANN org, the current .COM RA generally includes higher performance levels but with different technical specifications for functions including the escrow of registry data, provision of WHOIS information, and zone file access, than those in the Base RA, and the details of how to remedy a non-compliance for these functions also differs.

In October 2016, ICANN org and Verisign agreed to Amendment 1 of the .COM RA, which extended the term of the agreement to 30 November 2024, and added the following provision related to future amendments:

> *The parties shall cooperate and negotiate in good faith to amend the terms of the Agreement (a) by the second anniversary of the Amendment Effective Date, to preserve and enhance the security and stability of the Internet or the TLD, and (b) as may be necessary for consistency with changes to, or the termination or expiration of, the Cooperative Agreement between Registry Operator and the Department of Commerce.*

In addition to the term extension, Amendment 1 created the expectation to incorporate relevant changes from the Cooperative Agreement and to make revisions by the end of October 2018 that will preserve and enhance the security and stability of the Internet or the TLD. In 2018, the parties agreed to handle these revisions once the changes to the Cooperative Agreement were completed.

On 1 November 2018, the DOC and Verisign announced Amendment 35 to the Cooperative Agreement. The most notable change in this amendment is the ability to increase the maximum wholesale price of a .COM registration. Under a previous amendment to the Cooperative Agreement, the maximum price Verisign could charge a registrar for a .COM domain name was US$7.85. The amended Cooperative Agreement provides Verisign the ability to increase prices for both new registrations and renewals by seven percent per year in the final four years of each six-year period, and the first six-year period commenced on 26 October 2018. The DOC cited that "ccTLDs, new gTLDs, and the use of social media have created a more dynamic DNS marketplace" as part of its justification for the changes to the price controls. In early November 2018, Verisign submitted a proposed amendment to the .COM RA to ICANN org based on Amendment 1 to incorporate the pricing provisions as outlined in Amendment 35 of the Cooperative Agreement. On 3 January 2020, ICANN org and Verisign announced a preliminary agreement in the form of the proposed Amendment 3 to the .COM RA and a binding Letter of Intent between ICANN org and Verisign. Simultaneously, on 3 January 2020, ICANN org published this proposal for Public Comment. The comment period closed on 14 February 2020, with over 9,000 comments. Per ICANN org's standard practice, the comments have been reviewed, summarized, and analyzed into a report which has been shared with the Board for its consideration and published.

Domain Name Market Dynamic

In generic top-level domains (gTLDs), registry operators set wholesale prices for domain names. It is registrars that set "retail" prices and speculators who set "aftermarket" or "secondary market" prices. ICANN org has observed that while the wholesale price for .COM domain names has been frozen at US$7.85 since 2012, retail prices for .COM renewals (a more accurate measure of true prices since many registries and registrars discount initial registration fees) have continued to rise. In fact, GoDaddy, the world's largest provider of domain name registrations, applied a 20 percent increase to .COM domain renewal prices in early 2019, bringing its standard renewal fee for a .COM domain name from US$14.99 (in 2018) to US$17.99 (for 2019) and several other registrars, including Namecheap, imposed similar price increases to their customers.

Additionally, ICANN org observed that many of those that fueled the high volume of comments on this topic with publicity campaigns, including the Internet Commerce Association (ICA) and Namecheap, are active players in the so called "aftermarket" for domain names, where domain name speculators attempt to profit by "buying low and selling high" on domain names, forcing end users to pay higher than retail prices for desirable domain names. According to Namebio.com the average price of a .COM domain name traded on the secondary market and reported to Namebio.com was US$2,415, while the median price was US$1,643. This is one view of that from a particular market sector but may not be representative of the entire secondary market. ICANN org recognizes the data set from Namebio is non-exhaustive as many transactions are not reported to Namebio.com, it does contain over 600,000 transactions on record. On the ultra-premium end of the spectrum, the top five highest price .COM domain name transactions in USD according to DNJournal.com are:

1. Voice.com - $30,000,000
2. Sex.com - $13,000,000
3. Tesla.com - $11,000,000
4. Fund.com - $9,999,950
5. Porn.com - $8,888,888

RATIONALE:

Together, the proposed Amendment 3 and the proposed binding LOI satisfy the parties' obligations under Amendment 1 and accomplish five primary objectives:

1. Alignment of certain terms of the .COM RA with Amendment 35 of the Cooperative Agreement, including the maximum allowable pricing provision for .COM registry services.
2. New commitments from Verisign related to mitigating or combating DNS security threats.
3. Additional funding to support ICANN org's core mission to ensure the stable and secure operation of the Internet's unique identifier systems.
4. Alignment of certain technical and reporting obligations for the .COM TLD with those in the Base gTLD Registry Agreement (Base RA).
5. Incorporation of commitments related to the Registration Data Access Protocol (RDAP).

Objective 1: Alignment with Amendment 35 of the Cooperative Agreement

The price for .COM registry services has been static at US$7.85 since 2012. This price freeze was established by the DOC in Amendment 32 of the Cooperative Agreement. Under Amendment 35, the DOC noted that the domain name marketplace had grown more dynamic and concluded that it was in the public interest that, among other things, Verisign and ICANN org may agree to amend the .COM RA to permit an increase to the maximum allowable wholesale price for .COM registry services, up to a maximum of seven percent in each of the final four years of each six-year period (the first six-year period commenced on 26 October 2018). The proposed Amendment 3 to the .COM RA reflects this change, essentially restoring the pricing structure from the 2006 .COM RA.

As anticipated, the proposed increase to the maximum wholesale price for .COM registry services generated significant community attention, and comments related to this aspect of the proposed agreement make up 95 percent of the 9,043 comments received. Of those that self-identified, comments about this topic were received from .COM registrants, domain investors, and domain name registrars. The comments about the proposed changes to the maximum allowable wholesale price for .COM registry services were nearly unanimous in voicing disagreement or concern and commenters provided a variety of reasons why they are against the change. ICANN org understands the commenters' perspective that they don't want an increase in price of .COM domain names.

It is important to remember that the proposed Amendment 3 retains a built-in registrant protection related to price. As the registry operator, Verisign continues to be required to provide at least six months' notice to registrars of any wholesale price increase. This allows registrars, on behalf of their registrant customers, to register or renew .COM domain names during the notice period for up to a 10-year total registration term, at the then-current price, prior to any increase. This allows for the ability to lock in current wholesale prices for up to 10 years. Although registrars are not obligated to offer 10-year registrations, registrants have the ability to transfer their domain names to any accredited registrar that does.

While some commenters requested market analysis or economic study prior to ICANN taking action on the proposed amendment, ICANN org is not a competition authority or price regulator and ICANN has neither the remit nor expertise to serve as one. Rather, as enshrined in ICANN's Bylaws, which were developed through a bottom up, multistakeholder process, ICANN's mission is to ensure the security and stability of the Internet's unique identifier systems. Accordingly, ICANN must defer to relevant competition authorities and/or regulators, and let them determine if any conduct or behavior raises anti-competition concerns and, if so, to address such concerns, whether it be through price regulation or otherwise. As such, ICANN org has long-deferred to the DOC and the United States Department of Justice (DOJ) for the regulation of wholesale pricing for .COM registry services. For example, the 2006 version of the .COM RA included a near identical set of restrictions on the pricing for .COM registry services as proposed in Amendment 3. These restrictions were based on the guidance and approval of the DOC under Amendment 30 of the Cooperative Agreement. Then in 2012, the DOC instructed Verisign to

freeze the maximum wholesale price of .COM registry services at US$7.85 and memorialized this in Amendment 32 of the Cooperative Agreement; this wholesale price freeze was in turn inserted into the current version of the .COM Registry Agreement.

In addition, the proposed Amendment 3 reflects language in Amendment 35 to the Cooperative Agreement clarifying that the restrictions on Verisign's ownership of ICANN-accredited registrars in the .COM RA are intended to apply solely to the .COM TLD. While several registrars raised questions and concerns about this proposed change, ICANN org is again applying the direction given to Verisign by the DOC. The provisions in the .COM RA to prohibit Verisign from holding a controlling interest in a registrar for .COM names is contrary to the requirements of the Base RA, which enable such "vertical integration" with certain requirements and restrictions. If Verisign were to choose to participate as a registrar or reseller in new gTLDs, it would be bound by Section 2.9 of the Base RA which requires any registry operator to abide by certain restrictions and processes for doing so, and these may include referral to the relevant competition authority.

In summary, while ICANN org received a high volume of comments from the public suggesting that ICANN org not move forward with the changes to the pricing provisions in the proposed Amendment 3, ICANN org is electing to instead continue to defer to the DOC and DOJ, by applying the terms as agreed between the DOC and Verisign in Amendment 35 to the Cooperative Agreement.

Objective 2: New commitments from Verisign related to mitigating or combating DNS security threats.

DNS abuse has been one of the most discussed topics within the ICANN community for several years. This is why it was important for ICANN org and Verisign to include commitments to mitigate DNS security threats in the proposed amendment and binding LOI. The proposed Amendment 3 contains certain commitments that directly relate to the mitigation of DNS security threats. The requirements are based on Specification 11, Sections 3A and 3B of the Base RA, which obligate the registry operator to: (i) require its accredited registrars to include in their registration agreements provisions prohibiting domains from being used to perpetrate DNS security threats;, and (ii) at least once a month conduct scans of its zone to identify domains being used to perpetrate DNS security threats. In addition to the contractual requirements in the proposed Amendment 3, ICANN org and Verisign have agreed on a framework for working together to support additional enhancements to the security, stability, and resiliency of the DNS, including to help combat DNS security threats. This agreement is in the form of a proposed binding LOI between Verisign and ICANN org.

Overall, comments were primarily positive regarding the inclusion of new commitments from Verisign related to mitigating or combating DNS security threats with no objection to inclusion of Specification 11 3(a) and 3(b) in the proposed Amendment 3. Some in the community requested a broader definition for DNS security threats while others were concerned that the LOI put Verisign outside or above others within the ICANN community. The proposed LOI utilizes the definitions of DNS security threats from Specification 11 of the Base RA and includes provisions that enable adjustment to the definition. This

was deliberate so not to pre-empt the ICANN community. Together the proposed Amendment 3 and binding LOI add commitments to mitigate and combat DNS security threats to the world's largest registry.

Objective 3: Additional funding to ICANN org to support ICANN org's core mission to ensure the stable and secure operation of the Internet's unique identifier systems.

The proposed LOI also provides that Verisign will contribute US$20 million dollars over five years, beginning on 1 January 2021, to support ICANN's initiatives to preserve and enhance the security, stability, and resiliency of the DNS, including root server system governance, mitigation of DNS security threats, promotion and/or facilitation of Domain Name System Security Extensions (DNSSEC) deployment, the mitigation of name collisions, and research into the operation of the DNS.

Comments were mixed in support of Verisign's commitment to fund ICANN org's initiatives to preserve and enhance the security, stability, and resiliency of the DNS. While some were supportive of the contribution, other members of the community seem skeptical about Verisign's motives in offering the contribution and some perceived a lack of transparency regarding how ICANN org will use the funding. ICANN org agrees with and supports the need for accountability and transparency regarding how the funds are used and is committed to full transparency to provide the ICANN community the appropriate level of information as such funds are received and used. ICANN intends that all impacts related to these funds be incorporated into ICANN's annual planning and budgeting process, as well as ICANN's periodic financial reporting. In this process, ICANN org carries out extensive community engagement and consultation throughout the entire planning process, including webinars and meetings with ICANN's Supporting Organizations (SOs), their stakeholder groups, and the Advisory Committees (ACs), as well as formal Public Comment proceeding on all planning documents, including strategic plan, operating plans, and budgets. The Empowered Community can exercise rejection powers on Board decisions adopting the strategic plan, the five-year operating and financial plan, and the annual plan and budget, providing for a complete measure of accountability.

Objective 4: Alignment of certain technical and reporting obligations for the .COM TLD with those in the Base RA.

The Base RA was developed to support the 1200-plus new gTLD registries created under the 2012 New gTLD Program. It contains standardized technical and reporting obligations for registry operators of new gTLDs. Over time, ICANN org has been working to standardize the technical and reporting requirements across all gTLDs to the extent possible and practical to ensure technical and operational consistency across the gTLDs. The proposed Amendment 3 to the .COM RA includes updates to several technical and reporting specifications to bring certain requirements of the following technical specifications more in line with those of the Base RA:

- Registry Data Escrow (appendix 1A and 2A)
- WHOIS and Registration Data Publication Services (Appendix 5A)

- Zone File Access (Appendix 3A)
- Registry Reporting (Appendix 4A)

None of the comments received directly tied to technical or reporting obligations, though comments were received regarding the decision to include or not include certain provisions from Specification 11 of the RA or of the Uniform Rapid Suspension (URS) Rights Protection Mechanism. While the Public Interest Commitment Dispute Resolution Procedure (PICDRP) from the Base RA was not included in Appendix 11 of the proposed Amendment 3, the provisions in Appendix 11 are enforceable by ICANN org's Contractual Compliance function. Any Internet user is able to submit complaints to ICANN Contractual Compliance or ICANN Contractual Compliance may identify an issue through its proactive monitoring. In either case, ICANN Contractual Compliance will work to ensure that Verisign is abiding by its agreement, or appropriately remediates the issue to return to compliance. The URS was not included in the proposed Amendment 3 because ICANN org's primary focus in the negotiations were provisions to enhance or preserve security, stability, and resiliency as committed in Amendment 1.

Objective 5: Incorporation of commitments related to the implementation of the Registration Data Access Protocol (RDAP).

In support of objective 5, the proposed Amendment 3 includes provisions related to the implementation of Registration Data Access Protocol (RDAP). ICANN org recently entered into negotiations with the gTLD Registries Stakeholder Group to incorporate more robust requirements related to RDAP and to transition the technology of choice for Registration Data Directory Services (RDDS) from WHOIS protocol to RDAP for the Base RA.

Since .COM does not utilize the Base RA, these changes would not apply to the .COM RA. In the proposed Amendment 3, ICANN org and Verisign have agreed to an initial set of requirements for RDAP, based on discussions with a working group of contracted parties focused on RDAP, and to adjust these requirements as needed to align with what ICANN org ultimately negotiates with the gTLD Registries Stakeholder Group for the Base RA. The agreement with Verisign for .COM does not include any sunsetting of obligations for WHOIS services at this time so that the transition can be coordinated in alignment with all other gTLDs and ICANN-accredited registrars.

Consultation with the ICANN Board

The .COM RA is arguably the most important contract under ICANN's responsibility. ICANN org consulted with the ICANN Board prior to negotiating with Verisign and prior to completing the negotiations. These consultations continued after the documents were posted for Public Comment, including on 15 and 26 January 2020. After the closing of the Public Comment window, ICANN org reviewed, analyzed, and considered each of the 9,043 comments received. ICANN org briefed the Board in detail about the community's comments and ICANN org's analysis on each of the topics set forth in this paper on 5 March and 24 March 2020. The Board agreed that ICANN's President and CEO will

make a final decision on the proposed Amendment 3 and binding LOI as decision-making duties regarding contracts fall within the President and CEO's authority as set forth in the Delegation of Authority Guidelines. The Board agreed that while the President and CEO would make the decision, he would do so in consultation with the Board, including the detailed discussions regarding the community's comments that occurred as noted above.

DECISION:

After careful consideration of the comments, and several discussions with the ICANN Board, the ICANN org President and CEO has decided to execute Amendment 3 and the LOI with Verisign as was proposed for Public Comment.

Signature Block:

By: _____

Name by: Göran Marby

Title: ICANN President and CEO

Date: 27 March 2020

Ex. R-35

Redacted – Confidential Information

Ex. R-36

R-36

Adopted Board Resolutions | Regular Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board

This page is available in:
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08 Nov 2016

1. Consent Agenda:
    a. Approval of Board Meeting Minutes

    b. Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) (SSAC (Security and Stability Advisory Committee)) Member Appointments
        Rationale for Resolution 2016.11.08.02

    c. Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) (SSAC (Security and Stability Advisory Committee)) Member Reappointments
        Rationale for Resolution 2016.11.08.03

    d. Appointment of D-, E-, G-, and H-Root Server Operator Representatives to the Root Server System Advisory Committee (Advisory Committee) (RSSAC (Root Server System Advisory Committee))
        Rationale for Resolution 2016.11.08.04

    e. Investment of Auction Proceeds
        Rationale for Resolution 2016.11.08.05

    f. ICANN (Internet Corporation for Assigned Names and Numbers) Delegation of Authority Guidelines
        Rationale for Resolution 2016.11.08.06

    g. Renewal of .TEL Registry Agreement
        Rationale for Resolution 2016.11.08.07

    h. Thank You to Community Members

    i. Thank You to Local Host of ICANN (Internet Corporation for Assigned Names and Numbers) 57 Meeting

    j. Thank You to Sponsors of ICANN (Internet Corporation for Assigned Names and Numbers) 57 Meeting

    k. Thank You to Interpreters, Staff, Event and Hotel Teams of ICANN (Internet Corporation for Assigned Names and Numbers) 57 Meeting

2. Main Agenda:
    a. Two-Character Domain Names in the New gTLD (generic Top Level Domain) Namespace
        Rationale for Resolution 2016.11.08.15

    b. Consideration of the *Corn Lake, LLC v. ICANN (Internet Corporation for Assigned Names and Numbers)* Independent Review Process Final Declaration
        Rationale for Resolutions 2016.11.08.16 – 2016.11.08.18

    c. Thank You to the Global Multistakeholder Community

    d. Thank You to Bruno Lanvin for his service to the ICANN (Internet Corporation for Assigned Names and Numbers) Board

e. Thank You to Erika Mann for her service to the ICANN (Internet Corporation for Assigned Names and Numbers) Board

f. Thank You to Kuo-Wei Wu for his service to the ICANN (Internet Corporation for Assigned Names and Numbers) Board

g. Thank You to Suzanne Woolf for her service to the ICANN (Internet Corporation for Assigned Names and Numbers) Board

h. Thank You to Bruce Tonkin for his service to the ICANN (Internet Corporation for Assigned Names and Numbers) Board

1. Consent Agenda:

a. Approval of Board Meeting Minutes

Resolved (2016.11.08.01), the Board approves the minutes of the 9 August, 15 August, 17 September and 30 September 2016 meetings of the ICANN (Internet Corporation for Assigned Names and Numbers) Board.

b. Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) (SSAC (Security and Stability Advisory Committee)) Member Appointments

Whereas, the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) (SSAC (Security and Stability Advisory Committee)) reviews its membership and makes adjustments from time-to-time.

Whereas, the SSAC (Security and Stability Advisory Committee) Membership Committee, on behalf of the SSAC (Security and Stability Advisory Committee), requests that the Board should appoint Jacques Latour and Tara Whalen to the SSAC (Security and Stability Advisory Committee) for three-year terms beginning immediately upon approval of the Board and ending on 31 December 2019.

Resolved (2016.11.08.02), that the Board appoints Jacques Latour and Tara Whalen to the SSAC (Security and Stability Advisory Committee) for three-year terms beginning immediately upon approval of the Board and ending on 31 December 2019.

Rationale for Resolution 2016.11.08.02

The SSAC (Security and Stability Advisory Committee) is a diverse group of individuals whose expertise in specific subject matters enables the SSAC (Security and Stability Advisory Committee) to fulfill its charter and execute its mission. Since its inception, the SSAC (Security and Stability Advisory Committee) has invited individuals with deep knowledge and experience in technical and security areas that are critical to the security and stability of the Internet's naming and address allocation systems.

The SSAC (Security and Stability Advisory Committee)'s continued operation as a competent body is dependent on the accrual of talented subject matter experts who have consented to volunteer their time and energies to the execution of the SSAC (Security and Stability Advisory Committee) mission. Jacques Latour is currently the CTO at CIRA, the Canadian Internet Registry Authority for .CA, a position he has held for the past 6 years. He also is an active member of the ccNSO (Country Code Names Supporting Organization) community and the IETF (Internet Engineering Task Force) DNS (Domain Name System) community. Jacques has extensive country code registry experience and all of the related technologies. He has been an active member of the SSAC (Security and Stability Advisory Committee)'s DNSSEC (DNS Security Extensions) Workshop Program Committee for several years.

Tara Whalen has a PhD in Computer Science followed by a Masters in Law with a concentration in Law and Technology. She has over 20 years of experience in security and privacy, including working in the Office of the Privacy Commissioner of Canada, as a Privacy and Security (Security – Security, Stability and Resiliency (SSR)) Standards Engineer at Apple, and is

currently a Staff Privacy Analyst at Google. She has been active in the IETF (Internet Engineering Task Force) (intrusion detection working group) and is currently active in the W3C (World Wide Web Consortium) (Privacy Interest Group). She is generally engaged in an operational role around the nexus of security and privacy.

The SSAC (Security and Stability Advisory Committee) believes Jacques Latour and Tara Whalen would be significant contributing members of the SSAC (Security and Stability Advisory Committee).

c. Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) (SSAC (Security and Stability Advisory Committee)) Member Reappointments

Whereas, Article 12, Section 12.2(b) of the Bylaws governs the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) (SSAC (Security and Stability Advisory Committee)).

Whereas, the Board, at Resolution 2010.08.05.07 approved Bylaws revisions that created three-year terms for SSAC (Security and Stability Advisory Committee) members, required staggering of terms, and obligated the SSAC (Security and Stability Advisory Committee) Chair to recommend the reappointment of all current SSAC (Security and Stability Advisory Committee) members to full or partial terms to implement the Bylaws revisions.

Whereas, the Board, at Resolution 2010.08.05.08 appointed SSAC (Security and Stability Advisory Committee) members to terms of one, two, and three years beginning on 01 January 2011 and ending on 31 December 2011, 31 December 2012, and 31 December 2013.

Whereas, in January 2016 the SSAC (Security and Stability Advisory Committee) Membership Committee initiated an annual review of SSAC (Security and Stability Advisory Committee) members whose terms are ending 31 December 2016 and submitted to the SSAC (Security and Stability Advisory Committee) its recommendations for reappointments in September 2016.

Whereas, on 21 September 2016, the SSAC (Security and Stability Advisory Committee) members approved the reappointments.

Whereas, the SSAC (Security and Stability Advisory Committee) recommends that the Board reappoint the following SSAC (Security and Stability Advisory Committee) members to three-year terms: Jeff Bedser, Ben Butler, Merike Kaeo, Warren Kumari, Xiaodong Lee, Carlos Martinez, and Danny McPherson.

Resolved (2016.11.08.03), the Board accepts the recommendation of the SSAC (Security and Stability Advisory Committee) and reappoints the following SSAC (Security and Stability Advisory Committee) members to three-year terms beginning 01 January 2017 and ending 31 December 2019: Jeff Bedser, Ben Butler, Merike Kaeo, Warren Kumari, Xiaodong Lee, Carlos Martinez, and Danny McPherson.

Rationale for Resolution 2016.11.08.03

The SSAC (Security and Stability Advisory Committee) is a diverse group of individuals whose expertise in specific subject matters enables the SSAC (Security and Stability Advisory Committee) to fulfill its charter and execute its mission. Since its inception, the SSAC (Security and Stability Advisory Committee) has invited individuals with deep knowledge and experience in technical and security areas that are critical to the security and stability of the Internet's naming and address allocation systems. The above-mentioned individuals provide the SSAC (Security and Stability Advisory Committee) with the expertise and experience required for the Committee to fulfill its charter and execute its mission.

d. Appointment of D-, E-, G-, and H-Root Server Operator Representatives to the Root Server System Advisory Committee (Advisory Committee) (RSSAC (Root Server System Advisory Committee))

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws call for the establishment of a Root Server System Advisory Committee (Advisory Committee) (RSSAC (Root Server System Advisory Committee)) with the role to advise the ICANN (Internet Corporation for Assigned Names and Numbers) community and ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors on matters relating to the operation, administration, security, and integrity of the Internet's Root Server System.

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws call for the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors to appoint one RSSAC (Root Server System Advisory Committee) member from each Root Server operator organization, based on recommendations from the RSSAC (Root Server System Advisory Committee) Co-Chairs.

Whereas, the RSSAC (Root Server System Advisory Committee) Co-Chairs have recommended for ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors consideration the appointment of representatives from the D-, E-, G, and H-root server operators to the RSSAC (Root Server System Advisory Committee).

Resolved (2016.11.08.04), the Board appoints to the RSSAC (Root Server System Advisory Committee) the following representatives from the D-, E-, G-, and H-root server operators: Tripti Sinha, Kevin Jones, Kevin Wright, and Howard Kash, respectively, through 31 December 2019.

Rationale for Resolution 2016.11.08.04

In May 2013, the root server operators (RSO) agreed to an initial membership of RSO representatives for RSSAC (Root Server System Advisory Committee), and each RSO nominated an individual. The ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors approved the initial membership of RSSAC (Root Server System Advisory Committee) in July 2013 with staggered terms.

The representatives from the D-, E-, G-, and H-root server operators were appointed to an initial three-year term, which expires on 31 December 2016. These appointments are for full, three-year terms.

The appointment of these RSSAC (Root Server System Advisory Committee) members is not anticipated to have any fiscal impact on ICANN (Internet Corporation for Assigned Names and Numbers), though there are budgeted resources necessary for ongoing support of the RSSAC (Root Server System Advisory Committee).

This resolution is an organizational administrative function for which no public comment is required. The appointment of RSSAC (Root Server System Advisory Committee) members contributes to ICANN (Internet Corporation for Assigned Names and Numbers)'s commitment to strengthening the security, stability, and resiliency of the DNS (Domain Name System).

e. Investment of Auction Proceeds

Whereas, to date ICANN (Internet Corporation for Assigned Names and Numbers) has collected US$233 million of auction proceeds.

Whereas, the Board Finance Committee has determined that auction proceeds need to be invested in a manner that preserves capital and keeps these funds readily available.

Whereas, the Board Finance Committee recommends that auction proceeds be distributed across three different investment managers, and invested in safe and liquid financial instruments.

Resolved (2016.11.08.05), the Board authorizes the President and CEO, or his designee(s), to take all actions necessary to distribute the auction proceeds across three different investment managers, which will be tasked with investing those proceeds in safe and liquid financial instruments.

Rationale for Resolution 2016.11.08.05

To date ICANN (Internet Corporation for Assigned Names and Numbers) has collected auction proceeds totaling US$233 million. ICANN (Internet Corporation for Assigned Names and Numbers) continuously mitigates the risk of custody by distributing investments across more than one investment management firm. Considering the amount of auction proceeds collected to date, the number of firms used to manage these funds need to be increased from the one firm currently used, to three firms. Through an RFP conducted in 2013 for the New gTLD (generic Top Level Domain) Program, ICANN (Internet Corporation for Assigned Names and Numbers) has already qualified three investment management firms. The auction funds will be distributed across these three firms, in separate and distinct accounts holding exclusively auction proceeds. In addition, considering the intended usage of these funds in the near future, as per the ongoing community process, the BFC has recommended that the managers hold these funds in safe and liquid financial instruments.

As a result, the organization recommends that the auction proceeds be invested at three different investment managers to reduce the risk of custody, and be invested in safe and liquid financial instruments.

This action is not expected to have any fiscal impact, or any impact on the security, stability and resiliency of the domain name system.

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

f. ICANN (Internet Corporation for Assigned Names and Numbers) Delegation of Authority Guidelines

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws Article 2 (/resources/pages/governance/bylaws-en/#article2) establishes that with certain exceptions, the powers of ICANN (Internet Corporation for Assigned Names and Numbers) shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws Article 15 (/resources/pages/governance/bylaws-en/#article15) establishes officers of ICANN (Internet Corporation for Assigned Names and Numbers), and designates the President to be the Chief Executive Officer (CEO) of ICANN (Internet Corporation for Assigned Names and Numbers) in charge of all of its activities and business. All other officers and staff shall report to the President or his or her delegate, unless stated otherwise in the Bylaws.

Whereas, the Board desires to set out a clear line of delegation of authority between the role of the Board and the roles of CEO and management.

Resolved (2016.11.08.06), the Board hereby adopts the "ICANN (Internet Corporation for Assigned Names and Numbers) Delegation of Authority Guidelines (/en/system/files/files/delegation-of-authority-guidelines-08nov16-en.pdf)" to provide clear guidance and clarification of roles between the ICANN (Internet Corporation for Assigned Names and Numbers) Board and the ICANN (Internet Corporation for Assigned Names and Numbers) CEO/Management ("Guidelines"). The Guidelines shall be reviewed regularly and amended from time to time by resolution of the Board.

Rationale for Resolution 2016.11.08.06

The Board is taking action at this time to adopt a set of guidelines to provide greater clarity of roles between the Board and CEO/Management. These guidelines, titled "ICANN (Internet Corporation for Assigned Names and Numbers) Delegation of Authority Guidelines," identify the respective key roles of the Board, key roles of CEO/Management, and the key interdependencies in those relationships. As outlined in the Guidelines, a primary source of the Board's powers come directly from the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, as well as internal policies. Among others, these key powers include: (1) acting collectively by voting at meetings to authorize and direct management to take action on behalf of the ICANN (Internet Corporation for Assigned Names and Numbers) organization, (2) interacting with the ICANN (Internet Corporation for Assigned Names and Numbers) community to ensure that ICANN (Internet Corporation for Assigned Names and Numbers) is serving the

global public interest within ICANN (Internet Corporation for Assigned Names and Numbers)'s mission, and (3) considering policy recommendations arising out of Supporting Organizations (Supporting Organizations), including participating in consultation processes if necessary.

The ICANN (Internet Corporation for Assigned Names and Numbers) CEO is authorized to act within the authority delegated by the Board. The CEO may designate key management to assist in carrying out these responsibilities. The CEO's responsibilities, include, but are not limited to: (1) interacting with the ICANN (Internet Corporation for Assigned Names and Numbers) community to ensure that ICANN (Internet Corporation for Assigned Names and Numbers) is serving the global public interest within ICANN (Internet Corporation for Assigned Names and Numbers)'s mission, (2) maintaining open lines of communication with the Board, (3) interacting with governments within the scope of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission and Board's directives, and (4) leading and overseeing ICANN (Internet Corporation for Assigned Names and Numbers)'s day-to-day operations.

By adopting these Guidelines, the Board intends to ensure that the Board and CEO/Management continue to operate within the scope of its mission. The Board's approval of the Guidelines will have positive impact on the community as provides additional transparency and clarity about the roles and responsibilities of key members in the ICANN (Internet Corporation for Assigned Names and Numbers) organization. Additionally, it provides additional accountability to the community by clearly defining the roles and responsibilities.

There is no anticipated fiscal impact of the Board taking this action, and there are no expected security, stability, or resiliency issues related to the DNS (Domain Name System) associated with the Board's approval of the Guidelines.

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

g. Renewal of .TEL Registry Agreement

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) commenced a public comment period from 04 August 2016 to 13 September 2016 on a proposed Renewal Registry Agreement for the .TEL TLD (Top Level Domain).

Whereas, the proposed .TEL Renewal Registry Agreement includes modified provisions to bring the .TEL Registry Agreement into line with the form of the New gTLD (generic Top Level Domain) Registry Agreement.

Whereas, the public comment forum on the proposed Renewal Registry Agreement closed on 13 September 2016, with ICANN (Internet Corporation for Assigned Names and Numbers) receiving twenty-seven (27) comments, both by individuals and organizations/groups. A summary and analysis of the comments were provided to the Board. ICANN (Internet Corporation for Assigned Names and Numbers) modified the proposed Renewal Registry Agreement to correct typographical errors and to incorporate additional clarifying language in response to the public comments related to the RPM (Rights Protection Mechanism) language proposed in Section 1 of Specification 7 regarding applicability and implementation of applicable rights protection mechanisms.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) conducted a review of Telnic's recent performance under the current .TEL Registry Agreement and found that Telnic substantially met its contractual requirements.

Resolved (2016.11.08.07), the .TEL Renewal Registry Agreement, as revised, is approved and the President and CEO, or his designee(s), is authorized to take such actions as appropriate to finalize and execute the Agreement.

Rationale for Resolution 2016.11.08.07

Why the Board is addressing the issue now?

ICANN (Internet Corporation for Assigned Names and Numbers) and Telnic Limited (the "Registry Operator") entered into a Registry Agreement (/resources/unthemed-pages/tel-2012-02-25-en) on 30 May 2006 for operation of the .TEL top-level domain. The current .TEL Registry Agreement expires on 01 March 2017. The proposed Renewal Registry Agreement was posted for public comment between 04 August 2016 and 13 September 2016. At this time, the Board is approving the Renewal Registry Agreement for the continued operation of the .TEL TLD (Top Level Domain) by the Registry Operator.

What is the proposal being considered?

The revised Renewal Registry Agreement approved by the Board includes modified provisions to bring the Agreement into line with the form of the New gTLD (generic Top Level Domain) Registry Agreement. The modifications include: updating technical specifications; adding Public Interest Commitments including the obligation to only use registrars under the 2013 Registrar Accreditation Agreement; and requiring the implementation of additional Rights Protection Mechanisms, namely the Uniform Rapid Suspension and the Post-Delegation Dispute Resolution Procedure.

Specifically, all approved registry services in the current .TEL Registry Agreement carry over to the revised Renewal Registry Agreement. Such services include Bulk Transfer After Partial Portfolio Acquisition, Registry Controlled DNS (Domain Name System) Records Service, Domain data change notifications, Whois private contact information opt-out for Individuals, Special Access Service, Additional RDDS Data Fields and Internationalized Domain Names.

With regard to the Schedule of Reserved Names, the revised Renewal Registry Agreement includes existing provisions permitting the Registry Operator to allocate previously reserved one and two-character names through ICANN (Internet Corporation for Assigned Names and Numbers)-accredited registrars via a Phased Allocation Program. However, all single-character numerical labels continue to be reserved at the second level.

As part of the adaptation needed to carry over the Sponsored TLD (Top Level Domain) Charter of .TEL to the revised Renewal Registry Agreement, Specification 12 incorporates the language of the original Sponsorship Charter - Appendix S (/resources/unthemed-pages/appendix-s-2011-02-02-en) in the current .TEL TLD (Top Level Domain) Agreement, with modifications to remove the requirement that the Registry control the name servers of delegated domain names, and the restriction that registrants cannot define the contents of the zone for their domain names. As .TEL was originally approved under this premise, the change will transform the .TEL TLD (Top Level Domain) into a gTLD (generic Top Level Domain) with a limited set of community parameters. These parameters will become optional rather than required.

Which stakeholders or others were consulted?

ICANN (Internet Corporation for Assigned Names and Numbers) conducted a public comment period on the proposed .TEL Renewal Registry Agreement from 04 August 2016 through 13 September 2016, following which time the comments were summarized and analyzed. Additionally, ICANN (Internet Corporation for Assigned Names and Numbers) engaged in bilateral negotiations with the Registry Operator to agree to the package of terms to be included in the proposed Renewal Registry Agreement that was posted for public comment.

What concerns or issues were raised by the community?

The proposed Renewal Registry Agreement was posted for public comment. Commenters expressed their views in three key areas during the public comment period:

- Extension of .TEL Registry Agreement: Some of the commenters expressed support for the extension of .TEL Registry Agreement, while others suggested that improvements should be implemented for .TEL domain names if the .TEL Registry Agreement is to be extended.
- Proposed Renewal Registry Agreement for .TEL: Three key issue areas were raised on the specific text of the renewal:

- General Views – Some commenters positively noted there are technical and operational advantages to the New gTLD (generic Top Level Domain) Registry Agreement form that serve as a benefit to registrants and the Internet community over earlier versions of the legacy Agreement. Additionally, there was support for ICANN (Internet Corporation for Assigned Names and Numbers)'s efforts at bilateral negotiations with legacy TLD (Top Level Domain) registries in order to transition to the New gTLD (generic Top Level Domain) Registry Agreement and the procedural benefit of consistency that will come with ICANN (Internet Corporation for Assigned Names and Numbers)'s bilaterally negotiating for transition to provisions of the New gTLD (generic Top Level Domain) Registry Agreement not only with .TEL but with other legacy TLDs like .JOBS, .CAT, .PRO, and .TRAVEL.
- Rights Protection Mechanisms – One commenter sought clarity over the language proposed in Section 1 of Specification 7 regarding applicability and implementation of rights protection mechanisms.
    - Registration Data Directory Service (Whois) – Some commenters raised concerns with continuing the unique Registration Data Directory Service that ICANN (Internet Corporation for Assigned Names and Numbers)'s Board approved in 2007 for the .TEL TLD (Top Level Domain).
- The continued operation of .TEL by Telnic Limited: Concerns were expressed over Telnic Limited continuing to be the Registry Operator of .TEL, claiming, among other things that Telnic has violated ICANN (Internet Corporation for Assigned Names and Numbers)'s requirements several times and Telnic no longer has stable financials to continue the operation of .TEL.

What significant materials did the Board review?

As part of its deliberations, the Board reviewed various materials, including, but not limited to, the following materials and documents:

- .TEL form of the New gTLD (generic Top Level Domain) Registry Agreement: <https://www.icann.org/sites/default/files/tlds/tel/tel-proposed-renewal-04aug16-en.pdf (/sites/default/files/tlds/tel/tel-proposed-renewal-04aug16-en.pdf)>
- .TEL Addendum to form of the New gTLD (generic Top Level Domain) Registry Agreement: <https://www.icann.org/sites/default/files/tlds/tel/tel-proposed-renewal-addendum-04aug16-en.pdf (/sites/default/files/tlds/tel/tel-proposed-renewal-addendum-04aug16-en.pdf)>. At this time, ICANN (Internet Corporation for Assigned Names and Numbers) is proposing to implement the incorporation of terms unique to a legacy TLD (Top Level Domain), such as .TEL, through an "Addendum" to the Registry Agreement. The Addendum will show the terms of the .TEL Registry Agreement that are unique from the New gTLD (generic Top Level Domain) Registry Agreement that are incorporated into the renewal.
- Public comments: <https://forum.icann.org/lists/comments-tel-renewal-04aug16/ (https://forum.icann.org/lists/comments-tel-renewal-04aug16/)>
- Summary and analysis of public comments: <https://www.icann.org/en/system/files/files/report-comments-tel-renewal-07oct16-en.pdf (/en/system/files/files/report-comments-tel-renewal-07oct16-en.pdf)>
- 27 September 2016 letter from Telnic CEO to ICANN (Internet Corporation for Assigned Names and Numbers) Board: https://www.icann.org/en/system/files/correspondence/mahdavi-to-icann-board-27sep16-en.pdf (/en/system/files/correspondence/mahdavi-to-icann-board-27sep16-en.pdf). Telnic's observations on past achievements and opportunities for .TEL.
- Current .TEL Registry Agreement and Appendices: <https://www.icann.org/resources/unthemed-pages/tel-2012-02-25-en (/resources/unthemed-pages/tel-2012-02-25-en)>

- New gTLD (generic Top Level Domain) Registry Agreement – Updated 09 January 2014 <http://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-09jan14-en.pdf (https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-09jan14-en.pdf) >
- 18 December 2007 Board Resolution (/resources/board-material/minutes-2007-12-18-en) that approved changes to .TEL's Registration Data Directory Service (Whois) requirements

What factors has the Board found to be significant?

The Board carefully considered the public comments received for the Renewal Registry Agreement, along with the summary and analysis of those comments. The Board also considered the terms agreed to by the Registry Operator as part of the bilateral negotiations with ICANN (Internet Corporation for Assigned Names and Numbers). The Board acknowledges the concerns expressed by some community members regarding suggested improvements that should be implemented for .TEL domain names if the .TEL Registry Agreement is to be extended. However, the terms of the .TEL Registry Agreement set forth the contractual obligations that must be fulfilled by Telnic Limited in its operation of the .TEL registry but do not prescribe or proscribe the Registry Operators' business model. Additionally, the Staff Report of Public Comment Proceeding (/en/system/files/files/report-comments-tel-renewal-07oct16-en.pdf) encouraged those commenters that desire to see changes in the business model of the .TEL registry to contact Telnic Limited to discuss these matters.

The Board acknowledges the request for clarity over the RPM (Rights Protection Mechanism) language proposed in Section 1 of Specification 7 regarding applicability and implementation of applicable rights protection mechanisms. While the revisions to Specification 7 were consistent with prior legacies, a modification was made to the language of the Renewal Registry Agreement for .TEL to address the comment. The revision is now reflected in Section 1 of Specification 7 of the revised Renewal Registry Agreement to read "Registry Operator will include all RPMs required by this Specification and any additional RPMs developed and implemented by Registry Operator in the registry-registrar agreement entered into by ICANN (Internet Corporation for Assigned Names and Numbers)-accredited registrars authorized to register names in the TLD (Top Level Domain)."

The Board acknowledges the concerns raised with continuing the unique Registration Data Directory Service that the Board approved in 2007 for the .TEL TLD (Top Level Domain). The Board notes the 18 December 2007 Board Resolution (/resources/board-material/minutes-2007-12-18-en) that approved changes to .TEL's Registration Data Directory Service (Whois) requirements was based on unique business and legal circumstances stating, "…the Board concludes that the requested modifications are justified by the unique business and legal circumstances of the .TEL top-level domain…" After conferring with Telnic Limited, ICANN (Internet Corporation for Assigned Names and Numbers) has confirmed that, to the knowledge of the Registry Operator, the legal circumstances related to Registration Data Directory Service (Whois) have not changed. Therefore, the Registration Data Directory Service (Whois) requirements which were ultimately replicated from the prior agreement between ICANN (Internet Corporation for Assigned Names and Numbers) and Telnic Limited will be retained in the Renewal Registry Agreement.

Additionally, the Board has considered comments regarding the continued operation of .TEL by Telnic Limited, including concerns that Telnic has violated ICANN (Internet Corporation for Assigned Names and Numbers)'s requirements several times and Telnic no longer has stable financials to continue the operation of .TEL. As part of the renewal process ICANN (Internet Corporation for Assigned Names and Numbers) conducts a review of contractual compliance under the .TEL Registry Agreement. Telnic Limited was found to be in substantial compliance with their contractual requirements. Also, during the past 10 years of operation, ICANN (Internet Corporation for Assigned Names and Numbers) has no knowledge of Telnic Limited experiencing financial or other operational impediments that have caused a failure of registry operations or security and stability concerns. If Telnic Limited were to experience financial problems that resulted in the Registry Operator failing to comply with its obligations under the Registry Agreement, ICANN (Internet Corporation for Assigned Names and Numbers) can take action to protect registrants and ensure continuity of registry operations.

Finally, the Board notes that existing Registry Agreement calls for presumptive renewal of the Agreement at its expiration so long as certain requirements are met. These provisions are intended to promote stability and security of the registry by encouraging long-term investment in TLD (Top Level Domain) operations, which benefits the community in the form of reliable operation of registry infrastructure. The Renewal Registry Agreement is subject to the negotiation of renewal terms reasonably acceptable to ICANN (Internet Corporation for Assigned Names and Numbers) and the Registry Operator. The renewal terms approved by the Board are the result of the bilateral negotiations called for in the current Registry Agreement.

Are there positive or negative community impacts?

The Board's approval of the Renewal Registry Agreement also offers positive technical and operational benefits. Pursuant to the Renewal Registry Agreement, in the event that any of the emergency thresholds for registry functions is reached, Registry Operator agrees that ICANN (Internet Corporation for Assigned Names and Numbers) may designate an emergency interim Registry Operator of the registry for the TLD (Top Level Domain), which would mitigate the risks to the stability and security of the Domain Name (Domain Name) System. Also, technical onboarding of the Registry Operator to comply with the provisions in the New gTLD (generic Top Level Domain) Agreement will allow the registry to use uniform and automated processes, which will facilitate operation of the TLD (Top Level Domain).

There will also be positive impacts on registrars and registrants. The transition to the New gTLD (generic Top Level Domain) Registry Agreement will provide consistency across all registries leading to a more predictable environment for end-users and also the fact that the proposed Renewal Registry Agreement requires that the Registry Operator uses ICANN (Internet Corporation for Assigned Names and Numbers) accredited registrars that are party to the 2013 Registrar Accreditation Agreement (RAA (Registrar Accreditation Agreement)) only will provide more benefits to registrars and registrants.

Are there fiscal impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) (strategic plan, operating plan, budget); the community; and/or the public?

There is no significant fiscal impact expected if ICANN (Internet Corporation for Assigned Names and Numbers) approves the proposed .TEL Renewal Registry Agreement. It should be noted however that as a result of approval of the Renewal Registry Agreement, projected annual registry fees to ICANN (Internet Corporation for Assigned Names and Numbers) will result in a minimal negative fiscal impact. This change has been considered in ICANN (Internet Corporation for Assigned Names and Numbers)'s budget.

Are there any security, stability or resiliency issues relating to the DNS (Domain Name System)?

There are no expected security, stability, or resiliency issues related to the DNS (Domain Name System) if ICANN (Internet Corporation for Assigned Names and Numbers) approves the proposed .TEL Renewal Registry Agreement. The proposed Renewal Registry Agreement in fact includes terms intended to allow for swifter action in the event of certain threats to the security or stability of the DNS (Domain Name System). As part of ICANN (Internet Corporation for Assigned Names and Numbers)'s organizational administrative function, ICANN (Internet Corporation for Assigned Names and Numbers) posted the draft Renewal Registry Agreement for public comment on 04 August 2016.

h. Thank You to Community Members

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) wishes to acknowledge the considerable effort, skills, and time that members of the stakeholder community contribute to ICANN (Internet Corporation for Assigned Names and Numbers).

Whereas, in recognition of these contributions, ICANN (Internet Corporation for Assigned Names and Numbers) wishes to acknowledge and thank members of the community when their terms of service end on the Supporting Organizations (Supporting Organizations), Advisory Committees (Advisory Committees) and Nominating Committee.

Whereas, the following members of the Address Supporting Organization (Supporting Organization) are concluding their terms of service:

- Dmitry Kohmanyuk, Address Supporting Organization (Supporting Organization) Address Council Member
- John Sweeting, Address Supporting Organization (Supporting Organization) Address Council Member

Resolved (2016.11.08.08), Dmitry Kohmanyuk and John Sweeting have earned the deep appreciation of the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors for their terms of service, and the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors wishes them well in their future endeavors within the ICANN (Internet Corporation for Assigned Names and Numbers) community and beyond.

Whereas, the following members of the County Code Names Supporting Organization (Supporting Organization) are concluding their terms of service:

- Becky Burr, County Code Names Supporting Organization (Supporting Organization) Council Member
- Celia Lerman Friedman, County Code Names Supporting Organization (Supporting Organization) Council Member
- Vika Mpisane, County Code Names Supporting Organization (Supporting Organization) Council Member
- Ron Sherwood, County Code Names Supporting Organization (Supporting Organization) Liaison to the At-Large Advisory Committee (Advisory Committee)

Resolved (2016.11.08.09), Becky Burr, Celia Lerman Friedman, Vika Mpisane, and Ron Sherwood have earned the deep appreciation of the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors for their terms of service, and the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors wishes them well in their future endeavors within the ICANN (Internet Corporation for Assigned Names and Numbers) community and beyond.

Whereas, the following members of the Generic Names Supporting Organization (Supporting Organization) are concluding their terms of service:

- David Cake, Generic Names Supporting Organization (Supporting Organization) Councilor
- Mason Cole, Generic Names Supporting Organization (Supporting Organization) Liaison to the Governmental Advisory Committee (Advisory Committee)
- Jennifer Gore, Generic Names Supporting Organization (Supporting Organization) Councilor
- Volker Greimann, Generic Names Supporting Organization (Supporting Organization) Councilor
- Carlos Ra (Registrar)úl Gutiérrez, Councilor
- Michele Neylon, Registrar Stakeholder Group Chair
- Darcy Southwell, Registrar Stakeholder Group Vice Chair
- Rudi Vansnick, Not-for-Profit Operational Concerns Constituency Chair

Resolved (2016.11.08.10), David Cake, Mason Cole, Jennifer Gore, Volker Greimann, Carlos Ra (Registrar)úl Gutiérrez, Michele Neylon, Darcy Southwell, and Rudi Vansnick have earned the deep appreciation of the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors for their terms of service, and the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors wishes them well in their future endeavors within the ICANN (Internet Corporation for Assigned Names and Numbers) community and beyond.

Whereas, the following members of the At-Large community are concluding their terms of service:

- Satish Babu, Asian, Australasian and Pacific Islands Regional At-Large Organization Vice Chair
- Humberto Carrasco, Latin American and Caribbean Islands Regional At-Large Organization Secretariat
- Olivier Crépin-Leblond, At-Large Advisory Committee (Advisory Committee) Liaison to the Generic Names Supporting Organization (Supporting Organization)
- Timothy Denton, At-Large Advisory Committee (Advisory Committee) Member
- Sandra Hoferichter, At-Large Advisory Committee (Advisory Committee) Member
- Barrack Otieno, African Regional At-Large Organization Secretariat
- Vanda Scartezini, At-Large Advisory Committee (Advisory Committee) Member
- Jimmy Schulz, At-Large Advisory Committee (Advisory Committee) Member
- Alberto Soto, Latin American and Caribbean Islands Regional At-Large Organization Chair
- Siranush Vardanyan, Asian, Australasian and Pacific Islands Regional At-Large Organization Chair

Resolved (2016.11.08.11), Satish Babu, Humberto Carrasco, Olivier Crépin-Leblond, Timothy Denton, Sandra Hoferichter, Barrack Otieno, Vanda Scartezini, Jimmy Schulz, Alberto Soto, and Siranush Vardanyan have earned the deep appreciation of the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors for their terms of service, and the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors wishes them well in their future endeavors within the ICANN (Internet Corporation for Assigned Names and Numbers) community and beyond.

Whereas, the following members of the Root Server System Advisory Committee (Advisory Committee) are concluding their terms of service:

- Jim Cassell, Member
- Ashley Heineman, National Telecommunications and Information Administration Liaison to the Root Server System Advisory Committee (Advisory Committee)
- Lars-Johan Liman, Co-Chair
- Jim Martin, Member

Resolved (2016.11.08.12), Jim Cassell, Ashley Heineman, Lars-Johan Liman, and Jim Martin have earned the deep appreciation of the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors for their terms of service, and the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors wishes them well in their future endeavors within the ICANN (Internet Corporation for Assigned Names and Numbers) community and beyond.

Whereas, the following member of the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) is concluding his term of service:

- Shinta Sato, Member

Resolved (2016.11.08.13), Shinta Sato has earned the deep appreciation of the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors for his terms of service, and the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors wishes him well in their future endeavors within the ICANN (Internet Corporation for Assigned Names and Numbers) community and beyond.

Whereas, the following members of the Nominating Committee are concluding their terms of service:

- Stephen Coates, Member
- Sylvia Herlein Leite, Member
- Hans Petter Holen, Chair-Elect
- Zahid Jamil, Member
- Wolfgang Kleinwächter, Associate Chair
- Yrjö Länsipuro, Member
- Stéphane Van Gelder, Chair

Resolved (2016.11.08.14), Stephen Coates, Sylvia Herlein Leite, Hans Petter Holen, Zahid Jamil, Wolfgang Kleinwächter, Yrjö Länsipuro, and Stéphane Van Gelder have earned the deep appreciation of the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors for their terms of service, and the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors wishes them well in their future endeavors within the ICANN (Internet Corporation for Assigned Names and Numbers) community and beyond.

i. Thank You to Local Host of ICANN (Internet Corporation for Assigned Names and Numbers) 57 Meeting

The Board wishes to extend its thanks to the local host organizer, Minister Ravi Shankar Prasad and the Government of India including Ministry of Electronics and Information Technology, Ministry of External Affairs, National Security (Security – Security, Stability and Resiliency (SSR)) Council Secretariat, Ministry of Home Affairs, Government of Telangana and National Internet Exchange of India (NIXI).

j. Thank You to Sponsors of ICANN (Internet Corporation for Assigned Names and Numbers) 57 Meeting

The Board wishes to thank the following sponsors: CentralNic, Knipp Median und Communication GmbH, Afilias plc, Public Interest Registry, China Internet Network Information Center, Nominet, Web Werks India Pvt. Ltd., Radix FZC, Verisign, .blog, Directi Web Technology Private Limited, BNSL, Tata Tele Services, Atria Convergence Technologies Pvt. Ltd. (ACT) and GMR.

k. Thank You to Interpreters, Staff, Event and Hotel Teams of ICANN (Internet Corporation for Assigned Names and Numbers) 57 Meeting

The Board expresses its deepest appreciation to the scribes, interpreters, audiovisual team, technical teams, and the entire ICANN (Internet Corporation for Assigned Names and Numbers) staff for their efforts in facilitating the smooth operation of the meeting.

The Board would also like to thank the management and staff of the Hyderabad International Convention Center for providing a wonderful facility to hold this event. Special thanks are extended to Vijay Ramnath Ugale, Event Manager; Varun Mehrotra, Director of Sales - Meetings & Events; Gorav Arora, Director of Sales and Marketing; Shyam Sunder, Director of Convention; Ravindra Reddy, Assistant Manager of Client Services; Johnet Pereira, Manager of Client Services; Rambabu Talluri, IT Manager; Anand Prakash Ravi, Operational Manager; Ramu Dasari, Asst. Manager of Client Services; Mr. Ranjan Alu, Asst. Manager F&B; Executive Chef Amanaraju; and Gilbert Yeo from Pryde Live.

2. Main Agenda:

a. Two-Character Domain Names in the New gTLD (generic Top Level Domain) Namespace

Whereas, Specification 5, Section 2 of the New gTLD (generic Top Level Domain) Registry Agreement requires registry operators to reserve two-character ASCII labels within the TLD (Top Level Domain) at the second level. The reserved two-character labels "may be released to the extent that Registry Operator reaches agreement with the related government and country-code manager of the string as specified in the ISO (International Organization for Standardization) 3166-1 alpha-2 standard. The Registry Operator may also propose the release of these reservations based on its implementation of measures to avoid confusion with the corresponding country codes, subject to approval by ICANN (Internet Corporation for Assigned Names and Numbers)."

Whereas, the GAC (Governmental Advisory Committee) has issued advice to the Board in various communiqués on two-character domains. The Los Angeles Communiqué (/en/system/files/correspondence/gac-to-board-15oct14-en.pdf) (15 October 2014) stated, "The GAC (Governmental Advisory Committee) recognized that two-character second level domain names are in wide use across existing TLDs, and have not been the cause of any security, stability, technical or competition concerns. The GAC (Governmental Advisory Committee) is not in a position to offer consensus advice on the use of two-character second level domains names in new gTLD (generic Top Level Domain) registry operations, including those combinations of letters that are also on the ISO (International Organization for Standardization) 3166-1 alpha 2 list." The GAC (Governmental Advisory Committee) also issued advice in the Singapore Communiqué (/en/system/files/correspondence/gac-to-board-11feb15-en.pdf) (11 February 2015) and the Dublin Communiqué (/en/system/files/correspondence/gac-to-board-21oct15-en.pdf) (21 October 2015).

Whereas, on 16 October 2014, the Board directed ICANN (Internet Corporation for Assigned Names and Numbers) to develop and implement an efficient procedure for the release of two-character domains currently required to be reserved in the New gTLD (generic Top Level Domain) Registry Agreement, taking into account the GAC (Governmental Advisory Committee)'s advice in the Los Angeles Communiqué on the matter. ICANN (Internet Corporation for Assigned Names and Numbers) launched this procedure (the "Authorization Process") on 1 December 2014.

Whereas, as part of the Authorization Process, ICANN (Internet Corporation for Assigned Names and Numbers) launched a community consultation process to help develop a standard set of proposed measures to avoid confusion with country codes. The measures were intended to be mandatory for new gTLD (generic Top Level Domain) registries seeking to release reserved letter/letter two-character labels.

Whereas, in the GAC (Governmental Advisory Committee)'s Helsinki Communiqué (/en/system/files/correspondence/gac-to-board-30jun16-en.pdf) (30 June 2016), the GAC (Governmental Advisory Committee) advised the Board to "urge the relevant Registry or the Registrar to engage with the relevant GAC (Governmental Advisory Committee) members when a risk is identified in order to come to an agreement on how to manage it or to have a third-party assessment of the situation if the name is already registered." The advice was incorporated in the proposed measures to avoid confusion.

Whereas, on 8 July 2016, ICANN (Internet Corporation for Assigned Names and Numbers) published for public comment the Proposed Measures for Letter/Letter Two-Character ASCII Labels to Avoid Confusion with Corresponding Country Codes (/en/system/files/files/proposed-measures-two-char-08jul16-en.pdf), which listed measures registry operators could adopt to avoid confusion with corresponding country codes. The measures incorporated the GAC (Governmental Advisory Committee)'s advice issued in the Helsinki Communiqué (/en/system/files/correspondence/gac-to-board-30jun16-en.pdf). Forty-three comments were submitted by individuals, governments and groups/organizations.

Whereas, the Board considered the public comments, the staff summary and analysis report of public comments, and GAC (Governmental Advisory Committee) advice. The proposed measures were updated to take into account the public comments and GAC (Governmental Advisory Committee) advice relating to the proposed measures and two-character labels.

Resolved (2016.11.08.15), the Measures for Letter/Letter Two-Character ASCII Labels to Avoid Confusion with Corresponding Country Codes (/en/system/files/files/revised-measures-ltr-ltr-two-char-ascii-labels-country-codes-08nov16-en.pdf) as revised are approved, and the President and CEO, or his designee(s), is authorized to take such actions as appropriate to authorize registry operators to release at the second level the reserved letter/letter two-character ASCII labels not otherwise reserved pursuant to Specification 5, Section 6 of the Registry Agreement, subject to these measures.

Rationale for Resolution 2016.11.08.15

Why the Board is addressing the issue?

On 16 October 2014, the Board adopted a resolution directing staff to develop and implement an efficient procedure for the release of two-character domains currently required to be reserved in the New gTLD (generic Top Level Domain) Registry Agreement, taking into account the GAC (Governmental Advisory Committee)'s advice in the Los Angeles Communiqué (/en/system/files/correspondence/gac-to-board-15oct14-en.pdf) on the matter.

For nearly two and a half years, ICANN (Internet Corporation for Assigned Names and Numbers) has been developing and implementing a procedure as directed by the Board. On 1 December 2014, ICANN (Internet Corporation for Assigned Names and Numbers) launched the first phase of the procedure, an Authorization Process for Release of Two-Character ASCII Labels (/resources/two-character-labels). The finalization of this procedure is the implementation of a framework containing standardized measures registry operators can implement to avoid confusion, in accordance with the Registry Agreement, and allow for the release of all letter/letter two-character ASCII labels corresponding with country codes not otherwise reserved pursuant to Specification 5, Section 6 of the Registry Agreement.

The GAC (Governmental Advisory Committee) has issued advice on this topic in various communiqués over the past two years including, most recently, the Helsinki Communiqué (/en/system/files/correspondence/gac-to-board-30jun16-en.pdf). Per Article XI, Section 2.1 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws (https://www.icann.org/en/about/governance/bylaws#XI), the GAC (Governmental Advisory Committee) may "put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies." The ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws require the Board to take into account the GAC (Governmental Advisory Committee)'s advice on public policy matters in the formulation and adoption of the policies.

What is the proposal being considered?

The proposal is to address requests from registry operators to release reserved letter/letter two-character ASCII labels and the advice from the GAC (Governmental Advisory Committee) on reserved letter/letter labels. The Board is taking action to approve the Measures for Letter/Letter Two-Character ASCII Labels to Avoid Confusion with Corresponding Country Codes, as revised. By approving the revised measures, the Board is authorizing ICANN (Internet Corporation for Assigned Names and Numbers) to issue a blanket authorization that allows new gTLD (generic Top Level Domain) registry operators who implement the required measures to release all reserved letter/letter two-character ASCII labels not otherwise reserved pursuant to Specification 5, Section 6 of the New gTLD (generic Top Level Domain) Registry Agreement. The current authorization process, whereby a registry operator submits an individual request subject to 60-day comment period and ICANN (Internet Corporation for Assigned Names and Numbers)'s review of comments, will be retired.

Which stakeholders or others were consulted?

ICANN (Internet Corporation for Assigned Names and Numbers) initiated multiple public comment periods and consulted with various stakeholders on this matter over a period of nearly two and a half years.

From June through September 2014, ICANN (Internet Corporation for Assigned Names and Numbers) staff initiated five public comment forums to obtain feedback from the community on

the amendments that resulted from various RSEPs to implement the proposed new registry service of releasing from reservation two-character ASCII labels[1] for 203 TLDs. Various members of the community submitted comments, including the At-Large Advisory Committee (Advisory Committee) (ALAC (At-Large Advisory Committee)), gTLD (generic Top Level Domain) registry operators, the Brand Registry Group (BRG (Brand Registry Group)), INTA (International Trademark Association) Internet Committee (INTA (International Trademark Association)), the Business Constituency (BC (Business Constituency)), the Intellectual Property Constituency (IPC (Intellectual Property Constituency)) and a registrar.

Since 1 December 2014 at the launch of the Authorization Process for Release from Two-Character ASCII Labels (/resources/two-character-labels), all authorization requests for letter/letter two-character ACII labels were subject to a comment period. Over 646 requests have been received under this process.

Throughout the nearly two and a half years, ICANN (Internet Corporation for Assigned Names and Numbers) notified 1) the GAC (Governmental Advisory Committee) for amendments posted from June through September 2014 and 2) governments for requests under the Authorization Process since December 2014, when two-character requests from registry operators were posted for comment. The GAC (Governmental Advisory Committee) had not submitted comments under the Public Comment Periods for the amendments to release two-character labels. Under the Authorization Process, the GAC (Governmental Advisory Committee) had not submitted comments, but various individual governments submitted comments on requests.

On 6 October 2015, ICANN (Internet Corporation for Assigned Names and Numbers) corresponded with governments who previously submitted comments requesting that clarification of their comments be provided via a new comment form within 60 days; new comments were required to be submitted via the new comment form.

On 25 February 2016, ICANN (Internet Corporation for Assigned Names and Numbers) corresponded with registry operators requesting they provide proposed measures to avoid confusion with corresponding country codes in order to respond to governments' confusion concerns within 60 days.

On 8 July 2016, taking into consideration the inputs from governments and registry operators, ICANN (Internet Corporation for Assigned Names and Numbers) published for public comment the Proposed Measures for Letter/Letter Two-Character ASCII Labels to Avoid Confusion with Corresponding Country Codes (/en/system/files/files/proposed-measures-two-char-08jul16-en.pdf), which listed measures registry operators could adopt to avoid confusion with corresponding country codes and which incorporated the GAC (Governmental Advisory Committee)'s advice issued in its Helsinki Communiqué (/en/system/files/correspondence/gac-to-board-30jun16-en.pdf). As part of the proposal, registry operators who adopt the measures would be authorized to release all letter/letter two-character ASCII labels not otherwise reserved in other sections of the Registry Agreement, and the current process would be retired. Forty-three comments were received, including comments from the RySG (Registries Stakeholder Group), the BRG (Brand Registry Group), the IPC (Intellectual Property Constituency), the NCSG (Non-Commercial Stakeholders Group), LACTLD (Latin American and Caribbean ccTLDs), various governments, ccTLD (Country Code Top Level Domain) registry operators and gTLD (generic Top Level Domain) registry operators.

What concerns or issues were raised by the community?

From the five public comment periods from 2014 on registry agreement amendments that resulted from RSEPs, the majority of the comments received were in favor of the release of two-character domain names.

The arguments made in favor of the release of the two-character domain names included:

- The introduction of two-character domain names would increase competition since the current restrictions hinder competition, in particular for the new gTLDs, which are competing with legacy TLDs that are allowed to offer such registrations. The current restrictions to the new gTLD (generic Top Level Domain) registry operators create a discriminatory situation, which is contrary to the ICANN (Internet Corporation for Assigned

Names and Numbers) Bylaws Article II, Section 3 that provide for Non-Discriminatory Treatment of ICANN (Internet Corporation for Assigned Names and Numbers) stakeholders.

- The introduction of two-character domain names poses a limited risk of confusion, or no risk at all, as demonstrated by prior use of two-character domain names in existing TLDs.
- The release of two-character domain names would provide opportunities for companies and brands to have tailored segmented domain names to connect with the public as well as provide localized content, thus expanding consumer choice and driving economic growth, in particular in developing countries.
- There is uniform precedent regarding the release of two-character domain names in the history of relevant RSEP (Registry Services Evaluation Policy) requests.
- The release of country codes and names is allowed by the Applicant Guidebook.

The arguments made in opposition to the release of the two-character domain names expressed two general concerns: the first concern is related to the general recognition and associated use of the two character domain names leading to user confusion or abuse; the second concern is how to specifically protect ccTLDs when country and territory names are newly formed.

From the public comment forum for the Proposed Measures for Letter/Letter Two-Character ASCII Labels to Avoid Confusion with Corresponding Country Codes (/en/system/files/files/proposed-measures-two-char-08jul16-en.pdf), which established a standard set of registry operator requirements to avoid confusion, comments indicated support for the release of two-character labels reserved pursuant to Specification 5, Section 2 of the New gTLD (generic Top Level Domain) Registry Agreement overall, including comments of support from the NCSG (Non-Commercial Stakeholders Group), IPC (Intellectual Property Constituency) and RySG (Registries Stakeholder Group) among others. Comments noted that the Registry Agreement allows for two paths by which registry operators may release two-character labels: one path of agreement with the government and country-code manager, and a second path of ICANN (Internet Corporation for Assigned Names and Numbers) approval.

There was moderate support for the Proposed Measures to the extent the Proposed Measures allows for the release of two-character labels, including comments of support from the RySG (Registries Stakeholder Group) and BRG (Brand Registry Group) among others. Comments that seem to generally support the Proposed Measures made specific suggestions about how the framework could be improved, such as noting that two of the three proposed measures (registration policy and post-registration investigation) pertained to confusion and suggesting one measure (exclusive availability pre-registration period) be made voluntary.

Some commenters took the position that governments do not have special rights to two-character labels that correspond with country codes, and that the labels should be released as soon as possible. Conversely, some governments and ccTLD (Country Code Top Level Domain) operators commented with objections to the release of two-character labels that correspond with country codes and took the position that government and/or ccTLD (Country Code Top Level Domain) operator approval is required.

Over the past two years, the GAC (Governmental Advisory Committee) has issued advice through various communiqués and formal correspondence to ICANN (Internet Corporation for Assigned Names and Numbers). Members of the GAC (Governmental Advisory Committee) have varying views on the topic. In the Los Angeles Communiqué (/en/system/files/correspondence/gac-to-board-15oct14-en.pdf) (15 October 2014), the GAC (Governmental Advisory Committee) stated, “The GAC (Governmental Advisory Committee) recognized that two-character second level domain names are in wide use across existing TLDs, and have not been the cause of any security, stability, technical or competition concerns. The GAC (Governmental Advisory Committee) is not in a position to offer consensus advice on the use of two-character second level domains names in new gTLD (generic Top Level Domain) registry operations, including those combinations of letters that are also on the ISO (International Organization for Standardization) 3166-1 alpha 2 list.” In the Helsinki Communiqué

(https://gacweb.icann.org/download/attachments/27132037/20160630_GAC%20ICANN%2056%20Communique_FINAL%20%5B1%5D.pdf?version=1&modificationDate=1469016353728&api=v2) (30 June 2016), the GAC (Governmental Advisory Committee) stated, "Some countries and territories have stated they require no notification for the release of their 2 letter codes for use at the second level. The GAC (Governmental Advisory Committee) considers that, in the event that no preference has been stated, a lack of response should not be considered consent. Some other countries and territories require that an applicant obtains explicit agreement of the country/territory whose 2-letter code is to be used at the second level."

The Singapore Communiqué (/en/system/files/correspondence/gac-to-board-11feb15-en.pdf) (11 February 2015) and Dublin Communiqué (/en/system/files/correspondence/gac-to-board-21oct15-en.pdf) (21 October 2015) advised improvements to the process such as extending the comment period from 30 days to 60 days and working with the GAC (Governmental Advisory Committee) Secretariat to address technical issues on the comment form. In both communiqués, the GAC (Governmental Advisory Committee) advised that comments from relevant governments should be fully considered. In its Helsinki Communiqué (https://gacweb.icann.org/download/attachments/27132037/20160630_GAC%20ICANN%2056%20Communique_FINAL%20%5B1%5D.pdf?version=1&modificationDate=1469016353728&api=v2), the GAC (Governmental Advisory Committee) also advised the Board to "urge the relevant Registry or the Registrar to engage with the relevant GAC (Governmental Advisory Committee) members when a risk is identified in order to come to an agreement on how to manage it or to have a third-party assessment of the situation if the name is already registered."

What significant materials did the Board review? What factors did the Board find to be significant?

The Board reviewed several materials and also considered several significant factors during its deliberations about whether or not to approve the request. The significant materials and factors that the Board considered as part of its deliberations, included, but not limited to the following:

- Specification 5, Section 2 of the New gTLD (generic Top Level Domain) Registry Agreement (https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-09jan14-en.htm) (updated 9 January 2014)
- RSTEP (Registry Services Technical Evaluation Panel) Report on the Proposal for the Limited Release of Initially Reserved Two-Character Names (/en/system/files/files/rstep-gnr-proposal-review-team-report-04dec06-en.pdf) (4 December 2006)
- Correspondence from the Board to the GAC (Governmental Advisory Committee) regarding requests for release of two-character labels as second-level domains in New gTLDs (/en/system/files/correspondence/crocker-to-dryden-2-02sep14-en.pdf) (2 September 2014)
- Correspondence from the GAC (Governmental Advisory Committee) to the Board regarding requests for release of two-character labels as second-level domains in New gTLDs (/en/system/files/correspondence/dryden-to-crocker-10sep14-en.pdf) (10 September 2014)
- GAC (Governmental Advisory Committee) Los Angeles Communiqué (/en/system/files/correspondence/gac-to-board-15oct14-en.pdf) (15 October 2014)
- ICANN (Internet Corporation for Assigned Names and Numbers) Board Resolution 2014.10.16.14: Introduction of Two-character Domain Names in the New gTLD (generic Top Level Domain) Namespace (/resources/board-material/resolutions-2014-10-16-en#2.b) (16 October 2014)
- Authorization Process for Release of Two-Character ASCII Labels (/resources/two-character-labels) (launched 1 December 2014, last updated 14 April 2016)
- GAC (Governmental Advisory Committee) Singapore Communiqué (/en/system/files/correspondence/gac-to-board-11feb15-en.pdf) (11 February 2015)
- ICANN (Internet Corporation for Assigned Names and Numbers) Board Resolution 2015.02.12.2016: Release of Two-Letter Codes at the Second Level in gTLDs

(/resources/board-material/resolutions-2015-02-12-en#2.a) (12 February 2015)

- Correspondence from RySG (Registries Stakeholder Group) to the President of the Global Domains Division regarding the treatment of government comments on requests to release two-character ASCII labels (/en/system/files/correspondence/rysg-to-atallah-13mar15-en.pdf) (13 March 2015)
- Response from the President of the Global Domains Division to the RySG (Registries Stakeholder Group) regarding the treatment of government comments on requests to release two-character ASCII labels (/en/system/files/correspondence/atallah-to-rysg-23mar15-en.pdf) (23 March 2015)
- Joint Correspondence from the BRG (Brand Registry Group), the BC (Business Constituency) and the IPC (Intellectual Property Constituency) to the Board regarding the release of 2-letter labels and country names for Specification 13 registries (/en/system/files/correspondence/sutton-cooper-shatan-to-crocker-14apr15-en.pdf) (14 April 2015)
- Response from the President of the Global Domains Division to the BRG (Brand Registry Group), the BC (Business Constituency) and the IPC (Intellectual Property Constituency) regarding the release of 2-letter labels and country names for Specification 13 registries (/en/system/files/correspondence/atallah-to-sutton-et-al-15jun15-en.pdf) (15 June 2015)
- Correspondence from GAC (Governmental Advisory Committee) to the President of the Global Domains Division regarding two-character codes as Second Level Domains (/en/system/files/correspondence/schneider-to-atallah-16jul15-en.pdf) (16 July 2015)
- Response from the President of the Global Domains Division to the GAC (Governmental Advisory Committee) regarding two-character codes as Second Level Domains (/en/system/files/correspondence/atallah-to-schneider-1-06aug15-en.pdf) (6 August 2015)
- Two-Character Letter/Letter Labels Comments Consideration Process (/resources/pages/two-character-comments-consideration-2015-10-06-en) (launched 8 October 2015, last updated 25 February 2016)
- GAC (Governmental Advisory Committee) Dublin Communiqué (/en/system/files/correspondence/gac-to-board-21oct15-en.pdf) (21 October 2015)
- Correspondence from RySG (Registries Stakeholder Group) to the Board regarding advice contained in the GAC (Governmental Advisory Committee)'s Dublin communiqué regarding the use of two-letter country codes (/en/system/files/correspondence/diaz-to-crocker-09nov15-en.pdf) (9 November 2015)
- Response from the Board to the RySG (Registries Stakeholder Group) regarding advice contained in the GAC (Governmental Advisory Committee)'s Dublin communiqué regarding the use of two-letter country codes (/en/system/files/correspondence/chalaby-to-diaz-30mar16-en.pdf) (30 March 2016)
- GAC (Governmental Advisory Committee) Helsinki Communiqué (/en/system/files/correspondence/gac-to-board-30jun16-en.pdf) (30 June 2016)
- Proposed Measures for Letter/Letter Two-Character ASCII Labels to Avoid Confusion with Corresponding Country Codes (/en/system/files/files/proposed-measures-two-char-08jul16-en.pdf) (8 July 2016)
- Public Comment Summary and Analysis Report on Proposed Measures (/en/system/files/files/report-comments-proposed-measures-two-char-ascii-23sep16-en.pdf) (23 September 2016)
- Correspondence from the Secretariat General of the Cooperation Council for the Arab States of the Gulf to the ICANN (Internet Corporation for Assigned Names and Numbers) President and CEO regarding the proposed measures for letter/letter two-character ASCII labels (3 October 2016)
- Correspondence from the Communication and Information Technology Regulatory Authority of Kuwait to the ICANN (Internet Corporation for Assigned Names and Numbers)

President and CEO regarding the proposed measures for letter/letter two-character ASCII labels (12 October 2016)

Are there positive or negative community impacts? Are there fiscal impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) (strategic plan, operating plan, budget); the community; and/or the public? Are there any security, stability or resiliency issues relating to the DNS (Domain Name System)?

The overall impact on the community is anticipated to be positive as new opportunities for diversification, competition and targeted content creation in the gTLD (generic Top Level Domain) namespace are created, while minimal risk of user confusion has been identified.

It is not expected that there will be any significant fiscal impact on ICANN (Internet Corporation for Assigned Names and Numbers).

In December 2006, the Registry Services Technical Evaluation Panel (RSTEP (Registry Services Technical Evaluation Panel)) issued a report (/en/system/files/files/rstep-gnr-proposal-review-team-report-04dec06-en.pdf) regarding the release of two-character labels and found that "taken in the context of our overall understanding, none of the observations point to the proposed release of two-character Second Level Domain having a material security or stability impact on the Internet." Additionally, these names are not reserved in many legacy TLDs, which have not caused apparent security, stability or resiliency issues in relation to the DNS (Domain Name System).

It is expected that the release of these names in new gTLDs will not cause security, stability or resiliency issues.

Is this either a defined policy process within ICANN (Internet Corporation for Assigned Names and Numbers)'s Supporting Organizations (Supporting Organizations) or ICANN (Internet Corporation for Assigned Names and Numbers)'s Organizational Administrative Function decision requiring public comment or not requiring public comment?

This is an Organizational Administrative Function for which public comments were received.

b. Consideration of the *Corn Lake, LLC v. ICANN (Internet Corporation for Assigned Names and Numbers)* Independent Review Process Final Declaration

Whereas, on 19 October 2016, ICANN (Internet Corporation for Assigned Names and Numbers) received the Independent Review Process (IRP) Final Declaration in the IRP filed by Corn Lake, LLC (Corn Lake) against ICANN (Internet Corporation for Assigned Names and Numbers) (Final Declaration).

Whereas, the IRP Panel declared that: (i) Corn Lake's challenges to the determination rendered by an expert panelist sustaining the Independent Objector's (IO's) Community Objection against Corn Lake's application for .CHARITY (Expert Determination) and the Board Governance Committee's (BGC's) denial of Corn Lake's Reconsideration Request 14-3 challenging the Expert Determination were time-barred; (ii) "the Board acted without conflict [of interest]"; and (iii) "the Board members exercised independent judgment, believed to be in the best interests of the community." (See Final Declaration, ¶¶ 7.14, 8.70, 8.74, https://www.icann.org/en/system/files/files/irp-corn-lake-final-declaration-17oct16-en.pdf (/en/system/files/files/irp-corn-lake-final-declaration-17oct16-en.pdf).)

Whereas, the Panel further declared that "the [Board] action of omitting .CHARITY from the [the review mechanism to address perceived inconsistent or unreasonable string confusion objection determinations (Final Review Procedure)] was inconsistent with the Articles of Incorporation and Bylaws." (Final Declaration at ¶ 11.1(b).)

Whereas, the Panel further declared that "Claimant, Corn Lake, is the prevailing party" and that "no costs shall be allocated to the prevailing party." (Final Declaration at ¶¶ 11.1(a), (e).)

Whereas, the Panel recommended that: (1) "the Board extend the [Final Review Procedure] to include review of Corn Lake's .CHARITY Expert Determination"; and (2) "the Board continue to stay any action or decision in relation to [Spring Registry Limited's] .CHARITY application until such time as the Board reviews and acts upon the opinion of the IRP Panel." (Final Declaration at ¶¶ 11.1(c)-(d).)

Whereas, in accordance with Article IV, section 3.21 of ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws, the Board has considered the Final Declaration.

Resolved (2016.11.08.16), the Board accepts the following findings of the Final Declaration: (i) Corn Lake is the prevailing party in the Corn Lake, LLC v. ICANN (Internet Corporation for Assigned Names and Numbers) IRP; (ii) Corn Lake's challenges to the Expert Determination and the BGC's denial of Corn Lake's Reconsideration Request 14-3 were time-barred; (iii) the Board acted without conflict of interest; (iv) "the Board members exercised independent judgment, believed to be in the best interests of the community"; (v) "the [Board] action of omitting .CHARITY from the [Final Review Procedure] was inconsistent with the Articles of Incorporation and Bylaws"; and (vi) the parties shall each bear their own costs.

Resolved (2016.11.08.17), the Board directs the President and CEO, or his designee(s), to take all steps necessary to implement the Panel's recommendation that "the Board extend the [Final Review Procedure] to include review of Corn Lake's .CHARITY Expert Determination."

Resolved (2016.11.08.18), the Board directs the President and CEO, or his designee(s), to refrain from taking any further action or decision in relation to Spring Registry Limited's .CHARITY application until after the results of the Final Review Procedure are known, and then to proceed pursuant to established processes with the processing of both Corn Lake's and Spring Registry Limited's applications in accordance with the results of Final Review Procedure.

Rationale for Resolutions 2016.11.08.16 – 2016.11.08.18

Corn Lake, LLC (Corn Lake) initiated Independent Review Process (IRP) proceedings challenging: (1) the determination rendered by an expert panelist sustaining the Independent Objector's (IO's) community objection against Corn Lake's application for .CHARITY (Expert Determination); (2) the Board Governance Committee's (BGC's) denial of Corn Lake's Reconsideration Request 14-3 challenging the Expert Determination; and (3) the Board's decision to not include the Expert Determination in the review mechanism to address perceived inconsistent or unreasonable string confusion objection determinations (Final Review Procedure).

Corn Lake applied to ICANN (Internet Corporation for Assigned Names and Numbers) for the opportunity to operate the .CHARITY new gTLD (generic Top Level Domain). Spring Registry Limited ("SRL") also submitted an application for .CHARITY, and Excellent First Limited (Excellent First) submitted an application for .慈善 (the Chinese translation of "charity"). ICANN (Internet Corporation for Assigned Names and Numbers)'s Independent Objector (IO) filed Community Objections against the two .CHARITY applications, as well as the application for .慈善, meaning charity. The IO was concerned that, among other things, the lack of any policy restricting registrations in these gTLDs to charitable or not-for-profit organizations created a likelihood of detriment to the rights or legitimate interests of the charity community, to users, and to the general public. (See IO's Community Objection at Para. 46, pgs. 16-17, http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/charity-cty-corn-lake-llc/ (http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/charity-cty-corn-lake-llc/)).

The International Centre for Expertise of the International Chamber of Commerce (ICC (International Chamber of Commerce)) expert panel evaluating the IO's Community Objection to Corn Lake's application rendered a determination (Expert Determination) in favor of the IO, finding that, because Corn Lake's .CHARITY application did not include registration restrictions to charitable organizations, "there is a likelihood of material detriment to the charity sector community were the Application to proceed." The same ICC (International Chamber of Commerce) expert panel also evaluated the IO's Community Objections to SRL's application and Excellent First's application, rendering determinations in favor of SRL and Excellent First Limited. Specifically, the expert panel found that SRL's and Excellent First's commitments set

out in their applications to restrict registrations in the applied-for string to charitable organizations was sufficient to negate any concern of material detriment to the targeted community.

On 24 January 2014, Corn Lake filed Reconsideration Request 14-3 (Request 14-3) seeking reversal of the Expert Determination. On 27 February 2014, the Board Governance Committee (BGC) denied Request 14-3, finding no evidence that the expert panel violated any process or policy in reaching its determination.

Separately, in April 2013, the Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) recommended in the Beijing Communiqué that the Board adopt eligibility restrictions for "sensitive strings," including .CHARITY. (See Beijing Communiqué at https://www.icann.org/en/system/files/correspondence/gac-to-board-11apr13-en.pdf (/en/system/files/correspondence/gac-to-board-11apr13-en.pdf).) The New gTLD (generic Top Level Domain) Program Committee (NGPC) adopted the GAC (Governmental Advisory Committee)'s recommendation by a 5 February 2014 resolution (see https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-02-05-en (/resources/board-material/resolutions-new-gtld-2014-02-05-en)), which, according to the Panel, effectively required that whichever applicant ultimately operated the .CHARITY gTLD (generic Top Level Domain) would need to restrict registrations to charitable organizations. Also at that 5 February 2014 meeting, the NGPC adopted a resolution that authorized the ICANN (Internet Corporation for Assigned Names and Numbers) President and CEO to initiate a public comment period with respect to a proposed review mechanism to address perceived inconsistent string confusion objection determinations (Final Review Procedure). At its creation, the Final Review Procedure was limited to the review of certain string confusion expert determinations for .CAR/.CARS, .CAM/.COM, and .SHOP/.ONLINESHOPPING (in Japanese characters). In March 2014, via the public comment process, Corn Lake's parent company (Donuts, Inc.) asked the Board to extend the Final Review Procedure to perceived inconsistent determinations of community objection, such as that concerning .CHARITY. The Board did not do so when the procedure was implemented in a 12 October 2014 Board resolution ("12 October 2014 Resolution"). (See https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en (/resources/board-material/resolutions-new-gtld-2014-10-12-en).)

Corn Lake's IRP Request, submitted on 24 March 2015, sought a declaration that the ICANN (Internet Corporation for Assigned Names and Numbers) Board's decision not to include the .CHARITY determination in the 12 October 2014 Resolution violates ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles and Bylaws, and also asked the Panel to review the Expert Determination and the BGC's denial of Request 14-3.

On 17 October 2016, the three-member IRP Panel (Panel) issued its Final Declaration, which was circulated to the parties on 19 October 2016. After consideration and discussion, pursuant to Article IV, Section 3.21 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, the Board adopts the findings of the Panel, which are summarized below, and can be found in full at https://www.icann.org/en/system/files/files/irp-corn-lake-final-declaration-17oct16-en.pdf (/en/system/files/files/irp-corn-lake-final-declaration-17oct16-en.pdf).

The Panel held that the IRP request was denied in part and granted in part, and determined Corn Lake to be the prevailing party. (Final Declaration at ¶¶ 7.14, 8.96, 11.1(a).) As a threshold issue, the Panel declared that Corn Lake's challenges to the Expert Determination and the BGC's denial of Request 14-3 were "out of time" and therefore time-barred from consideration in this IRP. (Final Declaration at ¶¶ 7.14, 8.34.)

The Panel also declared that: (i) with respect to setting filing deadlines, "ICANN (Internet Corporation for Assigned Names and Numbers) is entitled and indeed required to establish reasonable procedural rules in its Bylaws, including in respect of filing deadline, in order to provide for orderly management of its review processes" (id. at ¶ 7.9); (ii) "it is now well established that: '…the IRP Panel is charged with 'objectively' determining whether or not the Board's actions are in fact consistent with the Articles, Bylaws and Guidebook, which the Panel understands as requiring that the Board's conduct be appraised independently, and without any presumption of correctness'" (id. at ¶ 8.18); (iii) "[t]here is no suggestion that the Board had a conflict of interest, and the IRP Panel finds that the Board acted without conflict." (id. at ¶ 8.70);

and (iv) "[t]here is no indication that the Board members were acting in any way other than in good faith and exercising independent judgment, with the subjective belief that they were acting in the best interests of the community. The IRP Panel finds that the Board members exercised independent judgment, believed to be in the best interests of the community" (id. at ¶ 8.74). The Panel further stated: "[t]his IRP Panel does not suggest that ICANN (Internet Corporation for Assigned Names and Numbers) lacks discretion to make decisions regarding its review processes as set out in the Applicant Guidebook, which may well require it to draw nuanced distinctions between different applications or categories of applications. Its ability to do so must be preserved as being in the best interest of the Internet community as a whole." (Id. at ¶ 8.98).

The Panel stated that "[t]he sole issue before this Panel is whether the Board properly or improperly excluded the .Charity Expert Determinations from the [Final Review Procedure] in the first place." (Final Declaration at ¶ 8.97, fn. 246.) In considering this issue, the Panel noted that the Expert Determination was largely based on the fact that Corn Lake's application originally had not made clear that it would restrict registrations to charitable organizations. The Panel felt that the NGPC's acceptance of the Beijing Communiqué created a "leveling effect," effectively requiring that whichever .CHARITY applicant prevailed, it would be required to implement restricted registration policies. The Panel noted: "We make no finding that the Board's failure to consider the impact of its adoption of the Beijing Communiqué recommendations was malicious or intentional. We find simply that the leveling effect on the eligibility requirements in the pending applications of the new PIC requirement was a material fact that should have been considered, and apparently it was not." (Final Declaration at ¶ 8.73.) The Panel therefore declared that that "the action of omitting .CHARITY from the [Final Review Procedure] was inconsistent with the Articles of Incorporation and Bylaws." (Final Declaration at ¶ 11.1(b).) The Panel noted that its finding "is further supported by the ICANN (Internet Corporation for Assigned Names and Numbers) Board's [later] decision to include the .HOSPITAL Expert Determinations [in the Final Review Procedure], despite those Determinations appearing to have been less clearly within the criteria tha[n] the .CHARITY Determinations." (Final Declaration at ¶ 8.101.) The Panel further noted that "this is a unique situation and peculiar to its own unique and unprecedented facts[; and t]his unique set of circumstances created what was doubtless a difficult situation for ICANN (Internet Corporation for Assigned Names and Numbers) to consider in establishing the scope of the new review process[.]" (Final Declaration at ¶ 8.97.)

The Panel further declared that "these IRP proceedings involve extraordinary circumstances," and therefore "no costs shall be allocated to the Claimant as the prevailing party," "each Party shall bear its own costs in respect of this IRP Panel proceeding." (Final Declaration at ¶¶ 9.3-9.5.)

In addition, the Panel recommended that: (1) "the Board extend the [Final Review Procedure] to include review of Corn Lake's .CHARITY Expert Determination"; and (2) "the Board continue to stay any action or decision in relation to [Spring Registry's] .CHARITY application until such time as the Board reviews and acts upon the opinion of the IRP Panel." (Final Declaration at ¶¶ 11.1(c)-(d).) Subsequent to the issuance of the Final Declaration, the Board received a letter on 28 October 2016 (dated 27 October) from Corn Lake's counsel "urg[ing] the Board to reinstate its .CHARITY application without" "[g]oing through the motions of such review[, which] will cost money to ICANN (Internet Corporation for Assigned Names and Numbers) and Corn Lake, and unnecessary time for all .CHARITY applicants." Corn Lake requests that the Board "reinstat[e] Corn Lake's .CHARITY application and allow[] it to compete for the domain without going through the additional time and expense [of the Final Review Procedure]." (See https://www.icann.org/en/system/files/correspondence/genga-to-icann-board-27oct16-en.pdf (/en/system/files/correspondence/genga-to-icann-board-27oct16-en.pdf).) The Board had the opportunity to review Corn Lake's correspondence and has taken it into consideration in reaching its Resolution regarding the Panel's recommendation.

As required, the Board has considered the Final Declaration. As this Board has previously indicated, the Board takes very seriously the results of one of ICANN (Internet Corporation for Assigned Names and Numbers)'s long-standing accountability mechanisms. Accordingly, and for the reasons set forth in this Resolution and Rationale, the Board has accepted the Panel's Final Declaration as indicated above.

Adopting the Panel's Final Declaration and implementing the Panel's recommendation will have a direct financial impact on the organization, but that impact will not impact the underlying budget for FY17. Adopting the Panel's Final Declaration will not have any direct impact on the security, stability or resiliency of the domain name system.

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

c. Thank You to the Global Multistakeholder Community

Whereas, on 14 March 2014, the National Telecommunications and Information Administration (NTIA (US National Telecommunications and Information Agency)) of the United States Department of Commerce announced its intention to transition the stewardship of the IANA (Internet Assigned Numbers Authority) Functions to the global multistakeholder community.

Whereas, NTIA (US National Telecommunications and Information Agency) asked ICANN (Internet Corporation for Assigned Names and Numbers) to convene global stakeholders to develop a proposal to transition the current role, played by NTIA (US National Telecommunications and Information Agency), in the coordination of the Internet's domain name system (DNS (Domain Name System)). NTIA (US National Telecommunications and Information Agency) required that the proposal for transition must have broad community support and uphold the following principles:

- Support and enhance the multistakeholder model;
- Maintain the security, stability, and resiliency of the Internet DNS (Domain Name System);
- Meet the needs and expectation of the global customers and partners of the IANA (Internet Assigned Numbers Authority) services; and,
- Maintain the openness of the Internet.

NTIA (US National Telecommunications and Information Agency) also stated it would not accept a proposal that replaces the NTIA (US National Telecommunications and Information Agency) role with a government-led or an inter-governmental organization solution.

Whereas, in the Board resolutions 2016.03.10.12-15 the ICANN (Internet Corporation for Assigned Names and Numbers) Board resolved to accept the IANA (Internet Assigned Numbers Authority) Stewardship Transition Coordination Group's (ICG (IANA Stewardship Transition Coordination Group)) IANA (Internet Assigned Numbers Authority) Stewardship Transition Proposal, reflecting he proposals developed by CRISP, IANA (Internet Assigned Numbers Authority) Plan and the CWG-Stewardship, and approve the transmittal of the Proposal to NTIA (US National Telecommunications and Information Agency) of the United States Department of Commerce in response to NTIA (US National Telecommunications and Information Agency)'s 14 March 2014 announcement.

Whereas, the Board further resolved that the President and CEO, or his designee, was directed to plan for the implementation of the Proposal so that ICANN (Internet Corporation for Assigned Names and Numbers) is operationally ready to implement in the event NTIA (US National Telecommunications and Information Agency) approves of the Proposal and the IANA (Internet Assigned Numbers Authority) Functions Contract expires.

Whereas, in its Board resolutions 2016.03.10.16-19, the ICANN (Internet Corporation for Assigned Names and Numbers) Board resolved to accept the Cross Community Working Group on Enhancing ICANN (Internet Corporation for Assigned Names and Numbers) Accountability (CCWG-Accountability) Work Stream 1 Report ("Report"), and approve the transmittal of the Report to NTIA (US National Telecommunications and Information Agency) to accompany the IANA (Internet Assigned Numbers Authority) Stewardship Transition Proposal developed by the ICG (IANA Stewardship Transition Coordination Group).

Whereas, the Board further resolved that the President and CEO, or his designee, is directed to plan for the implementation of the Report so that ICANN (Internet Corporation for Assigned Names and Numbers) is operationally ready to implement in the event NTIA (US National Telecommunications and Information Agency) approves of the IANA (Internet Assigned

Numbers Authority) Stewardship Transition Proposal and the IANA (Internet Assigned Numbers Authority) Functions Contract expires.

Whereas, on 27 May, the Board adopted resolution *2016.05.27.01-04, resolving that the* New ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws (/en/system/files/files/adopted-bylaws-27may16-en.pdf) will be deemed effective upon the expiration the IANA (Internet Assigned Numbers Authority) Functions Contract between ICANN (Internet Corporation for Assigned Names and Numbers) and NTIA (US National Telecommunications and Information Agency), and directed the President and CEO, or his designee, to plan for the implementation of the Bylaws so that ICANN (Internet Corporation for Assigned Names and Numbers) is operationally ready to meet its obligations in the event NTIA (US National Telecommunications and Information Agency) approves of the IANA (Internet Assigned Numbers Authority) Stewardship Transition Proposal and the IANA (Internet Assigned Numbers Authority) Functions Contract expires.

Whereas, on 9 June NTIA (US National Telecommunications and Information Agency) informed (/en/system/files/correspondence/strickling-to-crocker-09jun16-en.pdf) ICANN (Internet Corporation for Assigned Names and Numbers) that NTIA (US National Telecommunications and Information Agency) had completed its review of the IANA (Internet Assigned Numbers Authority) Stewardship Proposal along with the other US agencies, and determined that the proposal meets the criteria set out by NTIA (US National Telecommunications and Information Agency) in March 2014 when it announced its intent to transition NTIA (US National Telecommunications and Information Agency)"s stewardship of key Internet domain name functions to the global multistakeholder community. NTIA (US National Telecommunications and Information Agency) noted and outlined in their report that there was still some work to be done before the IANA (Internet Assigned Numbers Authority) functions stewardship transition could occur, and requested that ICANN (Internet Corporation for Assigned Names and Numbers) provide NTIA (US National Telecommunications and Information Agency) with an implementation planning status report by August 12, 2016.

Whereas, on 12 August, ICANN (Internet Corporation for Assigned Names and Numbers) provided NTIA (US National Telecommunications and Information Agency) with the implementation planning status report (/en/system/files/correspondence/marby-to-strickling-12aug16-en.pdf) noting that: "ICANN (Internet Corporation for Assigned Names and Numbers), working with the multistakeholder community, confirms that all required IANA (Internet Assigned Numbers Authority) functions stewardship transition tasks specified in NTIA (US National Telecommunications and Information Agency)'s June 9, 2016 letter are complete, and all other tasks in support of the IANA (Internet Assigned Numbers Authority) stewardship transition are either in a final review stage or awaiting approval, which will be complete in advance of September 30, 2016 to allow the IANA (Internet Assigned Numbers Authority) functions contract to expire."

Whereas, on 1 October, the NTIA (US National Telecommunications and Information Agency) advised ICANN (Internet Corporation for Assigned Names and Numbers) (https://www.ntia.doc.gov/press-release/2016/statement-assistant-secretary-strickling-iana-functions-contract) and the global multistakeholder community that the IANA (Internet Assigned Numbers Authority) Functions contract had expired.

Resolved (2016.11.08.19), the Board expresses its deep appreciation for the tireless efforts of the global multistakeholder community, including the leadership of the various community-led groups contributing to the Proposals. The development of the coordinated Proposals across the global community, that met the criteria set out by NTIA (US National Telecommunications and Information Agency), and the work to achieve implementation to allow for the contract to lapse on 30 September 2016, is unprecedented and serves as an historical record of the success of the work of the community to achieve a longstanding goal.

Resolved (2016.11.08.20), the Board expresses its deep appreciation to the US Department of Commerce, for standing by the long-standing commitment to end the IANA (Internet Assigned Numbers Authority) Functions contract, and for its dedication, and tireless efforts as a partner with ICANN (Internet Corporation for Assigned Names and Numbers) and the community to achieving this historic goal.

d. Thank You to Bruno Lanvin for his service to the ICANN (Internet Corporation for Assigned Names and Numbers) Board

Whereas, Bruno Lanvin was appointed by the Nominating Committee to serve as a member of the ICANN (Internet Corporation for Assigned Names and Numbers) Board on 21 November 2013.

Whereas, Bruno Lanvin concluded his term on the ICANN (Internet Corporation for Assigned Names and Numbers) Board on 8 November 2016.

Whereas, Bruno served as a member of the following Committees:

- Audit Committee
- Finance Committee
- New gTLD (generic Top Level Domain) Program Committee
- Organizational Effectiveness Committee [formerly the Structural Improvements Committee]

Resolved (2016.11.08.21), Bruno Lanvin has earned the deep appreciation of the Board for his term of service, and the Board wishes him well in his future endeavors within the ICANN (Internet Corporation for Assigned Names and Numbers) community and beyond.

e. Thank You to Erika Mann for her service to the ICANN (Internet Corporation for Assigned Names and Numbers) Board

Whereas, Erika Mann was appointed to serve by the Nominating Committee as a member of the ICANN (Internet Corporation for Assigned Names and Numbers) Board on 10 December 2010.

Whereas, Erika concludes her term on the ICANN (Internet Corporation for Assigned Names and Numbers) Board on 8 November 2016.

Whereas, Erika has served as a member of the following Committees and Working Groups:

- Audit Committee
- Compensation Committee
- Global Relationships Committee
- Governance Committee
- New gTLD (generic Top Level Domain) Program Committee
- Board-GAC (Governmental Advisory Committee) Recommendation Implementation Working Group
- Board Working Group on Internet Governance (BWG-IG)
- Board Working Group on Registration Data Directory Services (BWG-RDS)
- ICANN (Internet Corporation for Assigned Names and Numbers) Board Liaison to the Charter Drafting Team for the Cross Community Working Group on New gTLD (generic Top Level Domain) Auction Proceeds

Resolved (2016.11.08.22), Erika Mann has earned the deep appreciation of the Board for her term of service, and the Board wishes her well in her future endeavors within the ICANN (Internet Corporation for Assigned Names and Numbers) community and beyond.

f. Thank You to Kuo-Wei Wu for his service to the ICANN (Internet Corporation for Assigned Names and Numbers) Board

Whereas, Kuo-Wei Wu was appointed by the Address Supporting Organization (Supporting Organization) (AS0) to serve as a member of the ICANN (Internet Corporation for Assigned Names and Numbers) Board on 22 April 2010.

Whereas, Kuo-Wei concluded his term on the ICANN (Internet Corporation for Assigned Names and Numbers) Board on 8 November 2016.

Whereas, Kuo-Wei served as a member of the following ICANN (Internet Corporation for Assigned Names and Numbers) Board Committees and Working Groups:

- Global Relationships Committee
- IANA (Internet Assigned Numbers Authority) Committee
- New gTLD (generic Top Level Domain) Program Committee
- Organizational Effectiveness Committee [formerly the Structural Improvements Committee]
- Public Participation Committee
- Risk Committee
- IDN Variants Working Group

Resolved (2016.11.08.23), Kuo-Wei Wu has earned the deep appreciation of the Board for his term of service, and the Board wishes him well in his future endeavors within the ICANN (Internet Corporation for Assigned Names and Numbers) community and beyond.

g. Thank You to Suzanne Woolf for her service to the ICANN (Internet Corporation for Assigned Names and Numbers) Board

Whereas, Suzanne Woolf was appointed to serve by the Root Server System Advisory Committee (Advisory Committee) (RSSAC (Root Server System Advisory Committee)) as a member of the ICANN (Internet Corporation for Assigned Names and Numbers) Board on 5 December 2004.

Whereas, Suzanne concludes her term on the ICANN (Internet Corporation for Assigned Names and Numbers) Board on 8 November 2016.

Whereas, Suzanne has served as a member of the following Committees and Working Groups:

- Governance Committee
- Risk Committee
- IANA (Internet Assigned Numbers Authority) Committee
- IDN Variants Working Group

Resolved (2016.11.08.24), Suzanne Woolf has earned the deep appreciation of the Board for her term of service, and the Board wishes her well in her future endeavors within the ICANN (Internet Corporation for Assigned Names and Numbers) community and beyond.

h. Thank You to Bruce Tonkin for his service to the ICANN (Internet Corporation for Assigned Names and Numbers) Board

Whereas, Bruce Tonkin was appointed by the Generic Names Supporting Organization (Supporting Organization) (GNSO (Generic Names Supporting Organization)) to serve as a member of the ICANN (Internet Corporation for Assigned Names and Numbers) Board on 29 June 2007.

Whereas, Bruce Tonkin concluded his term on the ICANN (Internet Corporation for Assigned Names and Numbers) Board on 8 November 2016.

Whereas, Bruce served as a member of the following Committees:

- Governance Committee
- Compensation Committee
- Executive Committee
- Risk Committee
- Board Working Group on Registration Data Directory Services (BWG-RDS)
- ICANN (Internet Corporation for Assigned Names and Numbers) Board Liaison to the Cross Community Working Group (CCWG) on Enhancing ICANN (Internet Corporation for Assigned Names and Numbers) Accountability

Resolved (2016.11.08.25), Bruce Tonkin has earned the deep appreciation of the Board for his term of service, and the Board wishes him well in his future endeavors within the ICANN (Internet Corporation for Assigned Names and Numbers) community and beyond.

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[1] 12 June 2014 <https://www.icann.org/public-comments/two-char-new-gtld-2014-06-12-en (/public-comments/two-char-new-gtld-2014-06-12-en)>; 8 July 2014 <https://www.icann.org/public-comments/two-char-new-gtld-2014-07-08-en (/public-comments/two-char-new-gtld-2014-07-08-en)>; 23 July 2014 <https://www.icann.org/public-comments/two-char-new-gtld-2014-07-23-en (/public-comments/two-char-new-gtld-2014-07-23-en)>; 19 August 2014 <https://www.icann.org/public-comments/two-char-new-gtld-2014-08-19-en (/public-comments/two-char-new-gtld-2014-08-19-en)>; and 12 September 2014 <https://www.icann.org/public-comments/two-char-new-gtld-2014-09-12-en (/public-comments/two-char-new-gtld-2014-09-12-en)>

Published on 8 November 2016

Ex. R-37

ICANN's Delegation of Authority Guidelines
Adopted 8 November 2016

Purpose

To identify the respective key roles of the Board and the Chief Executive Officer (CEO) and the delegation of authority from the Board to the CEO and key staff. This document also identifies the key interdependencies in those relationships.

Guiding Principles

- *The Board and CEO should be unified in their understanding and goals for ICANN.*
- *Board and CEO should communicate freely and frequently to avoid misunderstandings.*
- *Trust and mutual respect is key to the relationship between the CEO and the Board.*

This list includes what has been discussed by the Board and the CEO regarding delegation of authority, but other issues as they arise and are discussed will be added to the document after being confirmed by the Board.

ICANN Board – Key Roles

A primary source of the Board's powers comes directly from the ICANN Bylaws, as well as internal policies. The Board's key powers and roles include:

- The Board acts collectively by voting at meetings to authorize and direct management to take action on behalf of the ICANN organization.
- Interact with the ICANN community to ensure that ICANN is serving the global public interest within ICANN's mission.
- Respect and support accountability mechanisms, including:
    - Participating in the Empowered Community processes as specified in Bylaws;
    - Considering Requests for Reconsideration; and
    - Considering final Independent Review Process declarations.
- Consider policy recommendations arising out of Supporting Organizations (SOs_, including participating in consultation processes if necessary.
- Acknowledge advice from Advisory Committee (ACs) and consider advice as appropriate.
- When necessary, follow consultation processes relating to AC advice.
- When necessary, create ACs and working groups to report recommendations and findings to the Board.
- Appoint membership of the RSSAC and SSAC, pursuant to the recommendations from the respective groups.
- Appoint the Nominating Committee Chair and Chair-Elect.
- Exercise strategic oversight, including oversight of the development of the strategic plan.

- Oversight of enterprise risk work within the organization.
- Delegate the Board's authority (within statutory limitations) to Board committees and management.
- Select the CEO and appoint other officers; and undertake CEO succession planning.
- Elect the Chair and Vice-Chair of the Board.
- Appoint members to membership and chair positions of the various board committees and working groups
- Setting and approving compensation structure for CEO. Approving compensation for officers.
- Setting and overseeing enforcement of conflicts of interest policy.
- Set the fiscal year, adopt annual budget, operation and strategic plans, appoint independent auditors and cause the annual financial report to be published.
- Overseeing the development of, and approval of, key financial direction such as the investment policies and reserve fund management policies.
- Set fees and charges for ICANN services.
- Appoint and oversee the performance of the Ombudsman.
- Authorize entering into expenditures and obligations as required by Contracting and Disbursement Policy.
- Approve new ICANN office locations, including hubs and engagement centers.
- Approve the need to move an ICANN Public Meeting from a previously identified location, or need to vary from approved meeting strategy.
- Consider recommendations from reviews.
- Selecting PTI Board membership.
- Setting agenda for the Board, and identifying the structure and information needed to support that agenda.
- Act in accordance with documented policies and procedures.

ICANN CEO – Key Roles

- The acts within the authority delegated by the Board.
- Interacts with the ICANN community to ensure that ICANN is serving the global public interest within ICANN's mission.
- Maintains open line of communication with the Board, and leads organizational communications with the Board.
- Interacts with governments and organizations within the scope of ICANN's Mission and Board's directives.
- Interacts with the broader Internet community and other interested parties within the scope of ICANN's Mission and Board's directives.
- Speaks for ICANN organization and serves as the external face of the organization.
- Leads and oversees ICANN's day-to-day operations (*i.e., the CEO is day-to-day decision maker*).

- Leads the ICANN organization, including the retention and supervision of staff.
- Executing global compensation structure for the organization based upon Board policies per legal obligations.
- Act in accordance with documented policies and procedures.

ICANN CEO and Senior Management – Key Roles

- Act within ICANN's Mission.
- Act in accordance with ICANN's Articles and Bylaws.
- Support accountability and transparency mechanisms, including coordination of reviews, supporting and advising the Board in considering Reconsideration Requests and declarations from Independent Review Processes, and document disclosure requests.
- Supporting the Empowered Community processes as necessary.
- Provide the Board with information as requested to enable the Directors to act on an informed manner
- Implement the decisions of the Board*, including implementation of policies approved by the Board and review recommendations approved by the Board.*
- Perform operational work in accordance with the strategic direction of the Board.
- Manage within the approved Budget.
- Identify sites for ICANN's Public Meetings within the approved Budget and meetings strategy.
- Upon Board approval of need to move a previously-announced ICANN Public Meeting or variance from meetings strategy, identify sites for ICANN Public Meetings within approved Budget and variance.
- Support community in development of and then implement Strategic Plan/Operating Plan as approved by Board.
- Ensure that ICANN remains in compliance with all applicable legal/regulatory requirements.
- Proactively protect the organization from third-party claims.
- Monitor and mitigate risks to the organization.
- Act in accordance with documented policies and procedures.
- Within budget, authorize entering into expenditures and obligations as required by Contracting and Disbursement Policy.
- Follow all applicable conflict of interest policy, confidentiality, employee conduct guidelines, applicable expense policies and travel guidelines, etc.

Interdependencies of Relationships

Across the roles and obligations that the Board, CEO and senior management share, there are numerous interdependencies in these relationships. These include:

- The CEO (or his designee) is the spokesperson for ICANN. The Chair is the spokesperson for the ICANN Board, unless delegated to other board members.
- Working together on Board workshop and Board meeting agendas, with the Organization responsible for timely delivery of materials to the Board in the circumstances when the Organization is informed that it should provide Board briefing materials.
- ICANN Board relies on management for information upon which the Board will base its decisions. The Board also relies on management to support the Board's interactions with the ICANN community.
- CEO oversees day-to-day operations, while the Board exercises oversight over the CEO, and is responsible for the identification of the strategic direction that the operations will serve.
- Management implements Board resolutions and acts within the scope of delegated authority reflected within those resolutions.
- Board and management actively engage with the community to ensure that ICANN serves the global public interest within ICANN's mission.
- Interdependencies highlighted through ICANN accountability mechanisms, including:
    - Empowered Community rights
    - Reconsideration of Board or staff actions
    - Independent review of Board or staff actions
- Management is responsible for leading the activities to develop budget and operating and strategic plans, and the Board approves those budget and operating and strategic plan and sets priorities.
- Once approved, the CEO (or to a person designated by the CEO) implements budget, plans and priorities approved by the Board.
- CEO has authority and obligation to lead day-to-day operations, within budget, plans and priorities.

Ex. R-38

Minutes | Board Accountability Mechanisms Committee (BAMC) Meeting

18 Mar 2020

BAMC Attendees: Becky Burr, Avri Doria, Mandla Msimang, Nigel Roberts, and León Sánchez (Chair)

BAMC Apologies: Sarah Deutsch and Chris Disspain

ICANN (Internet Corporation for Assigned Names and Numbers) Org Attendees: Franco Carrasco (Board Operations Specialist), Casandra Furey (Associate General Counsel), John Jeffery (General Counsel & Secretary), Wendy Profit (Board Operations Senior Manager), Jennifer Scott (Senior Counsel), Amy Stathos (Deputy General Counsel), and Russ Weinstein (Senior Director, gTLD (generic Top Level Domain) Accounts & Services)

The following is a summary of discussions, actions taken and actions identified:

1. **Procedural Evaluation of Reconsideration Request 20-1 (Namecheap, Inc.) –** The BAMC conducted a procedural evaluation of Reconsideration Request 20-1 from Namecheap, Inc. to determine if it was sufficiently stated as required under the Bylaws. Two BAMC members – Becky Burr and Nigel Roberts – recused themselves from the discussion and subsequent vote on the evaluation out of an abundance of caution. After having read and considered all of the materials, the BAMC determined that three of the four claims contained in the request should be summarily dismissed for not being sufficiently stated as set forth in the Bylaws. The remaining claim will proceed to an evaluation on its merits pursuant to the standard Reconsideration Request process.

    - Actions: ICANN (Internet Corporation for Assigned Names and Numbers) org to publish the partial summary dismissal and notify the requester, as well as prepare the remaining claim for next steps in the Reconsideration Request review process.

Published on 30 March 2020

Ex. R-39

Redacted – Confidential Information

Ex. R-40

Redacted – Confidential Information

Ex. R-41

Redacted – Confidential Information

Ex. R-42

COMMENT SUBMISSION FOR .ORG REGISTRY RENEWAL AGREEMENT

TIME IS RUNNING OUT! COMMENT BY APRIL 29TH…

ICANN is currently accepting comments on the proposed renewal of the .ORG Registry Agreement with Public Interest Registry (PIR).

This form will create an email in your default mail program. If you do not have one set up, you can simply copy and paste the below into a new email. The email sent using this form will NOT be or appear to be from or by the ICA – it will be an email sent by you from your usual mail application.

You can edit your comment as you wish before you send it in.

Step 1: Identify Yourself

- ○ I am a .org registrant.
- ○ I am a .org registrant (not-for-profit).
- ○ I am a .org registrant (non-profit).
- ○ I am a domain name registrant.

Step 2: Select Your Opinions

- ☑ I oppose the incorporation of the URS into the .org renewal agreement.
- ☑ Legacy domain name extensions should not be treated the same as new gTLDs.
- ☑ Removing price caps on .org is a bad idea.
- ☑ ICANN should be looking out for the .org registrants, in particular the non-profits.

Step 3: Submit Your Comment

Version: ◉ **A** ○ **B** ○ **C** ○ **D**

To

comments-org-renewal-18mar19@icann.org

Subject

Proposed Renewal of .org Registry Agreement

Body

ICANN staff should not unilaterally impose URS in legacy TLDs when that issue is precisely what is being examined by the volunteer ICANN Working Group who has been mandated to review this issue. ICANN policy making is supposed to be a 'bottom up, multi-stakeholder model'.

R-42

I believe that legacy gTLDs are fundamentally different from for-profit new gTLDs. Legacy TLDs are essentially a public trust, unlike new gTLDs which were created, bought and paid for by private interests. Registrants of legacy TLDs are entitled to price stability and predictability, and should not be subject to price increases with no maximums. Unlike new gTLDs, registrants of legacy TLDs registered their names and made their online presence on legacy TLDs on the basis that price caps would continue to exist.

Unrestrained price increases on the millions of .org registrants who are not-for-profits or non-profits would be unfair to them. Unchecked price increases have the potential to result in hundreds of millions of dollars being transferred from these organizations to one non-profit, the Internet Society, with .org registrants receiving no benefit in return. ICANN should not allow one non-profit nearly

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Ex. R-43

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

FINAL DECISION

Corrected version dated 15 July 2021

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20 May 2021

Members of the IRP Panel

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

Administrative Secretary to the IRP Panel

Virginie Blanchette-Séguin

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GLOSSARY OF DEFINED TERMS

Afilias	Claimant Afilias Domains No. 3 Limited.
Afilias' First DIDP Request	Documentary Information Disclosure Policy request submitted by Afilias to ICANN on 23 February 2018.
Afilias' Response to the *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

[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

[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

[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

[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

[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.

[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

[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

[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

[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, Mr. Livesay, then Vice-president and Counsel of Verisign, was asked by the company's CEO to identify and pursue potential business opportunities for the company in the New gTLD Program.[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. According to Mr. Livesay, one of the reasons for Verisign's interest in a new gTLD at the time he was asked by its CEO to look for opportunities in that space was that the inventory of available names for new registrations in .COM had decreased over time while at the same time the overall demand for domain names worldwide continued to increase.[20]

86. Verisign identified .WEB as one business opportunity in the New gTLD Program. Mr. Livesay was thus tasked with formulating and implementing a plan potentially to acquire rights to the .WEB gTLD. 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, in addition to compensation for NDC, 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

[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. Mr. Livesay testified that shortly before the ICANN auction, Verisign became aware of rumors in the industry and complaints to ICANN that NDC had undergone a change of ownership or had assigned its .WEB application. Mr. Livesay stated that Verisign contacted NDC to confirm that this was not so. According to Mr. Livesay's evidence, this led to the execution of the "Confirmation of Understandings" by Verisign and NDC on 26 July 2016, the day prior to the beginning of the ICANN auction, and which Mr. Livesay stated amended and supplemented the Domain Acquisition Agreement.[33]

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 "VeriSign intend[ed] to issue a press release [the following day] regarding the .web TLD" and that someone from Verisign would soon contact the president of ICANN's Global Domains Division, Mr. Akram Atallah. Ms. Willett congratulated Mr. Rasco "on winning the auction" and thanked him for "letting [her] know about the announcement."[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. On 23 August 2016, Arnold & Porter, acting as counsel for NDC and Verisign, sent a detailed letter to ICANN addressing the complaints that had been made about Verisign's involvement in the ICANN auction and about NDC's conduct in regard to its .WEB application.[39] This was in response to a request for information by ICANN that had been communicated informally by telephone to Arnold & Porter by ICANN's outside counsel.[40] Attached to Arnold & Porter's letter and marked as "Confidential Business Information: Do Not Disclose" was the Domain Acquisition Agreement and Mr. Kane's text message to Mr. Rasco of 22 July 2016.

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

[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, and it appears that Verisign also produced documents to, and met with representatives of, DOJ.[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

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.

[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.

[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 "exclusively at the direction of, and for the benefit of, VeriSign".[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

[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

[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,

[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

[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,

[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

[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] Verisign argues that, contrary to the Claimant's argument, NDC is not precluded from entering into other transactions to repay Verisign if needed.[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

[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

[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

[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 some of the payment terms of the Domain Acquisition Agreement were not contingent upon some future event, 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: the obligation to amend the application; the right to resolve the string contention with the other contention set members; the right to participate in the ICANN auction; the right and

[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.

obligation to negotiate and enter into the .WEB registry agreement; and finally the right to operate the .WEB registry.[163]

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,

[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

[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

[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

[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. By the DAA, the Claimant contends, NDC transferred this right to Verisign.[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

[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 the DAA was designed to ensure that no one would know that Verisign was pursuing .WEB through NDC until after NDC emerged at the winner of the contention set. 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

[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]

[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

[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

[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

[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

[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

[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

[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

[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,

[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.

[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.

[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

[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

[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

[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

[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.

[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

[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

[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

[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

[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

[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. The letter goes on providing a detailed refutation of each of the objections made by Afilias and "others in the contention set", explains why these objections "have no merit whatsoever", and asks that ICANN proceed to execute a registry agreement with NDC without unnecessary delay.[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

[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

[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 in ICANN's evaluation of the issues raised […]".[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

[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,

[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

[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

[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

[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.

[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]

[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

[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

[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?

[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

[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

[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

[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

[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

[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 as to each Claim".

[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.

[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

[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

[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

[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

[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.

[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 as a whole, or an IRP defence as a whole, is found by the Panel to be frivolous or abusive. In support of its position, the Respondent relies on the definition of Claim in Section 4.3(d) of the Bylaws, which reads as follows:

> (d) An IRP shall commence with the Claimant's filing of a written statement of a Dispute (a "**Claim**") with the IRP Provider (described in Section 4.3(m) below). For the EC to commence an IRP ("**Community IRP**"), the EC shall first comply with the procedures set forth in Section 4.2 of Annex D.

390. Based on this definition, the Respondent submits that "costs and legal expenses may be shifted onto the Claimant only if the Request for IRP as a whole is frivolous or abusive".[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

[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

[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.

[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.
>
> 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.
>
> 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]
>
> 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.

[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

Catherine Kessedjian

(s) Richard Chernick

Richard Chernick

(s) Pierre Bienvenu

Pierre Bienvenu, Ad. E., Chair

Dated: 20 May 2021

Ex. R-44

Redacted – Confidential Information

Ex. R-45

Domains

Introducing .COM, .ORG, .NET, .BIZ, & .CO Domains

Colleen Branch | November 17, 2020 0

11 min read

Picking between a huge range domains can seem overwhelming at first. Your head may feel like it's a constant battleground of *.COM vs* ***.ORG*** *vs .NET vs .BIZ vs* ***.CO***, and you're desperately wondering which of these popular options will be the best fit for your purpose.

Good news, that's where we can help! This blog post is packed full of useful information to help you get started. We'll also compare the mighty **.COM** against fellow top-level domain options to discover the pros and cons of each one. Ready? Let's begin!

Introducing .COM

Realistically, **.COM** domains need no introduction, in fact, sometimes **.COM** is called the 'king of domains'. Many of the most popular websites in the world use **.COM**, including *google.com*, *youtube.com*, and *twitter.com*. Even if you've only visited a handful of websites in your lifetime, you will have come across a **.COM**.

What is the meaning of .COM? How should .COM be used?

As one of the original line-up of six generic TLDs created in 1985, **.COM** was originally intended to be used by *commercial* organizations, while **.edu** was for educational purposes, and so on.

Despite **.COM**'s original intention, it's now open to anyone and **.COM** should be used (and can be used) for anything! Find out

Get the latest news and deals Sign up for email updates covering blogs, offers, and lots more.

I'd like to receive:

New blog post alerts

Regular newsletter and special offers

Enter your email Subscribe

Your data is kept safe and private in line with our values and the GDPR.

Current Deals at Namecheap

more about this mighty top-level domain in our article, what does **.COM** stand for?.

What are the pros and cons of using a .COM?

For starters, as a popular and recognized domain, it's trustworthy. Known across the globe, it's the perfect choice for ranking well on search engine results pages, whatever country you're in.

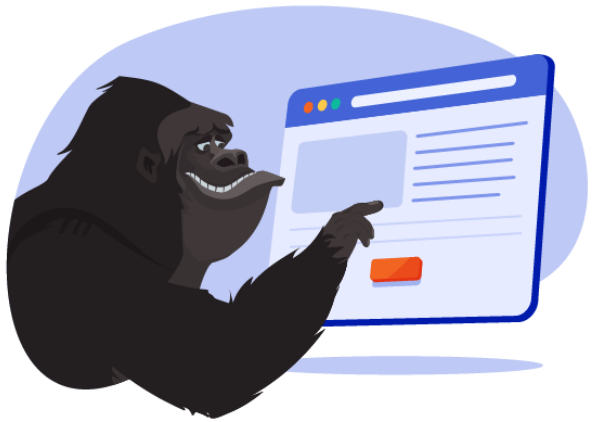
However, as many **.COM** domain names have already been taken, if you're considering buying one from a seller at a marketplace, it will most likely be more expensive. come with a higher price tag.

There's also the small risk of a **.COM price increase**, which could mean that within 10 years, domain names may cost approximately 70% more than the current wholesale price of $7.85.

What alternatives are there to the .COM domain extension?

There are many worthy **.COM** alternatives that you might not have considered, like country code and geographic top-level domains. You can choose from hundreds of other TLDs that are suitable for your business or passion project, you just need to scout them out!

Now, let's dive into learning more about some of the most popular generic top-level domains, **.ORG**, **.NET**, **.CO,** and **.BIZ**.



Introducing .ORG

If you're looking for an alternative top-level domain, have you ever considered a **.ORG** domain? When thinking about ***.ORG*** *vs* ***.COM***, you may be aware that it was originally reserved for non-profits, however, this is no longer the case.

What is the meaning of .ORG? How should .ORG be used?

The, **.ORG** extension stems from the word *organization*. Back in 1985, the domain was part of the original TLDs and it was initially intended for non-profit and non-commercial organizations. In 2019 it all changed, the restriction lifted, meaning anyone can register a **.ORG**.

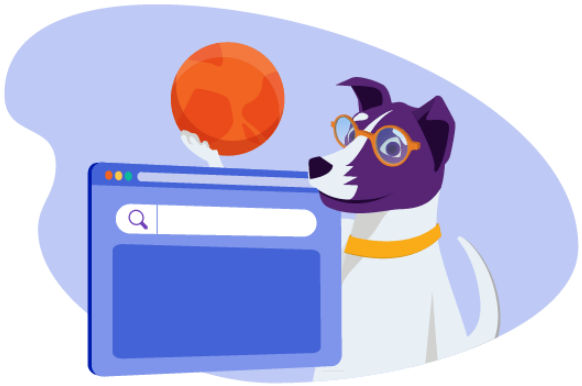
The **.ORG** domain should be used like any other domain. You can use it for charity, cultural, art, or social websites, or a non-profit community. In reality, there is little difference between **.COM** and **.ORG**, whether you want to use it for a non-profit or

startup, the choice is yours.

What are the pros and cons of using a .ORG?

If you're an organization looking for a domain, especially if you work in the charity sector, a **.ORG** is a sensible choice. The World Wildlife Fund, UNICEF, and Greenpeace all use a **.ORG** for their websites, and the domain's established association with charitable and humanitarian work will give immediate weight to your cause.

On the other hand, if you're a profit-driven business, using a **.ORG** might seem misleading. Another issue that may arise is a potential price increase at the hands of the **.ORG** registry. If they choose to increase their prices, then registrars will need to do so as well. Here at Namecheap, we always try to fight price increases that we believe are unjustified.



Introducing .NET

If **.ORG** wasn't the right fit for you, why not choose a **.NET** domain? You're probably wondering why **.NET** is called what it is. Originally it was intended for companies that worked in networking, but now it can be registered by anyone. Thinking about **.NET** vs **.COM**? Both domains are used for business and pleasure, so it's up to you to decide whether it's the right choice for your purpose.

What is the meaning of .NET? How should .NET be used?

The meaning of **.NET** (at least, the original meaning) was *network*. See, it's all rather logical, isn't it? You may be scratching your head by this point, thinking, but tell what domain would be champion in a ***.COM*** *vs* ***.NET*** *vs* ***.ORG*** showdown?

We already know that .ORG should be used for non-profits, but you may be contemplating the difference between **.COM** and **.NET**. While **.COM** was intended for commercial organizations, **.NET** was designed with networking organizations in mind, such as Internet service providers and email service providers.

These days, like the majority of TLDs, **.NET** domains can be used for any purpose, whether you run a social media network or provide an online service.

What are the pros and cons of using a .NET?

Again, just like **.COM** and **.ORG**, **.NET** is one of the original line-ups of domains created in 1985, and because of this, it

carries more trust than a newer, generic TLD might. Popular websites like *behance.NET* use the domain for building networks for creatives and companies looking for creative people.

On the other hand, it may not be a good choice for an online store or portfolio. What TLDs are your competitors using? Is there a brand new TLD that might suit your organization more? When it comes to choosing a domain that suits your business, it's vital to do some research to see what's out there before making that commitment.

Introducing .CO

The **.CO** domain was initially reserved for Colombia, but from 2010 became open to register by anyone. Despite not being one of the original TLDs created in 1985, it would be a worthy opponent if a ***.CO*** *vs* ***.COM*** fight were to take place.

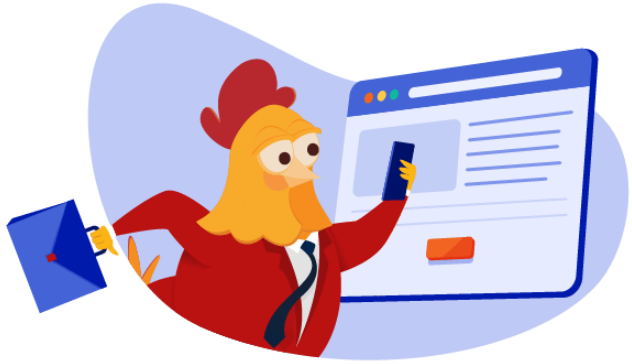
What is the meaning of .CO? How should .CO be used?

You may have guessed that the true meaning of **.CO** is *Colombia*, but now that anyone can register, it can mean anything. Whether you run a busy online community, a successful company, or a corgi fan site, it's a domain for the masses. You don't have to feel pressured into thinking a **.CO** should be used for a particular type of site like you might with other TLDs.

What are the pros and cons of using a .CO?

If you're deciding between domains, you may be wondering about the difference between a **.COM** and a **.CO.** Although **.CO** isn't as popular as a **.COM**, it does mean that you have more chance of getting the domain of your dreams, and for a better price.

However the **.CO** inarguably isn't as well-known, and therefore may not be trusted by the non-savvy web user. Another reason that it may not suit your purpose is that people might unwittingly add the 'm' on the end, thinking that it's supposed to be there, and end up on the wrong website.



Introducing .BIZ

You may have already come across **.BIZ** domains in your hunt for the best domain name. If you're trying to work out the winner of a ***.BIZ*** *vs* ***.COM*** fight**,** it might be interesting to learn that **.BIZ** was created in 2001 aimed at companies that didn't manage to land that dream **.COM** domain name.

What is the meaning of .BIZ? How should .BIZ be used?

The meaning of **.BIZ** is, of course, business. Customers will (hopefully) instantly realize that they've arrived at a legitimate business website, and **.BIZ** should be used for boasting about your superstar service or premium product.

But what about the difference between **.COM** and **.BIZ**? It's clear that, **.COM** domains are undoubtedly more popular when it comes to all types of websites, including businesses, but availability may be a problem, as well as cost. In this case, it may be sensible to use a **.BIZ**, unless you're in the luxurious position for having no budget constraints.

What are the pros and cons of using a .BIZ?

Once again, when buying anything other than a **.COM** you have more chance of registering the domain you want. It's also likely to be far cheaper, which can help you if you're launching a new venture.

However, some may perceive a **.BIZ** as a cheap or more unprofessional than a long-established TLD like **.NET** or **.ORG.**

Which of These TLDs Are the Most Popular?

The reigning king **.COM** is by far the most popular domain. Then, of the domains above, according to Statista, .ORG next, followed by **.NET**. These results are based on the top 10 million websites worldwide from October 2020.

Which of these TLDs Will Be Best for Search Engine Optimization?

Although the websites with the most traffic are **.COM** websites, any domain can be successful when it comes to ranking on search engine results pages. With Google's International Targeting report, you can target your website for different regions. For example, if you own a coffee shop in the US, setting your website location to the US will help your visibility.

Which of these TLDs Is the Most Credible?

You probably won't be surprised to learn that the **.COM** is the most trusted TLD. However, with a clever brand and marketing strategy, there's no reason to stop your domain name and organization from becoming a trusted household name.

Where Can I Get These Domains?

Register your domains with Namecheap of course! We make domain registration easy, plus we have lots of tools and services to help support your website and turn it into whatever you want to be. Alternatively, check out websites domains for sale in our Marketplace.

Why not learn more about domains by reading our informative articles below?

How:

- How to choose a domain name

- Can I change my domain name?
- How to choose a domain name?

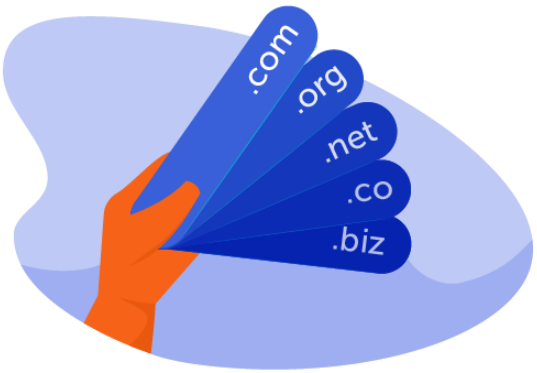
What:

- What is a subdomain
- What is the domain?
- What is a top-level domain?

So Which Should I Choose?

If you have the budget and your name is available, you can't go wrong with a **.COM** domain. However, due to the domain's popularity, that's often easier said than done.

Avoid needing to change domain names in the future, by weighing up the pros and cons in relation to your own needs. Try to choose a domain name that's perfect the first time. Use our website name generator tool to see what's available, and get some inspiration.



Frequently Asked Questions

What is the most trusted and reliable, .COM or .ORG?

Both are considered trustworthy and reliable, however, a **.ORG** would make the perfect fit for a non-profit organization, due to it being reserved for this type historically.

Is .COM better than .NET or .ORG?

Although you could perceive the **.COM** to be 'better', it depends on the type of business or personal website that you want to launch. If you've developed a new social network, it may make more sense **.NET**, and if you've started a charity, a **.ORG**

might be a better fit.

How much do these domains cost?

Check out our Domain Pricing and Registration page to discover the price for the domain name of your dreams. If you would like to learn a bit more about the financial side first, read our handy guide, How Much Does it Cost to Buy a Domain Name?.

Is .CO similar to the .COM TLD?

They may look similar, but in reality, a **.CO** domain will usually cost less than a **.COM**. Another disadvantage **.CO** has is that people might confuse the two, and mistakenly end up landing on someone else's site, rather than yours. Disaster!

Why is the .COM extension so popular and recommended for use?

It's one of the oldest TLDs, and because the majority of websites use it, **.COM** is associated with popular brands, and has over time, become a credible choice for any type of website. In some ways, the price tag can help to show that you're so serious about your brand, you're willing to invest in it, even when it comes at a higher cost.

Can I use other TLDs instead of .COM, .ORG, .NET, .CO, and .BIZ?

There are hundreds of other alternative domains available, from a tech-forward **.ai** and **.so**, to a creative **.art** and **.design**, ready and waiting to be snapped up. It might be that the perfect domain to represent you, may not be one of the oldest, and that a modern, newly released domain might be the perfect match for you. What are you waiting for?

Search for your dream domain name now

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Colleen Branch

Colleen is a senior copywriter at Namecheap and has been focussing on domain registration and management since 2019. She finds the domain industry fascinating and believes that "A domain name has unlimited possibilities. It's a chance for an individual or business to create a brand, communicate personality, and to grow. At Namecheap, we offer everything a person needs to get started and build their dream." Colleen started her copywriting career in 2008 and has been featured in HuffPost UK, The Times, and many other places in print and online. Her passions include cooking, music, and playing pool.

More articles written by Colleen.

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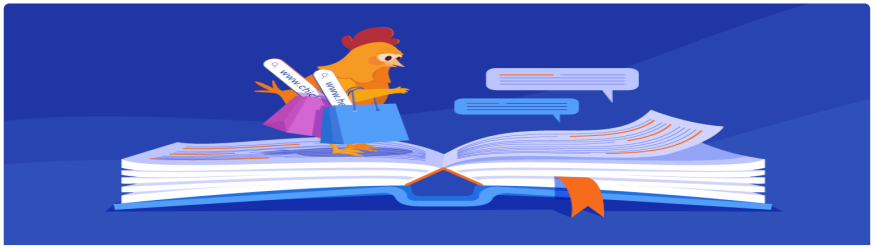

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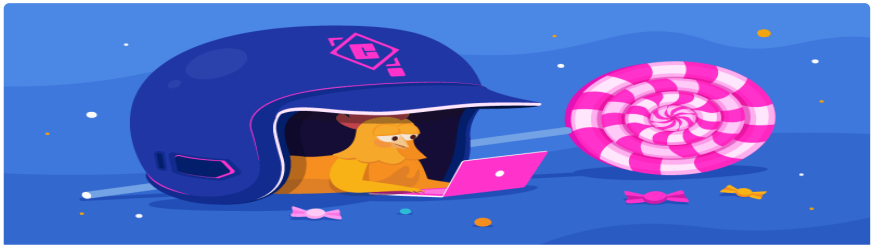

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Ex. R-46

Domains

Why Do Some Domain Extensions Cost More?

Andrew Allemann | November 3, 2016 2

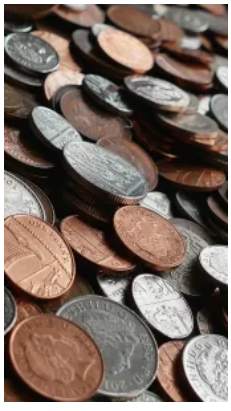
4 min read

When you register a new domain, you might notice a wide range in pricing. While some domain extensions are fairly inexpensive, others cost hundreds or even thousands of dollars. Since all domain names work the same way, why do you have to pay so much for some domains?

Below, we'll examine the reasons why some domains cost more than others.

Registries and Registrars

First, it's important to understand who sets the prices for domain names. You purchase domain names at a domain name retailer like Namecheap. These retailers are called *registrars*.



The registrars reserve domain names through wholesalers called *registries*. These wholesalers in turn control each top-level domain option (TLD). This is the part to the right of the dot in your domain name, like .com, .net, or .biz.
An easy way to think of it is to imagine the registrar as Target, and the registry as Coca-Cola. You can't buy soda directly from Coca-Cola; you have to buy it through a retailer like Target.

Just like with soda, both the retailers and wholesalers of domains set prices. The wholesalers set a price that the retailers have to pay whenever a customer registers one of the wholesaler's domain names. Like with any store, the domain retailer will generally add to the wholesale price (or "mark it up") when making the domain available for purchase.

For example, a company called Verisign is the wholesaler for .com. Whenever a retailer like Namecheap registers a domain for a customer, it has to pay a fee to Verisign, so the retailer has to charge at least that much to break even, and more to make a profit.

Domain Costs Vary Considerably

You'll see a lot of different prices for domain options when you search at Namecheap. Namecheap offers domain options for as little as $0.99. some top-level domains are much, much more expensive.

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For example, do you want to register the TLD .sucks? Prepare to pay hundreds of dollars. And it doesn't stop there. A few domain options are even more expensive. Fittingly, you'll have to be quite wealthy to buy a .rich domain, which will set you back almost two thousand dollars.

So Why Do Some Domains Cost So Much?

As your registrar, Namecheap adds just a little bit to each domain name it sells to cover expenses. So when you see a big price difference, that's because the wholesaler charges a lot more for that domain name.

Some domain names have fixed wholesale prices negotiated between the registry and a non-profit called the Internet Corporation for Assigned Names and Numbers (ICANN), which is like a regulator for domain names. The wholesale price for older domain options like .com, .net and .biz are limited by the regulator. That's why these domains are generally inexpensive to register.

But the regulator doesn't control prices on any of the new TLD options that have appeared recently, such as .club, .shop, and .news. The wholesalers for these domain names can charge whatever they want for these new web addresses, making them subject to the open market rules of supply-and-demand and resulting in wide price ranges. The regulator also doesn't limit what wholesalers of two-letter country domain options like .us and .ca can charge.

.

Is It Worth Buying an Expensive Domain?

Let's say the domain name you really want costs $50 per year, but you could settle for a second choice that's only $10. You'd be wise to think twice before passing on the more expensive one just to save a few bucks.

Your domain name is your brand. It's your identity on the web, your calling card, the web address you'll give to your customers and friends. Something this crucial to your online presence is not something to skimp on. So even though your first choice is more expensive, it may be worth the price.

Now that it's on your mind, why not register your next domain with Namecheap? Right now .com domains are just $5.88—grab one while they last!

Andrew Allemann is editor of Domain Name Wire, the longest-running blog covering the business of domain names. Domain Name Wire has covered the business of domain name investing for over ten years.

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Andrew Allemann

Andrew is the founder and editor of Domain Name Wire, a publication that has been covering domain names since 2005. He has personally written over 10,000 posts covering domain name sales, policy, and strategies for domain name owners. Andrew has been quoted in stories about domain names in The Wall Street Journal, Washington Post, New York Times and Fortune.

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Domains

Standing Up to ICANN to Keep Domain Prices in Check

Richard Kirkendall | July 29, 2019 8

4 min read

Earlier this year, ICANN announced that it would remove historical price caps for the **.org** top-level domain (TLD) from the Public Interest Registry (PIR) contract. Namecheap immediately encouraged Internet users to submit comments to ICANN in support of keeping the price caps for **.org** and other legacy TLDs (such as **.biz**, **.asia**, and **.info**).

Our concern was (and still is) that removing this price cap for these legacy (pre-2012) TLDs could lead to large and unpredictable price increases that would harm Internet users and stifle innovation. You can read more about this in our earlier blog post: Help Keep Domain Prices in Check.

We were overwhelmed by the extraordinary response – over 3,500 comments! After analyzing them carefully, we found that:

- 20% of comments were submitted by Namecheap customers
- 98% of comments supported keeping the price caps
- 0.25% of comments wanted to remove price caps
- 13% of comments were from nonprofits
- 34% of comments were from domain name registrants with domains in the **.org**, **.info**, or **.biz** TLDs (34%)

Despite the fact that almost every comment supported keeping price caps, ICANN decided to ignore this advice and removed the caps. ICANN's reasoning is that, in the event of a price increase, registrants could move to other TLDs or quickly renew domain names for 10 years prior to the change taking effect. In doing so, ICANN explicitly ignored feedback provided by many commenters:

- Using a **.org** domain name is critical to a nonprofit: it is well-known, safe, and trusted. There are no equivalent or relevant TLD that has the established reputation of **.org**.
- Many have been using a **.org** domain name for years, and the cost and risk of moving to another TLD (e.g. losing search engine rankings, notifying the public of the new TLD, etc) causes great concern.
- If prices increase too much, registrants might abandon using a domain name in order to use another platform with price certainty. This incl

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relying solely on social media or mobile apps.

- Concern that ICANN's decision only benefits the PIR and not registrants of **.org** or the Internet in general.
- Why now? The PIR is purely maintaining the **.org** registry and not undertaking development initiatives that would benefit registrants or require additional resources.
- Concern that removing the price cap for **.org** would also lead to removing the price cap for the **.com** registry agreement (which is subject to renewal in 2024, is the largest TLD by far, and because it is commercial in nature, is more likely to lead to price increases).

There were many emotional stories from commenters, often doing thankless and tireless work to provide humanitarian support all over the world. This includes suicide prevention, combatting human trafficking, helping disabled children, supporting people with life-threatening medical conditions, overcoming government censorship, and helping people in the poorest regions of the world. These commenters showed how any price increase in their domain name registration will hurt their important efforts, resulting in actual harm to people.

At Namecheap, we cannot understand why ICANN ignored the overwhelming voice of the Internet community and would decide to allow unrestricted price increases in legacy TLDs. We decided to stand up to ICANN on behalf of our customers, and the Internet community as a whole, on this very important issue by filing a Request for Reconsideration. This is a process through ICANN's bylaws that requires ICANN's board of directors to formally reconsider this wrong decision by ICANN staff. ICANN has 90 days to initially respond to Namecheap's request, and we'll update you when there is more information.

You can read more about Namecheap's Request for Reconsideration, including additional analysis and more stories from commenters, on ICANN's website at Request 19-2: Namecheap, Inc.

Namecheap remains committed to keeping domain name prices predictable and any price increases reasonable (as they always have been for legacy TLDs). We are also considering other options in the event that ICANN decides to ignore its own bylaws and the voice of the entire Internet community.

Sincerely,
Richard Kirkendall
CEO Namecheap

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Richard Kirkendall

Richard Kirkendall is the CEO of Namecheap.

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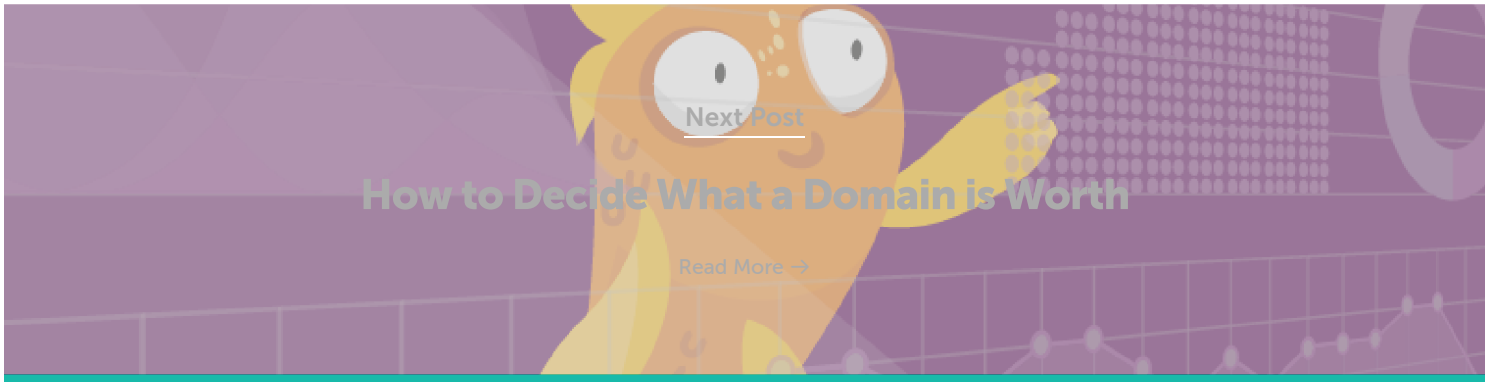

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Domains, News

Help Keep Domain Prices in Check

Jackie Dana | April 24, 2019 34

4 min read

Businesses want stability. They understand that domain prices increase over time but want predictability.

Imagine if next year you had to pay 10 times as much to renew your domain name as you paid this year. Based on an action proposed by the Internet Corporation for Assigned Names and Numbers (ICANN), price caps could be removed on several top level domains, which could significantly increase the price of domains.

Find out what's happening—and how to take action to stop this change before April 29.

Who Sets Domain Prices?

There are three parties involved when you register a domain name.

One is your domain name *registrar*, such as Namecheap.

When you register a domain name at Namecheap, we have to reserve the domain name through the domain name *registry*.

Think of the registrar as a domain name retailer and the registry as the wholesaler.

The wholesale registry charges Namecheap a set fee per domain name per year. Namecheap then adds a little markup to cover things like support, provisioning domain services, transaction fees, etc.

There's a lot of competition for domain name registrars. This keeps prices that companies like Namecheap charge in check.

Domain registries, on the other hand, have little competition. Only one registry can sell .org domains. The same goes for .info, .com, .net, etc.

A third group has historically kept the prices the registries charge Namecheap and other registrars in check. ICANN includes a provision in its contracts with registries that limits what they can charge.

Now ICANN has proposed *removing all price restrictions* on .org, .biz and .info domain names!

This could have a major impact on how much you pay to renew your domain names and register new ones.

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R-49

Sky-high .Org Prices Could Be Coming

ICANN's current contract with Public Interest Registry (PIR), the group that runs the .org domain name, lets PIR increase the wholesale price of .org domains by 10% a year.

That's a lot, but at least it's capped.

Now ICANN is proposing extending the contract to operate .org but letting PIR set whatever prices it wants. Rather than a 10% increase to renew your domain next year, it could suddenly start charging registrars like Namecheap 100 times as much. Registrars would have no choice but to pass these charges on to customers.

This means that the price for the domain name you've been using for over a decade could shoot up. The registry has to tell the registrar six months in advance, but then they are free to charge whatever they want. Switching domains is hard, so you will have little option but to pay the higher prices.

ICANN has also proposed lifting price caps on .info and .biz domain names.

ICANN's Bad Justification

ICANN has an interesting justification for why it wants to remove price controls.

In 2012, ICANN started accepting applications to operate "new" top level domains. Any company could apply to create alternatives to .com on the right of the dot. That's where domains like .guru, .money and .xyz came from.

The contracts for these new domains are different than for older domains. ICANN didn't impose any price restrictions on the new domains. After all, the companies that applied for the domains put their own money at risk.

ICANN believes that the contracts to run older TLDs like .org should be the same as those for running new top level domain names. This ignores the long history of these legacy top level domain names and how the contracts to run the registries were awarded. Whereas new top level domain companies risked their own money to introduce new domains, the registries running .org, .biz, etc. are merely stewards for what should be considered a resource that belongs to the web.

What Can You Do?

ICANN is asking the Internet community for input on its proposal to remove price caps. You can make your voice heard.

If you want to make sure ICANN doesn't let legacy top level domain operators increase prices to infinity, now is the time to act. There are open comment periods for ICANN's proposed new contracts, but you need to take action by April 29, 2019.

You can leave your comment on each proposal here:

- .Org comment period
- .Info comment period
- .Biz comment period

Because the layout of those pages is a bit confusing, this is where you would leave a comment:

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Also, the Internet Commerce Association, a group that advocates on behalf of domain name owners, has created a simple form you can use to submit comments on the .org proposal. The form lets you select the concerns you have about the new .org proposal and easily submit them to ICANN.

Make your voice heard: **tell ICANN to not remove its price limitations.**

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Jackie Dana

Jackie has been writing since childhood. As the Namecheap blog's content manager and regular contributor, she loves bringing

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helpful information about technology and business to our customers. In her free time, she enjoys drinking copious amounts of black tea, writing novels, and wrangling a gang of four-legged miscreants.

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FORM CD-451
(REV. 12-14)

U.S. DEPARTMENT OF COMMERCE

GRANT X COOPERATIVE AGREEMENT

AMENDMENT TO FINANCIAL ASSISTANCE AWARD

AWARD NUMBER
NCR-92-18742

CFDA NO. AND NAME
11.- National Telecommunications and Information Administration

PROJECT TITLE

RECIPIENT NAME
VeriSign, Inc.

AMENDMENT NUMBER
35

STREET ADDRESS
12061 Bluemont Way

EFFECTIVE DATE
October 26, 2018

CITY, STATE ZIP
Reston, Virginia 20190-5684

EXTEND PERIOD OF PERFORMANCE TO
(IF APPLICABLE)
November 30, 2024

COSTS ARE REVISED AS FOLLOWS:	PREVIOUS ESTIMATED COST	ADD	DEDUCT	TOTAL ESTIMATED COST
FEDERAL SHARE OF COST	$0.00	$0.00	$0.00	$0.00
RECIPIENT SHARE OF COST	$0.00	$0.00	$0.00	$0.00
TOTAL ESTIMATED COST	$0.00	$0.00	$0.00	$0.00

REASON(S) FOR AMENDMENT

The Department and Verisign have mutually agreed to certain modifications to the Cooperative Agreement as set forth in the Special Award Condition. Except as modified by this Amendment, the terms and conditions of the Cooperative Agreement, as previously amended, remain unchanged.

This Amendment Document (Form CD-451) signed by the Grants Officer constitutes an Amendment of the above-referenced Award, which may include an obligation of Federal funding. By signing this Form CD-451, the Recipient agrees to comply with the Amendment provisions checked below and attached, as well as previous provisions incorporated into the Award. If not signed and returned without modification by the Recipient within 30 days of receipt, the Grants Officer may unilaterally withdraw this Amendment offer and de-obligate any associated funds.

X SPECIAL AWARD CONDITIONS

LINE ITEM BUDGET

OTHER(S)

SIGNATURE OF DEPARTMENT OF COMMERCE GRANTS OFFICER

SCOTT MCNICHOL Digitally signed by SCOTT MCNICHOL
Date: 2018.10.26 11:52:09 -06'00'

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10/26/2018

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D. James Bidzos, CEO

DATE
10/26/18

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Federal Program Officer: Vernita Harris
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Award Contact Information

Contact Name	Contact Type	Email	Phone
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Special Award Conditions NCR-92-18742

Amendment Thirty-Five (35)

WHEREAS, pursuant to Amendment 34, the Department has reviewed whether to extend the term of the Cooperative Agreement and has determined that it is in the public interest to extend the Cooperative Agreement on the terms set forth herein;

WHEREAS, the parties agree that Verisign shall continue to operate the .com registry in a content neutral manner and will participate in ICANN processes that promote the development of content neutral policies for the operation of the Domain Name System (DNS);

WHEREAS, the Department finds that ccTLDs, new gTLDs, and the use of social media have created a more dynamic DNS marketplace;

WHEREAS, given the more dynamic DNS marketplace, the Department has determined that it is appropriate to amend the Cooperative Agreement to provide pricing flexibility for the registration and renewal of domain names in the .com registry;

WHEREAS, the parties have agreed to clarify that it was, and remains, the intention of the parties that the vertical integration restriction on Verisign's ability to own a registrar apply only to the .com registry and not to the other services offered by Verisign;

WHEREAS, the Department has reviewed the regulatory oversight necessary to ensure the security, stability and resiliency of the .com registry and to ensure that .com domain name registrations are offered at reasonable prices, terms and conditions;

WHEREAS, given this regulatory review, the Department has determined it is appropriate to remove certain unnecessary and burdensome regulations while still maintaining sufficient oversight by retaining the Department's approval authority for changes to the .com Registry Agreement for the following critical terms of the .com Registry Agreement: pricing; vertical integration; renewal or termination; functional and performance specifications; and the Whois Service;

THEREFORE, Verisign and the Department agree as follows:

1. **Content Neutral Operations**. The parties agree that Verisign will operate the .com registry in a content neutral manner and that Verisign will participate in ICANN processes that promote the development of content neutral policies for the operation of the DNS.

2. **Pricing Flexibility**. In recognition that ccTLDs, new gTLDs, and the use of social media have created a more dynamic DNS marketplace, the parties agree that the yearly price for the registration and renewal of domain names in the .com registry may be changed in accordance with the following:

    a. Without further approval by the Department, at any time following the Effective Date of this Amendment 35, Verisign and ICANN may agree to amend Section 7.3(d)(i) (Maximum Price) of the .com Registry Agreement to permit Verisign in each of the last four years of every six year period, beginning two years from the Effective Date of this Amendment 35 (i.e., on or after the anniversary of the Effective Date of this Amendment 35 in 2020-2023, 2026-2029, and so on) to increase the Maximum Price charged by Verisign for each yearly registration or renewal of a .com domain name up to seven percent over the highest Maximum Price charged in the previous calendar year.

    b. Section 2 of Amendment 32 which implemented the prior pricing restrictions is hereby deleted.

3. **Vertical Integration**. The parties hereby clarify that the restrictions on Verisign's ownership of any ICANN-accredited registrar(s) were, and remain, intended to apply solely to the .com registry and therefore Verisign and ICANN may agree to amend the .com Registry Agreement to clarify its terms in accordance with the following:

    a. Without further approval by the Department, at any time following the Effective Date of this Amendment 35, Verisign and ICANN may amend Section 7.1(c) (Restrictions on Acquisition of Ownership or Controlling Interest in Registrar) of the .com Registry Agreement to provide that the ownership restriction therein relates solely to the .com TLD and does not prevent Verisign from owning a registrar except as to .com.

4. **Continued Department Oversight**. The Department has determined it is appropriate to remove certain unnecessary and burdensome regulations while still maintaining sufficient oversight by retaining the Department's approval authority for certain changes to the .com Registry Agreement in accordance with the following:

    a. Department approval was previously required for changes to certain terms of the .com Registry Agreement defined as "Designated Terms" under Section 1.B.2.A(ii) of Amendment 19, as amended by Section 2 of Amendment 30

which is hereby deleted in its entirety, as well as, all references to "Designated Terms" in Amendment 30.

b. The parties agree that the following terms are the sole terms in the .com Registry Agreement that require the prior written approval of the Department:
    i. Removal of the Maximum Price restriction under Section 7.3(d)(i) (Maximum Price) of the .com Registry Agreement, which by way of clarification will continue to be subject to Section 3(a) of Amendment 32 setting forth the standard and process for removal;
    ii. Any change to Section 7.3(d) of the .com Registry Agreement which sets forth the Maximum Price restrictions (other than as agreed as set forth in Section 2 (Pricing Flexibility) in this Amendment 35);
    iii. Any change to Section 7.1(b) (Registry Operator Shall Not Act as Own Registrar) and 7.1(c) (Restrictions on Acquisition of Ownership or Controlling Interest in Registrar) of the .com Registry Agreement, which set forth the vertical integration restrictions on Verisign owning or acting as a registrar, respectively (other than as agreed as set forth in Section 3 of this Amendment 35);
    iv. Any changes to the security, stability and resiliency posture of the .com TLD as reflected in the functional and performance specifications under Section 3.1(d)(ii) or Appendix 7 (Functional and Performance Specifications) of the .com Registry Agreement;
    v. Any change to the conditions for renewal or termination under Sections 4.2 (Renewal), 4.3 (Failure to Perform in Good Faith) or 6.1 (Termination by ICANN) of the .com Registry Agreement;
    vi. Any changes to the Whois Service under Sections 3.1(c)(v) (Whois Service) or Appendix 5 (Whois Specification), except as such changes are mandated by ICANN through Temporary or Consensus Policies.

c. The Department's approval of any amendment to the .com Registry Agreement, or the renewal, extension, continuation or substitution of the .com Registry Agreement, shall not be required unless Verisign seeks to change a term identified in Section 4(b)(i)-(vi) of this Amendment 35, except as already approved under Sections 2 and 3 of this Amendment 35.

d. Upon application by Verisign for approval of such change or changes identified in Section 4(b) of this Amendment 35, the Department shall

consult with Verisign in any evaluation of its application. The Department shall issue a written decision explaining its reasons for granting or denying, in whole or in part, such application within ninety (90) days after submission of its application, or within 90 days after receipt of any additional materials requested by the Department to evaluate the application, whichever date is later. If the Department determines that additional time is needed to complete its review, then the parties shall agree to an extension of time for six months or such other reasonable time as the Department and Verisign may agree. After receiving any written notice of failure to approve, Verisign shall be entitled to confer with the Department. After conferring with the Department, Verisign may propose for the Department's approval one or more new or revised proposals. The Department's review of an initial application or new or revised proposals shall: (x) for applications to change pursuant to Section 4(b)(i) above, be in accordance with the standard set forth in Amendment 32, Section 3(a); (y) for applications to make any other changes as set forth in Sections 4(b)(ii)-(vi) above, be made by determining whether such change or changes are reasonably necessary to promote the public interest in consideration with the business necessity of the requested change. Any review and approval by the Department of any request under this Section shall not be unreasonably withheld. The Department's pending approval for any change to the .com Registry Agreement under Section 4 of this Amendment 35 shall not prevent Verisign and ICANN from entering into an amendment to the .com Registry Agreement, for its renewal, extension, continuation or substitution, without such change.

5. **Miscellaneous.** The following provisions are intended to ensure that the parties' intent in this Amendment 35 is reflected consistently throughout the Cooperative Agreement.

   a. As the parties have agreed to the standard of review for any proposed changes to the .com Registry Agreement requiring the Department's approval in Sections 4(b)(i) and 4(d) of this Amendment 35, the parties hereby delete the last sentence of Section I.B.2.A(iii) of Amendment 19, as amended by Section 2 of Amendment 30 that set forth the conflicting standard of approval being in the Department's sole discretion.

   b. As the parties have agreed to the timeframe for review of any proposed changes to the .com Registry Agreement in Section 4(b) of this Amendment

35, the parties hereby delete Section 3(b) of Amendment 32, which set forth the timeframes for evaluation of an application to remove pricing restrictions.

c. As the parties have identified the sole terms in the .com Registry Agreement that require the Department's prior written approval, the parties hereby revise Section 1.B.2.A(iv) of Amendment 19, as amended by Section 2 of Amendment 30, to apply solely to those terms identified in Section 4(b) of this Amendment 35.

d. As the parties have addressed the renewal of the .com Registry Agreement and because the Department's recognition of ICANN is no longer relevant, Section 1.B.9(ii) and (iii) of Amendment 19, as amended by Section 3 of Amendment 30, are hereby deleted.

6. **Expiration Date**.

a. Section 1.B.10 of Amendment 19, Expiration Date, as amended by Section 4 of Amendment 32 is amended as follows:

"The current term of the Cooperative Agreement shall continue through November 30, 2024, and shall automatically renew for six-year terms, unless the Department provides Verisign with written notice of non-renewal within one hundred twenty days (120) prior to the end of the then current term ("Expiration Date"). Notwithstanding anything in the Cooperative Agreement to the contrary, the Department and Verisign agree that: (i) upon expiration or termination of the Cooperative Agreement, neither party shall have any further obligation to the other and nothing shall prevent Verisign from operating the .com TLD pursuant to an agreement with ICANN or its successor; and (ii) neither party may amend the Cooperative Agreement without the mutual written agreement of the other."

b. Section 2 of Amendment 34 is hereby deleted.

7. **Antitrust Immunity**. The Department's approval of this Amendment 35 is not intended to confer federal antitrust immunity on Verisign with respect to the .com Registry Agreement.

8. **No Other Amendment**. Except as modified by this Amendment 35, the terms and conditions of this Cooperative Agreement, as previously amended, remain unchanged.

Ex. R-51

WHAT'S NEW PIR announces strategic expansion of mission-driven TLD portfolio!

Select Language

HOME
USE .ORG
NEWSROOM
.ORG NEWSROOM
ORG
AN OPEN LETTER TO THE .ORG COMMUNITY

Go Back

An Open Letter to the .ORG Community

MAY 1, 2019 | ORG

Dear .ORG Community:

Now that the ICANN public comment period has expired on the proposed .ORG Registry Agreement renewal, we would like to respond to some concerns that have been raised about moving .ORG to the standard registry agreement.

It was important for us to fully understand the opinions and insights offered to ensure we were as inclusive as possible with our response to you. It was equally important to us to preserve the integrity of the ICANN public comment process. We didn't want our response to shape or impact any of the important and

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critical discussions around the proposed agreement. It is now time to respond to you – our .ORG Community.

We Stand Beside You

The .ORG Community always is considered in every decision we make here at Public Interest Registry. **Rest assured, we will not raise prices unreasonably. In fact, we currently have no specific plans for any price increases for .ORG.** We simply are moving to the standard registry agreement with all of its applicable provisions that already is in place for more than 1,200 other top-level domain extensions.

Under the current .ORG Registry Agreement, Public Interest Registry has had the ability to annually raise prices 10% per year. Despite that ability, we have not raised our prices for the last three years.

We also want to mention that you, our end users, are protected in the registry agreement in case of any sensible future price increases. You would receive six-months' notice of any increase from your registrar (the company where you registered your domain) with the ability to lock in your pricing at the then current rate for the next 10 years without any price fluctuation. Also, keep in mind that .ORG is constrained by the competitive market; we cannot dramatically increase prices for .ORG, as we recognize and understand that both our .ORG end users and our .ORG registrars would turn away from .ORG.

To our valued registrar partners, we stand behind you and recognize that a dramatic price increase for .ORG would adversely impact you and your ability to effectively work with .ORG registrants. Such an increase is not in your interest, and that is another reason it is not in our interests either. We appreciate the constructive and thoughtful comments we received from our registrar friends on this front.

We are Mission Based, Like the .ORG Community

Public Interest Registry is the non-profit registry operator behind .ORG. We are different. We are mission based and not every decision is a financial one; we are not just driven by the “bottom line.”

It is important to note what Public Interest Registry does with the funds it raises through .ORG registrations. More than 50 cents of every dollar that currently comes into Public Interest Registry already goes directly to fund the Internet Society and its incredible work. If there are any sensible future price increases, obviously no proceeds would go towards bolstering Public Interest Registry’s share price (remember, we are a nonprofit), but instead would fund projects that do good work for the Internet, such as providing a more accessible and more secure Internet around the world.

Public Interest Registry has served as the Registry Operator for .ORG for more than 15 years, and .ORG is what it is today because of you. PIR is extraordinarily proud of our .ORGs and your good work, and we will never betray the trust that you have put into .ORG and us. Our stewardship of .ORG will continue in the exact same thoughtful and responsible manner as we have conducted ourselves to this point.

Thank you,

The PIR Team

Previous Next

SEARCH

BECOME A REGISTRAR FIND A REGISTRAR POLICIES GLOSSARY

Ex. R-52

ICANN BOARD SUBMISSION NO. 2019.11.21.1a

TITLE: **Consideration of Reconsideration Request 19-2**

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

EXECUTIVE SUMMARY:

Namecheap Inc. (Requestor) seeks reconsideration of ICANN organization's 2019 renewal of the Registry Agreements (RAs) with Public Interest Registry (PIR) and Afilias Limited (Afilias) for the .ORG and .INFO generic top-level domains (gTLDs), respectively (individually .ORG Renewed RA and .INFO Renewed RA; collectively, the .ORG/.INFO Renewed RAs). Specifically Requestor challenges the ORG/.INFO Renewed RAs insofar as they eliminated "the historic price caps" on domain name registration fees for .ORG and .INFO.[1] The Requestor claims that ICANN org's "decision to ignore public comments to keep price caps in legacy gTLDs is contrary to ICANN's Commitments and Core Values, and ICANN should reverse this decision for the public good."[2] The Requestor also asserts that ICANN Staff failed to consider material information concerning the nature of the .ORG TLD and security issues with new gTLDs when it executed the .ORG/.INFO Renewed RAs.[3] The Requestor "requests that ICANN org and the ICANN Board reverse its decision and include (or maintain) price caps in all legacy gTLDs."[4]

The Board previously issued a Proposed Determination denying reconsideration because ICANN org's execution of the .ORG/.INFO Renewed RAs did not contradict ICANN's Bylaws, policies, or procedures, and ICANN Staff did not fail to consider material information in executing the Agreements.[5]

Pursuant to Article 4, Section 4.2(q) of the Bylaws, the Requestor submitted a rebuttal to the Proposed Determination. The Requestor challenged the Board's reliance on evidence concerning and mechanisms designed for New gTLDs, reiterated its argument that ICANN Staff should have acted in accordance with "essentially unanimous public comments in support of price caps," and

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[1] Request 19-2, § 3, at Pg 2
[2] *Id.* § 8, at Pg 3
[3] *Id.*, § 8, at Pg 10
[4] *Id.*, § 9, at Pg 12
[5] https://www icann org/resources/board-material/resolutions-2019-11-03-en#1 a

asserted that the recent acquisition of .ORG by a for-profit entity merits additional scrutiny of the .ORG Renewed RA.[6]

PROPOSED RESOLUTION:

Whereas, Namecheap Inc. (Requestor) filed a reconsideration request (Request 19-2) challenging ICANN organization's 2019 renewal of the Registry Agreements (RAs) with Public Interest Registry (PIR) and Afilias Limited (Afilias) for the .ORG and .INFO generic top-level domains (gTLDs), respectively (collectively, .ORG/.INFO Renewed RAs), insofar as the renewals eliminated "the historic price caps" on domain name registration fees for .ORG and .INFO.[7]

Whereas, the Requestor claims that ICANN org's "decision to ignore public comments to keep price caps in legacy gTLDs is contrary to ICANN's Commitments and Core Values, and ICANN should reverse this decision for the public good."[8] The Requestor also asserts that ICANN Staff failed to consider material information concerning the nature of .ORG and security issues with new gTLDs when it executed the .ORG/.INFO Renewed RAs.[9]

Whereas, the Board Accountability Mechanisms Committee (BAMC) previously determined that Request 19-2 is sufficiently stated and sent Request 19-2 to the Ombudsman for consideration in accordance with Article 4, Section 4.2(j) and (k) of the ICANN Bylaws.

Whereas, pursuant to Article 4, Section 4.2(l), the Ombudsman accepted Request 19-2 for consideration, and, after investigating, concluded that "the CEO and Staff acted within the scope of the powers given them by the Board," and that "no rules or duties of corporate governance were violated (including the ICANN Bylaws)."[10]

Whereas, the Board previously issued a Proposed Determination denying reconsideration because ICANN org's execution of the .ORG/.INFO Renewed RAs did not contradict ICANN's

[6] Rebuttal in Support of Request 19-2, https://www icann org/resources/pages/reconsideration-19-2-namecheap-request-2019-07-22-en
[7] Request 19-2, § 3, at Pg 2
[8] *Id.* at § 3
[9] *Id.*
[10] https://www icann org/en/system/files/files/reconsideration-19-2-namecheap-evaluation-icann-ombudsman-request-07sep19-en pdf

Bylaws, policies, or procedures, and ICANN Staff did not fail to consider material information in executing the Agreements. (*See* https://www.icann.org/resources/board-material/resolutions-2019-11-03-en#1.a.) The Board's action was taken in lieu of the BAMC's substantive evaluation on Request 19-2 pursuant to Article 4, Section 4.2(e) of the Bylaws because the BAMC did not have a quorum to consider Request 19-2.

Whereas, the Board has carefully considered the merits of Request 19-2 and all relevant materials, including the Requestor's rebuttal, and the Board reaffirms its conclusions in the Proposed Determination that ICANN org's execution of the .ORG/.INFO Renewed RAs did not contradict ICANN's Bylaws, policies, or procedures, and that ICANN Staff did not fail to consider material information in executing the Agreements. The Board further concludes that the rebuttal provides no additional argument or evidence to support reconsideration.

Resolved (2019.11.21.XX), the Board adopts the Final Determination on Reconsideration Request 19-2.

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PROPOSED RATIONALE:

1. Brief Summary and Recommendation

The full factual background is set forth in the Proposed Determination on Request 19-2 (Proposed Determination), which is incorporated here.

On 3 November 2019, the Board evaluated Request 19-2 and all relevant materials, and issued a Proposed Determination denying reconsideration because ICANN org's execution of the .ORG/.INFO Renewed RAs did not contradict ICANN's Bylaws, policies, or procedures, and ICANN Staff did not fail to consider material information in executing the Agreements. (*See* https://www.icann.org/resources/board-material/resolutions-2019-11-03-en#1.a.) The Board's action was taken in lieu of the BAMC's substantive evaluation on Request 19-2 pursuant to Article 4, Section 4.2(e) of the Bylaws because the BAMC did not have a quorum to consider Request 19-2.

On 18 November 2019, the Requestor submitted a rebuttal to the Proposed Determination (Rebuttal), pursuant to Article 4, Section 4.2(q) of ICANN's Bylaws. The Requestor claims that (1) the Board should not have relied on an expert economist's prior assessment of the need for

price caps in new gTLD Registry Agreements; (2) the Base RA's development process does not support migration of .ORG and .INFO to the Base RA; (3) ICANN Staff disregarded "essentially unanimous public comments in support of price caps"; (4) that it has sufficiently alleged harm, and (5) that a for-profit entity purchased .ORG after the .ORG Renewed RA was executed "requires that ICANN [org] review this purchase in detail and take the necessary steps to ensure that .org domains are not used [as] a source of revenue" for certain purposes.[11]

The Board has carefully considered Request 19-2 and all relevant materials, including the Requestor's rebuttal, and, for the reasons set forth in detail in the Final Determination, the Board reaffirms its conclusions in the Proposed Determination and concludes that the Rebuttal provides no additional argument or evidence to support reconsideration.

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2. Analysis and Rationale

A. The .ORG/.INFO Renewed RAs Are Consistent With ICANN Org's Commitments.

There is no evidence to support the Requestor's conclusory assertion that ICANN org did not act for the public benefit when it omitted the price caps from the .ORG/.INFO Renewed RAs. As discussed in further detail in the Final Determination, which is incorporated herein, on the contrary, the evidence demonstrates that ICANN org sought community consultation regarding the proposed changes to the .ORG and .INFO RAs through a public comment process. ICANN org reviewed and considered all 3,700 comments received.[12] ICANN Staff presented and discussed the key issues raised in the public comment process and correspondence, including removal of price caps, with the Board before executing the .ORG/.INFO Renewed RAs.[13]

That ICANN org ultimately decided to proceed without price caps despite public comments opposing this approach does not render the public comment process a "sham" or otherwise demonstrate that ICANN org failed to act for the public benefit. ICANN Staff's careful consideration of the public comments—as reflected in its Report of Public Comments and

[11] Rebuttal in Support of Request 19-2, https://www icann org/resources/pages/reconsideration-19-2-namecheap-request-2019-07-22-en
[12] Report of Public Comments, ORG, at Pg 3; Report of Public Comments, INFO, at Pg 3
[13] 26 July 2019 Letter, at Pg 2.

discussion with the Board,[14] demonstrate the exact opposite, namely that the inclusion of price caps was carefully considered.

Further, the Report of Public Comments demonstrates ICANN Staff's belief that it was acting for the public benefit by "promot[ing] competition in the registration of domain names," providing the same "protections to existing registrants" afforded to registrants of other TLDs, and treating "the Registry Operator equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the Base [RA]."[15] There is no support for the Requestor's assertion that ICANN Staff's belief in this regard was based upon "conclusory statements not supported by evidence."[16] ICANN org considered Professor Carlton's 2009 expert analysis of the Base RA, and specifically his conclusion that limiting price increases was not necessary, and that the increasingly competitive field of registry operators in itself would serve as a safeguard against anticompetitive increases in domain name registration fees.[17]

B. The .ORG/.INFO Renewed RAs Are Consistent With ICANN Org's Core Values.

The Board finds that there is no evidence to support the Requestor's assertion that omitting the price caps from the .ORG/.INFO Renewed RAs contradicts ICANN org's Core Value of

> [s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.[18]

As discussed in further detail in the Final Determination, which is incorporated herein, contrary to the Requestor's argument, ICANN org *did* seek broad, informed participation through the public comment process for the .ORG/.INFO Renewed RAs. Moreover, ICANN org's Core Values do not require it to accede to each request or demand made in public comments or otherwise asserted through ICANN's various communication channels. ICANN org ultimately

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[14] 26 July 2019 Letter, at Pg 2.
[15] Report of Public Comments, ORG, at Pg 8
[16] Request 19-2, § 8, at Pg 12
[17] Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, at ¶ 12, https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf
[18] Request 19-2, § 8, at Pg 4

determined that ICANN's Mission was best served by replacing price caps in the .ORG/.INFO Renewed RAs with other pricing protections to promote competition in the registration of domain names, afford the same "protections to existing registrants" that are afforded to registrants of other TLDs, and treat registry operators equitably.[19] Further, the Base RA, which is incorporated in the .ORG/.INFO Renewed RA, "was developed through the bottom-up multi-stakeholder process including multiple rounds of public comment."[20]

The Requestor has not demonstrated that ICANN org failed to seek or support broad participation or ascertain the global public interest. To the contrary, ICANN org's transparent processes reflect its continuous efforts to ascertain and pursue the global public interest by migrating the legacy gTLDs to the Base RA. Accordingly, this argument does not support reconsideration.

C. ICANN Org's Statements Concerning The Purpose Of Public Comments Do Not Support Reconsideration.

The Board finds that there is not support for the Requestor's assertion that omitting the price caps from the .ORG/.INFO Renewed RAs is contrary to ICANN org's statement on the public comment proceeding that the "purpose of this public comment proceeding is to obtain community input on the proposed .ORG renewal agreement."[21] As discussed in further detail in the Final Determination, which is incorporated herein, ICANN org's decision not to include price caps in the .ORG/.INFO Renewed RAs does not mean that ICANN org failed to "obtain community input" or "use[]" the public comment "to guide implementation work" of ICANN org.[22] To the contrary, it is clear that ICANN org actively solicited community input, and carefully analyzed it as part of its efforts—in consultation with the Board—to ascertain, and then with the Board's support, to pursue, the global public interest. Additionally, the Board notes that reconsideration is available for ICANN Staff actions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies).[23] ICANN org's general description of the purpose of the public comment process is not a Commitment, Core Value,

Commented [A4]: Insert hyperlink to Final Determination

[19] Report of Public Comments, ORG, at Pg 8; Report of Public Comments, INFO, at Pg 7
[20] 26 July 2019 Letter, at Pg 1
[21] *Id.*
[22] *See id.*
[23] Bylaws, Art 4 § 4 2(c) The challenged action must adversely affect the Requestor as well *Id.*

established policy, nor part of ICANN org's Mission. Accordingly, reconsideration is not supported.

D. The Requestor Has Not Demonstrated That ICANN Org Acted Without Consideration Of Material Information.

As discussed in further detail in the Final Determination, which is incorporated herein, there is no evidence to support the Requestor's claim that ICANN org's analysis of the proposed removal of price caps was taken without material information.

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E. The Requestor Has Not Demonstrated That It Has Been Adversely Affected By The .ORG/.INFO Renewed RAs.

The Requestor has not shown that it has been harmed by the .ORG/.INFO Renewed RAs. The Requestor asserts that it has been adversely affected by the challenged conduct because, "[a]s a domain name registrar, removal of prices caps for legacy TLDs will negatively impact [the Requestor's] domain name registration business," insofar as the .ORG/.INFO Renewed RAs create an "uncertainty of price increases."[24] The Requestor has not shown that it has, in fact, been harmed by the financial uncertainty it identified in Request 19-2, nor that it has been harmed by any price increases under the .ORG/.INFO Renewed RAs. Instead, the Requestor asserts that "additional analysis is needed to determine whether" the removal of price caps in the .ORG RA "can result in uncompetitive practices."[25] This suggestion of further study is insufficient, at this stage, to warrant Reconsideration. The Requestor has not identified any *evidence* that it has been harmed or will be harmed by removal of the price caps, and the evidence that is available—Professor Carlton's expert report—indicates that such harm is not expected. As noted in the Final Determination, in 2009, Professor Carlton concluded that price caps were unnecessary to protect against unreasonable increases in domain name registration fees.[26] Professor Carlton explained that "a supplier that imposes unexpected or unreasonable price increases will quickly harm its reputation[,] making it more difficult for it to continue to attract new customers. Therefore, even in the absence of price caps, competition can reduce or

[24] Request 19-2, § 6, at Pg 2; *see also id* § 10, at Pg 13
[25] Request 19-2, § 8, at Pg 10
[26] Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, at ¶ 12, https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf

eliminate the incentives for suppliers to act opportunistically."[27] For these reasons, reconsideration is not warranted.

F. The Rebuttal Does Not Raise Arguments or Facts that Support Reconsideration.

The Requestor makes five arguments in its Rebuttal. None support reconsideration. As discussed in further detail in the Final Determination, the Requestor's Rebuttal reiterates arguments that the Board addressed in the Proposed Determination. The Requestor's responses to the Proposed Determination rely on the assumption that legacy gTLDs should be treated differently than new gTLDs and should not migrate to the Base RA; Requestor still offers no evidence supporting this argument, and is incorrect, as demonstrated by the legacy gTLDs that have migrated to the Base RA over the past several years. The .ORG Registry Operator is irrelevant to this Reconsideration Request and does not support reconsideration. Notwithstanding that we are denying Request 19-2, the Board does acknowledge the recently announced acquisition of PIR, the current .ORG Registry Operator, and the results of that transaction is something that ICANN organization will be evaluating as part of its normal process in such circumstances.

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This action is within ICANN's Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures. This accountability includes having a process in place by which a person or entity materially affected by an action of the ICANN Board or Staff may request reconsideration of that action or inaction by the Board. This action should have no financial impact on ICANN and will not negatively impact the security, stability and resiliency of the domain name system.

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

Submitted By:	Amy Stathos, Deputy General Counsel
Date Noted:	19 November 2019
Email:	amy.stathos@icann.org

[27] *Id.*

REFERENCE MATERIALS – BOARD PAPER NO. 2019.11.21.1a

TITLE: **Consideration of Reconsideration Request 19-2**

Documents

The following attachments are relevant to the Board's consideration of Reconsideration Request 19-2.

Attachment A is Reconsideration Request 19-2, submitted on 12 July 2019.

Attachment B is the Ombudsman's Evaluation of Request 19-2, issued 7 September 2019.

Attachment C is the Letter from the Internet Commerce Association to the Ombudsman, dated 12 September 2019.

Attachment D is the Proposed Determination on Request 19-2, adopted by the Board on 3 November 2010.

Attachment E is the Requestor's Rebuttal to the Proposed Determination on Request 19-2, submitted on 18 November 2019.

Attachment F is the Final Determination on Request 19-2.

Attachment G is the redline comparison of the Final Determation against the Proposed Determirnation on Request 19-2.

Submitted By:	Amy Stathos, Deputy General Counsel
Date Noted:	19 November 2019
Email:	amy.stathos@icann.org

Reconsideration Request Form

Version as of 21 September 2018

ICANN's Board Accountability Mechanisms Committee (BAMC) is responsible for receiving requests for reconsideration (Reconsideration Request) from any person or entity that has been adversely affected by the following:

> (a) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);
>
> (b) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or
>
> (c) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or Staff's reliance on false or inaccurate relevant information.

The person or entity submitting such a Reconsideration Request is referred to as the Requestor.

Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please refer to Article 4, Section 4.2 of the ICANN Bylaws and the Reconsideration Website at https://www.icann.org/resources/pages/accountability/reconsideration-en.

This form is provided to assist a Requestor in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requestors may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12-point font. Requestors may submit all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.

For all fields in this template calling for a narrative discussion, the text field will wrap and will not be limited.

Please submit completed form to reconsideration@icann.org.

1. Requestor Information

Name: Namecheap, Inc. (IANA 1068)

Address: Contact Information Redacted

Email: Contact Information Redacted

Phone Number (optional):

2. Request for Reconsideration of:

___X__ Board action/inaction

___X__ Staff action/inaction

3. Description of specific action you are seeking to have reconsidered.

On 30 June 2019, ICANN org renewed the registry agreement for the .org and .info TLD without the historic price caps, despite universal widespread public comment supporting maintain the price caps. The decision by ICANN org to unilaterally remove the price caps when renewing legacy TLDs with little (if any) evidence to support the decision goes against ICANN's Commitments and Core Values, and will result in harm to millions of internet users throughout the world. ICANN's announcement about this decision is at https://www.icann.org/resources/agreement/org-2019-06-30-en and https://www.icann.org/resources/agreement/info-2019-06-30-en.

4. Date of action/inaction:

30 June 2019

5. On what date did you become aware of the action or that action would not be taken?

1 July 2019

6. Describe how you believe you are materially and adversely affected by the action or inaction:

As a domain name registrar, removal of price caps for legacy TLDs will negatively impact Namecheap's domain name registration business.

Uncertainty regarding future price increases (including the possibility of increases that exceed historical norms) may cause Namecheap's customers to not renew domain names or not register new domain names in legacy TLDs. This may additionally impact other legacy TLDs subject to renewal, such as .com. ICANN org ignored the overwhelming number of public comments supporting maintaining historical price caps, essentially making a mockery of the public comment process.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

All domain name registrants, especially those who have domains in legacy TLDs with longstanding price caps, will be adversely affected when legacy TLDs begin to raise prices outside of previously established norms. In addition, web developers and internet hosting companies will see decreased sales and revenue. Unrestricted price increases for legacy TLDs will stifle internet innovation, harm lesser served regions and groups, and significantly disrupt the internet ecosystem. An incredible variety of public comments was submitted to ICANN from all continents (except Antarctica) imploring ICANN to maintain the legacy TLD price caps- which were completely discounted and ignored by ICANN org.

8. Detail of Board or Staff Action/Inaction – Required Information

I. Introduction

Namecheap is submitting this reconsideration request to protect the rights and interests of Namecheap's customers and the entire internet community. Price caps for legacy TLDs have been an integral longstanding foundation for the domain name marketplace, and removing them will result in uncertainty and confusion at a minimum, and in the worst case, increased costs for domain name registrants worldwide. ICANN requested public comment regarding the changes to the .org registry agreement, and the response was overwhelmingly against removing price caps. Comments came from small non-profits, international organizations, government agencies, members of government, individuals, families, businesses, entrepreneurs, and people from lesser developed regions and those underrepresented in the ICANN community. ICANN rejected over 3,500 comments against removing price caps by stating registrants could use other TLDs, renew for 10 years if a price increases were excessive, and claiming (without evidence) that market competition would keep the prices for the third largest TLD from rising compared to other TLDs (ignoring the significant differences between .org and new gTLDs raised by commenters). The decision to ignore public comments to keep price caps in legacy TLDs is contrary to ICANN's Commitments and Core Values, and ICANN should reverse this decision for the public good.

II. Basis for the Reconsideration Request

ICANN's bylaws include Commitment 4(A), which states that ICANN will "*seek input from the public, for whose benefit ICANN in all events shall act.*" The bylaws also include the following Core Values:

"*(ii) Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent*

[…]

(vii) Striving to achieve a reasonable balance between the interests of different stakeholders, while also avoiding capture"

In line with the Commitments and Core Values, ICANN's Public Comment Opportunities page prominently states:

"Public Comment is a mechanism that gives the ICANN community and other stakeholders an opportunity to provide input and feedback. Public Comment is a key part of the policy development process (PDP), allowing for refinement of recommendations before further consideration and potential adoption. Public Comment is also used to guide implementation work, reviews, and operational activities of the ICANN organization."

https://www.icann.org/public-comments (accessed 3 July 2019)

Specifically, regarding the public comment period for the Proposed Renewal of .org Registry Agreement, ICANN stated:

"Purpose: The purpose of this public comment proceeding is to obtain community input on the proposed .org renewal agreement (herein referred to as ".org renewal agreement").

[…]

Following review of the public comments received, ICANN will prepare and publish a summary and analysis of the comments received. The report will be available for the ICANN Board in its consideration of the proposed .org renewal agreement."

https://www.icann.org/public-comments/org-renewal-2019-03-18-en (accessed 3 July 2019)

In addition to the additional information how ICANN accepts and integrates public comments, for the past few years ICANN org has undertaken efforts to conduct

outreach to domain name registrants and encourage their participation in the ICANN community. Although this can be daunting for non-technical individuals, ICANN org provides good introductory information and in part encourages individuals to provide public comments to ICANN.

ICANN's dedicated section for domain name registrants (https://www.icann.org/registrants), states:

"Throughout all of ICANN's work, we endeavor to serve the global public interest, domain name registrants and end-users of the Internet by ensuring a secure and stable domain name system (DNS), all while promoting trust, choice, and competition in the industry. Domain name registrants are an integral component of the DNS; they are the entities or individuals that have acquired the right to use a domain name for a period of time via an agreement with a registrar or reseller.

[…]

Program Goals

Identifying and raising awareness about issues and challenges that registrants are facing."

- ICANN GDD: Raising Awareness About Registrant Issues and Challenges (presented at ICANN64 https://64.schedule.icann.org/meetings/962101) (accessed 3 July 2019)

The domain name registrants page provides links to encourage registrants to participate in ICANN policy, to provide public comments, and to get involved in the ICANN community.

III. Public comments submitted to ICANN

Namecheap reviewed the approximately 3,538 public comments that were submitted in response to the public comment proceedings for the renewal of the .org and .info registry agreements[1]. An analysis of the data shows that while a large number of commenters were Namecheap customers, a majority were not and represent a varied cross-section of internet users. Some key takeaways include:

1. 725 comments were submitted by Namecheap customers (20% of all comments)

[1] Comments for the renewal of .biz and .asia registry agreements were reviewed, and were similar in content and support of maintaining price caps as the comments for the .org and .info agreements. They are not included in this analysis because many are duplicates comments submitted by the same commenters.

2. 3,474 comments supported maintaining the price caps (98%)

3. 9 comments supported removing the price caps (0.25%)

4. 450 comments were from nonprofits (13%)

5. 1,197 comments were from domain name registrants with domains in the .org, .info, or .biz TLDs (34%)

Many more comments were submitted by domain name registrants. Although it is not possible to accurately determine how many came from registrants, it appears to have been a large majority of commenters.

A number of commenters raised concerns about including the Uniform Rapid Suspension (URS) in the .org registry agreement. Because the URS is being considered in other ICANN forums, Namecheap is not raising this as an issue during this Request for Reconsideration.

The public comments represent a truly global coalition. Although a majority of comments were from North American and Europe, there were comments from Africa, Asia, Australia, and South America. This represents all continents except Antarctica. The comments from Africa were particularly poignant, pleading with ICANN to help maintain a level playing field for them to be able to grow businesses.

Many nonprofits (which will be directly impacted by the removal of the price caps) submitted comments. They represent an incredible diversity of organizations. Below is a summary of the types of organizations that submitted comments, including multiple organizations of the same type. They include:

Advocacy
Aging
Agriculture
Animal Rescue
Arts
Association
Aviation
Charity (20)
Chess
Civic
Club
Community group
Consumer protection
Education (47)
Emergency response

Environmental protection (16)
Government agency (10)
Health
Historical society
Housing
Human Trafficking
Humanitarian
Industry organization
Job support
Justice
Library (6)
Media (4)
Medical (7)
Meditation
Mentoring
Model train
Motorcycle club
Music (8)
Networking
Open source software
Policy
Poverty
Professional
Publishing
Religious (69)
Research
Sailing
Science
Scouting
Service
Social
Software
Sports
Suicide prevention
Support
Support for the disabled (4)
Surgeons

Technology
Theater
Trade group
Trade organization
Transportation
Veterans support
Voting rights
Wellness
Youth

Contained within the comments are appeals to maintain price caps to ensure the survival of organizations that have extremely limited resources:

> "[removing the price cap] will negatively affect nonprofit organizations who struggle to survive as it is"
>
> "A rise in any administrative costs means I give less money to sick and disabled children."
>
> "Every dollar you take from us doesn't get to the people who need it."
>
> "A significant increase in the price of our domain would diminish our ability to offer these benefits and threaten our survival."
>
> "Why, in God's name, would anyone decide that .org domains in particular should be a market free-for-all?"
>
> "Every $1 in increased prices on the 10+ million .org domain users would generate more revenue each year than is utilized by all but the top one-percent of charitable nonprofits. Each one-dollar hike in costs per domain would divert more than $10 million from nonprofit missions for the enrichment of the monopoly. By anyone's estimate, this money would be better spent delivering an additional 1,600,000 meals by Meals on Wheels to seniors to help maintain their health, independence and quality of life. Or $10 million could enable nonprofits to provide vision screenings for every two- and three-year-olds in California. Or pay for one million middle school students to attend performances of "Hamilton" or "To Kill a Mockingbird". Nonprofits should not need to choose between paying for a domain name and helping people."

Some of the nonprofits that submitted comments provide truly vital services, helping the most disadvantaged people in the world. This includes organizations that:

- combat human trafficking

- work with indigenous and aboriginal communities in lesser developed regions,

- help prevent suicide

- provide resources for sick and disabled children

- provide support for people with life-threatening medical conditions

- provide food, shelter, and education to orphan children in Africa

- provide free VPN service for areas that struggle with government censorship of the internet

- help farmers in South America expand their businesses

When reviewing all of the comments, some common themes were provided by a number of commenters:

- using a .org domain name is critical to their nonprofit: it is well-known, safe, and trusted.

- many have been using their .org domain for many years, and the cost and risk of moving to another TLD (e.g. losing search engine rankings, notifying the public of the new TLD, etc) causes great concern.

- they do not want to use another TLD, because .org is known to be for nonprofits. There are no equivalent TLDs that have the established reputation of .org.

- if prices increase too much, they might abandon using a domain name in order to migrate to another platform that is outside of ICANN's remit (and would include price certainty). This includes relying solely upon social media or mobile apps.

- there was concern that ICANN was captured by Public Interest Registry (PIR), in that the removal of the price cap only benefits PIR and not registrants in .org or the internet in general.[2]

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[2] Namecheap notes that under the base registry agreement that now covers .org, .info, and other legacy TLDs, registry operators may actually pay **more** fees to ICANN than under the previous agreements. The base agreement includes quarterly fees due to ICANN of US$6,250 (plus US$0.25 per domain transaction fee). See Section 6.1 of the registry agreement. The quarterly fee was not present in the prior registry agreements. It is telling that while under the current budget pressure, ICANN did not highlight the additional US$25,000 that each registry operator would have to pay to ICANN annually under the new agreements (and did not consider

- questions why unrestricted price increases should be considered because at this point PIR is maintaining the .org registry and not undertaking development initiatives that would require additional resources.

- concern that removing the price cap for .org would also lead to removing the price cap for the .com registry agreement (which is subject to renewal in 2024, is the largest TLD by far, and because it is commercial in nature, is more likely to lead to price increases).

IV. ICANN org's response to public comments

In ICANN org's analysis of the public comments, ICANN rejects all of the comments against removing the price cap with a conclusory statement that is devoid of any supporting evidence:

"There are now over 1200 generic top-level domains available, and all but a few adhere to a standard contract that does not contain price regulation. Removing the price cap provisions in the .org Registry Agreement is consistent with the Core Values of ICANN org as enumerated in the Bylaws approved by the ICANN community. These values guide ICANN org to introduce and promote competition in the registration of domain names and, where feasible and appropriate, depend upon market mechanisms to promote and sustain a competitive environment in the DNS market."

https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf (accessed 3 July 2019)

ICANN then goes on to state that any price increases would require 6 months advance notice and that registrants could renew domains for 10 years at that point.

The generalizations in ICANN org's analysis ignores significant information that is contrary to its sweeping conclusions:

1. The TLD .org is the 3rd largest, with over 10 million domains. This is the equivalent number as the top 10 new gTLDs by volume. The TLD .org thus commands a large share of the TLD space, and as suggested by the Registrar Stakeholder Group (RrSG) comment, additional analysis is needed to determine whether this market share can result in uncompetitive practices.

2. The TLD .org was established in 1985. It is universally known, associated with nonprofit use, and has an excellent reputation.

3. Changing domains for an established entity can be a cumbersome and costly

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how registry operators would either absorb this cost or pass this cost to registrars or domain name registrants).

process, often with negative results (inability to connect with users, loss of search engine positions, confusion over validity of new domain, etc). Many would rather stay with an established domain (and the associated goodwill).

4. TLDs are not interchangeable as ICANN states. While there may be 1,200 other gTLDs to choose from, many of the new gTLDs are closed and not usable by nonprofits (e.g. trademarks, geographic, restricted for certain uses). Additionally, a number of TLDs are whimsical (e.g. .rocks or .ooo) or targeted to certain uses (e.g. .horse or .motorcycles) and cannot be used by nonprofits or businesses. It would be desirable for ICANN to identify which new gTLDs might be acceptable replacements to .org.

5. While there are additional TLDs for nonprofits (launched beginning in 2015 by PIR), there are few registrations in those TLDs (perhaps demonstrating that nonprofits do not want an alternative to .org). According to ICANN's monthly reports for March 2019 (at https://www.icann.org/resources/pages/registry-reports), the TLDs have the following domain totals:

.ngo[3]: 3,812

.ong[4]: 3,812

.संगठन (.xn--i1b6b1a6a2e)[5]: 1,323

.机构 (.xn--nqv7f)[6]: 1,291

.opr (.xn--c1avg)[7]: 2,317

6. There are some concerns higher levels of abuse exists in new gTLD domains (which decreases the value of new gTLDs in general). This includes (but is not limited to) higher levels of spam (https://www.techrepublic.com/article/rampant-spam-falling-registrations-show-new-gtlds-have-limited-business-value/). Additionally, ICANN's own analysis shows greater levels of abuse in new gTLDs compared to legacy TLDs: while new gTLDs represent 12% of total domains, they comprise 52% of domains identified with security threats (see ICANN DAAR report from January 2019 at https://www.icann.org/en/system/files/files/daar-monthly-report-31jan19-en.pdf).

7. Universal acceptance (UA)- including for new gTLDs- continues to be a high

[3] NGO stands for "non-governmental organization"
[4] ONG is the equivalent of NGO in some languages including French, Spanish, and Portuguese (https://pir.org/pir-files-applications-to-create-and-manage-ngo-and-ong-domains/)
[5] the equivalent of .org in Devanagari
[6] the equivalent of .org in Chinese
[7] the equivalent of .org in Russian

priority for ICANN org. ICANN's Board has made improving and promoting UA and Internationalized Domain Name (IDN) implementation one of five strategic priorities for FY21-FY25. (https://uasg.tech/2018/12/icann-further-commits-to-universal-acceptance-of-domain-names-and-email-addresses/). Due to issues with universal acceptance, it is possible that new gTLDs will not be usable in internet browsers, mobile devices, or email systems- all which greatly diminish the ability for nonprofits to switch to a new gTLD for their main domain name.

V. Conclusion

ICANN's Commitment claims that it will seek input from the public, and always act in the benefit of the public. ICANN's Core Values allege that ICANN will seek to determine the global public interest to strike a balance and avoid capture. Additionally, ICANN appears to use the public comment process to obtain community feedback for items such as the renewal of legacy TLD registry agreements, and states that such comments will be considered and incorporated into ICANN actions. Furthermore, ICANN org actively encourages regular internet users to be involved in such processes.

Based upon ICANN org's action in the renewal of the .org and other legacy TLD registry agreements, it is clear that ICANN has failed to abide by its Commitment, Core Values, and public statements. The ICANN org will decide whether to accept or reject public comment, and will unliterally make its own decisions- even if that ignores the public benefit or almost unanimous feedback to the contrary, and is based upon conclusory statements not supported by evidence. This shows that the public comment process is basically a sham, and that ICANN org will do as it pleases in this and other matters. It is a concern not only for the renewal of the .org and other legacy TLD registry agreements being renewed in 2019, but an even greater concern for the upcoming renewal of the .com registry agreement- as well as other vital policy issues under consideration by ICANN now and in the future.

It is disappointing that when internet users got involved on a massive scale in ICANN processes, ICANN failed its Commitments and Core Values by completely rejecting their feedback. ICANN org should revise all legacy TLD registry agreements to include the now missing price caps, otherwise it is clear that ICANN does not follow its Commitments, Core Values, nor does it serve the greater public good.

9. What are you asking ICANN to do now?

Namecheap requests that ICANN org and the ICANN Board reverse its decision and include (or maintain) price caps in all legacy TLDs.

10. Please state specifically the grounds under which you have the standing and the right to assert this Reconsideration Request, and the grounds or justifications that support your request.

Namecheap is an ICANN-accredited domain name registrar, and as indicated above, unrestricted price increases will have a direct impact on Namecheap's domain registration business as well as additional services (e.g. domain hosting). Namecheap is additionally filing this Reconsideration Request on behalf of the 725 Namecheap customers and internet users that submitted public comments stating how they will be harmed by removing the price cap, and who all likely lack the knowledge about ICANN processes to submit their own Reconsideration Requests. All of Namecheap's customers, as well as the internet community as a whole, will be harmed by uncertainty of price increases, or will be further harmed when prices increase for .org or other legacy TLDs after price caps are removed.

Maintaining the historical price caps will ensure that prices for .org and other legacy TLDs will be predictable and not harm the greater internet population.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

X Yes

No

11a. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm substantially the same for all of the Requestors? Explain.

Although the resulting impact will be different for Namecheap and domain name registrants, all of them will be negatively impacted by the uncertain threat of price increases without price caps, or will be actually harmed when prices increase in .org and other legacy TLD once price caps are removed.

12. Are you bringing this Reconsideration Request on an urgent basis pursuant to Article 4, Section 4.2(s) of the Bylaws?

Yes

X No

12a. If yes, please explain why the matter is urgent for reconsideration.

13. Do you have any documents you want to provide to ICANN?

No.

Terms and Conditions for Submission of Reconsideration Requests

Reconsideration Requests from different Requestors may be considered in the

same proceeding so long as: (i) the requests involve the same general action or inaction; and (ii) the Requestors are similarly affected by such action or inaction. In addition, consolidated filings may be appropriate if the alleged causal connection and the resulting harm is substantially the same for all of the Requestors. Every Requestor must be able to demonstrate that it has been materially harmed and adversely impacted by the action or inaction giving rise to the request.

The BAMC shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The BAMC may summarily dismiss a Reconsideration Request if: (i) the Requestor fails to meet the requirements for bringing a Reconsideration Request; or (ii) it is frivolous. The BAMC's summary dismissal of a Reconsideration Request shall be documented and promptly posted on the Reconsideration Website at https://www.icann.org/resources/pages/accountability/reconsideration-en.

Hearings are not required in the Reconsideration Process; however, Requestors may ask for the opportunity to be heard. The BAMC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BAMC's decision on any such request is final.

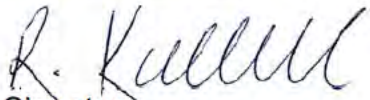
For all Reconsideration Requests that are not summarily dismissed, except where the Ombudsman is required to recuse himself or herself and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request. The BAMC shall make a final recommendation to the Board with respect to a Reconsideration Request following its receipt of the Ombudsman's evaluation (or following receipt of the Reconsideration Request involving those matters for which the Ombudsman recuses himself or herself or the receipt of the Community Reconsideration Request, if applicable).

The final recommendation of the BAMC shall be documented and promptly (i.e., as soon as practicable) posted on the Reconsideration Website at https://www.icann.org/resources/pages/accountability/reconsideration-en and shall address each of the arguments raised in the Reconsideration Request. The Requestor may file a 10-page (double-spaced, 12-point font) document, not including exhibits, in rebuttal to the BAMC's recommendation within 15 days of receipt of the recommendation, which shall also be promptly (i.e., as soon as practicable) posted to the ICANN Reconsideration Website and provided to the Board for its evaluation; provided, that such rebuttal shall: (i) be limited to rebutting or contradicting the issues raised in the BAMC's final recommendation; and (ii) not offer new evidence to support an argument made in the Requestor's original Reconsideration Request that the Requestor could have provided when the Requestor initially submitted the Reconsideration Request.

The ICANN Board shall not be bound to follow the recommendations of the BAMC. The ICANN Board's decision on the BAMC's recommendation is final

and not subject to a Reconsideration Request.

By submitting my personal data, I agree that my personal data will be processed in accordance with the ICANN Privacy Policy, and agree to abide by the website Terms of Service.



Signature

07/12/2019
Date

Richard Kirkendall
Print Name

Substantive Evaluation by the ICANN Ombudsman of Request for Reconsideration 19-2

This substantive evaluation of Request for Reconsideration ("RFR") 19-2 by the ICANN Ombudsman is required under the Paragraph 4.2(l) of the current ICANN Bylaws ("Bylaws" (as amended July 22, 2017)).

Under ICANN Bylaws 4.2(c), a Requestor can bring a Request for Reconsideration concerning an action or inaction as follows:

> Section 4.2. RECONSIDERATION…
>
> (c) A Requestor may submit a request for reconsideration or review of an ICANN action or inaction ("Reconsideration Request") to the extent that the Requestor has been adversely affected by:
>
> (i) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);
> (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or
> (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or staff's reliance on false or inaccurate relevant information.

Unpacking the above language, did an action (or inaction in other words an action that could have been taken which was not taken) contradict or violate ICANN's Mission or established policy (including the Bylaws and relevant California laws[1])? Or, was an action taken (or not taken) without consideration of material information, or was it the result of reliance on false or inaccurate relevant information? In providing the Board Accountability Mechanism Committee ("BAMC") and the ICANN Board of Directors a "substantive evaluation" of a Request for Reconsideration, the Ombudsman must look at the substance of what is being requested in the Request, and of course at the actions (or inaction) for which the Requestor seeks Reconsideration.

[1] While laws of a state or country are not mentioned explicitly in Bylaws Section 4.2, the Mission of a California public benefit corporation includes implicitly abiding by the relevant laws: here those are the applicable corporate laws pertinent to the governance of the corporation. If an action or inaction clearly is in violation of California law, it is improper. Similarly, the word "Commitments" suggests the commitment ICANN makes to be law abiding, especially of the laws of the State wherein and whereby it was formed, where it is headquartered, and where much of its operation takes place.

Request for Reconsideration 19-2 was filed by Namecheap, Inc. ("Requestor") on July 12th, 2019, seeking reconsideration of ICANN organization's renewal of the Registry Agreements with Public Interest Registry ("PIR") and Afilias Limited ("Afilias") for the .org and .info top-level domains (TLDs), respectively (collectively, the .org/.info renewed Registry Agreements are "Renewal Registry Agreements"), insofar as the renewals eliminated "the historic price caps" on domain name registration fees for .org and .info. The Requestor claims that ICANN org's "decision to ignore public comments to keep price caps in legacy TLDs is contrary to ICANN's Commitments and Core Values, and ICANN should reverse this decision for the public good."

The Renewal Registry Agreements (RA) (and their Addenda) that are at the heart of this Reconsideration Request can be found here: https://www.icann.org/resources/agreement/org-2019-06-30-en and https://www.icann.org/resources/agreement/info-2019-06-30-en.

The history of these RAs (which is detailed on the public comments pages) may be helpful to explain why and how these negotiations came about. [https://www.icann.org/public-comments/org-renewal-2019-03-18-en and https://www.icann.org/public-comments/info-renewal-2019-03-18-en)]

The Registries for these two historic and significant Top-Level Domains (TLDs) are Public Interest Registry (PIR) (for .org) and Afilias (for .info), (the former is a Pennsylvania non-profit corporation and the latter is a Pennsylvania corporation both are the "Registry Operators"). ICANN and the Registry Operators each bilaterally negotiated Registry Agreement renewals with ICANN org. ICANN and the Registry Operators "agreed to implement the incorporation of unique legacy-related terms of .org (and .info) through an 'Addendum' to the Registry Agreement." [https://www.icann.org/resources/agreement/org-2019-06-30-en]

The initial Registry Agreements for .org and .info were due to expire on June 30th, 2019. In anticipation of that nearing expiration date, ICANN and PIR, and ICANN and Afilias, bilaterally negotiated renewals of their respective Registry Agreements. The proposed renewals were based on ICANN's current Base gTLD Registry Agreement.

The Addendum allowed the Registry Operator to renew with "unique terms" included via the Addendum. The reasons ICANN and the Registry Operators were willing to renew with unique terms may have to do with the historical nature of these TLDs, their size, and the fact that in the case of .org, a vast number of non-profits and public interest entities are registered thereunder (ICANN itself is icann.org). The .org TLD is currently the third largest TLD, with at present more than 10 million registrants, and .info is the fourth largest (with ~4.65 million registrants as of May 2019).[2]

[2] The TLDs .com and .net are the two largest according to the latest statistics on Statista. [https://www.statista.com/statistics/262947/domain-numbers-of-the-ten-largest-top-level-domains/]

It's no understatement to note that regarding the history of Internet domains, putting all TLDs in context over the past 30 odd years, the three TLDs .org, .info, and .biz, (plus .com and .net), comprise the most important, most recognized, and just *most* period.

Viewed separately or together, these TLDs are *the most significant* TLDs; thus, it is not surprising that ICANN would take time and care to treat them differently in terms of their renewals, and be willing to renew them on unique terms. The removal of price controls brings these renewals in line with the current Base gTLD Registry Agreements, creating potential conformity for all (or almost all) TLD agreement terms going forward.

When bilateral renewal negotiations were finished, ICANN org posted the proposed, bilaterally negotiated renewal of the unique .org Registry Agreements for public comment (from March 18th, 2019 through April 29th, 2019).

According to the Staff Report of Public Comment Proceeding ("Staff Report") which was posted on June 3rd, 2019, ICANN received 3,200+ submissions during the public comment period for .org alone. (The Staff Report is available at https://www.icann.org/public-comments/org-renewal-2019-03-18-en).

The Staff Report notes this number of comments is comparable to a prior .org Registry Agreement renewal comment period in 2006, where over 2,000 comments were received. All of the present comments were submitted through an ICANN org public comment portal requiring human interaction; yet many of these comments seem clearly to be computer generated that is to say, they may be "comments" in some way, shape or form, but a vast number of comments are identical, with only the email address of the comment submitter changing. A brief search on the Internet identified one source of recurring comments to be: https://www.internetcommerce.org/comment-org/ (Web page accessed Sept. 7th, 2019).

As far as comments go for ICANN, 3200+ appears to be quite a sizeable number. But, seeing as how the public comments can be filled out and submitted electronically, it is not unexpected that many of the comments are, in actuality, more akin to spam.

After the public comment period closed, ICANN Staff prepared the Staff Report, which was circulated to the ICANN Board, and then subsequently made available to the public at the beginning of June 2019. All Board Directors could access all of the public comments, as could *anyone* (they live online here: https://www.icann.org/public-comments/org-renewal-2019-03-18-en). Given the significance of these Legacy TLDs, the Board was briefed about the negotiations in January 2019; subsequently (in June of 2019) the Board was briefed about the public comments and the decision taken by ICANN Staff and the President and CEO ("CEO") to go ahead with the renewals under the published terms.

Following consultation with the Board, ICANN published correspondence affirming that renewal of TLDs by the CEO and Staff continues to be a proper delegation of authority by the Board to the CEO and Staff.
[https://www.icann.org/en/system/files/correspondence/namazi-to-muscovitch-26jul19-en.pdf]

What may not be understood by the Community is that ICANN's Board delegated such authority to negotiate and renew Registry Agreements to the CEO and Staff long ago, utilizing the executive authority resident in the Chief Executive and its powers:

> **Section 15.4. PRESIDENT**
>
> The President shall be the Chief Executive Officer (CEO) of ICANN in charge of all of its activities and business. All other officers and staff shall report to the President or his or her delegate, unless stated otherwise in these Bylaws. The President shall serve as an ex officio Director, and shall have all the same rights and privileges of any Director. The President shall be empowered to call special meetings of the Board as set forth herein, and shall discharge all other duties as may be required by these Bylaws and from time to time may be assigned by the Board.

They call these powers "Executive" for a reason: the Staff and the officers under the CEO *execute* agreements, operations, etc. Indeed, the Board's delegation of authority to negotiate and enter into contracts is consistent with the Bylaws and the state laws of California, under and by which ICANN is formed as a corporation, as noted in Footnote 1 above (owing to Bylaws Section 4.2 inclusion of ICANN's "Mission" and "Commitments").

The most relevant Bylaw, however, is probably Bylaws Section 2.1:

> Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board (as defined in Section 7.1).

The Board of Directors has specifically directed the CEO and Staff to negotiate and execute agreements especially Registry Agreements. This authority is periodically reaffirmed, as appears to have happened in June 2019. Indeed, *executing* Registry Agreements (and their renewals) are, to an extent, the *raison d'être* and life's blood of ICANN; it makes total sense that the Board gave and keeps giving this authority and power to the CEO and his Staff.

The Bylaws specifically authorize the CEO's power to enter into and execute contracts (including, of course, Registry Agreements). Per the Bylaws, Section 21.1:

> **CONTRACTS**
>
> The Board may authorize any Officer or Officers, agent or agents, to enter into any contract or execute or deliver any instrument in the name of and on behalf of ICANN, and such authority may be general or confined to specific instances.

Following the ICANN 65 Marrakech Policy Meeting in June 2019, the Registry Operators for the .org, .info and .biz TLDs executed their bilaterally negotiated Renewal Registry

Agreements with ICANN (on June 30th, 2019). The choice to include unique terms (or any terms, unique or not) properly belongs to the CEO and Staff, and all the included and proposed terms were bilaterally negotiated by Staff with the respective Registry Operators.

After investigation, it seems apparent to me that the CEO and Staff acted within the scope of the powers given them by the Board. The Board retained oversight, the Board was briefed on the negotiations for the renewals of the Registry Agreements for the Legacy TLDs, and the Board was well aware of the public comments related thereto. The Board could have directed the CEO and Staff *not* to renew under these terms had it thought that warranted. It decided not to do so.

The Board were well aware of the public comments, had been briefed on them by the CEO and Staff, and had been provided with the Staff Report summarizing them; they chose to let Staff go ahead and renew on the terms agreed to with the Registry Operators, and the renewal Registry Agreements were duly and timely executed. Nothing about this seems to me, based on my investigation and understanding of the relevant rules, laws and Bylaws, to be any kind of violation or dereliction of CEO and Staff's normal executive obligations and duties, or of the Mission, Core Values, or Commitments of ICANN.

Ultimately, my substantive evaluation of this Request is that the whole renewal process and the terms themselves may be described as a corporate governance matter, and no rules or duties of corporate governance were violated (including the ICANN Bylaws). I have more to say about all this in the "companion" Substantive Evaluation of Reconsideration Request 19-3 (see Annex 1), which relates to other terms of these same renewal Registry Agreements (and which I have submitted per the Bylaws on the same day as I submitted this Evaluation: September 7th, 2019).

What Requestor set forth and requests in Request for Reconsideration 19-2 does not merit a recommendation by me to the BAMC or the Board to take the action Requestor requests, or to take any action at all.

Via Email:
correspondence@icann.org
ombudsman@icann.org
herb.waye@icann.org

September 12 2019

Mr. Herb Waye
Ombudsman
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, California
90094-2536, USA

Dear Mr. Waye:

Re: Your Response to Reconsideration Request 19-2

The position of Ombudsman has a crucial role within an organization and requires respect for stakeholders, sound judgment, and neutrality.

On or about September 7, 2019, in your position as ICANN Ombudsman, you issued a "Substantive Evaluation" of NameCheap, Inc.'s Request for Reconsideration wherein you made ill-informed and disparaging comments about members of the ICANN community.

On Page 3 of your "Substantive Evaluation" ("SE") at Paragraph 6, you stated that "many of the [3200+] comments are, in actuality, more akin to spam".

You also stated therein at Paragraph 5, that "many of these comments seem clearly to be computer generated—that is to say, they may be 'comments' in some way, shape or form, but a vast number of comments are identical, with only the email address of the comment submitter changing." You further stated therein that "a brief search on the Internet identified one source of recurring comments to be: https://www.internetcommerce.org/comment-org/ (Web page accessed Sept. 7th, 2019)".

Your disparagement of public comments from concerned stakeholders, which were duly submitted through the ICANN comment portal, is deeply concerning, particularly for an Ombudsman. Furthermore, your misrepresentation of facts demonstrates a failure to reasonably inform yourself prior to reaching an ill-advised and incorrect conclusion.

There was an unprecedented groundswell of public opposition to the Proposed .org Renewal Registry Agreement as demonstrated by the 3,200 Comments which were properly submitted. Each of these comments expressed the genuine perspective of the person or organization that submitted the comment. Many of these Comments were from major non-profit organizations, community groups, small associations, religious organizations, environmental groups, academics, and individual registrants. One could reasonably conclude that these Comments are indicative of the tens of thousands of other individuals and organizations with similar concerns that either were not aware of the Comment Period or who did not take the time and trouble to submit a Comment.

You however, attempted to denigrate and dismiss the volume of Comments on the purported basis of many of them being "spam". You attempted to justify your conclusion on the basis that many of the comments were, according to you, "computer generated" and were "identical, with only the email address of the comment submitter changing." This is misleading.

As a way to facilitate engagement with ICANN by the millions of .org registrants who would be harmed by the terms of the .org renewal agreement drafted by ICANN staff, and who are largely unfamiliar with ICANN's public comment procedure and who may be intimidated by what can only be construed as a user *un*-friendly procedure requiring individual email correspondence on complex policy matters, the Internet Commerce Association ("ICA") established a web page which facilitated a user-friendly and simple way for concerned stakeholders to make their voice heard. Any interested person could use the user-friendly ICA form to send a Comment to ICANN. Hundreds and perhaps thousands of individuals on their own initiative used the comment form as an aid to participating in the ICANN comment process. The vast majority of Commenters who used the ICA web page facility had no affiliation with the ICA and were unknown to the ICA.

The form allowed Commenters to write their own original Comment, or to choose from a selection of possibly applicable comments, or to create a comment from a combination of both. This is something that ICANN itself should have done long ago, and indeed ICANN is currently seeking feedback from stakeholders about changing the current procedure for submitting comments. In the ICANN survey (See; http://input.icann.org/app/survey/response.jsp), ICANN asks in part, "Would you (or a group you directly contribute to) respond more often to Public Comments if the consultation included short and precise questions regarding the subject matter in a Survey Monkey or similar format?"

Accordingly, human interaction was present in each and every one of the Comments which were submitted via the ICA user-friendly form. Each person who used the form took the time and effort to submit the form and select the comments that they wished to make or used the form to submit their own comments. All followed the established procedures which do not exclude emails submitted through a user-friendly portal. Most of these Commenters were from outside of

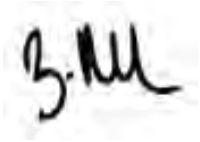
the usual ICANN community of Commenters, as they learned of this important issue from their registrar, from the press, from blogs, from online forums, and from each other.

Furthermore, contrary to your claim that these Comments "only [included] the email address", and did not otherwise identify the sender, each Comment submitted generally included the Commenter's name and email address, both of which are normally transmitted by a sender's own email application as with all correspondence and Comments submitted by email in the usual course. This was not "spam" as you alleged. "Spam" is unwelcome, unsolicited commercial messages sent from an unknown source. Contrary to your mischaracterization, these Comments expressed the genuine opinions of individuals from the community that ICANN purports to serve, and who took the trouble to share their viewpoints to better inform ICANN's decision-making process, only to find their views scorned and disregarded.

Rather than dismiss and effectively disenfranchise thousands of Commenters who duly expressed their views using this method, an Ombudsman should have embraced them and encouraged them. As you yourself admit, an Ombudsman's job is to listen. You failed to listen or were otherwise determined not to listen. Instead, you dismissed and deprecated legitimate Comments from members of the public and that is a disappointing dereliction of duty for someone in your position. In our view, your mischaracterization of much of the Comments submitted by the public as "spam" ostensibly submitted by spammers, calls into question your ability to fairly and impartially carry out your primary function which is to encourage and respect stakeholders who express themselves to ICANN. Moreover, you failed to conduct any meaningful research prior to reaching your conclusions on the nature of the Comments, other than apparently by visiting a web page. You could have and should have made inquiries of the ICA which would have informed you of the actual nature of its facilitation efforts.

Under the circumstances, we think that it is incumbent upon you to apologize to the numerous people who submitted these Comments and to retract your ill-advised statements. The Ombudsman should seek ways to increase public participation, particularly from those who are underrepresented or unengaged in ICANN's policy development, rather than devaluing and dismissing their contributions to the policy development process.

Yours truly,
INTERNET COMMERCE ASSOCIATION



Per:
Zak Muscovitch
General Counsel, ICA

PROPOSED DETERMINATION
OF THE ICANN BOARD OF DIRECTORS[1]
RECONSIDERATION REQUEST 19-2
3 November 2019

The Requestor, Namecheap Inc., seeks reconsideration of ICANN organization's 2019 renewal of the Registry Agreements (RAs) with Public Interest Registry (PIR) and Afilias Limited (Afilias) for the .ORG and .INFO generic top-level domains (gTLDs), respectively (individually .ORG Renewed RA and .INFO Renewed RA; collectively, the .ORG/.INFO Renewed RAs), insofar as the renewals eliminated "the historic price caps" on domain name registration fees for .ORG and .INFO.[2] The Requestor claims that ICANN org's "decision to ignore public comments to keep price caps in legacy gTLDs is contrary to ICANN's Commitments and Core Values, and ICANN should reverse this decision for the public good."[3]

Specifically, the Requestor claims that the .ORG/.INFO Renewed RAs are contrary to:

(i) ICANN org's commitment to "seek input from the public, for whose benefit ICANN in all events shall act."[4]

(ii) ICANN org's Core Value of "[s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent."[5]

(iii) ICANN org's Public Comment Opportunities page, which states that "Public Comment is a key part of the policy development process (PDP), allowing for refinement of recommendations before further consideration and potential

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[1] The Board designated the Board Accountability Mechanisms Committee (BAMC) to review and consider Reconsideration Requests before making recommendations to the Board on the merits of those Requests. Bylaws, Art. 4, § 4.2(e). However, the BAMC is empowered to act only upon consideration by a quorum of the Committee. *See* BAMC Charter https://www.icann.org/resources/pages/charter-bamc-2017-11-02-en. Here, the majority of the BAMC members have recused themselves from voting on this matter due to potential or perceived conflicts, or out an abundance of caution. Accordingly, the BAMC does not have a quorum to consider Request 19-2 so the Board itself has issued this Proposed Determination in lieu of a Recommendation by the BAMC.
[2] Request 19-2, § 3, at Pg. 2.
[3] *Id.* § 8, at Pg. 3.
[4] *Id.* § 8, at Pg. 4.
[5] *Id.* § 8, at Pg. 4.

adoption," and is "used to guide implementation work, reviews, and operational activities of the ICANN organization."[6]

(iv) ICANN org's statements concerning its call for Public Comment that the "purpose of this public comment proceeding is to obtain community input on the proposed .ORG renewal agreement."[7]

The Requestor also asserts that ICANN Staff failed to consider material information concerning the nature of the .ORG TLD and security issues with new gTLDs when it executed the .ORG/.INFO Renewed RAs.[8]

The Requestor "requests that ICANN org and the ICANN Board reverse its decision and include (or maintain) price caps in all legacy gTLDs."[9]

I. Brief Summary.

PIR is the registry operator for the .ORG TLD.[10] ICANN org and PIR entered into an RA on 2 December 2002 for the continued operation of the .ORG gTLD, which was renewed in 2006 and 2013.[11] ICANN org and Afilias first entered into an RA on 11 May 2001 for the operation of the .INFO gTLD, which was renewed in 2006 and 2013.[12] Before the recent renewals, the RAs for .ORG and .INFO included price caps, which limited the initial prices and allowable price increases for registrations.[13] Both RAs were scheduled to expire on 30 June 2019.

In anticipation of the 30 June 2019 expiration, ICANN org bilaterally negotiated renewals to the agreements with each registry operator. The proposed renewals were based on

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[6] *Id.* § 8, at Pg. 4.
[7] *Id.*, § 8, at Pg. 4.
[8] *Id.*, § 8, at Pg. 10.
[9] *Id.*, § 9, at Pg. 12.
[10] Public Comment Proceeding, Proposed Renewal of .ORG RA, 18 March 2019 (2019 .ORG RA Public Comment Proceeding), https://www.icann.org/public-comments/org-renewal-2019-03-18-en.
[11] *Id.*
[12] Public Comment Proceeding, Proposed Renewal of .INFO RA, 18 March 2019 (2019 .INFO RA Public Comment Proceeding), https://www.icann.org/public-comments/info-renewal-2019-03-18-en.
[13] 2002 .ORG RA, https://www.icann.org/resources/unthemed-pages/index-2002-12-02-en; 2001 .INFO RA, https://www.icann.org/resources/unthemed-pages/registry-agmt-2001-05-11-en.

ICANN org's base generic TLD Registry Agreement updated on 31 July 2017 (Base RA), modified to account for the specific nature of the .ORG and .INFO gTLDs.[14] As a result, the proposed Renewed RAs' terms were substantially similar to the terms of the Base RA.

From January 2019 to June 2019, ICANN Staff briefed and met with the Board several times regarding the proposed .ORG/.INFO Renewed RAs.[15] On 18 March 2019, ICANN Staff published the proposed .ORG/.INFO Renewed RAs for public comment to obtain community input on the proposed renewals. ICANN Staff described the material differences between proposed renewals and the current .ORG and .INFO RAs. These differences included removal of limits on domain name registration fee increases that had been in prior .ORG and .INFO RAs. ICANN Staff explained that the change would "allow the .ORG [and .INFO] renewal agreement[s] to better conform with the [Base RA]," while "tak[ing] into consideration the maturation of the domain name market and the goal of treating the Registry Operator[s] equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the [Base RA]."[16]

and .INFO agreements.[17] The comments predominantly related to three themes: (1) the proposed removal of price cap provisions; (2) inclusion of certain rights protection mechanisms

[14] *See* 2019 .ORG RA Public Comment Proceeding; 2019 .INFO RA Public Comment Proceeding. The RA for the operation of .BIZ was also set to expire on 30 June 2019; as a result of bilateral negotiations with the registry operator for .BIZ and after considering public comments, ICANN org and the registry operator for .BIZ entered into a Renewed RA for .BIZ that was based on (and therefore substantially similar to) the Base RA. *See* https://www.icann.org/resources/agreement/biz-2019-06-30-en.

[15] Letter from Namazi to Muscovitch, 26 July 2019, at Pg. 2, https://www.icann.org/en/system/files/ ICANN org received over 3,700 submissions in response to its call for public comments on the proposed .ORG correspondence/namazi-to-muscovitch-26jul19-en.pdf.

[16] 2019 .ORG RA Public Comment Proceeding. New gTLDs are TLDs released as part of ICANN org's New gTLD Program. *See* https://newgtlds.icann.org/en/about/program. Legacy gTLDs are gTLDs that existed before ICANN org's New gTLD Program. .ORG and .INFO are legacy TLDs.

[17] Report of Public Comments, .ORG, at Pg. 3, https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf; Report of Public Comments, .INFO, at Pg. 3, https://www.icann.org/en/system/files/files/report-comments-info-renewal-03jun19-en.pdf.

(RPMs), including the Uniform Rapid Suspension (URS) rules; and (3) the RA renewal process.[18]

ICANN Staff analyzed the public comments, including those addressing the proposed removal of price cap provisions, in its Report of Public Comments.[19] It concluded that removing the price cap provisions was "consistent with the Core Values of ICANN org as enumerated in the Bylaws," insofar as removing the price cap provisions would "promote competition in the registration of domain names," and enabled ICANN org to "depend upon market mechanisms to promote and sustain a competitive environment in the [Domain Name System (DNS)] market."[20] ICANN org also noted that the Base RA protected existing registrants' pricing by requiring the registry operator to: (1) give registrars six months' advance notice of price changes; and (2) allow registrants to renew their domain name registrations for up to 10 years *before* those price changes take effect.[21] ICANN Staff then noted that it would "consider the feedback from the community on this issue,"[22] "and, in consultation with the ICANN Board of Directors, make a decision regarding the proposed registry agreement."[23]

Following consultation with the ICANN Board of Directors and with the Board's support, on 30 June 2019, ICANN Staff announced that it had executed the .ORG/.INFO Renewed RAs. The .ORG/.INFO Renewed RAs did not include price caps.[24]

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[18] Report of Public Comments, .INFO, at Pg. 3; Report of Public Comments, .ORG, at Pg. 3.
[19] ICANN org received some comments supporting removal of the price cap provision because "ICANN org is not and should not be a price regulator," and because the Base RA would provide certain protections to current registrants. Report of Public Comments, .ORG, at Pg. 6.
[20] *Id.*, at Pg. 8.
[21] *Id.*
[22] *Id.*
[23] *Id.*, at Pg. 1.
[24] *See* ICANN org announcements: .ORG Renewed RA, https://www.icann.org/resources/agreement/org-2019-06-30-en; .INFO Renewed RA, https://www.icann.org/resources/agreement/info-2019-06-30-en.

On 12 July 2019, the Requestor filed Request 19-2, seeking reconsideration of the .ORG/.INFO Renewed RAs.

The Ombudsman accepted Request 19-2 for consideration, and, after investigating, concluded that "the CEO and Staff acted within the scope of the powers given them by the Board,"[25] and that "no rules or duties of corporate governance were violated (including the ICANN Bylaws)."[26]

The Board has considered Request 19-2 and all relevant materials. Based on its extensive review of all relevant materials, the Board finds that reconsideration is not warranted because ICANN org's execution of the .ORG/.INFO Renewed RAs was consistent with ICANN's Bylaws, policies, and procedures, and ICANN Staff considered all material information prior to executing the .ORG/.INFO Renewed RAs.

II. Facts.

A. Historic .ORG and .INFO RAs.

On 2 December 2002, ICANN org and PIR entered into a RA for the continued operation of .ORG, which became effective in 2003.[27] ICANN org and Afilias first entered into a RA on 11 May 2001 for the operation of .INFO.[28] Both RAs included price caps.[29]

In 2006, ICANN org considered removing price caps from several legacy gTLDs, including .INFO and .ORG.[30] However, after reviewing over 2,000 comments from over 1,000 commenters, many opposing removal of the price caps, and at the Board's direction, ICANN org

[25] Evaluation by the ICANN Ombudsman of Request for Reconsideration 19-2, at Pg. 5, 7 September 2019, https://www.icann.org/resources/pages/reconsideration-19-2-namecheap-request-2019-07-22-en.
[26] *Id*.
[27] 2019 .ORG RA Public Comment Proceeding; *see also* https://www.icann.org/resources/unthemed-pages/index-2002-12-02-en; https://www.icann.org/resources/unthemed-pages/registry-agmt-4e-2003-08-19-en.
[28] 2019 .INFO RA Public Comment Proceeding.
[29] 2002 .ORG RA, https://www.icann.org/resources/unthemed-pages/registry-agmt-4e-2003-08-19-en; 2001 .INFO RA, https://www.icann.org/resources/unthemed-pages/registry-agmt-2001-05-11-en.
[30] 2006 Public Comment of .BIZ, .INFO, .ORG, https://www.icann.org/news/announcement-3-2006-07-28-en.

renegotiated the .ORG and .INFO RAs to include price caps.[31] Following a public comment period for the revised RAs (which included price caps), on 8 December 2006, the Board approved .ORG and .INFO RAs with price caps (as proposed and posted during the public comment period for the revised RAs).[32]

B. The New gTLD Program and the Base RA.

In 2005, ICANN's Generic Names Supporting Organization (GNSO) undertook a policy development process to consider expanding the DNS by introducing new gTLDs.[33] In 2007, the GNSO concluded that "ICANN must implement a process that allows the introduction of new [gTLDs]."[34] Accordingly, ICANN org established and implemented the New gTLD Program, "enabling the largest expansion of the [DNS]."[35]

In 2009, ICANN org commissioned Professor Dennis W. Carlton to analyze "whether price caps... would be necessary to insure the potential competitive benefits" of new gTLDs.[36] Carlton concluded that price caps were "unnecessary to insure competitive benefits of the proposed process for introducing new [gTLDs]," and also noted that "competition among suppliers to attract new customers in markets characterized by switching costs [such as the

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[31] *See* Revised .BIZ, .INFO and .ORG Registry Agreements Posted for Public Comment, https://www.icann.org/news/announcement-2006-10-24-en.

[32] .ORG RA, 8 December 2006, https://www.icann.org/resources/unthemed-pages/index-c1-2012-02-25-en; .INFO RA, 8 December 2006, https://www.icann.org/resources/unthemed-pages/index-71-2012-02-25-en.

[33] https://newgtlds.icann.org/en/about/program.

[34] GNSO Final Report: Introduction of New Generic Top-Level Domains, 8 Aug. 2007, https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07 htm#_Toc43798015.

[35] https://newgtlds.icann.org/en/about/program.

[36] Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, at ¶ 4, March 2009 https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf. Professor Carlton has been a Professor of Economics at the Booth School of Business of The University of Chicago, and Co-Editor of the Journal of Law and Economics, Competition Policy International since 1984. *Id.*, at ¶¶ 1-2. He also served as Deputy Assistant Attorney General for Economic Analysis, Antitrust Division, United States Department of Justice from October 2006 through January 2008. *Id.*, at ¶ 3. In 2014, Professor Carlton was designated Economist of the Year by Global Competition Review. https://www.chicagobooth.edu/faculty/directory/c/dennis-w-carlton. Professor Carlton previously served as Professor of Economics at the Massachusetts Institute of Technology. Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, at ¶ 1.

market for gTLDs] limits or eliminates the suppliers' [*i.e.*, the registry operators'] incentive and ability to act opportunistically."[37] He explained that "a supplier that imposes unexpected or unreasonable price increases will quickly harm its reputation[,] making it more difficult for it to continue to attract new customers. Therefore, even in the absence of price caps, competition can reduce or eliminate the incentives for suppliers to act opportunistically."[38]

Carlton performed his analysis during the Base RA development process.[39] That process included multiple rounds of public comment on the proposed Base RA, several months of negotiations, meetings with stakeholders and communities, and formal community feedback via a public comment forum.[40] The Base RA was established in 2013 and aligns with the GNSO's policy recommendations for new gTLDs.[41] Since 2014, ICANN org has worked with legacy gTLD registry operators to transition the agreements for legacy gTLDs to the Base RA as well, and several legacy gTLDs, including .CAT, .JOBS, .MOBI, .PRO, .TEL, .TRAVEL, and .ASIA have adopted the Base RA in renewal agreements.[42] The Base RA does not contain price caps, but it "does contain requirements designed to protect registrants from a price perspective," including requirements that registry operators "provide registrars at least 30 days advance written notice of any price increase for initial registrations, and to provide a minimum 6-month notice for any price increases of renewals."[43] In addition, the registry operators must allow registrants

[37] *Id.*, at ¶ 12.
[38] *Id.*
[39] *See* New gTLD Program gTLD Applicant Guidebook, Version 2012-06-04, Preamble, *available for download at* https://newgtlds.icann.org/en/applicants/agb.
[40] https://www.icann.org/public-comments/base-agreement-2013-04-29-en; *see also* 26 July 2019 Letter, at Pg. 1.
[41] 26 July 2019 Letter, at Pg. 1; *see also* GNSO Final Report: Introduction of New Generic Top-Level Domains, 8 Aug. 2007, https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm#_Toc43798015.
[42] 26 July 2019 Letter, at Pg. 1.
[43] *Id.*

to renew for up to 10 years before implementing a price change, and subject to restrictions on discriminatory pricing.[44]

Using the Base RA for renewed legacy gTLDs without price cap provisions "is consistent with the gTLDs launched via the new gTLD program and will reduce ICANN org's role in domain pricing."[45] This promotes ICANN's Core Values of "introduc[ing] and promot[ing] competition in the registration of domain names and, where feasible and appropriate, depend[ing] upon market mechanisms to promote and sustain a competitive environment in the DNS market."[46]

The Base RA provides additional protections for the public benefit. For example, in 2015 the Board noted that the Base RA allows ICANN org to "designate an emergency interim registry operator of the registry for the TLD, which would mitigate the risks to the stability and security of the [DNS]."[47] Additionally, using the Base RA ensures that the Registry will use "uniform and automated processes, which will facilitate operation of the TLD," and "includes safeguards in the form of public interest commitments in Specification 11."[48]

The Board has also explained that transitioning legacy gTLDs to the Base RA "will provide consistency across all registries leading to a more predictable environment for end-users."[49] The Base RA's requirement that the registry operator only use ICANN accredited

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[44] *Id.*
[45] *Id.*
[46] *Id.*, at Pg. 2.
[47] Rationale for Board Resolution 2015.09.28.06 (renewal of .PRO RA), https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.e.rationale; *see also* Rationale for Board Resolution 2015.09.28.04 (renewal of .CAT RA), https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.c.rationale; Rationale for Board Resolution 2015.09.28.05 (renewal of .TRAVEL RA), https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.d rationale; 2019 .ORG RA, Art. 2, § 2.13, at Pg. 7, https://www.icann.org/sites/default/files/tlds/org/org-agmt-pdf-30jun19-en.pdf.
[48] Rationale for Board Resolution 2015.09.28.06; *see also* 2019 .ORG RA, Specification 11, at Pgs. 95-96, https://www.icann.org/sites/default/files/tlds/org/org-agmt-pdf-30jun19-en.pdf.
[49] Rationale for Board Resolution 2015.09.28.06.

registrars that are party to the 2013 Registrar Accreditation Agreement "will provide more benefits to registrars and registrants."[50] Finally, the Board has noted that the Base RA "includes terms intended to allow for swifter action in the event of certain threats to the security or stability of the DNS,"[51] another public benefit.

C. The 2019 .ORG and .INFO RA Renewals.

The .ORG RA with PIR was renewed several times, including on 22 August 2013.[52] Likewise, the .INFO RA with Afilias was renewed on 22 August 2013.[53]

In anticipation of the 30 June 2019 expiration of the 2013 .ORG and .INFO RAs, ICANN org bilaterally negotiated renewals with each registry operator. The proposed renewals were based on ICANN org's Base RA, modified "to account for the specific nature[s]" of each TLD and as a result of negotiations between ICANN and the registry operators.[54] On 18 March 2019, ICANN org published the proposed .ORG/.INFO RAs for public comment to obtain community input on the proposed renewals. ICANN org published redline versions of the proposed renewal agreements against the Base RA, and identified the material differences between proposed renewals and the Base RA. ICANN org explained that

> [i]n alignment with the [Base RA], the price cap provisions in the current .ORG [and .INFO] agreement[s], which limited the price of registrations and allowable price increases for registrations, are removed from the .ORG [and .INFO] renewal agreement[s]. Protections for existing registrants will remain in place, in line with the [Base RA]. This change will not only allow the .ORG [and .INFO] renewal agreement[s] to better conform with the [Base RA], but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator

[50] *Id.*
[51] *Id.*
[52] 2019 .ORG RA Public Comment Proceeding.
[53] 2019 .INFO RA Public Comment Proceeding.
[54] *See* 2019 .ORG RA Public Comment Proceeding ; 2019 .INFO RA Public Comment Proceeding.

> equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the [Base RA].[55]

The public comment period for the .ORG/.INFO Renewed RAs opened on 18 March 2019 and closed on 29 April 2019.[56] During that time, ICANN org received over 3,200 submissions in response to its call for public comments on the proposed .ORG agreement,[57] and over 500 submissions in response to its call for comments on the proposed .INFO agreement.[58] The comments predominantly related to three themes: (1) the proposed removal of the price cap provisions; (2) inclusion of the RPMs; and (3) the RA renewal process.[59]

ICANN org detailed its analysis of the public comments concerning the .ORG/.INFO Renewed RAs—including those addressing the proposed removal of price cap provisions—in its Report of Public Comments.[60] ICANN org concluded that

> [r]emoving the price cap provisions in the .ORG [and .INFO RAs] is consistent with the Core Values of ICANN org as enumerated in the Bylaws approved by the ICANN community. These values guide ICANN org to introduce and promote competition in the registration of domain names and, where feasible and appropriate, depend upon market mechanisms to promote and sustain a competitive environment in the DNS market.[61]

ICANN org also noted that

> the Base [RA] would also afford protections to existing registrants . . . [e]nacting this change will not only allow the .ORG renewal agreement to conform to the Base [RA], but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator equitably with registry

[55] 2019 .ORG RA Public Comment Proceeding; 2019 .INFO RA Public Comment Proceeding.
[56] 2019 .ORG RA Public Comment Proceeding; 2019 .INFO RA Public Comment Proceeding.
[57] Report of Public Comments, .ORG, at Pg. 3, https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf.
[58] Report of Public Comments, .INFO, at Pg. 3, https://www.icann.org/en/system/files/files/report-comments-info-renewal-03jun19-en.pdf.
[59] *Id.*, at Pg. 3; Report of Public Comments, .ORG, at Pg. 3.
[60] Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.
[61] Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.

> operators of new gTLDs and other legacy gTLDs utilizing the Base [RA].[62]

ICANN org explained that it would "consider the feedback from the community on this issue,"[63] and then ICANN org would "consider the public comments received and, in consultation with the ICANN Board of Directors, make a decision regarding the proposed registry agreement."[64]

ICANN org reviewed and considered all of the comments submitted concerning the proposed .ORG/.INFO Renewed RAs,[65] then ICANN Staff briefed the ICANN Board on its analysis of the public comments during the Board workshop on 21-23 June 2019.[66] With support from the Board to proceed with execution of the proposed renewals and pursuant to the ICANN Delegation of Authority Guidelines, on 30 June 2019, ICANN org executed the .ORG/.INFO Renewed RAs.[67]

D. The Request for Reconsideration and Ombudsman Report.

The Requestor submitted Request 19-2 on 12 July 2019.

Pursuant to Article 4, Section 4.2(l) of the Bylaws, ICANN org transmitted Request 19-2 to the Ombudsman for consideration, and the Ombudsman accepted consideration of the reconsideration request.[68]

After investigating, the Ombudsman concluded that "the CEO and Staff acted within the scope of the powers given them by the Board,"[69] and that "no rules or duties of corporate

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[62] Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.
[63] Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.
[64] Report of Public Comments, .ORG, at Pg. 1; Report of Public Comments, .INFO, at Pg. 1.
[65] 26 July 2019 Letter, at Pg. 2.
[66] 26 July 2019 Letter at Pg. 2.
[67] *See* ICANN org announcements: .ORG RA, https://www.icann.org/resources/agreement/org-2019-06-30-en; .INFO RA, https://www.icann.org/resources/agreement/info-2019-06-30-en.
[68] https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-ombudsman-action-redacted-27aug19-en.pdf.
[69] Evaluation by the ICANN Ombudsman of Request for Reconsideration 19-2, at Pg. 5, 7 September 2019.

governance were violated (including the ICANN Bylaws)."[70] He determined that the "Board were well aware of the public comments" because ICANN Staff briefed the Board on the comments, and because the comments were publicly available, so Board members could have read each comment had they so desired.[71] Additionally, the Ombudsman concluded that "the whole renewal process and the terms themselves may be described as a corporate governance matter, and no rules or duties of corporate governance were violated (including the ICANN Bylaws)."[72]

E. Relief Requested.

The Requestor "requests that ICANN org and the ICANN Board reverse its decision and include (or maintain) price caps in all legacy TLDs."[73]

III. Issues Presented.

The issues are as follows:

1. Whether ICANN Staff's decision not to include price caps in the .ORG/.INFO Renewed RA contradicts ICANN's Mission, Commitments, Core Values, or established ICANN policies; and

2. Whether ICANN Staff failed to consider material information when it executed the .ORG/.INFO Renewed RAs.

IV. The Relevant Standards for Reconsideration Requests.

Articles 4.2(a) and (c) of ICANN's Bylaws provide in relevant part that any entity "may submit a request for reconsideration or review of an ICANN action or inaction . . . to the extent the Requestor has been adversely affected by:

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[70] *Id*.
[71] *Id.*
[72] *Id.*, at Pg. 5. On 12 September 2019, the Internet Commerce Association (ICA) wrote to the Ombudsman, asserting that the Ombudsman "made ill-informed and disparaging comments about members of the ICANN community" in the Ombudsman's evaluation. 12 September 2019 letter from Z. Muskovitch to H. Waye, https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-letter-ica-to-icann-ombudsman-12sep19-en.pdf. The ICA asked the Ombudsman to "apologize to the numerous people who submitted these Comments and to retract [his] ill-advised statements." *Id.*, at Pg. 3.
[73] Request 19-2, § 9, at Pg. 12.

(i) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);

(ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or

(iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or Staff's reliance on false or inaccurate relevant information."[74]

The Board now considers Request 19-2's request for reconsideration of Staff action[75] on the grounds that the action was taken in contradiction of ICANN's Bylaws and without consideration of material information. The Board has reviewed the Request and now makes this proposed determination. Denial of a Request for Reconsideration of ICANN Staff action is appropriate if the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.[76]

V. Analysis and Rationale.

A. The .ORG/.INFO Renewed RAs Are Consistent With ICANN Org's Commitments.

The Requestor claims that omitting the price caps from the .ORG/.INFO Renewed RAs contradicts ICANN org's Commitment to "seek input from the public, for whose benefit ICANN in all events shall act."[77]

The Requestor acknowledges that "ICANN [org] requested public comment regarding the changes to the .ORG registry agreement."[78] It asserts, however, that ICANN org "reject[ed] all

[74] Bylaws, Art. 4 §§ 4.2(a) and (c).
[75] The Requestor sought reconsideration of Board and Staff Action, and brought the Request on behalf of itself and "725 Namecheap customers and internet users." *See* Request 19-2, § 2, at Pg. 2; *id.* § 10, at Pg. 12. Request 19-2 does not identify an action or inaction of the Board. Further, the Requestor's claim on behalf of its customers is not sufficiently stated because it does not satisfy the requirement that the Requestor, not a third party, must have been adversely affected by the challenged action. Accordingly, the Board's consideration is with respect to the Requestor's challenge to Staff action.
[76] Bylaws, Art. 4 § 4.2(e).
[77] Request 19-2, § 8, at Pg. 4.
[78] *Id.* § 8, at Pg. 3.

of the comments against removing the price cap with a conclusory statement that is devoid of any supporting evidence," and as a result, "the public comment process is basically a sham."[79] In sum, the Requestor claims that including price caps in the .ORG/.INFO Renewed RAs "ignore[d] the public benefit or almost unanimous feedback to the contrary."[80]

The Requestor does not dispute that ICANN org "review[ed] and consider[ed] all 3,200+ comments received,"[81] and acknowledged that the removal of the price caps was "[a] primary concern voiced in the comments."[82] ICANN Staff presented and discussed the "key issues raised in the public comment process and correspondence," including removal of price caps, with the Board before executing the .ORG/.INFO Renewed RAs.[83] Further, as the Ombudsman noted, the Board was "well aware of the public comments."[84]

The Reports of Public Comment were the result of ICANN Staff's extensive analysis of the comments; consistent with ICANN Staff's ordinary process for preparing the Report of Public Comment, ICANN Staff identified the main themes in the comments and summarized them, providing exemplary excerpts for each of those themes.[85] Neither the Bylaws, nor any ICANN policy or procedure, requires ICANN Staff to discuss each position stated in each comment. By the same token, there is no threshold number of comments about a topic that, if reached, requires ICANN Staff to address that topic in the Report of Public Comments. Even a single comment on a theme may merit inclusion in the report, under certain circumstances;

[79] *Id.* § 8, at Pgs. 10, 12.
[80] *Id.* § 8, at Pg. 12.
[81] 26 July 2019 Letter at Pg. 2.
[82] Report of Public Comments, .ORG, at Pg. 3; Report of Public Comments, .INFO, at Pg. 3.
[83] 26 July 2019 Letter, at Pg. 2.
[84] Ombudsman Evaluation of Request 19-2, at Pg. 5.
[85] *See* Report of Public Comments, .ORG, at Pg. 3 ("This section intends to summarize broadly and comprehensively the comments submitted to this public comment proceeding but does not address every specific position stated by each contributor."); Report of Public Comments, .INFO, at Pg. 3 (same).

likewise, a multitude of comments on a theme may merit little or no consideration in the report, under other circumstances.[86]

That ICANN org ultimately decided to proceed without price caps despite public comments opposing this approach does not render the public comment process a "sham" or otherwise demonstrate that ICANN org failed to act for the public benefit. ICANN Staff's careful consideration of the public comments—as reflected in its Report of Public Comments and discussion with the Board,[87] demonstrate the exact opposite, namely that the inclusion of price caps was carefully considered.

Further, the Report of Public Comments demonstrates ICANN Staff's belief that it was acting for the public benefit by "promot[ing] competition in the registration of domain names," providing the same "protections to existing registrants" afforded to registrants of other TLDs, and treating "the Registry Operator equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the Base [RA]."[88] There is no support for the Requestor's assertion that ICANN Staff's belief in this regard was based upon "conclusory statements not supported by evidence."[89] ICANN org considered Professor Carlton's 2009 expert analysis of the Base RA, and specifically his conclusion that limiting price increases was not necessary, and that the increasingly competitive field of registry operators in itself would serve as a safeguard against anticompetitive increases in domain name registration fees.[90]

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[86] The Board acknowledges the ICA's disagreement with the Ombudsman's characterization of certain comments as "spam" and "computer generated." 12 September 2019 Letter, at Pgs. 1-2. ICANN Staff acknowledged both the volume of comments submitted concerning the proposed .ORG/.INFO Renewed RAs and the issues they raised—including the removal of price cap provisions—without discounting the comments based on their apparent source. *See* Report of Public Comments, .ORG; Report of Public Comments, .INFO. Accordingly, the ICA's arguments do not change the Board's determination that reconsideration is not warranted here.
[87] 26 July 2019 Letter, at Pg. 2.
[88] Report of Public Comments, .ORG, at Pg. 8.
[89] Request 19-2, § 8, at Pg. 12.
[90] Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, at ¶ 12, https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf.

Finally, ICANN Staff was aware of the Board's 2015 statements (made in the course of approving the migration of another legacy gTLD, .PRO, to the Base RA) that the Base RA as a whole benefits the public by offering important safeguards that ensure the stability and security of the DNS and a more predictable environment for end-users.[91]

In sum, the Requestor's conclusory assertion that ICANN org did not act for the public benefit is unsupported and does not support reconsideration.

B. The .ORG/.INFO Renewed RAs Are Consistent With ICANN Org's Core Values.

The Requestor asserts that omitting the price caps from the .ORG/.INFO Renewed RAs contradicts ICANN org's Core Value of

> [s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.[92]

Contrary to the Requestor's argument, ICANN org *did* seek broad, informed participation through the public comment process for the .ORG/.INFO Renewed RAs. As noted above, ICANN org considered the responses and other factors, including its commitment to "[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment,"[93] and its Core Values of "depending on market mechanisms to promote and sustain a competitive environment in the DNS market" where "feasible and appropriate," and "[i]ntroducing and promoting competition in

[91] *See* Rationale for Board Resolution 2015.09.28.06.
[92] Request 19-2, § 8, at Pg. 4.
[93] Bylaws, Art. 1, § 1.2(a)(v); *see also* 26 July 2019 Letter, at Pg. 1.

the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process."[94]

Moreover, the public comment process is but one of several channels for ICANN's multistakeholder community to voice opinions. Members of the community may also voice their opinions in public meetings and through the final recommendations of supporting organizations, advisory committees, and direct correspondence with ICANN org. Accordingly, the multistakeholder community provides input to ICANN org in many ways, and ICANN org considers this input to ensure that all views have been taken into account during a decision-making process.

However, ICANN org's Core Values do not require it to accede to each request or demand made in public comments or otherwise asserted through ICANN's various communication channels. Here, ICANN org ultimately determined that ICANN's Mission was best served by replacing price caps in the .ORG/.INFO Renewed RAs with other pricing protections to promote competition in the registration of domain names, afford the same "protections to existing registrants" that are afforded to registrants of other TLDs, and treat registry operators equitably.[95] Further, the Base RA, which is incorporated in the .ORG/.INFO Renewed RA, "was developed through the bottom-up multi-stakeholder process including multiple rounds of public comment."[96]

The Requestor has not demonstrated that ICANN org failed to seek or support broad participation or ascertain the global public interest. To the contrary, ICANN org's transparent processes reflect its continuous efforts to ascertain and pursue the global public interest by

[94] Bylaws, Art. 1, § 1.2(b)(iii), (iv); *see also* 26 July 2019 Letter, at Pg. 2.
[95] Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.
[96] 26 July 2019 Letter, at Pg. 1.

migrating the legacy gTLDs to the Base RA. Accordingly, this argument does not support reconsideration.

C. ICANN Org's Statements Concerning The Purpose Of Public Comments Do Not Support Reconsideration.

The Requestor asserts that reconsideration is warranted because omitting the price caps from the .ORG/.INFO Renewed RAs is contrary to ICANN org's statement on its Public Comment Opportunities page that "Public Comment is a key part of the policy development process (PDP), allowing for refinement of recommendations before further consideration and potential adoption," and is "used to guide implementation work, reviews, and operational activities of the ICANN organization."[97] The Requestor asserts that omitting the price caps is inconsistent with ICANN org's statement that the "purpose of this public comment proceeding is to obtain community input on the proposed .ORG renewal agreement."[98]

Ultimately, ICANN org's decision not to include price caps in the .ORG/.INFO Renewed RAs does not mean that ICANN org failed to "obtain community input" or "use[]" the public comment "to guide implementation work" of ICANN org.[99] To the contrary, it is clear that ICANN org actively solicited community input, and carefully analyzed it as part of its efforts—in consultation with the Board—to ascertain, and then with the Board's support, to pursue, the global public interest.

Additionally, the Board notes that reconsideration is available for ICANN Staff actions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies).[100] ICANN org's general description of the purpose of the public comment process is

[97] Request 19-2, § 8, at Pg. 4.
[98] *Id.*
[99] *See id.*
[100] Bylaws, Art. 4 § 4.2(c). The challenged action must adversely affect the Requestor as well. *Id.*

not a Commitment, Core Value, established policy, nor part of ICANN org's Mission. Accordingly, even if ICANN org's decision to execute the .ORG/.INFO Renewed RAs without price caps contradicted these statements—and it did not, as explained in Section V.A above — this inconsistency could not form the basis of a Reconsideration Request.

D. The Requestor Has Not Demonstrated That ICANN Org Acted Without Consideration Of Material Information.

The Requestor asserts that ICANN org's analysis of the proposed removal of price caps "ignores significant information that is contrary to its sweeping conclusions."[101] Specifically, the Requestor asserts that ICANN org's analysis ignores that:

1. .ORG "is the 3rd largest" TLD, and "additional analysis is needed to determine whether this market share can result in uncompetitive practices,"[102]

2. .ORG "was established in 1985," "is universally known, associated with nonprofit use, and has an excellent reputation,"[103]

3. It can be "a cumbersome and costly process" for an established entity to change domain name, and "often" leads to "negative results (inability to connect with users, loss of search engine positions, confusion over validity of new domain, etc). Many would rather stay with an established domain (and the associated goodwill)."[104]

4. "TLDs are not interchangeable, as ICANN states. While there may be 1,200 other gTLDs to choose from, many of the new gTLDs are closed and not useable by nonprofits . . . or targeted to certain uses . . .and cannot be used by nonprofits or businesses. It would be desirable for ICANN to identify which new gTLDs might be acceptable replacements to .ORG."[105]

5. Although some new gTLDs are targeted to nonprofits, "there are few registrations in those TLDs (perhaps demonstrating that nonprofits do not want an alternative to .ORG)."[106]

[101] Request 19-2, § 8, at Pg. 10.
[102] *Id.*
[103] *Id.*
[104] *Id.*, at Pg. 10-11.
[105] *Id.*, at Pg. 11.
[106] *Id.*

6. "There are some concerns [that] higher levels of abuse exists in new gTLD domains . . . . ICANN's own analysis shows greater levels of abuse in new gTLDs compared to legacy TLDs."[107]

7. "[I]t is possible that new gTLDs will not be usable in internet browsers, mobile devices, or email systems- all which greatly diminish the ability for nonprofits to switch to a new gTLD for their main domain name."[108]

The Report of Public Comments for the .ORG Renewed RA makes clear that ICANN org *did* consider some of these concerns. Specifically, with respect to Item 1, ICANN Staff noted that commenters "questioned whether ICANN org conducted an economic study or research on the potential market implications of removing the existing pricing protections."[109] With respect to Item 2, ICANN Staff acknowledged that commentators noted that ".ORG was developed, cultivated and established over decades as catering to non-profit and similar charitable organizations."[110] With respect to Items 3, 4, 5, and 7, ICANN Staff acknowledged "concerns about the burden and costs associated with moving [a] web presence to another TLD," along with comments characterizing .ORG as "the most appropriate registry for a charity or non-profit."[111] Accordingly, the Requestor's argument that the information about these six "concerns" was not considered or was ignored is incorrect and therefore does not support reconsideration.

With respect the Requestor's assertion that "ICANN's own analysis shows greater levels of abuse in new gTLDs compared to legacy TLDs,"[112] the Requestor mischaracterizes the cited ICANN report. As the Requestor notes, the 2019 Domain Abuse Activity Reporting (DAAR) report concluded that 48.11% of the "domains identified as security threats . . . were in legacy

[107] *Id.* citing https://www.icann.org/en/system/files/files/daar-monthly-report-31jan19-en.pdf.
[108] *Id.*, at Pg. 11-12.
[109] Report of Public Comments, .ORG, at Pg. 5.
[110] *Id.*, at Pgs. 3-4.
[111] *Id.*, at Pgs. 4-5.
[112] *Id.*, citing 31 January 2019 DAAR Report, https://www.icann.org/en/system/files/files/daar-monthly-report-31jan19-en.pdf.

[TLDs]," and the remaining 51.89% of the domains identified as threats were in new gTLDs.[113] Further, the Report indicates that about 12% of TLD domain names are hosted on new gTLDs.[114] However, the Report also notes that 88% of the new gTLD domains identified as security threats were concentrated in only 25 new gTLDs, out of over 340 new gTLDs.[115] The Report further noted that 98% of the domains identified as security threats were hosted by "the 50 most-exploited new [TLDs]."[116] Accordingly, even if ICANN Staff did not consider the 2019 DAAR Report, the Requestor has not shown that the information contained in it was material to the inclusion of price caps in the .ORG/.INFO Renewed RAs. Moreover, the cited portions of the DAAR Report relate to security threats, not domain name registration fees. This argument does not support reconsideration.

E. The Requestor Has Not Demonstrated That It Has Been Adversely Affected By The .ORG/.INFO Renewed RAs.

The Requestor asserts that it has been adversely affected by the challenged conduct because, "[a]s a domain name registrar, removal of prices caps for legacy TLDs will negatively impact [the Requestor's] domain name registration business," insofar as the .ORG/.INFO Renewed RAs create an "uncertainty of price increases."[117] That the Requestor could not quantify the actual financial impact on the Requestor of removing the price caps at the time it submitted Request 19-2 was not material to our preliminary procedural evaluation, because the Requestor asserted that the financial uncertainty *itself* is the harm. Accordingly, the Board Accountability Mechanisms Committee (BAMC) concluded that Request 19-2 was sufficiently

[113] 31 January 2019 DAAR Report, Executive Summary.
[114] *Id.*, at Pg. 5.
[115] *Id.*, at Pg. 6. Similarly, four legacy TLDs hosted more than 94% of the legacy TLD domains identified as security threats. *Id.*
[116] *Id.*, at Pg. 6.
[117] Request 19-2, § 6, at Pg. 2; *see also id*. § 10, at Pg. 13.

stated.[118] However, the BAMC's conclusion that the Requestor sufficiently asserted that it was materially harmed was not a determination that the Requestor was in fact materially harmed or, if so, that removing the .ORG/.INFO Renewed RAs caused that harm.

The Board now concludes that the Requestor has not shown that it has been harmed by the .ORG/.INFO Renewed RAs. As noted above, in 2009, Professor Carlton concluded that price caps were unnecessary to protect against unreasonable increases in domain name registration fees.[119] Professor Carlton explained that "a supplier that imposes unexpected or unreasonable price increases will quickly harm its reputation[,] making it more difficult for it to continue to attract new customers. Therefore, even in the absence of price caps, competition can reduce or eliminate the incentives for suppliers to act opportunistically."[120]

The Requestor has not shown that it has, in fact, been harmed by the financial uncertainty it identified in Request 19-2, nor that it has been harmed by any price increases under the .ORG/.INFO Renewed RAs. Instead, the Requestor asserts that "additional analysis is needed to determine whether" the removal of price caps in the .ORG RA "can result in uncompetitive practices."[121] This suggestion of further study is insufficient, at this stage, to warrant Reconsideration. The Requestor has not identified any *evidence* that it has been harmed or will be harmed by removal of the price caps, and the evidence that is available—Professor Carlton's expert report—indicates that such harm is not expected. Accordingly, reconsideration is not warranted.

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[118] *See* Ombudsman Action on Request 19-2, at Pg. 2.
[119] Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, at ¶ 12, https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf.
[120] *Id.*
[121] Request 19-2, § 8, at Pg. 10.

VI. Proposed Determination.

The Board has considered the merits of Request 19-2 and, based on the foregoing, concludes that ICANN org's execution of the .ORG/.INFO Renewed RAs did not contradict ICANN's Bylaws, policies, or procedures, and that ICANN Staff did not fail to consider material information in executing the Agreements. Accordingly, the Board proposes denying Request 19-2.

Because the BAMC did not have a quorum to consider Request 19-2, the Board itself has issued this Proposed Determination in lieu of a Recommendation by the BAMC. Accordingly, the issuance of this Proposed Determination triggers Requestor's right to file a rebuttal consistent with Article 4, Section 4.2(q) of the Bylaws.

I. Introduction

The Requestor, Namecheap Inc., submits this Rebuttal to the ICANN Board's Proposed Determination on Reconsideration Request (RfR) 19-2 (the 'Recommendation'). The Recommendation concerns Requestor's request that the Board reverse ICANN org and the ICANN Board decision of 30 June 2019 to renew the registry agreement for the .org and .info TLDs without the historic price caps (the 'Decision').

As Requestor explains in this Rebuttal, ICANN's Decision and the Board's Recommendation have been made (i) in disregard of ICANN's fundamental rules and obligations, (ii) on the basis of an incomplete and non-transparent record. First, ICANN's reliance upon Professor Carlton's 2009 analysis is misguided because it is an opinion not based upon evidence or facts, but relies upon outdated and incomplete assumptions. Second, ICANN claims that the Base RA was developed through the ICANN policy process, however there is no evidence to suggest that those participants intended or considered the Base RA to apply to legacy TLDs (rather it was clear the intent was to develop an agreement for new gTLD registries only). Third, ICANN's failure to incorporate essentially unanimous public comments in support of price caps shows that ICANN will do as it pleases regardless of whether it solicits public comments. And finally, the recent purchase of Public Interest Registry (PIR), the operator of the .org TLD by an equity firm and its subsequent conversion into a for profit, along with the intermingling of ex-ICANN executives and industry insiders requires that ICANN review this purchase in detail and take necessary steps to ensure that .org domains are not used a source of revenue to support expansion by PIR or payment of dividends to PIR's shareholders (which are against the original nonprofit origins of the .org TLD). The .org and .info TLDs are unlike new gTLDs. Treating like cases alike and unlike cases differently is a general axiom of rational

behavior. This axiom is an absolute requirement to comply with ICANN's fundamental obligation to provide for non-discriminatory treatment.

II. Professor Carlton's 2009 "Analysis"

ICANN's determination relies substantially upon the Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries to support the removal of price caps from the Base RA as well as the registry agreements for legacy TLDs. ICANN's reliance is flawed for several reasons. First, the document is more opinion than a fact-based analysis. A review of the document fails to identify any data sources or references to support the sweeping opinions of the author- including but not limited to data pertaining to domain name registrant behavior, the degree of fungibility between gTLDs, or considering the entire DNS (including ccTLDs and underserved regions). Second, Prof. Carlton concludes in ¶ 5 that "…price caps … [for] **new gTLD registries** are unnecessary to insure competitive benefits … for introducing new gTLDs." Nowhere does the analysis consider removing price caps for legacy TLDs, and it states in ¶ 20 that "...**the existence of the caps [in legacy TLDs] limits the prices** that new gTLDs can charge by capping the price that the major registry operators can charge." Third, the DNS has changed significantly from June 2008 data cited in his report- rendering it antiquated and stale. In addition, the analysis was narrowly focused on gTLDs, completely ignoring a significant sector of the DNS: ccTLDs. The complete DNS data for Q2 2008 and Q2 2019 are included in Exhibit A, and demonstrate the significant changes to the DNS since 2008.

The analysis was subject to public comment, and the vast majority of public comments to the document were either against it and/or raised significant concerns about its methodology (with only one commenter supporting the analysis)[1]. One commenter stated, "I am an economist

[1] See https://forum.icann.org/lists/competition-pricing-prelim/

by training, and the report struck me as more argument than study, more an attempt to justify the new gTLD process than a serious evaluation of the facts of the matter."[2] Another comment included a longer report (with supporting data) that concluded, "Professor Carlton has made a number of assumptions about both the benefits and costs of new gTLDs that are simply not supported by market facts."[3] While it appears that ICANN disregarded the feedback and data provided disputing the findings in Prof. Carlton's analysis, Requestor attempted to review ICANN's Summary/analysis of comments[4] to confirm. However, that link redirected to Prof. Carlton's preliminary analysis and Requestor could not review ICANN's analysis or the reasons why it ignored facts and feedback contrary to its position. Furthermore, to date, ICANN has not conducted a data-based economic study regarding pricing and competition in the DNS (despite multiple requests over the past decade)[5]. One possible reason ICANN has not conducted such a study is because at least one assessment by ICANN based upon empirical data (rather than opinion) support's Prof. Carlton's position that price caps in legacy TLDs have maintained lower prices. As the assessment states on page 1: "The presence of price caps on legacy TLDs may help to explain the absence of changes in legacy TLD wholesale prices".[6]

Finally, ICANN's reliance on Prof. Carlton's Preliminary Analysis is nothing but a *post factum* construction in an attempt to justify ICANN's decision to remove the price cap. In 2013, Prof. Carlton's opinion was clearly not an impediment to maintain the price cap when renewing

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[2] See https://forum.icann.org/lists/competition-pricing-prelim/msg00019.html
[3] See https://forum.icann.org/lists/competition-pricing-prelim/pdf2m9kAd0xph.pdf
[4] Online at https://www.icann.org/resources/pages/compri-2009-03-04-en
[5] Two examples are https://forum.icann.org/lists/competition-pricing-prelim/pdf2m9kAd0xph.pdf and https://mm.icann.org/pipermail/comments-info-renewal-18mar19/attachments/20190430/11faa379/Responseto.Org.Info.BIZRenewalAgreementsv21.pdf
[6] See https://newgtlds.icann.org/en/reviews/cct/competitive-effects-phase-two-assessment-11oct16-en.pdf

the .org and .info RAs. So, why would this opinion suddenly become relevant now, where it was clearly not in 2013?

III. Reliance upon Base RA

Throughout the Determination, ICANN repeatedly states that the Base RA is the result of the ICANN policy development process (PDP), and provides links to various reports, documents, and letters to show that there was broad consensus to remove price caps from the Base RA. It is worth noting that the Base RA was developed for the *new gTLD registries*, and all of the evidence cited by ICANN confirms this. Requestor could not locate any confirmation in the references provided by ICANN that those participating in the development of the Base RA were aware that ICANN staff would subsequently apply the Base RA *to legacy TLDs* (e.g. they did not consider that price caps would be removed for legacy TLDs). As the public comments in 2006 and 2019 against removing price caps from the .org and .info registry agreements demonstrate, significant community opposition to removing the caps exists. Moreover, ICANN should have clarified to the participants in the development of the Base RA that it would later apply to legacy TLDs. Any statements by ICANN that the Base RA was intended to apply to legacy TLDs are disingenuous and revisionist by ICANN. The PDP on new gTLDs never aimed at changing the legal framework for legacy TLDs. The continued opposition, even with the advance notice of increases and the ability to renew for up to 10 years shows that the public still demands maintaining price caps to ensure predictable pricing for important TLDs.

ICANN also justifies adopting the Base RA for legacy TLDs because it includes protections for registrant pricing by requiring advance notice of price changes and allowing renewals of up to 10 years before the changes take effect. It is not clear why ICANN uses this

argument to justify its current decision, as those protections were present in the .org and .info registry agreements since 2006.[7]

The Base RA was adopted by ICANN on 2 July 2013,[8] and the registry agreements for .org and .info were last renewed on 22 August 2013[9]. As the Base RA was available to ICANN during the 2013 RA renewal process for these legacy TLDs, and if converting legacy TLDs to the Base RA was so important as to ignore massive public comment to the contrary, it is not clear why ICANN waited an additional six years to make the change.

IV. Public Comments

Although ICANN repeatedly states in its Determination that it considered the comments in detail, there are several factors which belie this position. A detailed review of the public comments submitted to ICANN regarding the changes to the .org and .info registry agreements reveals that ICANN ignored a number of glaring issues:

a. A number of commenters requested that ICANN keep their comment and/or their information private (yet it was published on icann.org);

b. A majority of comments published on icann.org included personally identifiable information (including full names, home addresses, telephone numbers, and email addresses) for individuals around the world (including the European Economic Area); and

c. One comment on icann.org reviewed by Namecheap was an ASCII representation of a hardcore pornographic image (which was removed in response to a Tweet by a

[7] See https://www.icann.org/resources/unthemed-pages/index-c1-2012-02-25-en and https://www.icann.org/resources/unthemed-pages/index-71-2012-02-25-en
[8] See https://www.icann.org/resources/pages/archive-54-2012-02-25-en
[9] See https://www.icann.org/resources/agreement/org-archive-1999-11-10-en and https://www.icann.org/resources/agreement/info-archive-2001-05-11-en

Namecheap staff member, just several weeks before ICANN published its staff report on the public comments).[10]

For obvious reasons, Requestor is not providing examples of the concerns above, however examples (including the ASCII art) can be provided upon request.

Additionally, it is still not clear why ICANN bothered to solicit public comment. Almost all of the comments were against removing price caps; yet ICANN decided to maintain its predetermined action. ICANN may state that it "considered" or "acknowledged" the public comment, but the fact that it maintained its prior position from before the public comment period shows otherwise. It is also absurd to state that the ICANN Board could read each comment had they so desired- the hundreds of hours required to review over 3,000 comments is a significant undertaking for Board members who have other responsibilities. It is a shame that ICANN staff chose not to share with the Board the multitude of personal stories from individuals and nonprofits as to how they will be adversely impacted by uncertain price increases. This effectively silenced the many voices that took the effort to provide feedback to ICANN.

V. Requestor Will Be Adversely Affected By Removal Of Price Caps

Although Requestor cannot now calculate future harm for price increases, its request detailed harms likely to occur in the future when prices rise for Namecheap, its customers, and various business sectors of the internet. The only time this harm can be measured is when prices do increase unreasonably, however at that point action through ICANN will not be possible. That is why ICANN must consider the substantial number of examples provided in Requestor's request and in the voluminous public comments with specific and real-world examples of harm by increased domain name registration prices. ICANN's Determination discounted all of these

[10] See https://twitter.com/lothar97/status/1128352716630085632

potential harms, allegedly by relying upon Prof. Carlton's opinion that price caps were unnecessary to protect against unreasonable price increases. As indicated above, reliance upon the opinion of a professor in 2009 unsupported by any real data or research is a significantly flawed position for ICANN to maintain when the lives of potentially tens of millions (or more) of people around the world may be impacted by its decision.

VI. Sale Of Public Interest Registry

On 13 November 2019, the Internet Society and Public Interest Registry (PIR) announced that PIR was sold to the investment firm Ethos Capital for an undisclosed sum of money[11] (however there is reasoned speculation the price was over $1 billion[12]). PIR is no longer a nonprofit company, will not pay upwards of $50 million annually to the Internet Society[13], and is now able to pay dividends to its shareholders. Additionally, it is not known how much of this acquisition was through debt (which will be required to be repaid with interest). Because this information was not available to Requestor (or ICANN) until last week, it is pertinent to be addressed in Requestor's rebuttal. The timing and the nature of this entire process is suspicious, and in a well-regulated industry, would draw significant scrutiny from regulators. For ICANN not to scrutinize this transaction closely in a completely transparent and accountable fashion (including public disclosure of pertinent information regarding the nature, cost, the terms of any debt associated with the acquisition, timeline of all parties involved, and the principals involved) would demonstrate that ICANN org and the ICANN Board do not function as a trusted or reliable internet steward.

[11] See https://thenew.org/the-internet-society-public-interest-registry-a-new-era-of-opportunity/
[12] See https://domainnamewire.com/2019/11/14/the-economics-of-org-domain-names/
[13] See http://domainincite.com/24976-selling-off-pir-did-isoc-just-throw-org-registrants-under-a-bus

The likely corporate entity for Ethos Capital was formed on 14 May 2019- the day after ICANN was due to publish its summary of public comments regarding the renewal of the .org registry agreement. The domain name ethoscapital.com was obtained by the investment firm sometime after July 2019 (as indicated by Exhibit B)- after ICANN removed the price cap requirement from the .org registry agreement. The domain name ethoscapital.org was registered on 7 May 2019 by the former CEO of ICANN Fadi Chehadé- who is a Senior Advisor for Abry Partners that led the acquisition of Donuts, Inc. (the entity that operates the most new gTLDs[14] and also the top 20 registrar Name.com[15]) (see attached registration data report from August 2018 to present as Exhibit C).

Mr. Chehadé is not the only former senior ICANN executive involved in these entities. Akram Atallah (former President of ICANN Global Domains Division (GDD)) is the CEO of Donuts (which was acquired by an affiliated private equity company). Nora Abusitta-Ouri (former Senior Vice President, Development and Public Responsibility Programs at ICANN, then employed by Mr. Chehadé's firm Chehadé & Company[16]) is the Chief Purpose Officer of Ethos Capital[17]. Ms. Abusitta-Ouri's LinkedIn profile indicates that she is also the Executive Director of the Digital Ethos Foundation. That Foundation uses the domain name digitalethos.foundation, which is registered to Binky Moon, LLC, the company operated by Donuts for contractual purposes with ICANN.[18] The word "ethos" has a connection for Mr. Chehadé, as he created the Multistakeholder Ethos Award while CEO of ICANN.[19] There are several other principals not previously employed by ICANN that make this transaction worthy of

[14] See https://www.prnewswire.com/news-releases/abry-partners-enters-into-agreement-to-invest-majority-stake-in-donuts-inc-300706706.html
[15] See https://www.domainstate.com/top-registrars.html
[16] See https://www.crunchbase.com/person/nora-abusitta#section-overview
[17] See https://www.linkedin.com/in/nora-abusitta/
[18] See http://domainincite.com/22675-donuts-scraps-200-companies-consolidates-under-binky-moon
[19] See https://www.icann.org/news/blog/multistakeholder-ethos-award-nomination-process

scrutiny. Jon Nevett is the current President and CEO of PIR.[20] He is a co-founder of Donuts, and left in October 2018[21]- and was replaced by Mr. Atallah.[22] The founder and CEO of Ethos Capital is Erik Brooks, who previously was at Abry Partners[23] and as recently as of October 2018, a board member of Donuts.[24]

When PIR adopted the new .org registry agreement, it stated it "is a mission driven non-profit registry and currently has no specific plans for any price changes for .ORG."[25] After the acquisition, PIR stated that it plans future takeovers and growth, however does not specify the resources to support these plans.[26] Considering that almost the entire source of revenue for PIR is from .org domain names, this strongly suggests the need to raise registration fees. The third largest gTLD registry, with an established and sterling reputation will be able to use its market power to raise prices as it sees fit. As PIR stated in August 2019 regarding price cap concerns, "We ourselves are a nonprofit, and we are driven by our mission of serving the public interest online. Public Interest Registry has served as the nonprofit registry operator for .ORG for more than 15 years and in that time, we have always strived to be thoughtful and responsible stewards of the Internet's most trusted and admired top-level domain. Our stewardship of .ORG will continue in the exact same manner for years to come."[27] This dynamic has been significantly altered, and ICANN must include the historical price caps in the .org registry agreement to ensure that future .org registrants are protected.

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[20] See https://thenew.org/org-people/about-pir/team/executive-team/
[21] See https://domainnamewire.com/2018/12/05/jon-nevett-named-new-ceo-of-pir-org/
[22] See https://www.prnewswire.com/news-releases/donuts-appoints-akram-j-atallah-as-ceo-300728610.html
[23] See https://ethoscapital.com/
[24] See https://donuts.news/donuts-appoints-akram-j-atallah-as-ceo
[25] See https://thenew.org/pir-welcomes-renewed-org-agreement/
[26] See http://www.domainpulse.com/2019/11/14/pir-eyeing-growth-ethos-capital-takeover/
[27] See https://mashable.com/article/dot-org-domain-private-equity-acquisition/

Another reason why this transaction and price caps needs to be reviewed is what happened when Donuts was acquired by Abry Partners. In 2017, Donuts was emphatic that it would not raise prices for existing registrants.[28] Within months of be acquired by Abry Partners, it raised prices in 2019 for 220 out of its 241 TLDs.[29] Any statements by PIR now to not raise prices unreasonably are just words,[30] and without price caps, there is no way that .org registrants are not used a source to generate revenue for acquisitions or to pay dividends to its shareholders.

While all of these connections and timing may be purely coincidental and above reproach, ICANN has a duty to review these concerns, and take steps to ensure that legacy TLD price caps maintained.

VII. Conclusion

Based on the foregoing and on the reasons expressed in RfR 19-2 and the letters exchanged in relation to this RfR, Requestor requests that the Board deny the Recommendation and grant RfR 19-2. This rebuttal is made reserving all rights, especially in view of the procedural imbalance, created *inter alia* by ICANN's requirement to respond to a 23-page Recommendation in a 10-page rebuttal, which was provided to Requestor 24 days after the expiration of the 90-day limit specified in the Standard Reconsideration Request Process[31] (and which also happened to be received on the first day of an ICANN meeting).

[28] See https://onlinedomain.com/2017/03/09/domain-name-news/donuts-no-plans-increase-prices-existing-registrants/
[29] See https://domainnamewire.com/2019/04/02/donuts-to-increase-domain-prices-in-october/
[30] See http://domainincite.com/24976-selling-off-pir-did-isoc-just-throw-org-registrants-under-a-bus
[31] See https://www.icann.org/en/system/files/files/reconsideration-request-timeline-24oct17-en.pdf

EXHIBIT A

	Q2 2008[1]	Q2 2019[2]
All TLDs	162 million	354 million
gTLDs	99 million	196 million
ccTLDs	63 million	159 million
Legacy TLDs	99 million	173 million
New gTLDs	NA	23 million
.com	77 million[3]	142 million
.net	12 million	13 million
.org	7 million	10 million
.info	5 million	4.5 million
.biz	2 million	1.5 million

[1] See https://www.verisign.com/assets/domain-name-report-june08.pdf
[2] See https://www.verisign.com/assets/domain-name-report-Q22019.pdf
[3] The data for .com, .net, .org, .info, and .biz are from Prof. Carlton's analysis rather than Verisign's Q2 2008 Domain Name Industry Brief

EXHIBIT B

DOMAINTOOLS

Domain Report - EthosCapital.com

Domain Name **EthosCapital.com**

Prepared On **November 13, 2019**

Webs te Screenshot taken 04/09/2016

About This Report

This report documents a thorough analysis of the Internet domain name "**EthosCapital.com**". It draws on the extensive DomainTools dataset and aims to deliver a comprehensive view of the domain's ownership profile, key historical events and technically linked domain names.

All data in this Report is, or was, freely available through standard Internet DNS and query protocols. DomainTools has not altered the data in any way from its original form, except in certain instances to format it for readability in this Report.

Data from DomainTools is presented as-is, and as captured from the original source. We make no representations or warranties of fitness of any kind.

About DomainTools

DomainTools offers the most comprehensive searchable database of domain name registration and hosting data. Combined with our other data sites such as DailyChanges.com, Screenshots.com and ReverseMX.com, users of DomainTools.com can review millions of historical domain name records from basic Whois, and DNS information, to homepage images and email settings. The Company's comprehensive snapshots of past and present domain name registration, ownership and usage data, in addition to powerful research and monitoring resources, help customers by unlocking everything there is to know about a domain name. DomainTools is a Top 250 site in the Alexa rankings.

Reach us at memberservices@domaintools.com if you have any questions on this report.

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Domain Profile

As of November 13, 2019

Ownership

Registered Owner	**Afternic DNescrow**
Owned Domains	**About 514 other domains**
Email Addresses	**abuse@godaddy.com**
Registrar	**godaddy.com, llc**

Registration

Created	**Oct 21, 2011**
Expires	**Aug 3, 2020**
Updated	**Aug 6, 2019**
Domain Status	**Parked**
Whois Server	**whois.godaddy.com**
Name Servers	**domaincontrol.com**

Network

Website IP Address	**198.49.23.144**
IP Location	**United States-New York-New York City Squarespace Inc.**
IP ASN	**AS53831**

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Current Whois Record

Reported on Nov 13, 2019

```
Domain Name: ethoscapital.com
Registry Domain ID: 1683367694_DOMAIN_COM-VRSN
Registrar WHOIS Server: whois.godaddy.com
Registrar URL: http://www.godaddy.com
Updated Date: 2019-08-06T20:11:18Z
Creation Date: 2011-10-21T18:12:01Z
Registrar Registration Expiration Date: 2020-08-03T11:59:59Z
Registrar: GoDaddy.com, LLC
Registrar IANA ID: 146
Registrar Abuse Contact Email: abuse@godaddy.com
Registrar Abuse Contact Phone: +1.4806242505
Domain Status: clientTransferProhibited http://www.icann.org/epp#clientTransferProhibited
Domain Status: clientUpdateProhibited http://www.icann.org/epp#clientUpdateProhibited
Domain Status: clientRenewProhibited http://www.icann.org/epp#clientRenewProhibited
Domain Status: clientDeleteProhibited http://www.icann.org/epp#clientDeleteProhibited
Registrant Organization: Afternic DNescrow
Registrant State/Province: Massachusetts
Registrant Country: US
Registrant Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ethos
Admin Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ethoscapit
Tech Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ethoscapita
Name Server: PDNS03.DOMAINCONTROL.COM
Name Server: PDNS04.DOMAINCONTROL.COM
DNSSEC: unsigned
URL of the ICANN WHOIS Data Problem Reporting System: http://wdprs.internic.net/
```


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Ownership History

Whois History for EthosCapital.com

DomainTools has 49 distinct historical ownership records for EthosCapital.com. The oldest record dates Jun 19, 2007. Each record is listed on its own page, starting with the most recent record. The date at the start of the section indicates the first time we captured the record. The website screenshot, when available, will be the image captured as close as possible to the record date.

About Whois History

DomainTools takes periodic snapshots of domain name Whois records and stores them for subsequent analysis. The database contains billions of Whois records across hundreds of millions of domains, dating back in some cases to 2001.

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Whois Record on Oct 24, 2019

Screenshot taken Apr 9, 2016

Domain Name: ethoscapital.com
Registry Domain ID: 1683367694_DOMAIN_COM-VRSN
Registrar WHOIS Server: whois.godaddy.com
Registrar URL: http://www.godaddy.com
Updated Date: 2019-08-06T20:11:18Z
Creation Date: 2011-10-21T18:12:01Z
Registrar Registration Expiration Date: 2020-08-03T11:59:59Z
Registrar: GoDaddy.com, LLC
Registrar IANA ID: 146
Registrar Abuse Contact Email: abuse@godaddy.com
Registrar Abuse Contact Phone: +1.4806242505
Domain Status: clientTransferProhibited http://www.icann.org/epp#clientTransferProhibited
Domain Status: clientUpdateProhibited http://www.icann.org/epp#clientUpdateProhibited
Domain Status: clientRenewProhibited http://www.icann.org/epp#clientRenewProhibited
Domain Status: clientDeleteProhibited http://www.icann.org/epp#clientDeleteProhibited
Registrant Organization: Afternic DNescrow
Registrant State/Province: Massachusetts
Registrant Country: US
Registrant Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ethoscapital.c
Admin Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ethoscapital.com
Tech Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ethoscapital.com
Name Server: PDNS03.DOMAINCONTROL.COM
Name Server: PDNS04.DOMAINCONTROL.COM
DNSSEC: unsigned
URL of the ICANN WHOIS Data Problem Reporting System: http://wdprs.internic.net/

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Whois Record on Oct 18, 2019

Screenshot taken Apr 9, 2016

```
Domain Name: ethoscapital.com
Registry Domain ID: 1683367694_DOMAIN_COM-VRSN
Registrar WHOIS Server: whois.godaddy.com
Registrar URL: http://www.godaddy.com
Updated Date: 2019-08-06T20:11:18Z
Creation Date: 2011-10-21T18:12:01Z
Registrar Registration Expiration Date: 2020-08-03T11:59:59Z
Registrar: GoDaddy.com, LLC
Registrar IANA ID: 146
Registrar Abuse Contact Email: abuse@godaddy.com
Registrar Abuse Contact Phone: +1.4806242505
Domain Status: clientTransferProhibited http://www.icann.org/epp#clientTransferProhibited
Domain Status: clientUpdateProhibited http://www.icann.org/epp#clientUpdateProhibited
Domain Status: clientRenewProhibited http://www.icann.org/epp#clientRenewProhibited
Domain Status: clientDeleteProhibited http://www.icann.org/epp#clientDeleteProhibited
Registrant Organization: Afternic DNescrow
Registrant State/Province: Massachusetts
Registrant Country: US
Registrant Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ethoscapital.c
Admin Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ethoscapital.com
Tech Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ethoscapital.com
Name Server: PDNS03.DOMAINCONTROL.COM
Name Server: PDNS04.DOMAINCONTROL.COM
DNSSEC: unsigned
URL of the ICANN WHOIS Data Problem Reporting System: http://wdprs.internic.net/
```


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Whois Record on Oct 16, 2019

Screenshot taken Apr 9, 2016

Domain Name: ethoscapital.com
Registry Domain ID: 1683367694_DOMAIN_COM-VRSN
Registrar WHOIS Server: whois.godaddy.com
Registrar URL: http://www.godaddy.com
Updated Date: 2019-08-06T20:11:18Z
Creation Date: 2011-10-21T18:12:01Z
Registrar Registration Expiration Date: 2020-08-03T11:59:59Z
Registrar: GoDaddy.com, LLC
Registrar IANA ID: 146
Registrar Abuse Contact Email: abuse@godaddy.com
Registrar Abuse Contact Phone: +1.4806242505
Domain Status: clientTransferProhibited http://www.icann.org/epp#clientTransferProhibited
Domain Status: clientUpdateProhibited http://www.icann.org/epp#clientUpdateProhibited
Domain Status: clientRenewProhibited http://www.icann.org/epp#clientRenewProhibited
Domain Status: clientDeleteProhibited http://www.icann.org/epp#clientDeleteProhibited
Registrant Organization: Afternic DNescrow
Registrant State/Province: Massachusetts
Registrant Country: US
Registrant Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ethoscapital.c
Admin Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ethoscapital.com
Tech Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ethoscapital.com
Name Server: PDNS03.DOMAINCONTROL.COM
Name Server: PDNS04.DOMAINCONTROL.COM
DNSSEC: unsigned
URL of the ICANN WHOIS Data Problem Reporting System: http://wdprs.internic.net/

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Whois Record on Aug 5, 2019

Screenshot taken Apr 9, 2016

Domain Name: ethoscapital.com
Registry Domain ID: 1683367694_DOMAIN_COM-VRSN
Registrar WHOIS Server: whois.godaddy.com
Registrar URL: http://www.godaddy.com
Updated Date: 2019-07-31T21:55:22Z
Creation Date: 2011-10-21T18:12:01Z
Registrar Registration Expiration Date: 2020-08-03T11:59:59Z
Registrar: GoDaddy.com, LLC
Registrar IANA ID: 146
Registrar Abuse Contact Email: abuse@godaddy.com
Registrar Abuse Contact Phone: +1.4806242505
Domain Status: clientTransferProhibited http://www.icann.org/epp#clientTransferProhibited
Domain Status: clientUpdateProhibited http://www.icann.org/epp#clientUpdateProhibited
Domain Status: clientRenewProhibited http://www.icann.org/epp#clientRenewProhibited
Domain Status: clientDeleteProhibited http://www.icann.org/epp#clientDeleteProhibited
Registrant Organization: Afternic DNescrow
Registrant State/Province: Massachusetts
Registrant Country: US
Registrant Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ethoscapital.c
Admin Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ethoscapital.com
Tech Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ethoscapital.com
Name Server: NS13.DOMAINCONTROL.COM
Name Server: NS14.DOMAINCONTROL.COM
DNSSEC: unsigned
URL of the ICANN WHOIS Data Problem Reporting System: http://wdprs.internic.net/

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Whois Record on Jul 24, 2019

Screenshot taken Apr 9, 2016

Domain Name: ETHOSCAPITAL.COM
Registry Domain ID: 1683367694_DOMAIN_COM-VRSN
Registrar WHOIS Server: whois.godaddy.com
Registrar URL: http://www.godaddy.com
Updated Date: 2018-08-03T15:49:37Z
Creation Date: 2011-10-21T18:12:01Z
Registrar Registration Expiration Date: 2020-08-03T11:59:59Z
Registrar: GoDaddy.com, LLC
Registrar IANA ID: 146
Registrar Abuse Contact Email: abuse@godaddy.com
Registrar Abuse Contact Phone: +1.4806242505
Domain Status: clientTransferProhibited http://www.icann.org/epp#clientTransferProhibited
Domain Status: clientUpdateProhibited http://www.icann.org/epp#clientUpdateProhibited
Domain Status: clientRenewProhibited http://www.icann.org/epp#clientRenewProhibited
Domain Status: clientDeleteProhibited http://www.icann.org/epp#clientDeleteProhibited
Registrant Organization: Ethos Capital Group
Registrant State/Province: Texas
Registrant Country: US
Registrant Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ETHOSCAPITAL.C
Admin Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ETHOSCAPITAL.COM
Tech Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ETHOSCAPITAL.COM
Name Server: NS13.DOMAINCONTROL.COM
Name Server: NS14.DOMAINCONTROL.COM
DNSSEC: unsigned
URL of the ICANN WHOIS Data Problem Reporting System: http://wdprs.internic.net/

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Whois Record on Apr 30, 2019

Screenshot taken Apr 9, 2016

```
Domain Name: ETHOSCAPITAL.COM
Registry Domain ID: 1683367694_DOMAIN_COM-VRSN
Registrar WHOIS Server: whois.godaddy.com
Registrar URL: http://www.godaddy.com
Updated Date: 2018-08-03T15:49:37Z
Creation Date: 2011-10-21T18:12:01Z
Registrar Registration Expiration Date: 2020-08-03T11:59:59Z
Registrar: GoDaddy.com, LLC
Registrar IANA ID: 146
Registrar Abuse Contact Email: abuse@godaddy.com
Registrar Abuse Contact Phone: +1.4806242505
Domain Status: clientTransferProhibited http://www.icann.org/epp#clientTransferProhibited
Domain Status: clientUpdateProhibited http://www.icann.org/epp#clientUpdateProhibited
Domain Status: clientRenewProhibited http://www.icann.org/epp#clientRenewProhibited
Domain Status: clientDeleteProhibited http://www.icann.org/epp#clientDeleteProhibited
Registrant Organization: Ethos Capital Group
Registrant State/Province: Texas
Registrant Country: US
Registrant Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ETHOSCAPITAL.C
Admin Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ETHOSCAPITAL.COM
Tech Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ETHOSCAPITAL.COM
Name Server: NS13.DOMAINCONTROL.COM
Name Server: NS14.DOMAINCONTROL.COM
DNSSEC: unsigned
URL of the ICANN WHOIS Data Problem Reporting System: http://wdprs.internic.net/
```


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Whois Record on Feb 11, 2019

Screenshot taken Apr 9, 2016

Domain Name: ETHOSCAPITAL.COM
Registry Domain ID: 1683367694_DOMAIN_COM-VRSN
Registrar WHOIS Server: whois.godaddy.com
Registrar URL: http://www.godaddy.com
Updated Date: 2018-08-03T15:49:37Z
Creation Date: 2011-10-21T18:12:01Z
Registrar Registration Expiration Date: 2020-08-03T11:59:59Z
Registrar: GoDaddy.com, LLC
Registrar IANA ID: 146
Registrar Abuse Contact Email: abuse@godaddy.com
Registrar Abuse Contact Phone: +1.4806242505
Domain Status: clientTransferProhibited http://www.icann.org/epp#clientTransferProhibited
Domain Status: clientUpdateProhibited http://www.icann.org/epp#clientUpdateProhibited
Domain Status: clientRenewProhibited http://www.icann.org/epp#clientRenewProhibited
Domain Status: clientDeleteProhibited http://www.icann.org/epp#clientDeleteProhibited
Registrant Organization: Ethos Capital Group
Registrant State/Province: Texas
Registrant Country: US
Registrant Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ETHOSCAPITAL.C
Admin Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ETHOSCAPITAL.COM
Tech Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ETHOSCAPITAL.COM
Name Server: NS13.DOMAINCONTROL.COM
Name Server: NS14.DOMAINCONTROL.COM
DNSSEC: unsigned
URL of the ICANN WHOIS Data Problem Reporting System: http://wdprs.internic.net/

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Whois Record on Nov 8, 2018

Screenshot taken Apr 9, 2016

```
Domain Name: ETHOSCAPITAL.COM
Registry Domain ID: 1683367694_DOMAIN_COM-VRSN
Registrar WHOIS Server: whois.godaddy.com
Registrar URL: http://www.godaddy.com
Updated Date: 2018-08-03T15:49:37Z
Creation Date: 2011-10-21T18:12:01Z
Registrar Registration Expiration Date: 2020-08-03T11:59:59Z
Registrar: GoDaddy.com, LLC
Registrar IANA ID: 146
Registrar Abuse Contact Email: abuse@godaddy.com
Registrar Abuse Contact Phone: +1.4806242505
Domain Status: clientTransferProhibited http://www.icann.org/epp#clientTransferProhibited
Domain Status: clientUpdateProhibited http://www.icann.org/epp#clientUpdateProhibited
Domain Status: clientRenewProhibited http://www.icann.org/epp#clientRenewProhibited
Domain Status: clientDeleteProhibited http://www.icann.org/epp#clientDeleteProhibited
Registrant Organization: Ethos Capital Group
Registrant State/Province: Texas
Registrant Country: US
Registrant Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ETHOSCAPITAL.C
Admin Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ETHOSCAPITAL.COM
Tech Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ETHOSCAPITAL.COM
Name Server: NS13.DOMAINCONTROL.COM
Name Server: NS14.DOMAINCONTROL.COM
DNSSEC: unsigned
URL of the ICANN WHOIS Data Problem Reporting System: http://wdprs.internic.net/
```


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Whois Record on Aug 5, 2018

Screenshot taken Apr 9, 2016

```
Domain Name: ETHOSCAPITAL.COM
Registry Domain ID: 1683367694_DOMAIN_COM-VRSN
Registrar WHOIS Server: whois.godaddy.com
Registrar URL: http://www.godaddy.com
Updated Date: 2018-08-03T15:49:37Z
Creation Date: 2011-10-21T18:12:01Z
Registrar Registration Expiration Date: 2020-08-03T11:59:59Z
Registrar: GoDaddy.com, LLC
Registrar IANA ID: 146
Registrar Abuse Contact Email: abuse@godaddy.com
Registrar Abuse Contact Phone: +1.4806242505
Domain Status: clientTransferProhibited http://www.icann.org/epp#clientTransferProhibited
Domain Status: clientUpdateProhibited http://www.icann.org/epp#clientUpdateProhibited
Domain Status: clientRenewProhibited http://www.icann.org/epp#clientRenewProhibited
Domain Status: clientDeleteProhibited http://www.icann.org/epp#clientDeleteProhibited
Registrant Organization: Ethos Capital Group
Registrant State/Province: Texas
Registrant Country: US
Registrant Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ETHOSCAPITAL.C
Admin Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ETHOSCAPITAL.COM
Tech Email: Select Contact Domain Holder link at https://www.godaddy.com/whois/results.aspx?domain=ETHOSCAPITAL.COM
Name Server: NS13.DOMAINCONTROL.COM
Name Server: NS14.DOMAINCONTROL.COM
DNSSEC: unsigned
URL of the ICANN WHOIS Data Problem Reporting System: http://wdprs.internic.net/
```


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EXHIBIT C

R-52

GoDaddy

Search the WHOIS Database

Enter a domain name to search Search

Private Registration Local listings

WHOIS search results

Domain Name: ethoscapital.org
Registry Domain ID: D402200000010251407-LROR
Registrar WHOIS Server: whois.godaddy.com
Registrar URL: http://www.godaddy.com
Updated Date: 2019-05-07T14:42:39Z
Creation Date: 2019-05-07T14:42:38Z
Registrar Registration Expiration Date: 2020-05-07T14:42:38Z
Registrar: GoDaddy.com, LLC
Registrar IANA ID: 146
Registrar Abuse Contact Email: abuse@godaddy.com
Registrar Abuse Contact Phone: +1.4806242505
Domain Status: clientTransferProhibited http://www.icann.org/epp#clientTransferProhibited
Domain Status: clientUpdateProhibited http://www.icann.org/epp#clientUpdateProhibited
Domain Status: clientRenewProhibited http://www.icann.org/epp#clientRenewProhibited
Domain Status: clientDeleteProhibited http://www.icann.org/epp#clientDeleteProhibited
Registry Registrant ID: CR370633889
Registrant Name: Contact Information Redacted
Registrant Organization:
Registrant Street: Contact Information Redacted
Registrant City: Contact Information Redacted
Registrant State/Province: Contact Information Redacted
Registrant Postal Code: Contact Information
Registrant Country: Contact Information
Registrant Phone: Contact Information Redacted
Registrant Phone E
Registrant Fax:
Registrant Fax Ext:
Registrant Email: Contact Information Redacted
Registry Admin ID: CR370633894
Admin Name: Contact Information Redacted
Admin Organization:
Admin Street: Contact Information Redacted
Admin City: Contact Information Redacted
Admin State/Province: Contact Information Redacted
Admin Postal Code: Contact Information Redacted
Admin Country: Contact Information

R-52

Admin Phone: Contact Information Redacted
Admin Phone Ext:
Admin Fax:
Admin Fax Ext:
Admin Email: Contact Information Redacted
Registry Tech ID: CR370633891
Tech Name: Contact Information Redacted
Tech Organization:
Tech Street: Contact Information Redacted
Tech City: Contact Information Redacted
Tech State/Province: Contact Information
Tech Postal Code: Contact Information
Tech Country: Contact Information Redacted
Tech Phone: Contact Information Redacted
Tech Phone Ext:
Tech Fax:
Tech Fax Ext:
Tech Email: Contact Information Redacted
Name Server: PDNS09.DOMAINCONTROL.COM
Name Server: PDNS10.DOMAINCONTROL.COM
DNSSEC: unsigned
URL of the ICANN WHOIS Data Problem Reporting System: http://wdprs.internic.net/
>>> Last update of WHOIS database: 2019-11-13T20:00:00Z <<<

For more information on Whois status codes, please visit https://www.icann.org/resources/pages/epp-status-codes-2014-06-16-en

Notes:

IMPORTANT: Port43 will provide the ICANN-required minimum data set per
ICANN Temporary Specification, adopted 17 May 2018.
Visit https://whois.godaddy.com to look up contact data for domains
not covered by GDPR policy.

The data contained in GoDaddy.com, LLC's Whols database,
while believed by the company to be reliable, is provided "as is"
with no guarantee or warranties regarding its accuracy. This
information is provided for the sole purpose of assisting you
in obtaining information about domain name registration records.
Any use of this data for any other purpose is expressly forbidden without the prior written
permission of GoDaddy.com, LLC. By submitting an inquiry,
you agree to these terms of usage and limitations of warranty. In particular,
you agree not to use this data to allow, enable, or otherwise make possible,
dissemination or collection of this data, in part or in its entirety, for any
purpose, such as the transmission of unsolicited advertising and
and solicitations of any kind, including spam. You further agree
not to use this data to enable high volume, automated or robotic electronic
processes designed to collect or compile this data for any purpose,
including mining this data for your own personal or commercial purposes.

Please note: the registrant of the domain name is specified

in the "registrant" section. In most cases, GoDaddy.com, LLC is not the registrant of domain names listed in this database.

See Underlying Registry Data | Contact Domain Holder | Report Invalid Whois

Want to buy this domain?

Get it with our Domain Broker Service.

Go

Is this your domain?

Add hosting, email and more.

Go

Get our newsletter, join the community:

Email Address

SIGN UP

We love taking your call.

guides

About GoDaddy

About Us

Newsroom

Investor Relations

Careers

Corporate Responsibility

GoDaddy Store

Trust Center

Legal

Help Center

Help Center

Community

GoDaddy Blog

Contact Us

Report Abuse

Resources

Webmail

WHOIS

GoDaddy Mobile App

ICANN Confirmation

Tools for Pros

Redeem Code

Product Catalog

Site Map

Videos

Partner Programs

Affiliates

Reseller Programs

GoDaddy Pro

Account

My Account

My Renewals

Create Account

Shopping

Domains

Websites

WordPress

Hosting

Web Security

Email & Office

Phone Numbers

Promos

United States - English ^ USD ^

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FINAL DETERMINATION
OF THE ICANN BOARD OF DIRECTORS
RECONSIDERATION REQUEST 19-2
21 November 2019

The Requestor, Namecheap Inc., seeks reconsideration of ICANN organization's 2019 renewal of the Registry Agreements (RAs) with Public Interest Registry (PIR) and Afilias Limited (Afilias) for the .ORG and .INFO generic top-level domains (gTLDs), respectively (individually .ORG Renewed RA and .INFO Renewed RA; collectively, the .ORG/.INFO Renewed RAs), insofar as the renewals eliminated "the historic price caps" on domain name registration fees for .ORG and .INFO.[1] The Requestor claims that ICANN org's "decision to ignore public comments to keep price caps in legacy gTLDs is contrary to ICANN's Commitments and Core Values, and ICANN should reverse this decision for the public good."[2]

Specifically, the Requestor claims that the .ORG/.INFO Renewed RAs are contrary to:

(i) ICANN org's commitment to "seek input from the public, for whose benefit ICANN in all events shall act."[3]

(ii) ICANN org's Core Value of "[s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent."[4]

(iii) ICANN org's Public Comment Opportunities page, which states that "Public Comment is a key part of the policy development process (PDP), allowing for refinement of recommendations before further consideration and potential adoption," and is "used to guide implementation work, reviews, and operational activities of the ICANN organization."[5]

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[1] Request 19-2, § 3, at Pg. 2.
[2] *Id.* § 8, at Pg. 3.
[3] *Id.* § 8, at Pg. 4.
[4] *Id.* § 8, at Pg. 4.
[5] *Id.* § 8, at Pg. 4.

(iv) ICANN org's statements concerning its call for Public Comment that the "purpose of this public comment proceeding is to obtain community input on the proposed .ORG renewal agreement."[6]

The Requestor also asserts that ICANN Staff failed to consider material information concerning the nature of the .ORG TLD and security issues with new gTLDs when it executed the .ORG/.INFO Renewed RAs.[7]

The Requestor "requests that ICANN org and the ICANN Board reverse its decision and include (or maintain) price caps in all legacy gTLDs."[8]

I. Brief Summary.

PIR is the registry operator for the .ORG TLD.[9] ICANN org and PIR entered into an RA on 2 December 2002 for the continued operation of the .ORG gTLD, which was renewed in 2006 and 2013.[10] ICANN org and Afilias first entered into an RA on 11 May 2001 for the operation of the .INFO gTLD, which was renewed in 2006 and 2013.[11] Before the recent renewals, the RAs for .ORG and .INFO included price caps, which limited the initial prices and allowable price increases for registrations.[12] Both RAs were scheduled to expire on 30 June 2019.

In anticipation of the 30 June 2019 expiration, ICANN org bilaterally negotiated renewals to the agreements with each registry operator. The proposed renewals were based on ICANN org's base generic TLD Registry Agreement updated on 31 July 2017 (Base RA),

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[6] *Id.*, § 8, at Pg. 4.
[7] *Id.*, § 8, at Pg. 10.
[8] *Id.*, § 9, at Pg. 12.
[9] Public Comment Proceeding, Proposed Renewal of .ORG RA, 18 March 2019 (2019 .ORG RA Public Comment Proceeding), https://www.icann.org/public-comments/org-renewal-2019-03-18-en.
[10] *Id.*
[11] Public Comment Proceeding, Proposed Renewal of .INFO RA, 18 March 2019 (2019 .INFO RA Public Comment Proceeding), https://www.icann.org/public-comments/info-renewal-2019-03-18-en.
[12] 2002 .ORG RA, https://www.icann.org/resources/unthemed-pages/index-2002-12-02-en; 2001 .INFO RA, https://www.icann.org/resources/unthemed-pages/registry-agmt-2001-05-11-en.

modified to account for the specific nature of the .ORG and .INFO gTLDs.[13] As a result, the proposed Renewed RAs' terms were substantially similar to the terms of the Base RA.

From January 2019 to June 2019, ICANN Staff briefed and met with the Board several times regarding the proposed .ORG/.INFO Renewed RAs.[14] On 18 March 2019, ICANN Staff published the proposed .ORG/.INFO Renewed RAs for public comment to obtain community input on the proposed renewals. ICANN Staff described the material differences between proposed renewals and the current .ORG and .INFO RAs. These differences included removal of limits on domain name registration fee increases that had been in prior .ORG and .INFO RAs. ICANN Staff explained that the change would "allow the .ORG [and .INFO] renewal agreement[s] to better conform with the [Base RA]," while "tak[ing] into consideration the maturation of the domain name market and the goal of treating the Registry Operator[s] equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the [Base RA]."[15]

ICANN org received over 3,700 submissions in response to its call for public comments on the proposed .ORG and .INFO agreements.[16] The comments predominantly related to three themes: (1) the proposed removal of price cap provisions; (2) inclusion of certain rights

[13] *See* 2019 .ORG RA Public Comment Proceeding; 2019 .INFO RA Public Comment Proceeding. The RA for the operation of .BIZ was also set to expire on 30 June 2019; as a result of bilateral negotiations with the registry operator for .BIZ and after considering public comments, ICANN org and the registry operator for .BIZ entered into a Renewed RA for .BIZ that was based on (and therefore substantially similar to) the Base RA. *See* https://www.icann.org/resources/agreement/biz-2019-06-30-en.

[14] Letter from Namazi to Muscovitch, 26 July 2019, at Pg. 2, https://www.icann.org/en/system/files/correspondence/namazi-to-muscovitch-26jul19-en.pdf.

[15] 2019 .ORG RA Public Comment Proceeding. New gTLDs are TLDs released as part of ICANN org's New gTLD Program. *See* https://newgtlds.icann.org/en/about/program. Legacy gTLDs are gTLDs that existed before ICANN org's New gTLD Program. .ORG and .INFO are legacy TLDs.

[16] Report of Public Comments, .ORG, at Pg. 3, https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf; Report of Public Comments, .INFO, at Pg. 3, https://www.icann.org/en/system/files/files/report-comments-info-renewal-03jun19-en.pdf.

protection mechanisms (RPMs), including the Uniform Rapid Suspension (URS) rules; and (3) the RA renewal process.[17]

ICANN Staff analyzed the public comments, including those addressing the proposed removal of price cap provisions, in its Report of Public Comments.[18] It concluded that removing the price cap provisions was "consistent with the Core Values of ICANN org as enumerated in the Bylaws," insofar as removing the price cap provisions would "promote competition in the registration of domain names," and enabled ICANN org to "depend upon market mechanisms to promote and sustain a competitive environment in the [Domain Name System (DNS)] market."[19] ICANN org also noted that the Base RA protected existing registrants' pricing by requiring the registry operator to: (1) give registrars six months' advance notice of price changes; and (2) allow registrants to renew their domain name registrations for up to 10 years *before* those price changes take effect.[20] ICANN Staff then noted that it would "consider the feedback from the community on this issue,"[21] "and, in consultation with the ICANN Board of Directors, make a decision regarding the proposed registry agreement."[22]

Following consultation with the ICANN Board of Directors and with the Board's support, on 30 June 2019, ICANN Staff announced that it had executed the .ORG/.INFO Renewed RAs. The .ORG/.INFO Renewed RAs did not include price caps.[23]

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[17] Report of Public Comments, .INFO, at Pg. 3; Report of Public Comments, .ORG, at Pg. 3.
[18] ICANN org received some comments supporting removal of the price cap provision because "ICANN org is not and should not be a price regulator," and because the Base RA would provide certain protections to current registrants. Report of Public Comments, .ORG, at Pg. 6.
[19] *Id.*, at Pg. 8.
[20] *Id.*
[21] *Id.*
[22] *Id.*, at Pg. 1.
[23] *See* ICANN org announcements: .ORG Renewed RA, https://www.icann.org/resources/agreement/org-2019-06-30-en; .INFO Renewed RA, https://www.icann.org/resources/agreement/info-2019-06-30-en.

On 12 July 2019, the Requestor filed Request 19-2, seeking reconsideration of the .ORG/.INFO Renewed RAs.

The Ombudsman accepted Request 19-2 for consideration, and, after investigating, concluded that "the CEO and Staff acted within the scope of the powers given them by the Board,"[24] and that "no rules or duties of corporate governance were violated (including the ICANN Bylaws)."[25]

The Board adopted a Proposed Determination denying Request 19-2 on 3 November 2019.[26] On 18 November 2019, the Requestor submitted a rebuttal to the Board's Proposed Determination. The Requestor challenged the Board's reliance on evidence concerning and mechanisms designed for new gTLDs as compared to legacy TLDs, reiterated its argument that ICANN Staff should have acted in accordance with "essentially unanimous public comments in support of price caps," and asserted that the recent acquisition of .ORG by a for-profit entity merits additional scrutiny of the .ORG Renewed RA.[27]

The Board has considered Request 19-2 and all relevant materials. Based on its extensive review of all relevant materials, the Board finds that reconsideration is not warranted because ICANN org's execution of the .ORG/.INFO Renewed RAs was consistent with ICANN's

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[24] Evaluation by the ICANN Ombudsman of Request for Reconsideration 19-2, at Pg. 5, 7 September 2019, https://www.icann.org/resources/pages/reconsideration-19-2-namecheap-request-2019-07-22-en.

[25] *Id*.

[26] Board action on Proposed Determination on Request 19-2, https://www.icann.org/resources/board-material/resolutions-2019-11-03-en#1.a; Proposed Determination on Request 19-2, https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-board-proposed-determination-03nov19-en.pdf. The Board designated the Board Accountability Mechanisms Committee (BAMC) to review and consider Reconsideration Requests before making recommendations to the Board on the merits of those Requests. Bylaws, Art. 4, § 4.2(e). However, the BAMC is empowered to act only upon consideration by a quorum of the Committee. *See* BAMC Charter https://www.icann.org/resources/pages/charter-bamc-2017-11-02-en. Here, the majority of the BAMC members recused themselves from voting on this matter due to potential or perceived conflicts, or out an abundance of caution. Accordingly, the BAMC did not have a quorum to consider Request 19-2 so the Board itself issued the Proposed Determination in lieu of a Recommendation from the BAMC.

[27] Rebuttal in Support of Request 19-2, .

Bylaws, policies, and procedures, and ICANN Staff considered all material information prior to executing the .ORG/.INFO Renewed RAs.

II. Facts.

A. Historic .ORG and .INFO RAs.

On 2 December 2002, ICANN org and PIR entered into a RA for the continued operation of .ORG, which became effective in 2003.[28] ICANN org and Afilias first entered into a RA on 11 May 2001 for the operation of .INFO.[29] Both RAs included price caps.[30]

In 2006, ICANN org considered removing price caps from several legacy gTLDs, including .INFO and .ORG.[31] However, after reviewing over 2,000 comments from over 1,000 commenters, many opposing removal of the price caps, and at the Board's direction, ICANN org renegotiated the .ORG and .INFO RAs to include price caps.[32] Following a public comment period for the revised RAs (which included price caps), on 8 December 2006, the Board approved .ORG and .INFO RAs with price caps (as proposed and posted during the public comment period for the revised RAs).[33]

B. The New gTLD Program and the Base RA.

In 2005, ICANN's Generic Names Supporting Organization (GNSO) undertook a policy development process to consider expanding the DNS by introducing new gTLDs.[34] In 2007, the GNSO concluded that "ICANN must implement a process that allows the introduction of new

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[28] 2019 .ORG RA Public Comment Proceeding; *see also* https://www.icann.org/resources/unthemed-pages/index-2002-12-02-en; https://www.icann.org/resources/unthemed-pages/registry-agmt-4e-2003-08-19-en.
[29] 2019 .INFO RA Public Comment Proceeding.
[30] 2002 .ORG RA, https://www.icann.org/resources/unthemed-pages/registry-agmt-4e-2003-08-19-en; 2001 .INFO RA, https://www.icann.org/resources/unthemed-pages/registry-agmt-2001-05-11-en.
[31] 2006 Public Comment of .BIZ, .INFO, .ORG, https://www.icann.org/news/announcement-3-2006-07-28-en.
[32] *See* Revised .BIZ, .INFO and .ORG Registry Agreements Posted for Public Comment, https://www.icann.org/news/announcement-2006-10-24-en.
[33] .ORG RA, 8 December 2006, https://www.icann.org/resources/unthemed-pages/index-c1-2012-02-25-en; .INFO RA, 8 December 2006, https://www.icann.org/resources/unthemed-pages/index-71-2012-02-25-en.
[34] https://newgtlds.icann.org/en/about/program.

[gTLDs]."[35] Accordingly, ICANN org established and implemented the New gTLD Program, "enabling the largest expansion of the [DNS]."[36]

In 2009, ICANN org commissioned Professor Dennis W. Carlton to analyze "whether price caps... would be necessary to insure the potential competitive benefits" of new gTLDs.[37] Carlton concluded that price caps were "unnecessary to insure competitive benefits of the proposed process for introducing new [gTLDs]," and also noted that "competition among suppliers to attract new customers in markets characterized by switching costs [such as the market for gTLDs] limits or eliminates the suppliers' [*i.e.*, the registry operators'] incentive and ability to act opportunistically."[38] He explained that "a supplier that imposes unexpected or unreasonable price increases will quickly harm its reputation[,] making it more difficult for it to continue to attract new customers. Therefore, even in the absence of price caps, competition can reduce or eliminate the incentives for suppliers to act opportunistically."[39]

Carlton performed his analysis during the Base RA development process.[40] That process included multiple rounds of public comment on the proposed Base RA, several months of negotiations, meetings with stakeholders and communities, and formal community feedback via

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[35] GNSO Final Report: Introduction of New Generic Top-Level Domains, 8 Aug. 2007, https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07 htm#_Toc43798015.
[36] https://newgtlds.icann.org/en/about/program.
[37] Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, at ¶ 4, March 2009 https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf. Professor Carlton has been a Professor of Economics at the Booth School of Business of The University of Chicago, and Co-Editor of the Journal of Law and Economics, Competition Policy International since 1984. *Id.*, at ¶¶ 1-2. He also served as Deputy Assistant Attorney General for Economic Analysis, Antitrust Division, United States Department of Justice from October 2006 through January 2008. *Id.*, at ¶ 3. In 2014, Professor Carlton was designated Economist of the Year by Global Competition Review. https://www.chicagobooth.edu/faculty/directory/c/dennis-w-carlton. Professor Carlton previously served as Professor of Economics at the Massachusetts Institute of Technology. Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, at ¶ 1.
[38] *Id.*, at ¶ 12.
[39] *Id.*
[40] *See* New gTLD Program gTLD Applicant Guidebook, Version 2012-06-04, Preamble, *available for download at* https://newgtlds.icann.org/en/applicants/agb.

a public comment forum.[41] The Base RA was established in 2013 and aligns with the GNSO's policy recommendations for new gTLDs.[42] Since 2014, ICANN org has worked with legacy gTLD registry operators to transition the agreements for legacy gTLDs to the Base RA as well, and several legacy gTLDs, including .CAT, .JOBS, .MOBI, .PRO, .TEL, .TRAVEL, and .ASIA have adopted the Base RA in renewal agreements.[43] The Base RA does not contain price caps, but it "does contain requirements designed to protect registrants from a price perspective," including requirements that registry operators "provide registrars at least 30 days advance written notice of any price increase for initial registrations, and to provide a minimum 6-month notice for any price increases of renewals."[44] In addition, the registry operators must allow registrants to renew for up to 10 years before implementing a price change, and subject to restrictions on discriminatory pricing.[45]

Using the Base RA for renewed legacy gTLDs without price cap provisions "is consistent with the gTLDs launched via the new gTLD program and will reduce ICANN org's role in domain pricing."[46] This promotes ICANN's Core Values of "introduc[ing] and promot[ing] competition in the registration of domain names and, where feasible and appropriate, depend[ing] upon market mechanisms to promote and sustain a competitive environment in the DNS market."[47]

The Base RA provides additional protections for the public benefit. For example, in 2015 the Board noted that the Base RA allows ICANN org to "designate an emergency interim

[41] https://www.icann.org/public-comments/base-agreement-2013-04-29-en; *see also* 26 July 2019 Letter, at Pg. 1.
[42] 26 July 2019 Letter, at Pg. 1; *see also* GNSO Final Report: Introduction of New Generic Top-Level Domains, 8 Aug. 2007, https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm#_Toc43798015.
[43] 26 July 2019 Letter, at Pg. 1.
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*, at Pg. 2.

registry operator of the registry for the TLD, which would mitigate the risks to the stability and security of the [DNS]."[48] Additionally, using the Base RA ensures that the Registry will use "uniform and automated processes, which will facilitate operation of the TLD," and "includes safeguards in the form of public interest commitments in Specification 11."[49]

The Board has also explained that transitioning legacy gTLDs to the Base RA "will provide consistency across all registries leading to a more predictable environment for end-users."[50] The Base RA's requirement that the registry operator only use ICANN accredited registrars that are party to the 2013 Registrar Accreditation Agreement "will provide more benefits to registrars and registrants."[51] Finally, the Board has noted that the Base RA "includes terms intended to allow for swifter action in the event of certain threats to the security or stability of the DNS,"[52] another public benefit.

C. The 2019 .ORG and .INFO RA Renewals.

The .ORG RA with PIR was renewed several times, including on 22 August 2013.[53] Likewise, the .INFO RA with Afilias was renewed on 22 August 2013.[54]

In anticipation of the 30 June 2019 expiration of the 2013 .ORG and .INFO RAs, ICANN org bilaterally negotiated renewals with each registry operator. The proposed renewals were based on ICANN org's Base RA, modified "to account for the specific nature[s]" of each TLD

[48] Rationale for Board Resolution 2015.09.28.06 (renewal of .PRO RA), https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.e.rationale; *see also* Rationale for Board Resolution 2015.09.28.04 (renewal of .CAT RA), https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.c.rationale; Rationale for Board Resolution 2015.09.28.05 (renewal of .TRAVEL RA), https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.d rationale; 2019 .ORG RA, Art. 2, § 2.13, at Pg. 7, https://www.icann.org/sites/default/files/tlds/org/org-agmt-pdf-30jun19-en.pdf.
[49] Rationale for Board Resolution 2015.09.28.06; *see also* 2019 .ORG RA, Specification 11, at Pgs. 95-96, https://www.icann.org/sites/default/files/tlds/org/org-agmt-pdf-30jun19-en.pdf.
[50] Rationale for Board Resolution 2015.09.28.06.
[51] *Id.*
[52] *Id.*
[53] 2019 .ORG RA Public Comment Proceeding.
[54] 2019 .INFO RA Public Comment Proceeding.

and as a result of negotiations between ICANN and the registry operators.[55] On 18 March 2019, ICANN org published the proposed .ORG/.INFO RAs for public comment to obtain community input on the proposed renewals. ICANN org published redline versions of the proposed renewal agreements against the Base RA, and identified the material differences between proposed renewals and the Base RA. ICANN org explained that

> [i]n alignment with the [Base RA], the price cap provisions in the current .ORG [and .INFO] agreement[s], which limited the price of registrations and allowable price increases for registrations, are removed from the .ORG [and .INFO] renewal agreement[s]. Protections for existing registrants will remain in place, in line with the [Base RA]. This change will not only allow the .ORG [and .INFO] renewal agreement[s] to better conform with the [Base RA], but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the [Base RA].[56]

The public comment period for the .ORG/.INFO Renewed RAs opened on 18 March 2019 and closed on 29 April 2019.[57] During that time, ICANN org received over 3,200 submissions in response to its call for public comments on the proposed .ORG agreement,[58] and over 500 submissions in response to its call for comments on the proposed .INFO agreement.[59] The comments predominantly related to three themes: (1) the proposed removal of the price cap provisions; (2) inclusion of the RPMs; and (3) the RA renewal process.[60]

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[55] *See* 2019 .ORG RA Public Comment Proceeding ; 2019 .INFO RA Public Comment Proceeding.
[56] 2019 .ORG RA Public Comment Proceeding; 2019 .INFO RA Public Comment Proceeding.
[57] 2019 .ORG RA Public Comment Proceeding; 2019 .INFO RA Public Comment Proceeding.
[58] Report of Public Comments, .ORG, at Pg. 3, https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf.
[59] Report of Public Comments, .INFO, at Pg. 3, https://www.icann.org/en/system/files/files/report-comments-info-renewal-03jun19-en.pdf.
[60] *Id.*, at Pg. 3; Report of Public Comments, .ORG, at Pg. 3.

ICANN org detailed its analysis of the public comments concerning the .ORG/.INFO Renewed RAs—including those addressing the proposed removal of price cap provisions—in its Report of Public Comments.[61] ICANN org concluded that

> [r]emoving the price cap provisions in the .ORG [and .INFO RAs] is consistent with the Core Values of ICANN org as enumerated in the Bylaws approved by the ICANN community. These values guide ICANN org to introduce and promote competition in the registration of domain names and, where feasible and appropriate, depend upon market mechanisms to promote and sustain a competitive environment in the DNS market.[62]

ICANN org also noted that

> the Base [RA] would also afford protections to existing registrants . . . [e]nacting this change will not only allow the .ORG renewal agreement to conform to the Base [RA], but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the Base [RA].[63]

ICANN org explained that it would "consider the feedback from the community on this issue,"[64] and then ICANN org would "consider the public comments received and, in consultation with the ICANN Board of Directors, make a decision regarding the proposed registry agreement."[65]

ICANN org reviewed and considered all of the comments submitted concerning the proposed .ORG/.INFO Renewed RAs,[66] then ICANN Staff briefed the ICANN Board on its analysis of the public comments during the Board workshop on 21-23 June 2019.[67] With support from the Board to proceed with execution of the proposed renewals and pursuant to the ICANN

[61] Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.
[62] Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.
[63] Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.
[64] Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.
[65] Report of Public Comments, .ORG, at Pg. 1; Report of Public Comments, .INFO, at Pg. 1.
[66] 26 July 2019 Letter, at Pg. 2.
[67] 26 July 2019 Letter at Pg. 2.

Delegation of Authority Guidelines, on 30 June 2019, ICANN org executed the .ORG/.INFO Renewed RAs.[68]

D. The Request for Reconsideration.

The Requestor submitted Request 19-2 on 12 July 2019.

Pursuant to Article 4, Section 4.2(l) of the Bylaws, ICANN org transmitted Request 19-2 to the Ombudsman for consideration, and the Ombudsman accepted consideration of the reconsideration request.[69]

After investigating, the Ombudsman concluded that "the CEO and Staff acted within the scope of the powers given them by the Board,"[70] and that "no rules or duties of corporate governance were violated (including the ICANN Bylaws)."[71] He determined that the "Board were well aware of the public comments" because ICANN Staff briefed the Board on the comments, and because the comments were publicly available, so Board members could have read each comment had they so desired.[72] Additionally, the Ombudsman concluded that "the whole renewal process and the terms themselves may be described as a corporate governance matter, and no rules or duties of corporate governance were violated (including the ICANN Bylaws)."[73]

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[68] *See* ICANN org announcements: .ORG RA, https://www.icann.org/resources/agreement/org-2019-06-30-en; .INFO RA, https://www.icann.org/resources/agreement/info-2019-06-30-en.
[69] https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-ombudsman-action-redacted-27aug19-en.pdf.
[70] Evaluation by the ICANN Ombudsman of Request for Reconsideration 19-2, at Pg. 5, 7 September 2019.
[71] *Id*.
[72] *Id.*
[73] *Id.*, at Pg. 5. On 12 September 2019, the Internet Commerce Association (ICA) wrote to the Ombudsman, asserting that the Ombudsman "made ill-informed and disparaging comments about members of the ICANN community" in the Ombudsman's evaluation. 12 September 2019 letter from Z. Muskovitch to H. Waye, https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-letter-ica-to-icann-ombudsman-12sep19-en.pdf. The ICA asked the Ombudsman to "apologize to the numerous people who submitted these Comments and to retract [his] ill-advised statements." *Id.*, at Pg. 3.

The Board adopted a Proposed Determination denying Request 19-2 on 3 November 2019.[74] On 18 November 2019, the Requestor submitted a rebuttal to the Board's Proposed Determination. The Requestor argued that: (1) the Board should not have relied on an expert economist's 2009 assessment of the propriety of price caps in new gTLD Registry Agreements; (2) the Base RA's development process does not support migration of .ORG and .INFO to the Base RA; (3) ICANN Staff disregarded "essentially unanimous public comments in support of price caps"; and (4) that a for-profit entity purchased .ORG after the .ORG Renewed RA was executed "requires that ICANN [org] review this purchase in detail and take the necessary steps to ensure that .org domains are not used [as] a source of revenue" for certain purposes.[75]

E. Relief Requested.

The Requestor "requests that ICANN org and the ICANN Board reverse its decision and include (or maintain) price caps in all legacy TLDs."[76]

III. Issues Presented.

The issues are as follows:

1. Whether ICANN Staff's decision not to include price caps in the .ORG/.INFO Renewed RA contradicts ICANN's Mission, Commitments, Core Values, or established ICANN policies; and

2. Whether ICANN Staff failed to consider material information when it executed the .ORG/.INFO Renewed RAs.

[74] Board action on Proposed Determination on Request 19-2, https://www.icann.org/resources/board-material/resolutions-2019-11-03-en#1.a; Proposed Determination on Request 19-2, https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-board-proposed-determination-03nov19-en.pdf.
[75] Rebuttal in Support of Request 19-2, [INSERT CITE WHEN POSTED].
[76] Request 19-2, § 9, at Pg. 12.

IV. The Relevant Standards for Reconsideration Requests.

Articles 4.2(a) and (c) of ICANN's Bylaws provide in relevant part that any entity "may submit a request for reconsideration or review of an ICANN action or inaction . . . to the extent the Requestor has been adversely affected by:

(i) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);

(ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or

(iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or Staff's reliance on false or inaccurate relevant information."[77]

The Board now considers Request 19-2's request for reconsideration of Staff action[78] on the grounds that the action was taken in contradiction of ICANN's Bylaws and without consideration of material information. The Board has reviewed the Request and all relevant materials and now makes this final determination. Denial of a Request for Reconsideration of ICANN Staff action is appropriate if the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.[79]

V. Analysis and Rationale.

A. The .ORG/.INFO Renewed RAs Are Consistent With ICANN Org's Commitments.

[77] Bylaws, Art. 4 §§ 4.2(a) and (c).
[78] The Requestor sought reconsideration of Board and Staff Action, and brought the Request on behalf of itself and "725 Namecheap customers and internet users." *See* Request 19-2, § 2, at Pg. 2; *id.* § 10, at Pg. 12. Request 19-2 does not identify an action or inaction of the Board. Further, the Requestor's claim on behalf of its customers is not sufficiently stated because it does not satisfy the requirement that the Requestor, not a third party, must have been adversely affected by the challenged action. Accordingly, the Board's consideration is with respect to the Requestor's challenge to Staff action.
[79] Bylaws, Art. 4 § 4.2(e).

The Requestor claims that omitting the price caps from the .ORG/.INFO Renewed RAs contradicts ICANN org's Commitment to "seek input from the public, for whose benefit ICANN in all events shall act."[80]

The Requestor acknowledges that "ICANN [org] requested public comment regarding the changes to the .ORG registry agreement."[81] It asserts, however, that ICANN org "reject[ed] all of the comments against removing the price cap with a conclusory statement that is devoid of any supporting evidence," and as a result, "the public comment process is basically a sham."[82] In sum, the Requestor claims that including price caps in the .ORG/.INFO Renewed RAs "ignore[d] the public benefit or almost unanimous feedback to the contrary."[83]

The Requestor does not dispute that ICANN org "review[ed] and consider[ed] all 3,200+ comments received,"[84] and acknowledged that the removal of the price caps was "[a] primary concern voiced in the comments."[85] ICANN Staff presented and discussed the "key issues raised in the public comment process and correspondence," including removal of price caps, with the Board before executing the .ORG/.INFO Renewed RAs.[86] Further, as the Ombudsman noted, the Board was "well aware of the public comments."[87]

The Reports of Public Comment were the result of ICANN Staff's extensive analysis of the comments;[88] consistent with ICANN Staff's ordinary process for preparing the Report of

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[80] Request 19-2, § 8, at Pg. 4.
[81] *Id.* § 8, at Pg. 3.
[82] *Id.* § 8, at Pgs. 10, 12; *see also* Rebuttal, at Pg. 5 ("it is still not clear why ICANN [org] bothered to solicit public comment"; omitting price caps from the .ORG/.INFO Renewed RAs "effectively silenced" those who submitted public comments opposing removal of price caps).
[83] Request 19-2,§ 8, at Pg. 12.
[84] 26 July 2019 Letter at Pg. 2.
[85] Report of Public Comments, .ORG, at Pg. 3; Report of Public Comments, .INFO, at Pg. 3.
[86] 26 July 2019 Letter, at Pg. 2.
[87] Ombudsman Evaluation of Request 19-2, at Pg. 5.
[88] The Requestor argues that ICANN Staff did not conduct an extensive analysis of the public comments because of "glaring issues" with the manner in which certain comments were posted to ICANN org's website. Rebuttal, at Pg. 5. Those issues do not concern the substance of public comments concerning the proposed price caps. They are not relevant to Request 19-2.

Public Comment, ICANN Staff identified the main themes in the comments and summarized them, providing exemplary excerpts for each of those themes.[89] Neither the Bylaws, nor any ICANN policy or procedure, requires ICANN Staff to discuss each position stated in each comment. By the same token, there is no threshold number of comments about a topic that, if reached, requires ICANN Staff to address that topic in the Report of Public Comments. Even a single comment on a theme may merit inclusion in the report, under certain circumstances; likewise, a multitude of comments on a theme may merit little or no consideration in the report, under other circumstances.[90]

That ICANN org ultimately decided to proceed without price caps despite public comments opposing this approach does not render the public comment process a "sham," "silence[]" public comments, or otherwise demonstrate that ICANN org failed to act for the public benefit. ICANN Staff's careful consideration of the public comments—as reflected in its Report of Public Comments and discussion with the Board,[91] demonstrate the exact opposite, namely that the inclusion of price caps was carefully considered.

Further, the Report of Public Comments demonstrates ICANN Staff's belief that it was acting for the public benefit by "promot[ing] competition in the registration of domain names," providing the same "protections to existing registrants" afforded to registrants of other TLDs, and treating "the Registry Operator equitably with registry operators of new gTLDs and other

[89] *See* Report of Public Comments, .ORG, at Pg. 3 ("This section intends to summarize broadly and comprehensively the comments submitted to this public comment proceeding but does not address every specific position stated by each contributor."); Report of Public Comments, .INFO, at Pg. 3 (same).
[90] The Board acknowledges the ICA's disagreement with the Ombudsman's characterization of certain comments as "spam" and "computer generated." 12 September 2019 Letter, at Pgs. 1-2. ICANN Staff acknowledged both the volume of comments submitted concerning the proposed .ORG/.INFO Renewed RAs and the issues they raised—including the removal of price cap provisions—without discounting the comments based on their apparent source. *See* Report of Public Comments, .ORG; Report of Public Comments, .INFO. Accordingly, the ICA's arguments do not change the Board's determination that reconsideration is not warranted here.
[91] 26 July 2019 Letter, at Pg. 2.

legacy gTLDs utilizing the Base [RA]."[92] There is no support for the Requestor's assertion that ICANN Staff's belief in this regard was based upon "conclusory statements not supported by evidence."[93] ICANN org considered Professor Carlton's 2009 expert analysis of the Base RA, and specifically his conclusion that limiting price increases was not necessary, and that the increasingly competitive field of registry operators in itself would serve as a safeguard against anticompetitive increases in domain name registration fees.[94] Finally, ICANN Staff was aware of the Board's 2015 statements (made in the course of approving the migration of another legacy gTLD, .PRO, to the Base RA) that the Base RA as a whole benefits the public by offering important safeguards that ensure the stability and security of the DNS and a more predictable environment for end-users.[95]

In sum, the Requestor's conclusory assertion that ICANN org did not act for the public benefit is unsupported and does not support reconsideration.

B. The .ORG/.INFO Renewed RAs Are Consistent With ICANN Org's Core Values.

The Requestor asserts that omitting the price caps from the .ORG/.INFO Renewed RAs contradicts ICANN org's Core Value of

> [s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.[96]

Contrary to the Requestor's argument, ICANN org *did* seek broad, informed participation through the public comment process for the .ORG/.INFO Renewed RAs. As noted above,

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[92] Report of Public Comments, .ORG, at Pg. 8.
[93] Request 19-2, § 8, at Pg. 12.
[94] Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, at ¶ 12, https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf.
[95] *See* Rationale for Board Resolution 2015.09.28.06.
[96] Request 19-2, § 8, at Pg. 4.

ICANN org considered the responses and other factors, including its commitment to "[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment,"[97] and its Core Values of "depending on market mechanisms to promote and sustain a competitive environment in the DNS market" where "feasible and appropriate," and "[i]ntroducing 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."[98]

Moreover, the public comment process is but one of several channels for ICANN's multistakeholder community to voice opinions. Members of the community may also voice their opinions in public meetings and through the final recommendations of supporting organizations, advisory committees, and direct correspondence with ICANN org. Accordingly, the multistakeholder community provides input to ICANN org in many ways, and ICANN org considers this input to ensure that all views have been taken into account during a decision-making process.

However, ICANN org's Core Values do not require it to accede to each request or demand made in public comments or otherwise asserted through ICANN's various communication channels. Here, ICANN org ultimately determined that ICANN's Mission was best served by replacing price caps in the .ORG/.INFO Renewed RAs with other pricing protections to promote competition in the registration of domain names, afford the same "protections to existing registrants" that are afforded to registrants of other TLDs, and treat registry operators equitably.[99] Further, the Base RA, which is incorporated in the .ORG/.INFO

[97] Bylaws, Art. 1, § 1.2(a)(v); *see also* 26 July 2019 Letter, at Pg. 1.
[98] Bylaws, Art. 1, § 1.2(b)(iii), (iv); *see also* 26 July 2019 Letter, at Pg. 2.
[99] Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.

Renewed RA, "was developed through the bottom-up multi-stakeholder process including multiple rounds of public comment."[100]

On rebuttal, the Requestor asserts that the Base RA "was developed for the new gTLD registries" and there is no evidence that participants in the Base RA development understood that ICANN org might use the Base RA for legacy gTLDs.[101] But ICANN org "has consistently used the Base RA as the starting point for discussions with legacy gTLD operators about renewing their Registry Agreements" since no later than 2014.[102] Since then, the following other legacy gTLDs have adopted the Base RA in renewed agreements: .CAT, .JOBS, .MOBI, .PRO, .TEL, .TRAVEL, .ASIA, and .BIZ.[103] Accordingly, ICANN org adhered to its commitment to treat the .ORG and .INFO registry operators consistently with other legacy gTLD registry operators (rather than single them out for discriminatory treatment) when it used the Base RA as the starting point for its renewal discussions in 2019.[104]

The Requestor has not demonstrated that ICANN org failed to seek or support broad participation or ascertain the global public interest. To the contrary, ICANN org's transparent processes reflect its continuous efforts to ascertain and pursue the global public interest by migrating the legacy gTLDs to the Base RA. Accordingly, this argument does not support reconsideration.

C. ICANN Org's Statements Concerning The Purpose Of Public Comments Do Not Support Reconsideration.

[100] 26 July 2019 Letter, at Pg. 1.
[101] Rebuttal, at Pg. 4.
[102] 26 July 2019 Letter, at Pg. 1.
[103] *Id.*
[104] *See* ICANN Bylaws, Art. 1, § 1.2(a)(v). That the .ORG and .INFO RAs that were renewed in August 2013 did not adopt the Base RA, which had been adopted just one month earlier, is not relevant. As noted above, ICANN org's consistent practice of using the Base RA for discussions with legacy gTLDs began in 2014. 26 July 2019 Letter, at Pg. 1.

The Requestor asserts that reconsideration is warranted because omitting the price caps from the .ORG/.INFO Renewed RAs is contrary to ICANN org's statement on its Public Comment Opportunities page that "Public Comment is a key part of the policy development process (PDP), allowing for refinement of recommendations before further consideration and potential adoption," and is "used to guide implementation work, reviews, and operational activities of the ICANN organization."[105] The Requestor asserts that omitting the price caps is inconsistent with ICANN org's statement that the "purpose of this public comment proceeding is to obtain community input on the proposed .ORG renewal agreement."[106]

Ultimately, ICANN org's decision not to include price caps in the .ORG/.INFO Renewed RAs does not mean that ICANN org failed to "obtain community input" or "use[]" the public comment "to guide implementation work" of ICANN org.[107] To the contrary, it is clear that ICANN org actively solicited community input, and carefully analyzed it as part of its efforts—in consultation with the Board—to ascertain, and then with the Board's support, to pursue, the global public interest.

Additionally, the Board notes that reconsideration is available for ICANN Staff actions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies).[108] ICANN org's general description of the purpose of the public comment process is not a Commitment, Core Value, established policy, nor part of ICANN org's Mission. Accordingly, even if ICANN org's decision to execute the .ORG/.INFO Renewed RAs without price caps contradicted these statements—and it did not, as explained in Section V.A above — this inconsistency could not form the basis of a Reconsideration Request.

[105] Request 19-2, § 8, at Pg. 4.
[106] *Id.*
[107] *See id.*
[108] Bylaws, Art. 4 § 4.2(c). The challenged action must adversely affect the Requestor as well. *Id.*

D. The Requestor Has Not Demonstrated That ICANN Org Acted Without Consideration Of Material Information.

The Requestor asserts that ICANN org's analysis of the proposed removal of price caps "ignores significant information that is contrary to its sweeping conclusions."[109] Specifically, the Requestor asserts that ICANN org's analysis ignores that:

1. .ORG "is the 3rd largest" TLD, and "additional analysis is needed to determine whether this market share can result in uncompetitive practices,"[110]

2. .ORG "was established in 1985," "is universally known, associated with nonprofit use, and has an excellent reputation,"[111]

3. It can be "a cumbersome and costly process" for an established entity to change domain name, and "often" leads to "negative results (inability to connect with users, loss of search engine positions, confusion over validity of new domain, etc). Many would rather stay with an established domain (and the associated goodwill)."[112]

4. "TLDs are not interchangeable, as ICANN states. While there may be 1,200 other gTLDs to choose from, many of the new gTLDs are closed and not useable by nonprofits . . . or targeted to certain uses . . .and cannot be used by nonprofits or businesses. It would be desirable for ICANN to identify which new gTLDs might be acceptable replacements to .ORG."[113]

5. Although some new gTLDs are targeted to nonprofits, "there are few registrations in those TLDs (perhaps demonstrating that nonprofits do not want an alternative to .ORG)."[114]

6. "There are some concerns [that] higher levels of abuse exists in new gTLD domains . . . . ICANN's own analysis shows greater levels of abuse in new gTLDs compared to legacy TLDs."[115]

7. "[I]t is possible that new gTLDs will not be usable in internet browsers, mobile devices, or email systems- all which greatly diminish the ability for nonprofits to switch to a new gTLD for their main domain name."[116]

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[109] Request 19-2, § 8, at Pg. 10.
[110] *Id.*
[111] *Id.*
[112] *Id.*, at Pg. 10-11.
[113] *Id.*, at Pg. 11.
[114] *Id.*
[115] *Id.* citing https://www.icann.org/en/system/files/files/daar-monthly-report-31jan19-en.pdf.
[116] *Id.*, at Pg. 11-12.

The Report of Public Comments for the .ORG Renewed RA makes clear that ICANN org *did* consider some of these concerns. Specifically, with respect to Item 1, ICANN Staff noted that commenters "questioned whether ICANN org conducted an economic study or research on the potential market implications of removing the existing pricing protections."[117] With respect to Item 2, ICANN Staff acknowledged that commentators noted that ".ORG was developed, cultivated and established over decades as catering to non-profit and similar charitable organizations."[118] With respect to Items 3, 4, 5, and 7, ICANN Staff acknowledged "concerns about the burden and costs associated with moving [a] web presence to another TLD," along with comments characterizing .ORG as "the most appropriate registry for a charity or non-profit."[119] Accordingly, the Requestor's argument that the information about these six "concerns" was not considered or was ignored is incorrect and therefore does not support reconsideration.

With respect the Requestor's assertion that "ICANN's own analysis shows greater levels of abuse in new gTLDs compared to legacy TLDs,"[120] the Requestor mischaracterizes the cited ICANN report. As the Requestor notes, the 2019 Domain Abuse Activity Reporting (DAAR) report concluded that 48.11% of the "domains identified as security threats . . . were in legacy [TLDs]," and the remaining 51.89% of the domains identified as threats were in new gTLDs.[121] Further, the Report indicates that about 12% of TLD domain names are hosted on new gTLDs.[122] However, the Report also notes that 88% of the new gTLD domains identified as security threats

[117] Report of Public Comments, .ORG, at Pg. 5.
[118] *Id.*, at Pgs. 3-4.
[119] *Id.*, at Pgs. 4-5.
[120] *Id.*, citing 31 January 2019 DAAR Report, https://www.icann.org/en/system/files/files/daar-monthly-report-31jan19-en.pdf.
[121] 31 January 2019 DAAR Report, Executive Summary.
[122] *Id.*, at Pg. 5.

were concentrated in only 25 new gTLDs, out of over 340 new gTLDs.[123] The Report further noted that 98% of the domains identified as security threats were hosted by "the 50 most-exploited new [TLDs]."[124] Accordingly, even if ICANN Staff did not consider the 2019 DAAR Report, the Requestor has not shown that the information contained in it was material to the inclusion of price caps in the .ORG/.INFO Renewed RAs. Moreover, the cited portions of the DAAR Report relate to security threats, not domain name registration fees. This argument does not support reconsideration.

E. The Requestor Has Not Demonstrated That It Has Been Adversely Affected By The .ORG/.INFO Renewed RAs.

The Requestor asserts that it has been adversely affected by the challenged conduct because, "[a]s a domain name registrar, removal of prices caps for legacy TLDs will negatively impact [the Requestor's] domain name registration business," insofar as the .ORG/.INFO Renewed RAs create an "uncertainty of price increases."[125] That the Requestor could not quantify the actual financial impact on the Requestor of removing the price caps at the time it submitted Request 19-2 was not material to our preliminary procedural evaluation, because the Requestor asserted that the financial uncertainty *itself* is the harm. Accordingly, the Board Accountability Mechanisms Committee (BAMC) concluded that Request 19-2 was sufficiently stated.[126] However, the BAMC's conclusion that the Requestor sufficiently asserted that it was materially harmed was not a determination that the Requestor was in fact materially harmed or, if so, that removing the .ORG/.INFO Renewed RAs caused that harm.

[123] *Id.*, at Pg. 6. Similarly, four legacy TLDs hosted more than 94% of the legacy TLD domains identified as security threats. *Id.*
[124] *Id.*, at Pg. 6.
[125] Request 19-2, § 6, at Pg. 2; *see also id.* § 10, at Pg. 13.
[126] *See* Ombudsman Action on Request 19-2, at Pg. 2.

The Board now concludes that the Requestor has not shown that it has been harmed by the .ORG/.INFO Renewed RAs. As noted above, in 2009, Professor Carlton concluded that price caps were unnecessary to protect against unreasonable increases in domain name registration fees.[127] Professor Carlton explained that "a supplier that imposes unexpected or unreasonable price increases will quickly harm its reputation[,] making it more difficult for it to continue to attract new customers. Therefore, even in the absence of price caps, competition can reduce or eliminate the incentives for suppliers to act opportunistically."[128] The Requestor disagrees with the Board's conclusion, but raises no new arguments or evidence supporting its disagreement.[129] Instead, in its Rebuttal, the Requestor merely repeats the argument from its original Request, namely that the claimed harm is "likely to occur," rather than presently existing.[130]

Regardless of whether the speculative harm on which Requestor bases Request 19-2 could be sufficient to support a Reconsideration Request, it is not sufficient here because (1) ICANN Staff acted consistent with ICANN Bylaws, policies, and procedures when it renewed the .ORG/.INFO RAs,[131] and (2) the additional safeguards discussed above demonstrate that, at this time, Requestor's concerns are not well founded.

In its Rebuttal the Requestor also challenges the Board's reliance on Professor Carlton's 2009 Preliminary Analysis Regarding Price Caps.[132] The Requestor asserts that the Board should disregard Professor Carlton's analysis because: (1) it is an opinion and does not cite "any data sources or references," (2) certain public commenters disagreed with Professor Carlton, (3)

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[127] Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, at ¶ 12, https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf.
[128] *Id.*
[129] Rebuttal, at Pgs. 6-7.
[130] *Id.* at Pg. 6.
[131] *See supra* § V.B.
[132] Rebuttal, at Pg. 2.

it focused on the propriety of removing price caps for new gTLDs and not legacy gTLDs, and (4) the Board did not reference Professor Carlton's analysis when the .ORG/.INFO RAs were renewed in 2013.[133]

The Requestor's first and second arguments amount to a disagreement with Professor Carlton's conclusions. They do not support reconsideration. Professor Carlton is a leader in economic analysis, particularly concerning antitrust issues.[134] His 2009 Preliminary Analysis is based on his extensive experience with and expertise in market forces. It is not—and does not claim to be—a data-driven study or survey.[135] The Requestor's disagreement with Professor Carlton's conclusions does not necessarily render them incorrect.

The Requestor's third argument does not support reconsideration because, although Professor Carlton did note that price caps in legacy gTLDs had the effect of limiting prices that new gTLDs could charge, Professor Carlton identified other controls that also have the effect of limiting price increases.[136] The Requestor's fourth argument likewise does not support reconsideration. The Requestor has identified no established policy or procedure (because there is none) requiring the Board to consider the exact same information and materials for every RA renewal. The Requestor has not demonstrated that consideration of Professor Carlton's analysis violates ICANN Bylaws or established policies or procedures.

The Requestor has not shown that it has, in fact, been harmed by the financial uncertainty it identified in Request 19-2, nor that it has been harmed by any price increases under the .ORG/.INFO Renewed RAs. Instead, the Requestor asserts that "additional analysis is needed to

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[133] *Id.* at Pg. 2-3.
[134] *See supra* § II.B.
[135] *See* Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf.
[136] *See supra* § II.B.

determine whether" the removal of price caps in the .ORG RA "can result in uncompetitive practices."[137] This suggestion of further study is insufficient, at this stage, to warrant Reconsideration. The Requestor has not identified any *evidence* that it has been harmed or will be harmed by removal of the price caps, and the evidence that is available—Professor Carlton's expert report—indicates that such harm is not expected. Accordingly, reconsideration is not warranted.

F. The Parent Company of the .ORG Registry Operator Is Not Relevant to the Reconsideration Request and Does Not Support Reconsideration.

The Requestor argues that the "timing and nature" of the 13 November 2019 acquisition of the .ORG Registry Operator PIR by an investment firm "is suspicious" because the Requestor believes that negotiations for the acquisition began before the .ORG RA was renewed.[138] Accordingly, the Requestor asserts, ICANN should "scrutinize this transaction closely."[139] However, PIR's corporate structure is not relevant to Request 19-2, which concerns the 30 June 2019 renewal of the .ORG RA and must be evaluated in accordance with the grounds for reconsideration as set forth in ICANN's Bylaws. The Ethos Capital acquisition of PIR, which was announced more than four months after the execution of the .ORG Renewed RA, did not impact ICANN Staff's determination that ICANN's Mission and Core Values were best served by migrating the .ORG/.INFO RAs to the Base RA.[140]

In sum, Request 19-2 is not the appropriate vehicle for challenging Ethos Capital's acquisition of PIR.

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[137] Request 19-2, § 8, at Pg. 10.
[138] Rebuttal, at Pg. 7.
[139] *Id.*
[140] *See supra* § II.C. Neither ICANN Staff nor PIR were aware that Ethos Capital would acquire PIR when the parties finalized the .ORG Renewed RA. *See* http://domainincite.com/24988-i-attempt-to-answer-icas-questions-about-the-terrible-blunder-org-acquisition.

VI. Determination.

The Board has considered the merits of Request 19-2 and, based on the foregoing, concludes that ICANN org's execution of the .ORG/.INFO Renewed RAs did not contradict ICANN's Bylaws, policies, or procedures, and that ICANN Staff did not fail to consider material information in executing the Agreements. Accordingly, the Board denies Request 19-2.

FINAL DETERMINATION
OF THE ICANN BOARD OF DIRECTORS
RECONSIDERATION REQUEST 19-2
21 November 2019

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The Requestor, Namecheap Inc., seeks reconsideration of ICANN organization's 2019 renewal of the Registry Agreements (RAs) with Public Interest Registry (PIR) and Afilias Limited (Afilias) for the .ORG and .INFO generic top-level domains (gTLDs), respectively (individually .ORG Renewed RA and .INFO Renewed RA; collectively, the .ORG/.INFO Renewed RAs), insofar as the renewals eliminated "the historic price caps" on domain name registration fees for .ORG and .INFO.[2] The Requestor claims that ICANN org's "decision to ignore public comments to keep price caps in legacy gTLDs is contrary to ICANN's Commitments and Core Values, and ICANN should reverse this decision for the public good."[3]

Specifically, the Requestor claims that the .ORG/.INFO Renewed RAs are contrary to:

(i) ICANN org's commitment to "seek input from the public, for whose benefit ICANN in all events shall act."[4]

(ii) ICANN org's Core Value of "[s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent."[5]

(iii) ICANN org's Public Comment Opportunities page, which states that "Public Comment is a key part of the policy development process (PDP), allowing for refinement of recommendations before further consideration and potential adoption," and is "used to guide implementation work, reviews, and operational activities of the ICANN organization."[6]

[2] Request 19-2, § 3, at Pg 2
[3] *Id.* § 8, at Pg 3
[4] *Id.* § 8, at Pg 4
[5] *Id.* § 8, at Pg 4
[6] *Id.* § 8, at Pg 4

(iv) ICANN org's statements concerning its call for Public Comment that the "purpose of this public comment proceeding is to obtain community input on the proposed .ORG renewal agreement."[7]

The Requestor also asserts that ICANN Staff failed to consider material information concerning the nature of the .ORG TLD and security issues with new gTLDs when it executed the .ORG/.INFO Renewed RAs.[8]

The Requestor "requests that ICANN org and the ICANN Board reverse its decision and include (or maintain) price caps in all legacy gTLDs."[9]

I. Brief Summary.

PIR is the registry operator for the .ORG TLD.[10] ICANN org and PIR entered into an RA on 2 December 2002 for the continued operation of the .ORG gTLD, which was renewed in 2006 and 2013.[11] ICANN org and Afilias first entered into an RA on 11 May 2001 for the operation of the .INFO gTLD, which was renewed in 2006 and 2013.[12] Before the recent renewals, the RAs for .ORG and .INFO included price caps, which limited the initial prices and allowable price increases for registrations.[13] Both RAs were scheduled to expire on 30 June 2019.

In anticipation of the 30 June 2019 expiration, ICANN org bilaterally negotiated renewals to the agreements with each registry operator. The proposed renewals were based on ICANN org's base generic TLD Registry Agreement updated on 31 July 2017 (Base RA),

[7] *Id.*, § 8, at Pg 4
[8] *Id.*, § 8, at Pg 10
[9] *Id.*, § 9, at Pg 12
[10] Public Comment Proceeding, Proposed Renewal of ORG RA, 18 March 2019 (2019 ORG RA Public Comment Proceeding), https://www icann org/public-comments/org-renewal-2019-03-18-en
[11] *Id.*
[12] Public Comment Proceeding, Proposed Renewal of INFO RA, 18 March 2019 (2019 INFO RA Public Comment Proceeding), https://www icann org/public-comments/info-renewal-2019-03-18-en
[13] 2002 ORG RA, https://www icann org/resources/unthemed-pages/index-2002-12-02-en; 2001 INFO RA, https://www icann org/resources/unthemed-pages/registry-agmt-2001-05-11-en

modified to account for the specific nature of the .ORG and .INFO gTLDs.[14] As a result, the proposed Renewed RAs' terms were substantially similar to the terms of the Base RA.

From January 2019 to June 2019, ICANN Staff briefed and met with the Board several times regarding the proposed .ORG/.INFO Renewed RAs.[15] On 18 March 2019, ICANN Staff published the proposed .ORG/.INFO Renewed RAs for public comment to obtain community input on the proposed renewals. ICANN Staff described the material differences between proposed renewals and the current .ORG and .INFO RAs. These differences included removal of limits on domain name registration fee increases that had been in prior .ORG and .INFO RAs. ICANN Staff explained that the change would "allow the .ORG [and .INFO] renewal agreement[s] to better conform with the [Base RA]," while "tak[ing] into consideration the maturation of the domain name market and the goal of treating the Registry Operator[s] equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the [Base RA]."[16]

ICANN org received over 3,700 submissions in response to its call for public comments on the proposed .ORG and .INFO agreements.[17] The comments predominantly related to three themes: (1) the proposed removal of price cap provisions; (2) inclusion of certain rights

[14] *See* 2019 ORG RA Public Comment Proceeding; 2019 INFO RA Public Comment Proceeding The RA for the operation of BIZ was also set to expire on 30 June 2019; as a result of bilateral negotiations with the registry operator for BIZ and after considering public comments, ICANN org and the registry operator for BIZ entered into a Renewed RA for BIZ that was based on (and therefore substantially similar to) the Base RA *See* https://www icann org/resources/agreement/biz-2019-06-30-en

[15] Letter from Namazi to Muscovitch, 26 July 2019, at Pg 2, https://www icann org/en/system/files/correspondence/namazi-to-muscovitch-26jul19-en pdf

[16] 2019 ORG RA Public Comment Proceeding New gTLDs are TLDs released as part of ICANN org's New gTLD Program *See* https://newgtlds icann org/en/about/program Legacy gTLDs are gTLDs that existed before ICANN org's New gTLD Program ORG and INFO are legacy TLDs

[17] Report of Public Comments, ORG, at Pg 3, https://www icann org/en/system/files/files/report-comments-org-renewal-03jun19-en pdf; Report of Public Comments, INFO, at Pg 3, https://www icann org/en/system/files/files/report-comments-info-renewal-03jun19-en pdf

protection mechanisms (RPMs), including the Uniform Rapid Suspension (URS) rules; and (3) the RA renewal process.[18]

ICANN Staff analyzed the public comments, including those addressing the proposed removal of price cap provisions, in its Report of Public Comments.[19] It concluded that removing the price cap provisions was "consistent with the Core Values of ICANN org as enumerated in the Bylaws," insofar as removing the price cap provisions would "promote competition in the registration of domain names," and enabled ICANN org to "depend upon market mechanisms to promote and sustain a competitive environment in the [Domain Name System (DNS)] market."[20] ICANN org also noted that the Base RA protected existing registrants' pricing by requiring the registry operator to: (1) give registrars six months' advance notice of price changes; and (2) allow registrants to renew their domain name registrations for up to 10 years *before* those price changes take effect.[21] ICANN Staff then noted that it would "consider the feedback from the community on this issue,"[22] "and, in consultation with the ICANN Board of Directors, make a decision regarding the proposed registry agreement."[23]

Following consultation with the ICANN Board of Directors and with the Board's support, on 30 June 2019, ICANN Staff announced that it had executed the .ORG/.INFO Renewed RAs. The .ORG/.INFO Renewed RAs did not include price caps.[24]

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[18] Report of Public Comments, INFO, at Pg 3; Report of Public Comments, ORG, at Pg 3.
[19] ICANN org received some comments supporting removal of the price cap provision because "ICANN org is not and should not be a price regulator," and because the Base RA would provide certain protections to current registrants Report of Public Comments, ORG, at Pg 6
[20] *Id.*, at Pg 8
[21] *Id.*
[22] *Id.*
[23] *Id.*, at Pg 1
[24] *See* ICANN org announcements: ORG Renewed RA, https://www icann org/resources/agreement/org-2019-06-30-en; INFO Renewed RA, https://www icann org/resources/agreement/info-2019-06-30-en

On 12 July 2019, the Requestor filed Request 19-2, seeking reconsideration of the .ORG/.INFO Renewed RAs.

The Ombudsman accepted Request 19-2 for consideration, and, after investigating, concluded that "the CEO and Staff acted within the scope of the powers given them by the Board,"[25] and that "no rules or duties of corporate governance were violated (including the ICANN Bylaws)."[26]

The Board adopted a Proposed Determination denying Request 19-2 on 3 November 2019.[27] On 18 November 2019, the Requestor submitted a rebuttal to the Board's Proposed Determination. The Requestor challenged the Board's reliance on evidence concerning and mechanisms designed for new gTLDs as compared to legacy TLDs, reiterated its argument that ICANN Staff should have acted in accordance with "essentially unanimous public comments in support of price caps," and asserted that the recent acquisition of .ORG by a for-profit entity merits additional scrutiny of the .ORG Renewed RA.[28]

The Board has considered Request 19-2 and all relevant materials. Based on its extensive review of all relevant materials, the Board finds that reconsideration is not warranted because ICANN org's execution of the .ORG/.INFO Renewed RAs was consistent with ICANN's

[25] Evaluation by the ICANN Ombudsman of Request for Reconsideration 19-2, at Pg 5, 7 September 2019, https://www icann org/resources/pages/reconsideration-19-2-namecheap-request-2019-07-22-en

[26] *Id*

[27] Board action on Proposed Determination on Request 19-2, https://www icann org/resources/board-material/resolutions-2019-11-03-en#1 a; Proposed Determination on Request 19-2, https://www icann org/en/system/files/files/reconsideration-19-2-namecheap-board-proposed-determination-03nov19-en pdf The Board designated the Board Accountability Mechanisms Committee (BAMC) to review and consider Reconsideration Requests before making recommendations to the Board on the merits of those Requests Bylaws, Art 4, § 4 2(e) However, the BAMC is empowered to act only upon consideration by a quorum of the Committee *See* BAMC Charter https://www icann org/resources/pages/charter-bamc-2017-11-02-en Here, the majority of the BAMC members recused themselves from voting on this matter due to potential or perceived conflicts, or out an abundance of caution Accordingly, the BAMC did not have a quorum to consider Request 19-2 so the Board itself issued the Proposed Determination in lieu of a Recommendation from the BAMC

[28] Rebuttal in Support of Request 19-2, [INSERT CITE WHEN POSTED]

Bylaws, policies, and procedures, and ICANN Staff considered all material information prior to executing the .ORG/.INFO Renewed RAs.

II. Facts.

A. Historic .ORG and .INFO RAs.

On 2 December 2002, ICANN org and PIR entered into a RA for the continued operation of .ORG, which became effective in 2003.[29] ICANN org and Afilias first entered into a RA on 11 May 2001 for the operation of .INFO.[30] Both RAs included price caps.[31]

In 2006, ICANN org considered removing price caps from several legacy gTLDs, including .INFO and .ORG.[32] However, after reviewing over 2,000 comments from over 1,000 commenters, many opposing removal of the price caps, and at the Board's direction, ICANN org renegotiated the .ORG and .INFO RAs to include price caps.[33] Following a public comment period for the revised RAs (which included price caps), on 8 December 2006, the Board approved .ORG and .INFO RAs with price caps (as proposed and posted during the public comment period for the revised RAs).[34]

B. The New gTLD Program and the Base RA.

In 2005, ICANN's Generic Names Supporting Organization (GNSO) undertook a policy development process to consider expanding the DNS by introducing new gTLDs.[35] In 2007, the GNSO concluded that "ICANN must implement a process that allows the introduction of new

[29] 2019 ORG RA Public Comment Proceeding; *see also* https://www icann org/resources/unthemed-pages/index-2002-12-02-en; https://www icann org/resources/unthemed-pages/registry-agmt-4e-2003-08-19-en
[30] 2019 INFO RA Public Comment Proceeding
[31] 2002 ORG RA, https://www icann org/resources/unthemed-pages/registry-agmt-4e-2003-08-19-en; 2001 INFO RA, https://www icann org/resources/unthemed-pages/registry-agmt-2001-05-11-en
[32] 2006 Public Comment of BIZ, INFO, ORG, https://www icann org/news/announcement-3-2006-07-28-en
[33] *See* Revised BIZ, INFO and ORG Registry Agreements Posted for Public Comment, https://www icann org/news/announcement-2006-10-24-en
[34] ORG RA, 8 December 2006, https://www icann org/resources/unthemed-pages/index-c1-2012-02-25-en; INFO RA, 8 December 2006, https://www icann org/resources/unthemed-pages/index-71-2012-02-25-en
[35] https://newgtlds icann org/en/about/program

[gTLDs]."[36] Accordingly, ICANN org established and implemented the New gTLD Program, "enabling the largest expansion of the [DNS]."[37]

In 2009, ICANN org commissioned Professor Dennis W. Carlton to analyze "whether price caps... would be necessary to insure the potential competitive benefits" of new gTLDs.[38] Carlton concluded that price caps were "unnecessary to insure competitive benefits of the proposed process for introducing new [gTLDs]," and also noted that "competition among suppliers to attract new customers in markets characterized by switching costs [such as the market for gTLDs] limits or eliminates the suppliers' [*i.e.*, the registry operators'] incentive and ability to act opportunistically."[39] He explained that "a supplier that imposes unexpected or unreasonable price increases will quickly harm its reputation[,] making it more difficult for it to continue to attract new customers. Therefore, even in the absence of price caps, competition can reduce or eliminate the incentives for suppliers to act opportunistically."[40]

Carlton performed his analysis during the Base RA development process.[41] That process included multiple rounds of public comment on the proposed Base RA, several months of negotiations, meetings with stakeholders and communities, and formal community feedback via

[36] GNSO Final Report: Introduction of New Generic Top-Level Domains, 8 Aug 2007, https://gnso icann org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07 htm#_Toc43798015
[37] https://newgtlds icann org/en/about/program
[38] Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, at ¶ 4, March 2009 https://archive icann org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en pdf Professor Carlton has been a Professor of Economics at the Booth School of Business of The University of Chicago, and Co-Editor of the Journal of Law and Economics, Competition Policy International since 1984 *Id.*, at ¶¶ 1-2 He also served as Deputy Assistant Attorney General for Economic Analysis, Antitrust Division, United States Department of Justice from October 2006 through January 2008 *Id.*, at ¶ 3 In 2014, Professor Carlton was designated Economist of the Year by Global Competition Review https://www chicagobooth edu/faculty/directory/c/dennis-w-carlton Professor Carlton previously served as Professor of Economics at the Massachusetts Institute of Technology Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, at ¶ 1
[39] *Id.*, at ¶ 12
[40] *Id.*
[41] *See* New gTLD Program gTLD Applicant Guidebook, Version 2012-06-04, Preamble, *available for download at* https://newgtlds icann org/en/applicants/agb

a public comment forum.[42] The Base RA was established in 2013 and aligns with the GNSO's policy recommendations for new gTLDs.[43] Since 2014, ICANN org has worked with legacy gTLD registry operators to transition the agreements for legacy gTLDs to the Base RA as well, and several legacy gTLDs, including .CAT, .JOBS, .MOBI, .PRO, .TEL, .TRAVEL, and .ASIA have adopted the Base RA in renewal agreements.[44] The Base RA does not contain price caps, but it "does contain requirements designed to protect registrants from a price perspective," including requirements that registry operators "provide registrars at least 30 days advance written notice of any price increase for initial registrations, and to provide a minimum 6-month notice for any price increases of renewals."[45] In addition, the registry operators must allow registrants to renew for up to 10 years before implementing a price change, and subject to restrictions on discriminatory pricing.[46]

Using the Base RA for renewed legacy gTLDs without price cap provisions "is consistent with the gTLDs launched via the new gTLD program and will reduce ICANN org's role in domain pricing."[47] This promotes ICANN's Core Values of "introduc[ing] and promot[ing] competition in the registration of domain names and, where feasible and appropriate, depend[ing] upon market mechanisms to promote and sustain a competitive environment in the DNS market."[48]

The Base RA provides additional protections for the public benefit. For example, in 2015 the Board noted that the Base RA allows ICANN org to "designate an emergency interim

[42] https://www icann org/public-comments/base-agreement-2013-04-29-en; *see also* 26 July 2019 Letter, at Pg 1
[43] 26 July 2019 Letter, at Pg 1; *see also* GNSO Final Report: Introduction of New Generic Top-Level Domains, 8 Aug 2007, https://gnso icann org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07 htm# Toc43798015
[44] 26 July 2019 Letter, at Pg 1
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*, at Pg 2

registry operator of the registry for the TLD, which would mitigate the risks to the stability and security of the [DNS]."[49] Additionally, using the Base RA ensures that the Registry will use "uniform and automated processes, which will facilitate operation of the TLD," and "includes safeguards in the form of public interest commitments in Specification 11."[50]

The Board has also explained that transitioning legacy gTLDs to the Base RA "will provide consistency across all registries leading to a more predictable environment for end-users."[51] The Base RA's requirement that the registry operator only use ICANN accredited registrars that are party to the 2013 Registrar Accreditation Agreement "will provide more benefits to registrars and registrants."[52] Finally, the Board has noted that the Base RA "includes terms intended to allow for swifter action in the event of certain threats to the security or stability of the DNS,"[53] another public benefit.

C. The 2019 .ORG and .INFO RA Renewals.

The .ORG RA with PIR was renewed several times, including on 22 August 2013.[54] Likewise, the .INFO RA with Afilias was renewed on 22 August 2013.[55]

In anticipation of the 30 June 2019 expiration of the 2013 .ORG and .INFO RAs, ICANN org bilaterally negotiated renewals with each registry operator. The proposed renewals were based on ICANN org's Base RA, modified "to account for the specific nature[s]" of each TLD

[49] Rationale for Board Resolution 2015 09 28 06 (renewal of PRO RA), https://www icann org/resources/board-material/resolutions-2015-09-28-en#1 e rationale; *see also* Rationale for Board Resolution 2015 09 28 04 (renewal of CAT RA), https://www icann org/resources/board-material/resolutions-2015-09-28-en#1 c rationale; Rationale for Board Resolution 2015 09 28 05 (renewal of TRAVEL RA), https://www icann org/resources/board-material/resolutions-2015-09-28-en#1 d rationale 2019 ORG RA, Art 2, § 2 13, at Pg 7, https://www icann org/sites/default/files/tlds/org/org-agmt-pdf-30jun19-en pdf
[50] Rationale for Board Resolution 2015 09 28 06; *see also* 2019 ORG RA, Specification 11, at Pgs 95-96, https://www icann org/sites/default/files/tlds/org/org-agmt-pdf-30jun19-en pdf
[51] Rationale for Board Resolution 2015 09 28 06
[52] *Id.*
[53] *Id.*
[54] 2019 ORG RA Public Comment Proceeding
[55] 2019 INFO RA Public Comment Proceeding

and as a result of negotiations between ICANN and the registry operators.[56] On 18 March 2019, ICANN org published the proposed .ORG/.INFO RAs for public comment to obtain community input on the proposed renewals. ICANN org published redline versions of the proposed renewal agreements against the Base RA, and identified the material differences between proposed renewals and the Base RA. ICANN org explained that

> [i]n alignment with the [Base RA], the price cap provisions in the current .ORG [and .INFO] agreement[s], which limited the price of registrations and allowable price increases for registrations, are removed from the .ORG [and .INFO] renewal agreement[s]. Protections for existing registrants will remain in place, in line with the [Base RA]. This change will not only allow the .ORG [and .INFO] renewal agreement[s] to better conform with the [Base RA], but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the [Base RA].[57]

The public comment period for the .ORG/.INFO Renewed RAs opened on 18 March 2019 and closed on 29 April 2019.[58] During that time, ICANN org received over 3,200 submissions in response to its call for public comments on the proposed .ORG agreement,[59] and over 500 submissions in response to its call for comments on the proposed .INFO agreement.[60] The comments predominantly related to three themes: (1) the proposed removal of the price cap provisions; (2) inclusion of the RPMs; and (3) the RA renewal process.[61]

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[56] *See* 2019 ORG RA Public Comment Proceeding ; 2019 INFO RA Public Comment Proceeding
[57] 2019 ORG RA Public Comment Proceeding; 2019 INFO RA Public Comment Proceeding
[58] 2019 ORG RA Public Comment Proceeding; 2019 INFO RA Public Comment Proceeding
[59] Report of Public Comments, ORG, at Pg 3, https://www icann org/en/system/files/files/report-comments-org-renewal-03jun19-en pdf
[60] Report of Public Comments, INFO, at Pg 3, https://www icann org/en/system/files/files/report-comments-info-renewal-03jun19-en pdf
[61] *Id.*, at Pg 3; Report of Public Comments, ORG, at Pg 3

ICANN org detailed its analysis of the public comments concerning the .ORG/.INFO Renewed RAs—including those addressing the proposed removal of price cap provisions—in its Report of Public Comments.[62] ICANN org concluded that

> [r]emoving the price cap provisions in the .ORG [and .INFO RAs] is consistent with the Core Values of ICANN org as enumerated in the Bylaws approved by the ICANN community. These values guide ICANN org to introduce and promote competition in the registration of domain names and, where feasible and appropriate, depend upon market mechanisms to promote and sustain a competitive environment in the DNS market.[63]

ICANN org also noted that

> the Base [RA] would also afford protections to existing registrants . . . [e]nacting this change will not only allow the .ORG renewal agreement to conform to the Base [RA], but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the Base [RA].[64]

ICANN org explained that it would "consider the feedback from the community on this issue,"[65] and then ICANN org would "consider the public comments received and, in consultation with the ICANN Board of Directors, make a decision regarding the proposed registry agreement."[66]

ICANN org reviewed and considered all of the comments submitted concerning the proposed .ORG/.INFO Renewed RAs,[67] then ICANN Staff briefed the ICANN Board on its analysis of the public comments during the Board workshop on 21-23 June 2019.[68] With support from the Board to proceed with execution of the proposed renewals and pursuant to the ICANN

[62] Report of Public Comments, ORG, at Pg 8; Report of Public Comments, INFO, at Pg 7
[63] Report of Public Comments, ORG, at Pg 8; Report of Public Comments, INFO, at Pg 7
[64] Report of Public Comments, ORG, at Pg 8; Report of Public Comments, INFO, at Pg 7
[65] Report of Public Comments, ORG, at Pg 8; Report of Public Comments, INFO, at Pg 7
[66] Report of Public Comments, ORG, at Pg 1; Report of Public Comments, INFO, at Pg 1
[67] 26 July 2019 Letter, at Pg 2
[68] 26 July 2019 Letter at Pg 2

Delegation of Authority Guidelines, on 30 June 2019, ICANN org executed the .ORG/.INFO Renewed RAs.[69]

D. The Request for Reconsideration.

The Requestor submitted Request 19-2 on 12 July 2019.

Pursuant to Article 4, Section 4.2(l) of the Bylaws, ICANN org transmitted Request 19-2 to the Ombudsman for consideration, and the Ombudsman accepted consideration of the reconsideration request.[70]

After investigating, the Ombudsman concluded that "the CEO and Staff acted within the scope of the powers given them by the Board,"[71] and that "no rules or duties of corporate governance were violated (including the ICANN Bylaws)."[72] He determined that the "Board were well aware of the public comments" because ICANN Staff briefed the Board on the comments, and because the comments were publicly available, so Board members could have read each comment had they so desired.[73] Additionally, the Ombudsman concluded that "the whole renewal process and the terms themselves may be described as a corporate governance matter, and no rules or duties of corporate governance were violated (including the ICANN Bylaws)."[74]

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[69] *See* ICANN org announcements: ORG RA, https://www.icann.org/resources/agreement/org-2019-06-30-en INFO RA, https://www.icann.org/resources/agreement/info-2019-06-30-en

[70] https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-ombudsman-action-redacted-27aug19-en.pdf

[71] Evaluation by the ICANN Ombudsman of Request for Reconsideration 19-2, at Pg 5, 7 September 2019

[72] *Id*

[73] *Id.*

[74] *Id.*, at Pg 5 On 12 September 2019, the Internet Commerce Association (ICA) wrote to the Ombudsman, asserting that the Ombudsman "made ill-informed and disparaging comments about members of the ICANN community" in the Ombudsman's evaluation 12 September 2019 letter from Z Muskovitch to H Waye, https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-letter-ica-to-icann-ombudsman-12sep19-en.pdf The ICA asked the Ombudsman to "apologize to the numerous people who submitted these Comments and to retract [his] ill-advised statements" *Id.*, at Pg 3

The Board adopted a Proposed Determination denying Request 19-2 on 3 November 2019.[75] On 18 November 2019, the Requestor submitted a rebuttal to the Board's Proposed Determination. The Requestor argued that: (1) the Board should not have relied on an expert economist's 2009 assessment of the propriety of price caps in new gTLD Registry Agreements; (2) the Base RA's development process does not support migration of .ORG and .INFO to the Base RA; (3) ICANN Staff disregarded "essentially unanimous public comments in support of price caps"; and (4) that a for-profit entity purchased .ORG after the .ORG Renewed RA was executed "requires that ICANN [org] review this purchase in detail and take the necessary steps to ensure that .org domains are not used [as] a source of revenue" for certain purposes.[76]

E. Relief Requested.

The Requestor "requests that ICANN org and the ICANN Board reverse its decision and include (or maintain) price caps in all legacy TLDs."[77]

III. Issues Presented.

The issues are as follows:

1. Whether ICANN Staff's decision not to include price caps in the .ORG/.INFO Renewed RA contradicts ICANN's Mission, Commitments, Core Values, or established ICANN policies; and

2. Whether ICANN Staff failed to consider material information when it executed the .ORG/.INFO Renewed RAs.

[75] Board action on Proposed Determination on Request 19-2, https://www icann org/resources/board-material/resolutions-2019-11-03-en#1 a; Proposed Determination on Request 19-2, https://www icann org/en/system/files/files/reconsideration-19-2-namecheap-board-proposed-determination-03nov19-en pdf

[76] Rebuttal in Support of Request 19-2, [INSERT CITE WHEN POSTED]

[77] Request 19-2, § 9, at Pg 12

IV. The Relevant Standards for Reconsideration Requests.

Articles 4.2(a) and (c) of ICANN's Bylaws provide in relevant part that any entity "may submit a request for reconsideration or review of an ICANN action or inaction . . . to the extent the Requestor has been adversely affected by:

(i) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);

(ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or

(iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or Staff's reliance on false or inaccurate relevant information."[78]

The Board now considers Request 19-2's request for reconsideration of Staff action[79] on the grounds that the action was taken in contradiction of ICANN's Bylaws and without consideration of material information. The Board has reviewed the Request and all relevant materials and now makes this final determination. Denial of a Request for Reconsideration of ICANN Staff action is appropriate if the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.[80]

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V. Analysis and Rationale.

A. The .ORG/.INFO Renewed RAs Are Consistent With ICANN Org's Commitments.

[78] Bylaws, Art 4 §§ 4 2(a) and (c)
[79] The Requestor sought reconsideration of Board and Staff Action, and brought the Request on behalf of itself and "725 Namecheap customers and internet users " *See* Request 19-2, § 2, at Pg 2; *id.* § 10, at Pg 12 Request 19-2 does not identify an action or inaction of the Board Further, the Requestor's claim on behalf of its customers is not sufficiently stated because it does not satisfy the requirement that the Requestor, not a third party, must have been adversely affected by the challenged action Accordingly, the Board's consideration is with respect to the Requestor's challenge to Staff action
[80] Bylaws, Art 4 § 4 2(e)

The Requestor claims that omitting the price caps from the .ORG/.INFO Renewed RAs contradicts ICANN org's Commitment to "seek input from the public, for whose benefit ICANN in all events shall act."[81]

The Requestor acknowledges that "ICANN [org] requested public comment regarding the changes to the .ORG registry agreement."[82] It asserts, however, that ICANN org "reject[ed] all of the comments against removing the price cap with a conclusory statement that is devoid of any supporting evidence," and as a result, "the public comment process is basically a sham."[83] In sum, the Requestor claims that including price caps in the .ORG/.INFO Renewed RAs "ignore[d] the public benefit or almost unanimous feedback to the contrary."[84]

The Requestor does not dispute that ICANN org "review[ed] and consider[ed] all 3,200+ comments received,"[85] and acknowledged that the removal of the price caps was "[a] primary concern voiced in the comments."[86] ICANN Staff presented and discussed the "key issues raised in the public comment process and correspondence," including removal of price caps, with the Board before executing the .ORG/.INFO Renewed RAs.[87] Further, as the Ombudsman noted, the Board was "well aware of the public comments."[88]

The Reports of Public Comment were the result of ICANN Staff's extensive analysis of the comments;[89] consistent with ICANN Staff's ordinary process for preparing the Report of

[81] Request 19-2, § 8, at Pg 4
[82] *Id.* § 8, at Pg 3
[83] *Id.* § 8, at Pgs 10, 12; *see also* Rebuttal, at Pg 5 ("it is still not clear why ICANN [org] bothered to solicit public comment" omitting price caps from the ORG/ INFO Renewed RAs "effectively silenced" those who submitted public comments opposing removal of price caps)
[84] Request 19-2 § 8, at Pg 12
[85] 26 July 2019 Letter at Pg 2
[86] Report of Public Comments, ORG, at Pg 3; Report of Public Comments, INFO, at Pg 3
[87] 26 July 2019 Letter, at Pg 2.
[88] Ombudsman Evaluation of Request 19-2, at Pg 5
[89] The Requestor argues that ICANN Staff did not conduct an extensive analysis of the public comments because of "glaring issues" with the manner in which certain comments were posted to ICANN org's website Rebuttal, at Pg 5 Those issues do not concern the substance of public comments concerning the proposed price caps They are not relevant to Request 19-2

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Public Comment, ICANN Staff identified the main themes in the comments and summarized them, providing exemplary excerpts for each of those themes.[90] Neither the Bylaws, nor any ICANN policy or procedure, requires ICANN Staff to discuss each position stated in each comment. By the same token, there is no threshold number of comments about a topic that, if reached, requires ICANN Staff to address that topic in the Report of Public Comments. Even a single comment on a theme may merit inclusion in the report, under certain circumstances; likewise, a multitude of comments on a theme may merit little or no consideration in the report, under other circumstances.[91]

That ICANN org ultimately decided to proceed without price caps despite public comments opposing this approach does not render the public comment process a "sham," "silence[]" public comments, or otherwise demonstrate that ICANN org failed to act for the public benefit. ICANN Staff's careful consideration of the public comments—as reflected in its Report of Public Comments and discussion with the Board,[92] demonstrate the exact opposite, namely that the inclusion of price caps was carefully considered.

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Further, the Report of Public Comments demonstrates ICANN Staff's belief that it was acting for the public benefit by "promot[ing] competition in the registration of domain names," providing the same "protections to existing registrants" afforded to registrants of other TLDs, and treating "the Registry Operator equitably with registry operators of new gTLDs and other

[90] *See* Report of Public Comments, ORG, at Pg 3 ("This section intends to summarize broadly and comprehensively the comments submitted to this public comment proceeding but does not address every specific position stated by each contributor "); Report of Public Comments, INFO, at Pg 3 (same)
[91] The Board acknowledges the ICA's disagreement with the Ombudsman's characterization of certain comments as "spam" and "computer generated " 12 September 2019 Letter, at Pgs 1-2 ICANN Staff acknowledged both the volume of comments submitted concerning the proposed ORG/ INFO Renewed RAs and the issues they raised—including the removal of price cap provisions—without discounting the comments based on their apparent source *See* Report of Public Comments, ORG; Report of Public Comments, INFO Accordingly, the ICA's arguments do not change the Board's determination that reconsideration is not warranted here
[92] 26 July 2019 Letter, at Pg 2.

legacy gTLDs utilizing the Base [RA]."[93] There is no support for the Requestor's assertion that ICANN Staff's belief in this regard was based upon "conclusory statements not supported by evidence."[94] ICANN org considered Professor Carlton's 2009 expert analysis of the Base RA, and specifically his conclusion that limiting price increases was not necessary, and that the increasingly competitive field of registry operators in itself would serve as a safeguard against anticompetitive increases in domain name registration fees.[95] Finally, ICANN Staff was aware of the Board's 2015 statements (made in the course of approving the migration of another legacy gTLD, .PRO, to the Base RA) that the Base RA as a whole benefits the public by offering important safeguards that ensure the stability and security of the DNS and a more predictable environment for end-users.[96]

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In sum, the Requestor's conclusory assertion that ICANN org did not act for the public benefit is unsupported and does not support reconsideration.

B. The .ORG/.INFO Renewed RAs Are Consistent With ICANN Org's Core Values.

The Requestor asserts that omitting the price caps from the .ORG/.INFO Renewed RAs contradicts ICANN org's Core Value of

> [s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.[97]

Contrary to the Requestor's argument, ICANN org *did* seek broad, informed participation through the public comment process for the .ORG/.INFO Renewed RAs. As noted above,

[93] Report of Public Comments, ORG, at Pg 8
[94] Request 19-2, § 8, at Pg 12
[95] Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, at ¶ 12, https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf
[96] *See* Rationale for Board Resolution 2015.09.28.06
[97] Request 19-2, § 8, at Pg 4

ICANN org considered the responses and other factors, including its commitment to "[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment,"[98] and its Core Values of "depending on market mechanisms to promote and sustain a competitive environment in the DNS market" where "feasible and appropriate," and "[i]ntroducing 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."[99]

Moreover, the public comment process is but one of several channels for ICANN's multistakeholder community to voice opinions. Members of the community may also voice their opinions in public meetings and through the final recommendations of supporting organizations, advisory committees, and direct correspondence with ICANN org. Accordingly, the multistakeholder community provides input to ICANN org in many ways, and ICANN org considers this input to ensure that all views have been taken into account during a decision-making process.

However, ICANN org's Core Values do not require it to accede to each request or demand made in public comments or otherwise asserted through ICANN's various communication channels. Here, ICANN org ultimately determined that ICANN's Mission was best served by replacing price caps in the .ORG/.INFO Renewed RAs with other pricing protections to promote competition in the registration of domain names, afford the same "protections to existing registrants" that are afforded to registrants of other TLDs, and treat registry operators equitably.[100] Further, the Base RA, which is incorporated in the .ORG/.INFO

[98] Bylaws, Art 1, § 1 2(a)(v); *see also* 26 July 2019 Letter, at Pg 1
[99] Bylaws, Art 1, § 1 2(b)(iii), (iv); *see also* 26 July 2019 Letter, at Pg 2
[100] Report of Public Comments, ORG, at Pg 8; Report of Public Comments, INFO, at Pg 7

Renewed RA, "was developed through the bottom-up multi-stakeholder process including multiple rounds of public comment."[101]

On rebuttal, the Requestor asserts that the Base RA "was developed for the new gTLD registries" and there is no evidence that participants in the Base RA development understood that ICANN org might use the Base RA for legacy gTLDs.[102] But ICANN org "has consistently used the Base RA as the starting point for discussions with legacy gTLD operators about renewing their Registry Agreements" since no later than 2014.[103] Since then, the following other legacy gTLDs have adopted the Base RA in renewed agreements: .CAT, .JOBS, .MOBI, .PRO, .TEL, .TRAVEL, .ASIA, and .BIZ.[104] Accordingly, ICANN org adhered to its commitment to treat the .ORG and .INFO registry operators consistently with other legacy gTLD registry operators (rather than single them out for discriminatory treatment) when it used the Base RA as the starting point for its renewal discussions in 2019.[105]

The Requestor has not demonstrated that ICANN org failed to seek or support broad participation or ascertain the global public interest. To the contrary, ICANN org's transparent processes reflect its continuous efforts to ascertain and pursue the global public interest by migrating the legacy gTLDs to the Base RA. Accordingly, this argument does not support reconsideration.

C. ICANN Org's Statements Concerning The Purpose Of Public Comments Do Not Support Reconsideration.

[101] 26 July 2019 Letter, at Pg 1
[102] Rebuttal, at Pg 4
[103] 26 July 2019 Letter, at Pg 1
[104] *Id.*
[105] *See* ICANN Bylaws, Art 1, § 1 2(a)(v) That the ORG and INFO RAs that were renewed in August 2013 did not adopt the Base RA, which had been adopted just one month earlier, is not relevant As noted above, ICANN org's consistent practice of using the Base RA for discussions with legacy gTLDs began in 2014 26 July 2019 Letter, at Pg 1

The Requestor asserts that reconsideration is warranted because omitting the price caps from the .ORG/.INFO Renewed RAs is contrary to ICANN org's statement on its Public Comment Opportunities page that "Public Comment is a key part of the policy development process (PDP), allowing for refinement of recommendations before further consideration and potential adoption," and is "used to guide implementation work, reviews, and operational activities of the ICANN organization."[106] The Requestor asserts that omitting the price caps is inconsistent with ICANN org's statement that the "purpose of this public comment proceeding is to obtain community input on the proposed .ORG renewal agreement."[107]

Ultimately, ICANN org's decision not to include price caps in the .ORG/.INFO Renewed RAs does not mean that ICANN org failed to "obtain community input" or "use[]" the public comment "to guide implementation work" of ICANN org.[108] To the contrary, it is clear that ICANN org actively solicited community input, and carefully analyzed it as part of its efforts—in consultation with the Board—to ascertain, and then with the Board's support, to pursue, the global public interest.

Additionally, the Board notes that reconsideration is available for ICANN Staff actions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies).[109] ICANN org's general description of the purpose of the public comment process is not a Commitment, Core Value, established policy, nor part of ICANN org's Mission. Accordingly, even if ICANN org's decision to execute the .ORG/.INFO Renewed RAs without price caps contradicted these statements—and it did not, as explained in Section V.A above —this inconsistency could not form the basis of a Reconsideration Request.

[106] Request 19-2, § 8, at Pg 4
[107] *Id.*
[108] *See id.*
[109] Bylaws, Art 4 § 4 2(c) The challenged action must adversely affect the Requestor as well *Id.*

D. The Requestor Has Not Demonstrated That ICANN Org Acted Without Consideration Of Material Information.

The Requestor asserts that ICANN org's analysis of the proposed removal of price caps "ignores significant information that is contrary to its sweeping conclusions."[110] Specifically, the Requestor asserts that ICANN org's analysis ignores that:

1. .ORG "is the 3rd largest" TLD, and "additional analysis is needed to determine whether this market share can result in uncompetitive practices,"[111]

2. .ORG "was established in 1985," "is universally known, associated with nonprofit use, and has an excellent reputation,"[112]

3. It can be "a cumbersome and costly process" for an established entity to change domain name, and "often" leads to "negative results (inability to connect with users, loss of search engine positions, confusion over validity of new domain, etc). Many would rather stay with an established domain (and the associated goodwill)."[113]

4. "TLDs are not interchangeable, as ICANN states. While there may be 1,200 other gTLDs to choose from, many of the new gTLDs are closed and not useable by nonprofits . . . or targeted to certain uses . . .and cannot be used by nonprofits or businesses. It would be desirable for ICANN to identify which new gTLDs might be acceptable replacements to .ORG."[114]

5. Although some new gTLDs are targeted to nonprofits, "there are few registrations in those TLDs (perhaps demonstrating that nonprofits do not want an alternative to .ORG)."[115]

6. "There are some concerns [that] higher levels of abuse exists in new gTLD domains . . . . ICANN's own analysis shows greater levels of abuse in new gTLDs compared to legacy TLDs."[116]

7. "[I]t is possible that new gTLDs will not be usable in internet browsers, mobile devices, or email systems- all which greatly diminish the ability for nonprofits to switch to a new gTLD for their main domain name."[117]

[110] Request 19-2, § 8, at Pg 10
[111] *Id.*
[112] *Id.*
[113] *Id.*, at Pg 10-11
[114] *Id.*, at Pg 11
[115] *Id.*
[116] *Id.* citing https://www icann org/en/system/files/files/daar-monthly-report-31jan19-en pdf
[117] *Id.*, at Pg 11-12

The Report of Public Comments for the .ORG Renewed RA makes clear that ICANN org *did* consider some of these concerns. Specifically, with respect to Item 1, ICANN Staff noted that commenters "questioned whether ICANN org conducted an economic study or research on the potential market implications of removing the existing pricing protections."[118] With respect to Item 2, ICANN Staff acknowledged that commentators noted that ".ORG was developed, cultivated and established over decades as catering to non-profit and similar charitable organizations."[119] With respect to Items 3, 4, 5, and 7, ICANN Staff acknowledged "concerns about the burden and costs associated with moving [a] web presence to another TLD," along with comments characterizing .ORG as "the most appropriate registry for a charity or non-profit."[120] Accordingly, the Requestor's argument that the information about these six "concerns" was not considered or was ignored is incorrect and therefore does not support reconsideration.

With respect the Requestor's assertion that "ICANN's own analysis shows greater levels of abuse in new gTLDs compared to legacy TLDs,"[121] the Requestor mischaracterizes the cited ICANN report. As the Requestor notes, the 2019 Domain Abuse Activity Reporting (DAAR) report concluded that 48.11% of the "domains identified as security threats . . . were in legacy [TLDs]," and the remaining 51.89% of the domains identified as threats were in new gTLDs.[122] Further, the Report indicates that about 12% of TLD domain names are hosted on new gTLDs.[123] However, the Report also notes that 88% of the new gTLD domains identified as security threats

[118] Report of Public Comments, ORG, at Pg 5
[119] *Id* , at Pgs 3-4
[120] *Id* , at Pgs 4-5
[121] *Id.*, citing 31 January 2019 DAAR Report, https://www icann org/en/system/files/files/daar-monthly-report-31jan19-en pdf
[122] 31 January 2019 DAAR Report, Executive Summary
[123] *Id.*, at Pg 5

were concentrated in only 25 new gTLDs, out of over 340 new gTLDs.[124] The Report further noted that 98% of the domains identified as security threats were hosted by "the 50 most-exploited new [TLDs]."[125] Accordingly, even if ICANN Staff did not consider the 2019 DAAR Report, the Requestor has not shown that the information contained in it was material to the inclusion of price caps in the .ORG/.INFO Renewed RAs. Moreover, the cited portions of the DAAR Report relate to security threats, not domain name registration fees. This argument does not support reconsideration.

E. The Requestor Has Not Demonstrated That It Has Been Adversely Affected By The .ORG/.INFO Renewed RAs.

The Requestor asserts that it has been adversely affected by the challenged conduct because, "[a]s a domain name registrar, removal of prices caps for legacy TLDs will negatively impact [the Requestor's] domain name registration business," insofar as the .ORG/.INFO Renewed RAs create an "uncertainty of price increases."[126] That the Requestor could not quantify the actual financial impact on the Requestor of removing the price caps at the time it submitted Request 19-2 was not material to our preliminary procedural evaluation, because the Requestor asserted that the financial uncertainty *itself* is the harm. Accordingly, the Board Accountability Mechanisms Committee (BAMC) concluded that Request 19-2 was sufficiently stated.[127] However, the BAMC's conclusion that the Requestor sufficiently asserted that it was materially harmed was not a determination that the Requestor was in fact materially harmed or, if so, that removing the .ORG/.INFO Renewed RAs caused that harm.

[124] *Id.*, at Pg 6 Similarly, four legacy TLDs hosted more than 94% of the legacy TLD domains identified as security threats *Id.*
[125] *Id.*, at Pg 6
[126] Request 19-2, § 6, at Pg 2; *see also id* § 10, at Pg 13
[127] *See* Ombudsman Action on Request 19-2, at Pg 2

The Board now concludes that the Requestor has not shown that it has been harmed by the .ORG/.INFO Renewed RAs. As noted above, in 2009, Professor Carlton concluded that price caps were unnecessary to protect against unreasonable increases in domain name registration fees.[128] Professor Carlton explained that "a supplier that imposes unexpected or unreasonable price increases will quickly harm its reputation[,] making it more difficult for it to continue to attract new customers. Therefore, even in the absence of price caps, competition can reduce or eliminate the incentives for suppliers to act opportunistically."[129] The Requestor disagrees with the Board's conclusion, but raises no new arguments or evidence supporting its disagreement.[130] Instead, in its Rebuttal, the Requestor merely repeats the argument from its original Request, namely that the claimed harm is "likely to occur," rather than presently existing.[131]

Regardless of whether the speculative harm on which Requestor bases Request 19-2 could be sufficient to support a Reconsideration Request, it is not sufficient here because (1) ICANN Staff acted consistent with ICANN Bylaws, policies, and procedures when it renewed the .ORG/.INFO RAs,[132] and (2) the additional safeguards discussed above demonstrate that, at this time, Requestor's concerns are not well founded.

In its Rebuttal the Requestor also challenges the Board's reliance on Professor Carlton's 2009 Preliminary Analysis Regarding Price Caps.[133] The Requestor asserts that the Board should disregard Professor Carlton's analysis because: (1) it is an opinion and does not cite "any data sources or references," (2) certain public commenters disagreed with Professor Carlton, (3)

[128] Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, at ¶ 12, https://archive icann org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en pdf
[129] *Id.*
[130] Rebuttal, at Pgs 6-7
[131] *Id.* at Pg 6
[132] *See supra* § V B
[133] Rebuttal, at Pg 2

it focused on the propriety of removing price caps for new gTLDs and not legacy gTLDs, and (4) the Board did not reference Professor Carlton's analysis when the .ORG/.INFO RAs were renewed in 2013.[134]

The Requestor's first and second arguments amount to a disagreement with Professor Carlton's conclusions. They do not support reconsideration. Professor Carlton is a leader in economic analysis, particularly concerning antitrust issues.[135] His 2009 Preliminary Analysis is based on his extensive experience with and expertise in market forces. It is not—and does not claim to be—a data-driven study or survey.[136] The Requestor's disagreement with Professor Carlton's conclusions does not necessarily render them incorrect.

The Requestor's third argument does not support reconsideration because, although Professor Carlton did note that price caps in legacy gTLDs had the effect of limiting prices that new gTLDs could charge, Professor Carlton identified other controls that also have the effect of limiting price increases.[137] The Requestor's fourth argument likewise does not support reconsideration. The Requestor has identified no established policy or procedure (because there is none) requiring the Board to consider the exact same information and materials for every RA renewal. The Requestor has not demonstrated that consideration of Professor Carlton's analysis violates ICANN Bylaws or established policies or procedures.

The Requestor has not shown that it has, in fact, been harmed by the financial uncertainty it identified in Request 19-2, nor that it has been harmed by any price increases under the .ORG/.INFO Renewed RAs. Instead, the Requestor asserts that "additional analysis is needed to

[134] *Id.* at Pg. 2-3
[135] *See supra* § II B
[136] *See* Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf.
[137] *See supra* § II B

determine whether" the removal of price caps in the .ORG RA "can result in uncompetitive practices."[138] This suggestion of further study is insufficient, at this stage, to warrant Reconsideration. The Requestor has not identified any *evidence* that it has been harmed or will be harmed by removal of the price caps, and the evidence that is available—Professor Carlton's expert report—indicates that such harm is not expected. Accordingly, reconsideration is not warranted.

F. The Parent Company of the .ORG Registry Operator Is Not Relevant to the Reconsideration Request and Does Not Support Reconsideration.

The Requestor argues that the "timing and nature" of the 13 November 2019 acquisition of the .ORG Registry Operator PIR by an investment firm "is suspicious" because the Requestor believes that negotiations for the acquisition began before the .ORG RA was renewed.[139] Accordingly, the Requestor asserts, ICANN should "scrutinize this transaction closely."[140] However, PIR's corporate structure is not relevant to Request 19-2, which concerns the 30 June 2019 renewal of the .ORG RA and must be evaluated in accordance with the grounds for reconsideration as set forth in ICANN's Bylaws. The Ethos Capital acquisition of PIR, which was announced more than four months after the execution of the .ORG Renewed RA, did not impact ICANN Staff's determination that ICANN's Mission and Core Values were best served by migrating the .ORG/.INFO RAs to the Base RA.[141]

In sum, Request 19-2 is not the appropriate vehicle for challenging Ethos Capital's acquisition of PIR.

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[138] Request 19-2, § 8, at Pg 10
[139] Rebuttal, at Pg 7
[140] *Id.*
[141] *See supra* § II C. Neither ICANN Staff nor PIR were aware that Ethos Capital would acquire PIR when the parties finalized the .ORG Renewed RA. *See* http://domainincite.com/24988-i-attempt-to-answer-icas-questions-about-the-terrible-blunder-org-acquisition

VI. Determination.

The Board has considered the merits of Request 19-2 and, based on the foregoing, concludes that ICANN org's execution of the .ORG/.INFO Renewed RAs did not contradict ICANN's Bylaws, policies, or procedures, and that ICANN Staff did not fail to consider material information in executing the Agreements. Accordingly, the Board denies Request 19-2.

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Deleted: Because the BAMC did not have a quorum to consider Request 19-2, the Board itself has issued this Proposed Determination in lieu of a Recommendation by the BAMC Accordingly, the issuance of this Proposed Determination triggers Requestor's right to file a rebuttal consistent with Article 4, Section 4 2(q) of the Bylaws

Ex. R-53

PROPOSED DETERMINATION
OF THE ICANN BOARD OF DIRECTORS[1]
RECONSIDERATION REQUEST 19-2
3 November 2019

The Requestor, Namecheap Inc., seeks reconsideration of ICANN organization's 2019 renewal of the Registry Agreements (RAs) with Public Interest Registry (PIR) and Afilias Limited (Afilias) for the .ORG and .INFO generic top-level domains (gTLDs), respectively (individually .ORG Renewed RA and .INFO Renewed RA; collectively, the .ORG/.INFO Renewed RAs), insofar as the renewals eliminated "the historic price caps" on domain name registration fees for .ORG and .INFO.[2] The Requestor claims that ICANN org's "decision to ignore public comments to keep price caps in legacy gTLDs is contrary to ICANN's Commitments and Core Values, and ICANN should reverse this decision for the public good."[3]

Specifically, the Requestor claims that the .ORG/.INFO Renewed RAs are contrary to:

(i) ICANN org's commitment to "seek input from the public, for whose benefit ICANN in all events shall act."[4]

(ii) ICANN org's Core Value of "[s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent."[5]

(iii) ICANN org's Public Comment Opportunities page, which states that "Public Comment is a key part of the policy development process (PDP), allowing for refinement of recommendations before further consideration and potential

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[1] The Board designated the Board Accountability Mechanisms Committee (BAMC) to review and consider Reconsideration Requests before making recommendations to the Board on the merits of those Requests. Bylaws, Art. 4, § 4.2(e). However, the BAMC is empowered to act only upon consideration by a quorum of the Committee. *See* BAMC Charter https://www.icann.org/resources/pages/charter-bamc-2017-11-02-en. Here, the majority of the BAMC members have recused themselves from voting on this matter due to potential or perceived conflicts, or out an abundance of caution. Accordingly, the BAMC does not have a quorum to consider Request 19-2 so the Board itself has issued this Proposed Determination in lieu of a Recommendation by the BAMC.
[2] Request 19-2, § 3, at Pg. 2.
[3] *Id.* § 8, at Pg. 3.
[4] *Id.* § 8, at Pg. 4.
[5] *Id.* § 8, at Pg. 4.

adoption," and is "used to guide implementation work, reviews, and operational activities of the ICANN organization."[6]

(iv) ICANN org's statements concerning its call for Public Comment that the "purpose of this public comment proceeding is to obtain community input on the proposed .ORG renewal agreement."[7]

The Requestor also asserts that ICANN Staff failed to consider material information concerning the nature of the .ORG TLD and security issues with new gTLDs when it executed the .ORG/.INFO Renewed RAs.[8]

The Requestor "requests that ICANN org and the ICANN Board reverse its decision and include (or maintain) price caps in all legacy gTLDs."[9]

I. Brief Summary.

PIR is the registry operator for the .ORG TLD.[10] ICANN org and PIR entered into an RA on 2 December 2002 for the continued operation of the .ORG gTLD, which was renewed in 2006 and 2013.[11] ICANN org and Afilias first entered into an RA on 11 May 2001 for the operation of the .INFO gTLD, which was renewed in 2006 and 2013.[12] Before the recent renewals, the RAs for .ORG and .INFO included price caps, which limited the initial prices and allowable price increases for registrations.[13] Both RAs were scheduled to expire on 30 June 2019.

In anticipation of the 30 June 2019 expiration, ICANN org bilaterally negotiated renewals to the agreements with each registry operator. The proposed renewals were based on

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[6] *Id.* § 8, at Pg. 4.
[7] *Id.*, § 8, at Pg. 4.
[8] *Id.*, § 8, at Pg. 10.
[9] *Id.*, § 9, at Pg. 12.
[10] Public Comment Proceeding, Proposed Renewal of .ORG RA, 18 March 2019 (2019 .ORG RA Public Comment Proceeding), https://www.icann.org/public-comments/org-renewal-2019-03-18-en.
[11] *Id.*
[12] Public Comment Proceeding, Proposed Renewal of .INFO RA, 18 March 2019 (2019 .INFO RA Public Comment Proceeding), https://www.icann.org/public-comments/info-renewal-2019-03-18-en.
[13] 2002 .ORG RA, https://www.icann.org/resources/unthemed-pages/index-2002-12-02-en; 2001 .INFO RA, https://www.icann.org/resources/unthemed-pages/registry-agmt-2001-05-11-en.

ICANN org's base generic TLD Registry Agreement updated on 31 July 2017 (Base RA), modified to account for the specific nature of the .ORG and .INFO gTLDs.[14] As a result, the proposed Renewed RAs' terms were substantially similar to the terms of the Base RA.

From January 2019 to June 2019, ICANN Staff briefed and met with the Board several times regarding the proposed .ORG/.INFO Renewed RAs.[15] On 18 March 2019, ICANN Staff published the proposed .ORG/.INFO Renewed RAs for public comment to obtain community input on the proposed renewals. ICANN Staff described the material differences between proposed renewals and the current .ORG and .INFO RAs. These differences included removal of limits on domain name registration fee increases that had been in prior .ORG and .INFO RAs. ICANN Staff explained that the change would "allow the .ORG [and .INFO] renewal agreement[s] to better conform with the [Base RA]," while "tak[ing] into consideration the maturation of the domain name market and the goal of treating the Registry Operator[s] equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the [Base RA]."[16]

and .INFO agreements.[17] The comments predominantly related to three themes: (1) the proposed removal of price cap provisions; (2) inclusion of certain rights protection mechanisms

[14] *See* 2019 .ORG RA Public Comment Proceeding; 2019 .INFO RA Public Comment Proceeding. The RA for the operation of .BIZ was also set to expire on 30 June 2019; as a result of bilateral negotiations with the registry operator for .BIZ and after considering public comments, ICANN org and the registry operator for .BIZ entered into a Renewed RA for .BIZ that was based on (and therefore substantially similar to) the Base RA. *See* https://www.icann.org/resources/agreement/biz-2019-06-30-en.

[15] Letter from Namazi to Muscovitch, 26 July 2019, at Pg. 2, https://www.icann.org/en/system/files/ ICANN org received over 3,700 submissions in response to its call for public comments on the proposed .ORG correspondence/namazi-to-muscovitch-26jul19-en.pdf.

[16] 2019 .ORG RA Public Comment Proceeding. New gTLDs are TLDs released as part of ICANN org's New gTLD Program. *See* https://newgtlds.icann.org/en/about/program. Legacy gTLDs are gTLDs that existed before ICANN org's New gTLD Program. .ORG and .INFO are legacy TLDs.

[17] Report of Public Comments, .ORG, at Pg. 3, https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf; Report of Public Comments, .INFO, at Pg. 3, https://www.icann.org/en/system/files/files/report-comments-info-renewal-03jun19-en.pdf.

(RPMs), including the Uniform Rapid Suspension (URS) rules; and (3) the RA renewal process.[18]

ICANN Staff analyzed the public comments, including those addressing the proposed removal of price cap provisions, in its Report of Public Comments.[19] It concluded that removing the price cap provisions was "consistent with the Core Values of ICANN org as enumerated in the Bylaws," insofar as removing the price cap provisions would "promote competition in the registration of domain names," and enabled ICANN org to "depend upon market mechanisms to promote and sustain a competitive environment in the [Domain Name System (DNS)] market."[20] ICANN org also noted that the Base RA protected existing registrants' pricing by requiring the registry operator to: (1) give registrars six months' advance notice of price changes; and (2) allow registrants to renew their domain name registrations for up to 10 years *before* those price changes take effect.[21] ICANN Staff then noted that it would "consider the feedback from the community on this issue,"[22] "and, in consultation with the ICANN Board of Directors, make a decision regarding the proposed registry agreement."[23]

Following consultation with the ICANN Board of Directors and with the Board's support, on 30 June 2019, ICANN Staff announced that it had executed the .ORG/.INFO Renewed RAs. The .ORG/.INFO Renewed RAs did not include price caps.[24]

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[18] Report of Public Comments, .INFO, at Pg. 3; Report of Public Comments, .ORG, at Pg. 3.
[19] ICANN org received some comments supporting removal of the price cap provision because "ICANN org is not and should not be a price regulator," and because the Base RA would provide certain protections to current registrants. Report of Public Comments, .ORG, at Pg. 6.
[20] *Id.*, at Pg. 8.
[21] *Id.*
[22] *Id.*
[23] *Id.*, at Pg. 1.
[24] *See* ICANN org announcements: .ORG Renewed RA, https://www.icann.org/resources/agreement/org-2019-06-30-en; .INFO Renewed RA, https://www.icann.org/resources/agreement/info-2019-06-30-en.

On 12 July 2019, the Requestor filed Request 19-2, seeking reconsideration of the .ORG/.INFO Renewed RAs.

The Ombudsman accepted Request 19-2 for consideration, and, after investigating, concluded that "the CEO and Staff acted within the scope of the powers given them by the Board,"[25] and that "no rules or duties of corporate governance were violated (including the ICANN Bylaws)."[26]

The Board has considered Request 19-2 and all relevant materials. Based on its extensive review of all relevant materials, the Board finds that reconsideration is not warranted because ICANN org's execution of the .ORG/.INFO Renewed RAs was consistent with ICANN's Bylaws, policies, and procedures, and ICANN Staff considered all material information prior to executing the .ORG/.INFO Renewed RAs.

II. Facts.

A. Historic .ORG and .INFO RAs.

On 2 December 2002, ICANN org and PIR entered into a RA for the continued operation of .ORG, which became effective in 2003.[27] ICANN org and Afilias first entered into a RA on 11 May 2001 for the operation of .INFO.[28] Both RAs included price caps.[29]

In 2006, ICANN org considered removing price caps from several legacy gTLDs, including .INFO and .ORG.[30] However, after reviewing over 2,000 comments from over 1,000 commenters, many opposing removal of the price caps, and at the Board's direction, ICANN org

[25] Evaluation by the ICANN Ombudsman of Request for Reconsideration 19-2, at Pg. 5, 7 September 2019, https://www.icann.org/resources/pages/reconsideration-19-2-namecheap-request-2019-07-22-en.
[26] *Id.*
[27] 2019 .ORG RA Public Comment Proceeding; *see also* https://www.icann.org/resources/unthemed-pages/index-2002-12-02-en; https://www.icann.org/resources/unthemed-pages/registry-agmt-4e-2003-08-19-en.
[28] 2019 .INFO RA Public Comment Proceeding.
[29] 2002 .ORG RA, https://www.icann.org/resources/unthemed-pages/registry-agmt-4e-2003-08-19-en; 2001 .INFO RA, https://www.icann.org/resources/unthemed-pages/registry-agmt-2001-05-11-en.
[30] 2006 Public Comment of .BIZ, .INFO, .ORG, https://www.icann.org/news/announcement-3-2006-07-28-en.

renegotiated the .ORG and .INFO RAs to include price caps.[31] Following a public comment period for the revised RAs (which included price caps), on 8 December 2006, the Board approved .ORG and .INFO RAs with price caps (as proposed and posted during the public comment period for the revised RAs).[32]

B. The New gTLD Program and the Base RA.

In 2005, ICANN's Generic Names Supporting Organization (GNSO) undertook a policy development process to consider expanding the DNS by introducing new gTLDs.[33] In 2007, the GNSO concluded that "ICANN must implement a process that allows the introduction of new [gTLDs]."[34] Accordingly, ICANN org established and implemented the New gTLD Program, "enabling the largest expansion of the [DNS]."[35]

In 2009, ICANN org commissioned Professor Dennis W. Carlton to analyze "whether price caps... would be necessary to insure the potential competitive benefits" of new gTLDs.[36] Carlton concluded that price caps were "unnecessary to insure competitive benefits of the proposed process for introducing new [gTLDs]," and also noted that "competition among suppliers to attract new customers in markets characterized by switching costs [such as the

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[31] *See* Revised .BIZ, .INFO and .ORG Registry Agreements Posted for Public Comment, https://www.icann.org/news/announcement-2006-10-24-en.

[32] .ORG RA, 8 December 2006, https://www.icann.org/resources/unthemed-pages/index-c1-2012-02-25-en; .INFO RA, 8 December 2006, https://www.icann.org/resources/unthemed-pages/index-71-2012-02-25-en.

[33] https://newgtlds.icann.org/en/about/program.

[34] GNSO Final Report: Introduction of New Generic Top-Level Domains, 8 Aug. 2007, https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm#_Toc43798015.

[35] https://newgtlds.icann.org/en/about/program.

[36] Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, at ¶ 4, March 2009 https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf. Professor Carlton has been a Professor of Economics at the Booth School of Business of The University of Chicago, and Co-Editor of the Journal of Law and Economics, Competition Policy International since 1984. *Id.*, at ¶¶ 1-2. He also served as Deputy Assistant Attorney General for Economic Analysis, Antitrust Division, United States Department of Justice from October 2006 through January 2008. *Id.*, at ¶ 3. In 2014, Professor Carlton was designated Economist of the Year by Global Competition Review. https://www.chicagobooth.edu/faculty/directory/c/dennis-w-carlton. Professor Carlton previously served as Professor of Economics at the Massachusetts Institute of Technology. Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, at ¶ 1.

market for gTLDs] limits or eliminates the suppliers' [*i.e.*, the registry operators'] incentive and ability to act opportunistically."[37] He explained that "a supplier that imposes unexpected or unreasonable price increases will quickly harm its reputation[,] making it more difficult for it to continue to attract new customers. Therefore, even in the absence of price caps, competition can reduce or eliminate the incentives for suppliers to act opportunistically."[38]

Carlton performed his analysis during the Base RA development process.[39] That process included multiple rounds of public comment on the proposed Base RA, several months of negotiations, meetings with stakeholders and communities, and formal community feedback via a public comment forum.[40] The Base RA was established in 2013 and aligns with the GNSO's policy recommendations for new gTLDs.[41] Since 2014, ICANN org has worked with legacy gTLD registry operators to transition the agreements for legacy gTLDs to the Base RA as well, and several legacy gTLDs, including .CAT, .JOBS, .MOBI, .PRO, .TEL, .TRAVEL, and .ASIA have adopted the Base RA in renewal agreements.[42] The Base RA does not contain price caps, but it "does contain requirements designed to protect registrants from a price perspective," including requirements that registry operators "provide registrars at least 30 days advance written notice of any price increase for initial registrations, and to provide a minimum 6-month notice for any price increases of renewals."[43] In addition, the registry operators must allow registrants

[37] *Id.*, at ¶ 12.
[38] *Id.*
[39] *See* New gTLD Program gTLD Applicant Guidebook, Version 2012-06-04, Preamble, *available for download at* https://newgtlds.icann.org/en/applicants/agb.
[40] https://www.icann.org/public-comments/base-agreement-2013-04-29-en; *see also* 26 July 2019 Letter, at Pg. 1.
[41] 26 July 2019 Letter, at Pg. 1; *see also* GNSO Final Report: Introduction of New Generic Top-Level Domains, 8 Aug. 2007, https://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm#_Toc43798015.
[42] 26 July 2019 Letter, at Pg. 1.
[43] *Id.*

to renew for up to 10 years before implementing a price change, and subject to restrictions on discriminatory pricing.[44]

Using the Base RA for renewed legacy gTLDs without price cap provisions "is consistent with the gTLDs launched via the new gTLD program and will reduce ICANN org's role in domain pricing."[45] This promotes ICANN's Core Values of "introduc[ing] and promot[ing] competition in the registration of domain names and, where feasible and appropriate, depend[ing] upon market mechanisms to promote and sustain a competitive environment in the DNS market."[46]

The Base RA provides additional protections for the public benefit. For example, in 2015 the Board noted that the Base RA allows ICANN org to "designate an emergency interim registry operator of the registry for the TLD, which would mitigate the risks to the stability and security of the [DNS]."[47] Additionally, using the Base RA ensures that the Registry will use "uniform and automated processes, which will facilitate operation of the TLD," and "includes safeguards in the form of public interest commitments in Specification 11."[48]

The Board has also explained that transitioning legacy gTLDs to the Base RA "will provide consistency across all registries leading to a more predictable environment for end-users."[49] The Base RA's requirement that the registry operator only use ICANN accredited

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[44] *Id.*
[45] *Id.*
[46] *Id.*, at Pg. 2.
[47] Rationale for Board Resolution 2015.09.28.06 (renewal of .PRO RA), https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.e.rationale; *see also* Rationale for Board Resolution 2015.09.28.04 (renewal of .CAT RA), https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.c.rationale; Rationale for Board Resolution 2015.09.28.05 (renewal of .TRAVEL RA), https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.d.rationale; 2019 .ORG RA, Art. 2, § 2.13, at Pg. 7, https://www.icann.org/sites/default/files/tlds/org/org-agmt-pdf-30jun19-en.pdf.
[48] Rationale for Board Resolution 2015.09.28.06; *see also* 2019 .ORG RA, Specification 11, at Pgs. 95-96, https://www.icann.org/sites/default/files/tlds/org/org-agmt-pdf-30jun19-en.pdf.
[49] Rationale for Board Resolution 2015.09.28.06.

registrars that are party to the 2013 Registrar Accreditation Agreement "will provide more benefits to registrars and registrants."[50] Finally, the Board has noted that the Base RA "includes terms intended to allow for swifter action in the event of certain threats to the security or stability of the DNS,"[51] another public benefit.

C. The 2019 .ORG and .INFO RA Renewals.

The .ORG RA with PIR was renewed several times, including on 22 August 2013.[52] Likewise, the .INFO RA with Afilias was renewed on 22 August 2013.[53]

In anticipation of the 30 June 2019 expiration of the 2013 .ORG and .INFO RAs, ICANN org bilaterally negotiated renewals with each registry operator. The proposed renewals were based on ICANN org's Base RA, modified "to account for the specific nature[s]" of each TLD and as a result of negotiations between ICANN and the registry operators.[54] On 18 March 2019, ICANN org published the proposed .ORG/.INFO RAs for public comment to obtain community input on the proposed renewals. ICANN org published redline versions of the proposed renewal agreements against the Base RA, and identified the material differences between proposed renewals and the Base RA. ICANN org explained that

> [i]n alignment with the [Base RA], the price cap provisions in the current .ORG [and .INFO] agreement[s], which limited the price of registrations and allowable price increases for registrations, are removed from the .ORG [and .INFO] renewal agreement[s]. Protections for existing registrants will remain in place, in line with the [Base RA]. This change will not only allow the .ORG [and .INFO] renewal agreement[s] to better conform with the [Base RA], but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator

[50] *Id.*
[51] *Id.*
[52] 2019 .ORG RA Public Comment Proceeding.
[53] 2019 .INFO RA Public Comment Proceeding.
[54] *See* 2019 .ORG RA Public Comment Proceeding ; 2019 .INFO RA Public Comment Proceeding.

> equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the [Base RA].[55]

The public comment period for the .ORG/.INFO Renewed RAs opened on 18 March 2019 and closed on 29 April 2019.[56] During that time, ICANN org received over 3,200 submissions in response to its call for public comments on the proposed .ORG agreement,[57] and over 500 submissions in response to its call for comments on the proposed .INFO agreement.[58] The comments predominantly related to three themes: (1) the proposed removal of the price cap provisions; (2) inclusion of the RPMs; and (3) the RA renewal process.[59]

ICANN org detailed its analysis of the public comments concerning the .ORG/.INFO Renewed RAs—including those addressing the proposed removal of price cap provisions—in its Report of Public Comments.[60] ICANN org concluded that

> [r]emoving the price cap provisions in the .ORG [and .INFO RAs] is consistent with the Core Values of ICANN org as enumerated in the Bylaws approved by the ICANN community. These values guide ICANN org to introduce and promote competition in the registration of domain names and, where feasible and appropriate, depend upon market mechanisms to promote and sustain a competitive environment in the DNS market.[61]

ICANN org also noted that

> the Base [RA] would also afford protections to existing registrants . . . [e]nacting this change will not only allow the .ORG renewal agreement to conform to the Base [RA], but also takes into consideration the maturation of the domain name market and the goal of treating the Registry Operator equitably with registry

[55] 2019 .ORG RA Public Comment Proceeding; 2019 .INFO RA Public Comment Proceeding.
[56] 2019 .ORG RA Public Comment Proceeding; 2019 .INFO RA Public Comment Proceeding.
[57] Report of Public Comments, .ORG, at Pg. 3, https://www.icann.org/en/system/files/files/report-comments-org-renewal-03jun19-en.pdf.
[58] Report of Public Comments, .INFO, at Pg. 3, https://www.icann.org/en/system/files/files/report-comments-info-renewal-03jun19-en.pdf.
[59] *Id.*, at Pg. 3; Report of Public Comments, .ORG, at Pg. 3.
[60] Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.
[61] Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.

> operators of new gTLDs and other legacy gTLDs utilizing the Base [RA].[62]

ICANN org explained that it would "consider the feedback from the community on this issue,"[63] and then ICANN org would "consider the public comments received and, in consultation with the ICANN Board of Directors, make a decision regarding the proposed registry agreement."[64]

ICANN org reviewed and considered all of the comments submitted concerning the proposed .ORG/.INFO Renewed RAs,[65] then ICANN Staff briefed the ICANN Board on its analysis of the public comments during the Board workshop on 21-23 June 2019.[66] With support from the Board to proceed with execution of the proposed renewals and pursuant to the ICANN Delegation of Authority Guidelines, on 30 June 2019, ICANN org executed the .ORG/.INFO Renewed RAs.[67]

D. The Request for Reconsideration and Ombudsman Report.

The Requestor submitted Request 19-2 on 12 July 2019.

Pursuant to Article 4, Section 4.2(l) of the Bylaws, ICANN org transmitted Request 19-2 to the Ombudsman for consideration, and the Ombudsman accepted consideration of the reconsideration request.[68]

After investigating, the Ombudsman concluded that "the CEO and Staff acted within the scope of the powers given them by the Board,"[69] and that "no rules or duties of corporate

[62] Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.
[63] Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.
[64] Report of Public Comments, .ORG, at Pg. 1; Report of Public Comments, .INFO, at Pg. 1.
[65] 26 July 2019 Letter, at Pg. 2.
[66] 26 July 2019 Letter at Pg. 2.
[67] *See* ICANN org announcements: .ORG RA, https://www.icann.org/resources/agreement/org-2019-06-30-en; .INFO RA, https://www.icann.org/resources/agreement/info-2019-06-30-en.
[68] https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-ombudsman-action-redacted-27aug19-en.pdf.
[69] Evaluation by the ICANN Ombudsman of Request for Reconsideration 19-2, at Pg. 5, 7 September 2019.

governance were violated (including the ICANN Bylaws)."[70] He determined that the "Board were well aware of the public comments" because ICANN Staff briefed the Board on the comments, and because the comments were publicly available, so Board members could have read each comment had they so desired.[71] Additionally, the Ombudsman concluded that "the whole renewal process and the terms themselves may be described as a corporate governance matter, and no rules or duties of corporate governance were violated (including the ICANN Bylaws)."[72]

E. Relief Requested.

The Requestor "requests that ICANN org and the ICANN Board reverse its decision and include (or maintain) price caps in all legacy TLDs."[73]

III. Issues Presented.

The issues are as follows:

1. Whether ICANN Staff's decision not to include price caps in the .ORG/.INFO Renewed RA contradicts ICANN's Mission, Commitments, Core Values, or established ICANN policies; and

2. Whether ICANN Staff failed to consider material information when it executed the .ORG/.INFO Renewed RAs.

IV. The Relevant Standards for Reconsideration Requests.

Articles 4.2(a) and (c) of ICANN's Bylaws provide in relevant part that any entity "may submit a request for reconsideration or review of an ICANN action or inaction . . . to the extent the Requestor has been adversely affected by:

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[70] *Id.*
[71] *Id.*
[72] *Id.*, at Pg. 5. On 12 September 2019, the Internet Commerce Association (ICA) wrote to the Ombudsman, asserting that the Ombudsman "made ill-informed and disparaging comments about members of the ICANN community" in the Ombudsman's evaluation. 12 September 2019 letter from Z. Muskovitch to H. Waye, https://www.icann.org/en/system/files/files/reconsideration-19-2-namecheap-letter-ica-to-icann-ombudsman-12sep19-en.pdf. The ICA asked the Ombudsman to "apologize to the numerous people who submitted these Comments and to retract [his] ill-advised statements." *Id.*, at Pg. 3.
[73] Request 19-2, § 9, at Pg. 12.

(i) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);

(ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or

(iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or Staff's reliance on false or inaccurate relevant information."[74]

The Board now considers Request 19-2's request for reconsideration of Staff action[75] on the grounds that the action was taken in contradiction of ICANN's Bylaws and without consideration of material information. The Board has reviewed the Request and now makes this proposed determination. Denial of a Request for Reconsideration of ICANN Staff action is appropriate if the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.[76]

V. Analysis and Rationale.

A. The .ORG/.INFO Renewed RAs Are Consistent With ICANN Org's Commitments.

The Requestor claims that omitting the price caps from the .ORG/.INFO Renewed RAs contradicts ICANN org's Commitment to "seek input from the public, for whose benefit ICANN in all events shall act."[77]

The Requestor acknowledges that "ICANN [org] requested public comment regarding the changes to the .ORG registry agreement."[78] It asserts, however, that ICANN org "reject[ed] all

[74] Bylaws, Art. 4 §§ 4.2(a) and (c).
[75] The Requestor sought reconsideration of Board and Staff Action, and brought the Request on behalf of itself and "725 Namecheap customers and internet users." *See* Request 19-2, § 2, at Pg. 2; *id.* § 10, at Pg. 12. Request 19-2 does not identify an action or inaction of the Board. Further, the Requestor's claim on behalf of its customers is not sufficiently stated because it does not satisfy the requirement that the Requestor, not a third party, must have been adversely affected by the challenged action. Accordingly, the Board's consideration is with respect to the Requestor's challenge to Staff action.
[76] Bylaws, Art. 4 § 4.2(e).
[77] Request 19-2, § 8, at Pg. 4.
[78] *Id.* § 8, at Pg. 3.

of the comments against removing the price cap with a conclusory statement that is devoid of any supporting evidence," and as a result, "the public comment process is basically a sham."[79] In sum, the Requestor claims that including price caps in the .ORG/.INFO Renewed RAs "ignore[d] the public benefit or almost unanimous feedback to the contrary."[80]

The Requestor does not dispute that ICANN org "review[ed] and consider[ed] all 3,200+ comments received,"[81] and acknowledged that the removal of the price caps was "[a] primary concern voiced in the comments."[82] ICANN Staff presented and discussed the "key issues raised in the public comment process and correspondence," including removal of price caps, with the Board before executing the .ORG/.INFO Renewed RAs.[83] Further, as the Ombudsman noted, the Board was "well aware of the public comments."[84]

The Reports of Public Comment were the result of ICANN Staff's extensive analysis of the comments; consistent with ICANN Staff's ordinary process for preparing the Report of Public Comment, ICANN Staff identified the main themes in the comments and summarized them, providing exemplary excerpts for each of those themes.[85] Neither the Bylaws, nor any ICANN policy or procedure, requires ICANN Staff to discuss each position stated in each comment. By the same token, there is no threshold number of comments about a topic that, if reached, requires ICANN Staff to address that topic in the Report of Public Comments. Even a single comment on a theme may merit inclusion in the report, under certain circumstances;

[79] *Id.* § 8, at Pgs. 10, 12.
[80] *Id.* § 8, at Pg. 12.
[81] 26 July 2019 Letter at Pg. 2.
[82] Report of Public Comments, .ORG, at Pg. 3; Report of Public Comments, .INFO, at Pg. 3.
[83] 26 July 2019 Letter, at Pg. 2.
[84] Ombudsman Evaluation of Request 19-2, at Pg. 5.
[85] *See* Report of Public Comments, .ORG, at Pg. 3 ("This section intends to summarize broadly and comprehensively the comments submitted to this public comment proceeding but does not address every specific position stated by each contributor."); Report of Public Comments, .INFO, at Pg. 3 (same).

likewise, a multitude of comments on a theme may merit little or no consideration in the report, under other circumstances.[86]

That ICANN org ultimately decided to proceed without price caps despite public comments opposing this approach does not render the public comment process a "sham" or otherwise demonstrate that ICANN org failed to act for the public benefit. ICANN Staff's careful consideration of the public comments—as reflected in its Report of Public Comments and discussion with the Board,[87] demonstrate the exact opposite, namely that the inclusion of price caps was carefully considered.

Further, the Report of Public Comments demonstrates ICANN Staff's belief that it was acting for the public benefit by "promot[ing] competition in the registration of domain names," providing the same "protections to existing registrants" afforded to registrants of other TLDs, and treating "the Registry Operator equitably with registry operators of new gTLDs and other legacy gTLDs utilizing the Base [RA]."[88] There is no support for the Requestor's assertion that ICANN Staff's belief in this regard was based upon "conclusory statements not supported by evidence."[89] ICANN org considered Professor Carlton's 2009 expert analysis of the Base RA, and specifically his conclusion that limiting price increases was not necessary, and that the increasingly competitive field of registry operators in itself would serve as a safeguard against anticompetitive increases in domain name registration fees.[90]

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[86] The Board acknowledges the ICA's disagreement with the Ombudsman's characterization of certain comments as "spam" and "computer generated." 12 September 2019 Letter, at Pgs. 1-2. ICANN Staff acknowledged both the volume of comments submitted concerning the proposed .ORG/.INFO Renewed RAs and the issues they raised—including the removal of price cap provisions—without discounting the comments based on their apparent source. *See* Report of Public Comments, .ORG; Report of Public Comments, .INFO. Accordingly, the ICA's arguments do not change the Board's determination that reconsideration is not warranted here.

[87] 26 July 2019 Letter, at Pg. 2.

[88] Report of Public Comments, .ORG, at Pg. 8.

[89] Request 19-2, § 8, at Pg. 12.

[90] Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, at ¶ 12, https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf.

Finally, ICANN Staff was aware of the Board's 2015 statements (made in the course of approving the migration of another legacy gTLD, .PRO, to the Base RA) that the Base RA as a whole benefits the public by offering important safeguards that ensure the stability and security of the DNS and a more predictable environment for end-users.[91]

In sum, the Requestor's conclusory assertion that ICANN org did not act for the public benefit is unsupported and does not support reconsideration.

B. The .ORG/.INFO Renewed RAs Are Consistent With ICANN Org's Core Values.

The Requestor asserts that omitting the price caps from the .ORG/.INFO Renewed RAs contradicts ICANN org's Core Value of

> [s]eeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.[92]

Contrary to the Requestor's argument, ICANN org *did* seek broad, informed participation through the public comment process for the .ORG/.INFO Renewed RAs. As noted above, ICANN org considered the responses and other factors, including its commitment to "[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment,"[93] and its Core Values of "depending on market mechanisms to promote and sustain a competitive environment in the DNS market" where "feasible and appropriate," and "[i]ntroducing and promoting competition in

[91] *See* Rationale for Board Resolution 2015.09.28.06.
[92] Request 19-2, § 8, at Pg. 4.
[93] Bylaws, Art. 1, § 1.2(a)(v); *see also* 26 July 2019 Letter, at Pg. 1.

the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process."[94]

Moreover, the public comment process is but one of several channels for ICANN's multistakeholder community to voice opinions. Members of the community may also voice their opinions in public meetings and through the final recommendations of supporting organizations, advisory committees, and direct correspondence with ICANN org. Accordingly, the multistakeholder community provides input to ICANN org in many ways, and ICANN org considers this input to ensure that all views have been taken into account during a decision-making process.

However, ICANN org's Core Values do not require it to accede to each request or demand made in public comments or otherwise asserted through ICANN's various communication channels. Here, ICANN org ultimately determined that ICANN's Mission was best served by replacing price caps in the .ORG/.INFO Renewed RAs with other pricing protections to promote competition in the registration of domain names, afford the same "protections to existing registrants" that are afforded to registrants of other TLDs, and treat registry operators equitably.[95] Further, the Base RA, which is incorporated in the .ORG/.INFO Renewed RA, "was developed through the bottom-up multi-stakeholder process including multiple rounds of public comment."[96]

The Requestor has not demonstrated that ICANN org failed to seek or support broad participation or ascertain the global public interest. To the contrary, ICANN org's transparent processes reflect its continuous efforts to ascertain and pursue the global public interest by

[94] Bylaws, Art. 1, § 1.2(b)(iii), (iv); *see also* 26 July 2019 Letter, at Pg. 2.
[95] Report of Public Comments, .ORG, at Pg. 8; Report of Public Comments, .INFO, at Pg. 7.
[96] 26 July 2019 Letter, at Pg. 1.

migrating the legacy gTLDs to the Base RA. Accordingly, this argument does not support reconsideration.

C. ICANN Org's Statements Concerning The Purpose Of Public Comments Do Not Support Reconsideration.

The Requestor asserts that reconsideration is warranted because omitting the price caps from the .ORG/.INFO Renewed RAs is contrary to ICANN org's statement on its Public Comment Opportunities page that "Public Comment is a key part of the policy development process (PDP), allowing for refinement of recommendations before further consideration and potential adoption," and is "used to guide implementation work, reviews, and operational activities of the ICANN organization."[97] The Requestor asserts that omitting the price caps is inconsistent with ICANN org's statement that the "purpose of this public comment proceeding is to obtain community input on the proposed .ORG renewal agreement."[98]

Ultimately, ICANN org's decision not to include price caps in the .ORG/.INFO Renewed RAs does not mean that ICANN org failed to "obtain community input" or "use[]" the public comment "to guide implementation work" of ICANN org.[99] To the contrary, it is clear that ICANN org actively solicited community input, and carefully analyzed it as part of its efforts—in consultation with the Board—to ascertain, and then with the Board's support, to pursue, the global public interest.

Additionally, the Board notes that reconsideration is available for ICANN Staff actions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies).[100] ICANN org's general description of the purpose of the public comment process is

[97] Request 19-2, § 8, at Pg. 4.
[98] *Id.*
[99] *See id.*
[100] Bylaws, Art. 4 § 4.2(c). The challenged action must adversely affect the Requestor as well. *Id.*

not a Commitment, Core Value, established policy, nor part of ICANN org's Mission. Accordingly, even if ICANN org's decision to execute the .ORG/.INFO Renewed RAs without price caps contradicted these statements—and it did not, as explained in Section V.A above — this inconsistency could not form the basis of a Reconsideration Request.

D. The Requestor Has Not Demonstrated That ICANN Org Acted Without Consideration Of Material Information.

The Requestor asserts that ICANN org's analysis of the proposed removal of price caps "ignores significant information that is contrary to its sweeping conclusions."[101] Specifically, the Requestor asserts that ICANN org's analysis ignores that:

1. .ORG "is the 3rd largest" TLD, and "additional analysis is needed to determine whether this market share can result in uncompetitive practices,"[102]

2. .ORG "was established in 1985," "is universally known, associated with nonprofit use, and has an excellent reputation,"[103]

3. It can be "a cumbersome and costly process" for an established entity to change domain name, and "often" leads to "negative results (inability to connect with users, loss of search engine positions, confusion over validity of new domain, etc). Many would rather stay with an established domain (and the associated goodwill)."[104]

4. "TLDs are not interchangeable, as ICANN states. While there may be 1,200 other gTLDs to choose from, many of the new gTLDs are closed and not useable by nonprofits . . . or targeted to certain uses . . .and cannot be used by nonprofits or businesses. It would be desirable for ICANN to identify which new gTLDs might be acceptable replacements to .ORG."[105]

5. Although some new gTLDs are targeted to nonprofits, "there are few registrations in those TLDs (perhaps demonstrating that nonprofits do not want an alternative to .ORG)."[106]

[101] Request 19-2, § 8, at Pg. 10.
[102] *Id.*
[103] *Id.*
[104] *Id.*, at Pg. 10-11.
[105] *Id.*, at Pg. 11.
[106] *Id.*

6. "There are some concerns [that] higher levels of abuse exists in new gTLD domains . . . . ICANN's own analysis shows greater levels of abuse in new gTLDs compared to legacy TLDs."[107]

7. "[I]t is possible that new gTLDs will not be usable in internet browsers, mobile devices, or email systems- all which greatly diminish the ability for nonprofits to switch to a new gTLD for their main domain name."[108]

The Report of Public Comments for the .ORG Renewed RA makes clear that ICANN org *did* consider some of these concerns. Specifically, with respect to Item 1, ICANN Staff noted that commenters "questioned whether ICANN org conducted an economic study or research on the potential market implications of removing the existing pricing protections."[109] With respect to Item 2, ICANN Staff acknowledged that commentators noted that ".ORG was developed, cultivated and established over decades as catering to non-profit and similar charitable organizations."[110] With respect to Items 3, 4, 5, and 7, ICANN Staff acknowledged "concerns about the burden and costs associated with moving [a] web presence to another TLD," along with comments characterizing .ORG as "the most appropriate registry for a charity or non-profit."[111] Accordingly, the Requestor's argument that the information about these six "concerns" was not considered or was ignored is incorrect and therefore does not support reconsideration.

With respect the Requestor's assertion that "ICANN's own analysis shows greater levels of abuse in new gTLDs compared to legacy TLDs,"[112] the Requestor mischaracterizes the cited ICANN report. As the Requestor notes, the 2019 Domain Abuse Activity Reporting (DAAR) report concluded that 48.11% of the "domains identified as security threats . . . were in legacy

[107] *Id.* citing https://www.icann.org/en/system/files/files/daar-monthly-report-31jan19-en.pdf.
[108] *Id.*, at Pg. 11-12.
[109] Report of Public Comments, .ORG, at Pg. 5.
[110] *Id.*, at Pgs. 3-4.
[111] *Id.*, at Pgs. 4-5.
[112] *Id.*, citing 31 January 2019 DAAR Report, https://www.icann.org/en/system/files/files/daar-monthly-report-31jan19-en.pdf.

[TLDs]," and the remaining 51.89% of the domains identified as threats were in new gTLDs.[113] Further, the Report indicates that about 12% of TLD domain names are hosted on new gTLDs.[114] However, the Report also notes that 88% of the new gTLD domains identified as security threats were concentrated in only 25 new gTLDs, out of over 340 new gTLDs.[115] The Report further noted that 98% of the domains identified as security threats were hosted by "the 50 most-exploited new [TLDs]."[116] Accordingly, even if ICANN Staff did not consider the 2019 DAAR Report, the Requestor has not shown that the information contained in it was material to the inclusion of price caps in the .ORG/.INFO Renewed RAs. Moreover, the cited portions of the DAAR Report relate to security threats, not domain name registration fees. This argument does not support reconsideration.

E. The Requestor Has Not Demonstrated That It Has Been Adversely Affected By The .ORG/.INFO Renewed RAs.

The Requestor asserts that it has been adversely affected by the challenged conduct because, "[a]s a domain name registrar, removal of prices caps for legacy TLDs will negatively impact [the Requestor's] domain name registration business," insofar as the .ORG/.INFO Renewed RAs create an "uncertainty of price increases."[117] That the Requestor could not quantify the actual financial impact on the Requestor of removing the price caps at the time it submitted Request 19-2 was not material to our preliminary procedural evaluation, because the Requestor asserted that the financial uncertainty *itself* is the harm. Accordingly, the Board Accountability Mechanisms Committee (BAMC) concluded that Request 19-2 was sufficiently

[113] 31 January 2019 DAAR Report, Executive Summary.
[114] *Id.*, at Pg. 5.
[115] *Id.*, at Pg. 6. Similarly, four legacy TLDs hosted more than 94% of the legacy TLD domains identified as security threats. *Id.*
[116] *Id.*, at Pg. 6.
[117] Request 19-2, § 6, at Pg. 2; *see also id*. § 10, at Pg. 13.

stated.[118] However, the BAMC's conclusion that the Requestor sufficiently asserted that it was materially harmed was not a determination that the Requestor was in fact materially harmed or, if so, that removing the .ORG/.INFO Renewed RAs caused that harm.

The Board now concludes that the Requestor has not shown that it has been harmed by the .ORG/.INFO Renewed RAs. As noted above, in 2009, Professor Carlton concluded that price caps were unnecessary to protect against unreasonable increases in domain name registration fees.[119] Professor Carlton explained that "a supplier that imposes unexpected or unreasonable price increases will quickly harm its reputation[,] making it more difficult for it to continue to attract new customers. Therefore, even in the absence of price caps, competition can reduce or eliminate the incentives for suppliers to act opportunistically."[120]

The Requestor has not shown that it has, in fact, been harmed by the financial uncertainty it identified in Request 19-2, nor that it has been harmed by any price increases under the .ORG/.INFO Renewed RAs. Instead, the Requestor asserts that "additional analysis is needed to determine whether" the removal of price caps in the .ORG RA "can result in uncompetitive practices."[121] This suggestion of further study is insufficient, at this stage, to warrant Reconsideration. The Requestor has not identified any *evidence* that it has been harmed or will be harmed by removal of the price caps, and the evidence that is available—Professor Carlton's expert report—indicates that such harm is not expected. Accordingly, reconsideration is not warranted.

[118] *See* Ombudsman Action on Request 19-2, at Pg. 2.
[119] Preliminary Analysis of Dennis Carlton Regarding Price Caps for New gTLD Internet Registries, March 2009, at ¶ 12, https://archive.icann.org/en/topics/new-gtlds/prelim-report-registry-price-caps-04mar09-en.pdf.
[120] *Id*.
[121] Request 19-2, § 8, at Pg. 10.

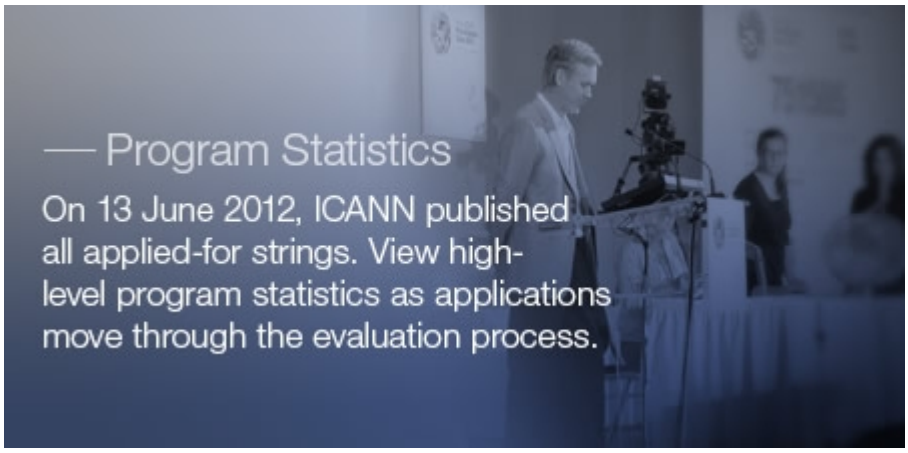
VI. Proposed Determination.

The Board has considered the merits of Request 19-2 and, based on the foregoing, concludes that ICANN org's execution of the .ORG/.INFO Renewed RAs did not contradict ICANN's Bylaws, policies, or procedures, and that ICANN Staff did not fail to consider material information in executing the Agreements. Accordingly, the Board proposes denying Request 19-2.

Because the BAMC did not have a quorum to consider Request 19-2, the Board itself has issued this Proposed Determination in lieu of a Recommendation by the BAMC. Accordingly, the issuance of this Proposed Determination triggers Requestor's right to file a rebuttal consistent with Article 4, Section 4.2(q) of the Bylaws.

Ex. R-54

New Generic Top-Level Domains



PROGRAM STATISTICS

Current Statistics *(Updated monthly)*

Application Statistics: Overview (as of 31 December 2021)	
Total Applications Submitted *(https://gtldresult.icann.org/application-result/applicationstatus)*	***1930***
Completed New gTLD Program (/en/program-status/delegated-strings) (gTLD Delegated** - introduced into Internet)	1240
Applications Withdrawn	646
Applications that Will Not Proceed/Not Approved	39
Currently Proceeding through New gTLD Program*	5

Contention Resolution	
Total Contention Sets *(https://gtldresult.icann.org/applicationstatus/stringcontentionstatus)*	234
Resolved Contention Sets	232
Contention Sets Resolved via ICANN Auction (https://gtldresult.icann.org/applicationstatus/auctionresults)	16
Unresolved Contention Sets	2
Applications Pending Contention Resolution	0

Contracting	
Executed Registry Agreements (completed contracting)	1255
Registry Agreements with Specification 13	494
Registry Agreements with Code of Conduct Exemption	80
In Contracting	4

Pre-Delegation Testing (PDT)	
Passed PDT	1252

**Breakdown: Delegation Statistics	
Delegated gTLDs (/en/program-status/delegated-strings) (Introduced into Internet)	1240
Select Subcategories of Delegated gTLDs (NOTE: gTLDs may fall into more than one subcategory)	
Community	55
Geographic	53
Internationalized Domain Names (IDNs)	97

gTLD Startup Statistics (as of 1 January 2022)	
Sunrise	
Completed	608
In Progress	0
Not Started	1
Claims	
Completed	728
In Progress	226
Not Started	1

Please note: Registry Agreement and Delegated gTLD totals are not adjusted for TLDs that subsequently terminated their Registry Agreements and/or were removed from the root zone. In addition, Specification 13 and Code of Conduct Exemption totals are not adjusted if subsequently removed.

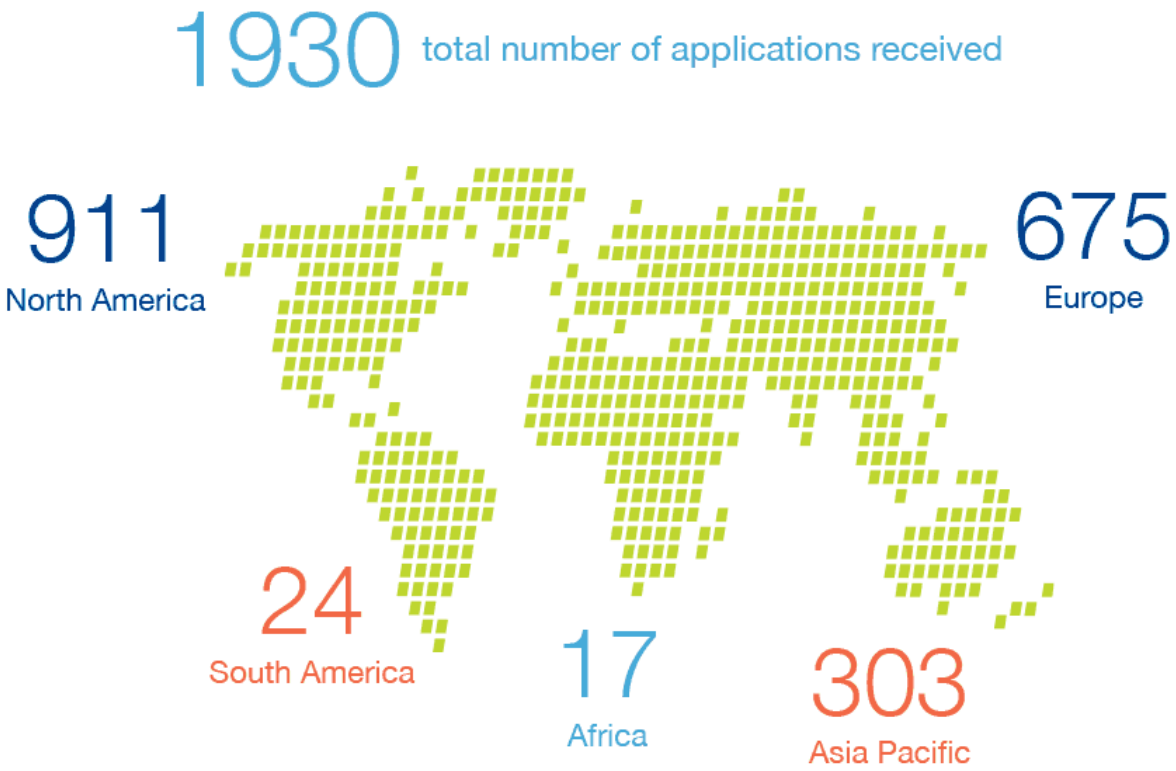
Get a status update on an individual application » (https://gtldresult.icann.org/application-result/applicationstatus)

New gTLD Application Submission Statistics

The statistics in this section were calculated based on applications received by the 29 March 2012 deadline.

Application Breakdown by: Region | Type | String Similarity

Application Breakdown by Region
Statistics as of 13 June 2012

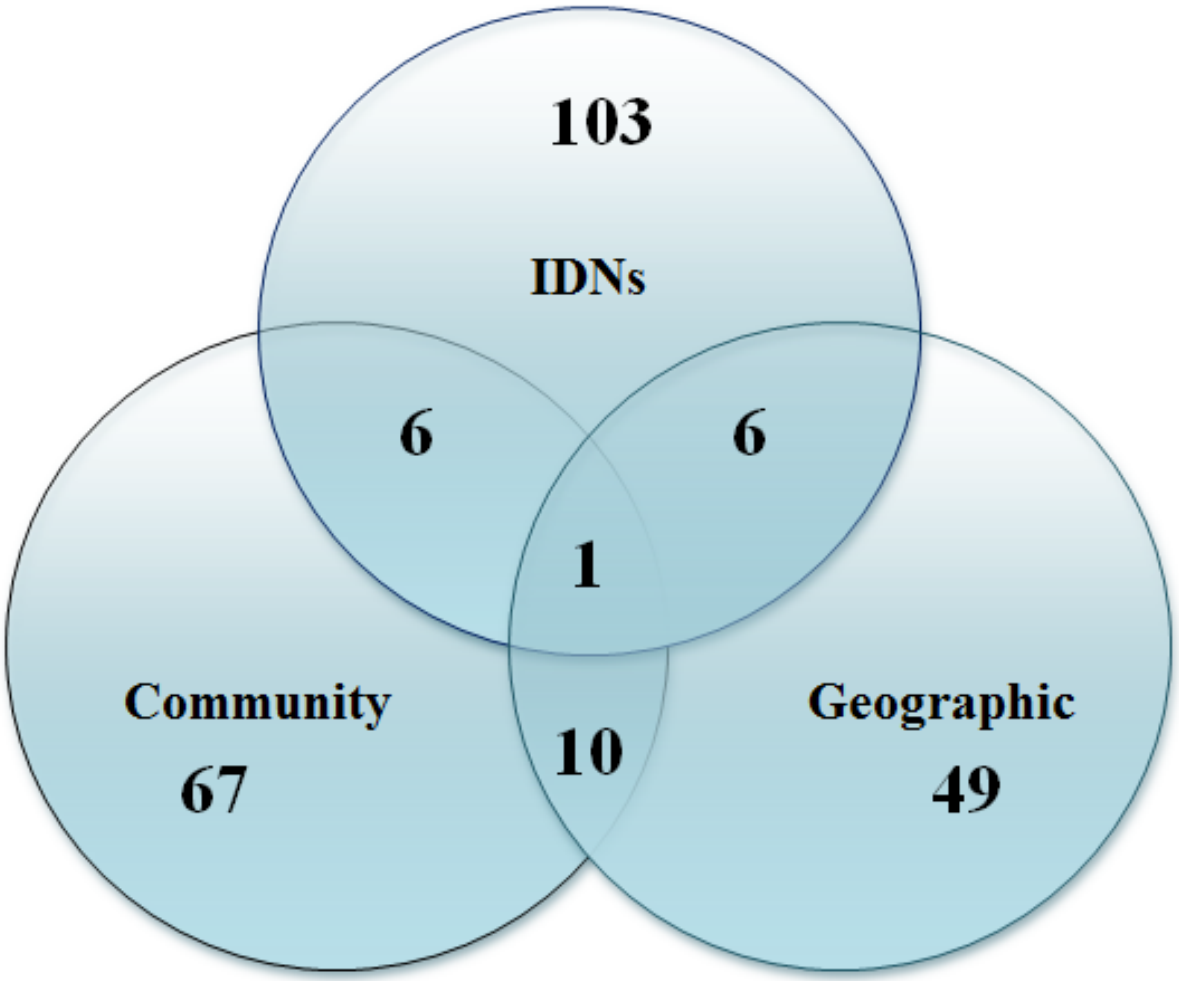


(/sites/default/files/main-images/application-stats-region-844x546-12mar14-en.png)

Application Breakdown by Type
Statistics as of 13 June 2012

Application Totals

- Community: 84
- Geographic: 66
- Internationalized Domain Names: 116
  - Total Scripts Represented: 12
- Other: 1846



(/sites/default/files/main-images/program-statistics-diagram-530x440-12jul12-en.png)

Application Breakdown by String Similarity
Statistics as of 26 February 2013

Approximate Number of Unique Applied-for Strings: 1,400

- Contention Sets
  - Exact Match: 230
    (two or more applications for a string with same characters)
  - Confusingly Similar: 2
    - .hotels & .hoteis
    - .unicorn & .unicom
- Applications in a Contention Set: 751

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Ex. R-55

Minutes | Board Governance Committee (BGC) Meeting

24 Jul 2014

BGC Attendees: Cherine Chalaby, Olga Madruga-Forti, Ray Plzak, Mike Silber and Bruce Tonkin – Chair

BGC Member Apologies: Chris Disspain and Ram Mohan

Other Board Member Attendees: Steve Crocker

Executive and Staff Attendees: Megan Bishop (Board Support Coordinator), John Jeffrey (General Counsel and Secretary), and Amy Stathos (Deputy General Counsel)

The following is a summary of discussions, actions taken, and actions identified:

1. Minutes – The BGC approved the minutes from the meeting on 21 June 2014.

2. Reconsideration Request 14-27 – Bruce Tonkin abstained from participation in this matter noting conflicts; Bruce indicated that his employer uses Amazon as a supplier and, while not material to this particular decision, he would abstain to prevent any perception of bias. Staff briefed the BGC regarding Amazon EU S.a.r.l.'s ("Requester's") request seeking reconsideration of the NGPC's 14 May 2014 resolution (Resolution 2014.05.14.NG03) accepting the GAC (Governmental Advisory Committee) advice and directing that the applications for .AMAZON and related IDNs (Internationalized Domain Names) in Japanese and Chinese filed by Amazon (collectively, the "Amazon Applications") should not proceed. The Requester asserted, among other things, that the NGPC had relied on false or inaccurate information in making its determination. In its 21 June 2014 meeting, the BGC decided to evaluate whether additional information or clarification from the Requester is necessary in order to complete the BGC's due diligence on this matter and to reach a determination on

this Reconsideration Request. At the BGC's request, staff provided a report to the BGC regarding potential additional information to seek from the Requester. After discussion and consideration of the report, the BGC directed staff to seek additional information from the Requester.

- Action: Staff to seek additional information from the Requester.

3. Reconsideration Request 14-28 – Bruce Tonkin abstained from participation in this matter noting conflicts; Bruce indicated that his employer uses Amazon as a supplier and, while not material to this particular decision, he would abstain to prevent any perception of bias. Staff briefed the BGC regarding DotMusic Limited's ("Requester's") request seeking reconsideration of: (i) ICANN (Internet Corporation for Assigned Names and Numbers)'s approval of application change requests for Amazon EU S.a.r.l.'s ("Amazon's") applications for .MUSIC, .SONG and .TUNES; and (ii) ICANN (Internet Corporation for Assigned Names and Numbers)'s alleged failure to invite .music LLC to submit a change request for its application for .MUSIC. On 7 June 2014, the Requester filed Reconsideration Request 14-28, claiming that ICANN (Internet Corporation for Assigned Names and Numbers) staff failed to properly consider the seven factors for change requests, and failed to treat all applicants for Category 2 Strings similarly by failing to invite .music LLC to submit a change request for its .MUSIC application. After discussion and consideration of the Request, the BGC concluded that the Requester has not demonstrated that ICANN (Internet Corporation for Assigned Names and Numbers) staff violated any established policy or procedures and, therefore, determined that Request 14-28 be denied. The Bylaws authorize the BGC to make a final determination on Reconsideration Requests brought regarding staff action or inaction and the BGC concluded that its determination on Request 14-28 is final; no consideration by the NGPC is warranted.

4. Reconsideration Request 14-29 – Bruce Tonkin abstained from participation in this matter noting conflicts; Bruce indicated that his employer uses Amazon as a supplier and, while not material to this particular decision, he would abstain to prevent any perception of bias. Staff briefed the BGC regarding DotKids Foundation Limited's ("Requester's") request seeking reconsideration of ICANN (Internet Corporation for Assigned Names and Numbers)'s decision to partially

defer the Requester's change request seeking to modify portions of its community application for .KIDS in preparation for its Community Priority Evaluation ("CPE"). The Requester and Amazon EU S.a.r.l ("Amazon") both applied for .KIDS and are in the same contention set. In preparing for the CPE, the Requester submitted a change request to ICANN (Internet Corporation for Assigned Names and Numbers) seeking: (i) to supplement its application with additional letters of support; and (ii) to revise written portions of its application. ICANN (Internet Corporation for Assigned Names and Numbers) permitted the additional letters of support; but deferred making any decision regarding the revisions to the application until after the CPE was concluded. On 11 June 2014, the Requester filed Reconsideration Request 14-29, claiming that ICANN (Internet Corporation for Assigned Names and Numbers) violated policies and procedures in partially deferring the Requester's change request. After discussion and consideration of the Request, the BGC asked staff to obtain additional information regarding the procedures for evaluating change requests in order to complete the BGC's due diligence on this matter and to reach a determination on this Reconsideration Request.

- Action: Staff to provide report to the BGC regarding ICANN (Internet Corporation for Assigned Names and Numbers) procedures for evaluating change requests.

5. Reconsideration Requests 14-30, 14-32, and 14-33 – Staff briefed the BGC regarding DotRegistry, LLC's ("Requester's") request seeking reconsideration of the Community Priority Evaluation ("CPE") Panels' Reports, and ICANN (Internet Corporation for Assigned Names and Numbers)'s acceptance of those Reports, finding that the Requester did not prevail in the CPEs for .LLC, .INC, and .LLP. The Requester submitted community-based applications for .LLC, .INC, and .LLP ("Applications"). The Applications were placed in contention sets with other applications for each string, respectively. The Requester was invited to, and did, participate in a CPE for each Application, but did not prevail. As a result, the Applications go back into their respective contention sets and will be resolved among the involved applicants. On 25 June 2014, the Requester filed Reconsideration Requests 14-30, 14-32, and 14-33, claiming that the CPE Panels failed to comply with established ICANN (Internet Corporation for Assigned Names and Numbers) policies and procedures in rendering the respective CPE

Reports. After discussion and consideration of the Request, the BGC concluded that the Requester has failed to demonstrate that the CPE Panels acted in contravention of established policy or procedure in rendering their Reports, or that the Requester has been adversely affected by the challenged actions of the CPE Panels. The BGC therefore concluded that Reconsideration Requests 14-30, 14-32, and 14-33 be denied. The Bylaws authorize the BGC to make a final determination on Reconsideration Requests brought regarding staff action or inaction and the BGC concluded that its determination on Requests 14-30, 14-32, and 14-33 is final; no consideration by the NGPC is warranted.

6. Reconsideration Request 14-31 – Staff briefed the BGC regarding TLDDOT GmbH's ("Requester's") request seeking reconsideration of the Community Priority Evaluation ("CPE") Panel's Report, and ICANN (Internet Corporation for Assigned Names and Numbers)'s acceptance of that Report, finding that the Requester did not prevail in the CPE for .GMBH. The Requester submitted a community-based application for .GMBH ("Application"). The Application was placed in a contention set with other applications for .GMBH. The Requester was invited to, and did, participate in a CPE for that string, but did not prevail. On 25 June 2014, the Requester filed Reconsideration Request 14-31, claiming that the CPE Panel failed to comply with established ICANN (Internet Corporation for Assigned Names and Numbers) policies and procedures in rendering its Report. After discussion and consideration of the Request, the BGC concluded that the Requester has failed to demonstrate that the CPE Panel acted in contravention of established policy or procedure in rendering its Report, or that the Requester has been adversely affected by the challenged actions of the CPE Panel. The BGC therefore concluded that Reconsideration Request 14-31 be denied. The Bylaws authorize the BGC to make a final determination on Reconsideration Requests brought regarding staff action or inaction and the BGC concluded that its determination on Request 14-31 is final; no consideration by the NGPC is warranted.

7. Expressions of Interest for Nominating Committee 2015 Leadership – Staff briefed the BGC regarding the status of current Expressions of Interest ("EOIs") for Nominating Committee ("NomCom") Leadership. The BGC will be appointing a Chair and a Chair-Elect position for the NomCom. After discussion and consideration of the submissions of

EOIs for NomCom Leadership, the BGC decided to seek additional information from each of the interested applicants in order to make determinations regarding candidate interviews, and to allow for the conclusion of a 360-degree review of the 2014 NomCom Leadership before proceeding. The BGC concluded that applicants will be asked to submit written responses to additional questions regarding their interest, relevant skills and experience.

- Action: The BGC to draft questions to be posed to applicants for NomCom 2015 Leadership positions.

8. Board Evaluation – The BGC discussed conducting a 360-degree Board evaluation, the need for a comprehensive survey questionnaire, the need to determine the quantity and selection process of potential participants in the questionnaire, and potential timing for development of the questionnaire and issuance of the questionnaire.

Published on 22 August 2014

EX. RLA-4

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Harper v. Canyon Hills Community Association, Cal.App. 4 Dist., August 19, 2014

21 Cal.4th 249, 980 P.2d 940, 87 Cal.Rptr.2d 237, 99 Cal. Daily Op. Serv. 6358, 1999 Daily Journal D.A.R. 8073
Supreme Court of California

GERTRUDE M. LAMDEN, Plaintiff and Appellant,
v.
LA JOLLA SHORES CLUBDOMINIUM HOMEOWNERS ASSOCIATION, Defendant and Respondent.

No. S070296.
Aug. 9, 1999.

SUMMARY

The board of directors of a condominium community association elected to spot-treat termite infestation rather than to fumigate. The owner of a condominium unit brought an action for an injunction and declaratory relief, alleging that the she had suffered diminution in the value of her unit as the result of the association's decision. The trial court found for the association, applying a deferential business judgment test. (Superior Court of San Diego County, No. 677082, Mack P. Lovett, Judge. *) The Court of Appeal, Fourth Dist., Div. One, No. D025485, reversed. It held that the trial court should have analyzed the association's actions under an objective standard of reasonableness test, and that had it done so, an outcome more favorable to the homeowner would have resulted.

* Retired Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

The Supreme Court reversed the judgment of the Court of Appeal. The court held that the business judgment rule did not directly apply to this case, but that the trial court correctly deferred to the board's decision. The court further held that a court should defer to a community association board's authority and presumed expertise, regardless of the association's corporate status, when a duly constituted board, upon reasonable investigation, in good faith, and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants, and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas. (Opinion by Werdegar, J., expressing the unanimous view of the court.) ***250**

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d, 1e, 1f)
Condominiums and Cooperative Apartments § 2--Condominiums--Associations--Treatment of Termite Infestation-- Owner's Legal Challenge--Judicial Standard of Review.
In an action for an injunction and declaratory relief brought by a condominium owner against the condominium community association, alleging that the association's election of spot treatment rather than fumigation to remedy termite infestation diminished the value of her unit, the trial court did not err in deferring to the decisions of the association's board of directors. Although the business judgment rule, on which the court relied, did not directly apply, a court should defer to a community association board's authority and presumed expertise, regardless of the association's corporate status, when a duly constituted board, upon reasonable investigation, in good faith, and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants, and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas. Judicial deference is appropriate, since owners and directors of common interest developments are more competent than the courts to make the detailed and peculiar economic decisions necessary to maintain their developments.

[See 4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, §§ 322, 328. See also 7 Miller & Starr, Cal. Real Estate (2d ed. 1990) §§ 20:11, 20:12.]

(2a, 2b)
Corporations § 39--Directors, Officers, and Agents--Liability-- Business Judgment Rule.
The common law business judgment rule has two components, one that immunizes corporate directors from

personal liability if they act in accordance with its requirements, and another that insulates from court intervention those management decisions that are made by directors in good faith in what they believe is the organization's best interest. A hallmark of the business judgment rule is that, when the rule's requirements are met, a court will not substitute its judgment for that of the corporation's board of directors. The business judgment rule has been justified primarily on two grounds. First, directors should be given wide latitude in their handling of corporate affairs because the hindsight of the judicial process is an imperfect device for evaluating business decisions. Second, the rule ***251** recognizes that shareholders to a very real degree voluntarily undertake the risk of bad business judgment; investors need not buy stock, for investment markets offer an array of opportunities less vulnerable to mistakes in judgment by corporate officers.

(3a, 3b)
Condominiums and Cooperative Apartments § 2--Condominiums-- Associations--Standard of Care--Residents' Safety in Common Areas.
A community association may be held to a landlord's standard of care as to residents' safety in the common areas. The association is, for all practical purposes, the development project's landlord. Traditional tort principles impose on landlords, no less than on homeowner associations that function as landlords in maintaining the common areas of large condominium complexes, a duty to exercise due care for the residents' safety in those areas under their control. This general duty includes the duty to take reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures.

(4)
Condominiums and Cooperative Apartments § 2--Condominiums-- Associations--Enforcement of Use Restrictions.
An equitable servitude will be enforced unless it violates public policy, it bears no rational relationship to the protection, preservation, operation, or purpose of the affected land, or it otherwise imposes burdens on the affected land that are so disproportionate to the restriction's beneficial effects that the restriction should not be enforced. A common interest development's recorded use restrictions are enforceable equitable servitudes, unless unreasonable (Civ. Code, § 1354, subd. (a)). Hence, those restrictions should be enforced unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit. When an association determines that a unit owner has violated a use restriction, the association must do so in good faith, not in an arbitrary or capricious manner, and its enforcement procedures must be fair and applied uniformly. Generally, courts will uphold decisions made by the governing board of an owners association so long as they represent good faith efforts to further the purposes of the common interest development, are consistent with the development's governing documents, and comply with public policy.

(5)
Condominiums and Cooperative Apartments § 2--Condominiums--Legal Action by Homeowner--Enforcement of Use Restrictions.
Under well-accepted principles of condominium law, a homeowner can sue the association for damages and an injunction to compel ***252** the association to enforce the provisions of the governing declaration of restrictions. The homeowner can also sue directly to enforce the declaration.

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June Babiracki Barlow and Neil D. Kalin for California Association of Realtors as Amicus Curiae on behalf of Defendant and Respondent.

WERDEGAR, J.

A building in a condominium development suffered from termite infestation. The board of directors of the development's community association [1] decided to treat the infestation locally ("spot-treat"), rather than fumigate. Alleging the board's decision diminished the value of ***253** her unit, the owner of a condominium in the development sued the community association. In adjudicating her claims, under what standard should a court evaluate the board's decision?

As will appear, we conclude as follows: Where a duly constituted community association board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise. Thus, we adopt today for California courts a rule of judicial deference to community association board decisionmaking that applies, regardless of an association's corporate status, when owners in common interest developments seek to litigate ordinary maintenance decisions entrusted to the discretion of their associations' boards of directors. (Cf. *Levandusky v. One Fifth Ave. Apt. Corp.* (1990) 75 N.Y.2d 530, 537-538 [554 N.Y.S.2d 807, 811, 557 N.E.2d 1317, 1321] [analogizing a similarly deferential rule to the common law "business judgment rule"].)

Accordingly, we reverse the judgment of the Court of Appeal.

Background

Plaintiff Gertrude M. Lamden owns a condominium unit in one of three buildings comprising the La Jolla Shores Clubdominium condominium development (Development). [2] Over some years, the board of governors (Board) of defendant La Jolla Shores Clubdominium Homeowners Association (Association), an unincorporated community association, elected to spot treat (secondary treatment), rather than fumigate (primary treatment), for termites the building in which Lamden's unit is located (Building Three).

2 The Development was built, and its governing declaration of restrictions recorded, in 1971. In 1973 Lamden and her husband bought unit 375, one of 42 units in the complex's largest building. Until 1977 the Lamdens used their unit only as a rental. From 1977 until 1988 they lived in the unit; since 1988 the unit has again been used only as a rental.

In the late 1980's, attempting to remedy water intrusion and mildew damage, the Association hired a contractor to renovate exterior siding on all three buildings in the Development. The contractor replaced the siding on ***254** the southern exposure of Building Three and removed damaged drywall and framing. Where the contractor encountered termites, a termite extermination company provided spot treatment and replaced damaged material.

Lamden remodeled the interior of her condominium in 1990. At that time, the Association's manager arranged for a termite extermination company to spot-treat areas where Lamden had encountered termites.

The following year, both Lamden and the Association obtained termite inspection reports recommending fumigation, but the Association's Board decided against that approach. As the Court of Appeal explained, the Board based its decision not to fumigate on concerns about the cost of fumigation, logistical problems with temporarily relocating residents, concern that fumigation residue could affect residents' health and safety, awareness that upcoming walkway renovations would include replacement of damaged areas, pet moving expenses, anticipated breakage by the termite company, lost rental income and the likelihood that termite infestation would recur even if primary treatment were utilized. The Board decided to continue to rely on secondary treatment until a more widespread problem was demonstrated.

In 1991 and 1992, the Association engaged a company to repair water intrusion damage to four units in Building Three. The company removed siding in the balcony area, repaired and waterproofed the decks, and repaired joints between the decks and the walls of the units. The siding of the unit below Lamden's and one of its walls were repaired. Where termite infestation or damage became apparent during this project, spot treatment was applied and damaged material removed.

In 1993 and 1994, the Association commissioned major renovation of the Development's walkway system, the underpinnings of which had suffered water and termite

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damage. The $1.6 million walkway project was monitored by a structural engineer and an on-site architect.

In 1994, Lamden brought this action for damages, an injunction and declaratory relief. She purported to state numerous causes of action based on the Association's refusal to fumigate for termites, naming as defendants certain individual members of the Board as well as the Association. Her amended complaint included claims sounding in breach of contract (viz., the governing declaration of restrictions [Declaration]), breach of fiduciary duty and negligence. She alleged that the Association, in opting for secondary over primary treatment, had breached ***255** Civil Code section 1364, subdivision (b)(1)[3] and the Declaration[4] in failing adequately to repair, replace and maintain the common areas of the Development.

3 As discussed more fully *post*, "In a community apartment project, condominium project, or stock cooperative ... unless otherwise provided in the declaration, the association is responsible for the repair and maintenance of the common area occasioned by the presence of wood-destroying pests or organisms." (Civ. Code, § 1364, subd. (b)(1).)

4 The Declaration, which contained the Development's governing covenants, conditions, and restrictions (CC&R's), stated that the Association was to provide for the management, maintenance, repair and preservation of the complex's common areas for the enhancement of the value of the project and each unit and for the benefit of the owners.

Lamden further alleged that, as a proximate result of the Association's breaching its responsibilities, she had suffered diminution in the value of her condominium unit, repair expenses, and fees and costs in connection with this litigation. She also alleged that the Association's continued breach had caused and would continue to cause her irreparable harm by damaging the structural integrity and soundness of her unit, and that she has no adequate remedy at law. At trial, Lamden waived any damages claims and dismissed with prejudice the individual defendants. Presently, she seeks only an injunction and declaratory relief.

After both sides had presented evidence and argument, the trial court rendered findings related to the termite infestation affecting plaintiff's condominium unit, its causes, and the remedial steps taken by the Association. The trial court found there was "no question from all the evidence that Mrs. Lamden's unit ... has had a serious problem with termites." In fact, the trial court found, "The evidence ... was overwhelming that termites had been a problem over the past several years." The court concluded, however, that while "there may be active infestation" that would require "steps [to be] taken within the future years," there was no evidence that the condominium units were in imminent structural danger or "that these units are about to fall or something is about to happen."

The trial court also found that, "starting in the late '80's," the Association had arranged for "some work" addressing the termite problem to be done. Remedial and investigative work ordered by the Association included, according to the trial court, removal of siding to reveal the extent of damage, a "big project ... in the early '90's," and an architect's report on building design factors. According to the court, the Board "did at one point seriously consider" primary treatment; "they got a bid for this fumigation, and there was discussion." The court found that the Board also considered possible problems entailed by fumigation, including relocation costs, lost rent, concerns about pets and plants, human health issues and eventual termite reinfestation. ***256**

As to the causes of the Development's termite infestation, the trial court concluded that "the key problem came about from you might say a poor design" and resulting "water intrusion." In short, the trial court stated, "the real culprit is not so much the Board, but it's the poor design and the water damage that is conducive to bringing the termites in."

As to the Association's actions, the trial court stated, "the Board did take appropriate action." The court noted the Board "did come up with a plan," viz., to engage a pest control service to "come out and [spot] treat [termite infestation] when it was found." The trial judge opined he might, "from a personal relations standpoint," have acted sooner or differently under the circumstances than did the Association, but nevertheless concluded "the Board did have a rational basis for their decision to reject fumigation, and do ... what they did." Ultimately, the court gave judgment for the Association, applying what it called a "business judgment test." Lamden appealed.

Citing *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490 [229 Cal.Rptr. 456, 723 P.2d 573, 59 A.L.R.4th 447] (*Frances T.*), the Court of Appeal agreed with Lamden

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that the trial court had applied the wrong standard of care in assessing the Association's actions. In the Court of Appeal's view, relevant statutes, the governing Declaration and principles of common law imposed on the Association an objective duty of reasonable care in repairing and maintaining the Development's common areas near Lamden's unit as occasioned by the presence of termites. The court also concluded that, had the trial court analyzed the Association's actions under an objective standard of reasonableness, an outcome more favorable to Lamden likely would have resulted. Accordingly, the Court of Appeal reversed the judgment of the trial court.

We granted the Association's petition for review.

Discussion

"In a community apartment project, condominium project, or stock cooperative ... unless otherwise provided in the declaration, the association is responsible for the repair and maintenance of the common area occasioned by the presence of wood-destroying pests or organisms." (Civ. Code, § 1364, subd. (b)(1).) The Declaration in this case charges the Association with "management, maintenance and preservation" of the Development's common areas. Further, the Declaration confers upon the Board power and authority to maintain and repair the common areas. Finally, the Declaration provides that "limitations, restrictions, conditions and covenants set forth in this Declaration constitute a general scheme for (i) the maintenance, protection and enhancement of value of the Project and all Condominiums and (ii) the benefit of all Owners." ***257**

(1a) In light of the foregoing, the parties agree the Association is responsible for the repair and maintenance of the Development's common areas occasioned by the presence of termites. They differ only as to the standard against which the Association's performance in discharging this obligation properly should be assessed: a deferential "business judgment" standard or a more intrusive one of "objective reasonableness."

The Association would have us decide this case through application of "the business judgment rule." As we have observed, that rule of judicial deference to corporate decisionmaking "exists in one form or another in every American jurisdiction." (*Frances T., supra*, 42 Cal.3d at p. 507, fn. 14.)

(2a) "The common law business judgment rule has two components—one which immunizes [corporate] directors from personal liability if they act in accordance with its requirements, and another which insulates from court intervention those management decisions which are made by directors in good faith in what the directors believe is the organization's best interest." (*Lee v. Interinsurance Exchange* (1996) 50 Cal.App.4th 694, 714 [57 Cal.Rptr.2d 798], citing 2 Marsh & Finkle, Marsh's Cal. Corporation Law (3d ed., 1996 supp.) § 11.3, pp. 796-797.) A hallmark of the business judgment rule is that, when the rule's requirements are met, a court will not substitute its judgment for that of the corporation's board of directors. (See generally, *Katz v. Chevron Corp.* (1994) 22 Cal.App.4th 1352, 1366 [27 Cal.Rptr.2d 681].) As discussed more fully below, in California the component of the common law rule relating to directors' personal liability is defined by statute. (See Corp. Code, §§ 309 [profit corporations], 7231 [nonprofit corporations].)

(1b) According to the Association, uniformly applying a business judgment standard in judicial review of community association board decisions would promote certainty, stability and predictability in common interest development governance. Plaintiff, on the other hand, contends general application of a business judgment standard to board decisions would undermine individual owners' ability, under Civil Code section 1354, to enforce, as equitable servitudes, the CC&R's in a common interest development's declaration.[5] Stressing residents' interest in a stable and predictable living environment, as embodied in a given development's particular CC&R's, ***258** plaintiff encourages us to impose on community associations an objective standard of reasonableness in carrying out their duties under governing CC&R's or public policy.

5 Civil Code section 1354, subdivision (a) provides: "The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development. Unless the declaration states otherwise, these servitudes may be enforced by any owner of a separate interest or by the association, or by both."

For at least two reasons, what we previously have identified as the "business judgment rule" (see *Frances T., supra*, 42 Cal.3d at p. 507 [discussing Corporations Code section

7231] and fn. 14 [general discussion of common law rule]; *United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, 594 [83 Cal.Rptr. 418, 463 P.2d 770] [reference to common law rule]) does not directly apply to this case. First, the statutory protections for individual directors (Corp. Code, §§ 309, subd. (c), 7231, subd. (c)) do not apply, as no individual directors are defendants here.

Corporations Code sections 309 and 7231 (section 7231) are found in the General Corporation Law (Corp. Code, § 100 et seq.) and the Nonprofit Corporation Law (*id.*, § 5000 et seq.), respectively; the latter incorporates the standard of care defined in the former (*Frances T., supra*, 42 Cal.3d at p. 506, fn. 13, citing legis. committee com., Deering's Ann. Corp. Code (1979 ed.) foll. § 7231, p. 205; 1B Ballantine & Sterling, Cal. Corporation Laws (4th ed. 1984) § 406.01, p. 19-192). Section 7231 provides, in relevant part: "A director shall perform the duties of a director ... in good faith, in a manner such director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances." (§ 7231, subd. (a); cf. Corp. Code, § 309, subd. (a).) "A person who performs the duties of a director in accordance with [the stated standards] shall have no liability based upon any alleged failure to discharge the person's obligations as a director ...." (§ 7231, subd. (c); cf. Corp. Code, § 309, subd. (c).)

Thus, by its terms, section 7231 protects only "[a] person who performs the duties of a director" (§ 7231, subd. (c), italics added); it contains no reference to the component of the common law business judgment rule that somewhat insulates ordinary corporate business decisions, per se, from judicial review. (See generally, *Lee v. Interinsurance Exchange, supra*, 50 Cal.App.4th at p. 714, citing 2 Marsh & Finkle, Marsh's Cal. Corporation Law, *supra*, § 11.3, pp. 796-797.) Moreover, plaintiff here is seeking only injunctive and declaratory relief, and it is not clear that such a prayer implicates section 7231. The statute speaks only of protection against "liability based upon any alleged failure to discharge the person's obligations ...." (§ 7231, subd. (c), italics added.)

As no compelling reason for departing therefrom appears, we must construe section 7231 in accordance with its plain language. (*Rossi v. Brown* ***259** (1995) 9 Cal.4th 688, 694 [38 Cal.Rptr.2d 363, 889 P.2d 557]; *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 826 [4 Cal.Rptr.2d 615, 823 P.2d 1216]; *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798 [268 Cal.Rptr. 753, 789 P.2d 934].) It follows that section 7231 cannot govern for present purposes.

Second, neither the California statute nor the common law business judgment rule, strictly speaking, protects noncorporate entities, and the defendant in this case, the Association, is not incorporated. [6]

6 The parties do not dispute that the component of the common law business judgment rule calling for deference to corporate decisions survives the Legislature's codification, in section 7231, of the component shielding individual directors from liability. (See also *Lee v. Interinsurance Exchange, supra*, 50 Cal.App.4th at p. 714; see generally, *California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297 [65 Cal.Rptr.2d 872, 940 P.2d 323] [unless expressly provided, statutes should not be interpreted to alter the common law]; *Rojo v. Kliger* (1990) 52 Cal.3d 65, 80 [276 Cal.Rptr. 130, 801 P.2d 373] ["statutes do not supplant the common law unless it appears that the Legislature intended to cover the entire subject"].)

(2b) Traditionally, our courts have applied the common law "business judgment rule" to shield from scrutiny qualifying decisions made by a corporation's board of directors. (See, e.g., *Marsili v. Pacific Gas & Elec. Co.* (1975) 51 Cal.App.3d 313, 324 [124 Cal.Rptr. 313, 79 A.L.R.3d 477]; *Fairchild v. Bank of America* (1961) 192 Cal.App.2d 252, 256-257 [13 Cal.Rptr. 491]; *Findley v. Garrett* (1952) 109 Cal.App.2d 166, 174-175 [240 P.2d 421]; *Duffey v. Superior Court* (1992) 3 Cal.App.4th 425, 429 [4 Cal.Rptr.2d 334] [rule applied to decision by board of incorporated community association]; *Beehan v. Lido Isle Community Assn.* (1977) 70 Cal.App.3d 858, 865 [137 Cal.Rptr. 528] [same].) The policies underlying judicial creation of the common law rule derive from the realities of business in the corporate context. As we previously have observed: "The business judgment rule has been justified primarily on two grounds. First, that directors should be given wide latitude in their handling of corporate affairs because the hindsight of the judicial process is an imperfect device for evaluating business decisions. Second, '[t]he rule recognizes that shareholders to a very real degree voluntarily undertake the risk of bad business judgment; investors need not buy stock, for investment markets offer an array of opportunities less vulnerable to mistakes in judgment by corporate officers.' " (*Frances T.*,

supra, 42 Cal.3d at p. 507, fn. 14, quoting 18B Am.Jur.2d (1985) Corporations, § 1704, pp. 556-557; see also *Findley v. Garrett*, *supra*, 109 Cal.App.2d at p. 174.)

(1c) California's statutory business judgment rule contains no express language extending its protection to noncorporate entities or actors. ***260** Section 7231, as noted, is part of our Corporations Code and, by its terms, protects only "director[s]." In the Corporations Code, except where otherwise expressly provided, "directors" means "natural persons" designated, elected or appointed "to act as members of the governing body of the corporation." (Corp. Code, § 5047.)

Despite this absence of textual support, the Association invites us for policy reasons to construe section 7231 as applying both to incorporated and unincorporated community associations. (See generally, Civ. Code, § 1363, subd. (a) [providing that a common interest development "shall be managed by an association which may be incorporated or unincorporated"]; *id*., subd. (c) ["Unless the governing documents provide otherwise," the association, whether incorporated or unincorporated, "may exercise the powers granted to a nonprofit mutual benefit corporation, as enumerated in Section 7140 of the Corporations Code."]; *Oil Workers Intl. Union v. Superior Court* (1951) 103 Cal.App.2d 512, 571 [230 P.2d 71], quoting *Otto v. Tailors' P. & B. Union* (1888) 75 Cal. 308, 313 [17 P. 217] [observing that when courts take jurisdiction over unincorporated associations for the purpose of protecting members' property rights, they " 'will follow and enforce, so far as applicable, the rules applying to incorporated bodies of the same character' "]; *White v. Cox* (1971) 17 Cal.App.3d 824, 828 [95 Cal.Rptr. 259, 45 A.L.R.3d 1161] [noting "unincorporated associations are now entitled to general recognition as separate legal entities"].) Since other aspects of this case—apart from the Association's corporate status—render section 7231 inapplicable, anything we might say on the question of the statute's broader application would, however, be dictum. Accordingly, we decline the Association's invitation to address the issue.

For the foregoing reasons, the "business judgment rule" of deference to corporate decisionmaking, at least as we previously have understood it, has no direct application to the instant controversy. The precise question presented, then, is whether we should in this case adopt for California courts a rule—analogous perhaps to the business judgment rule—of judicial deference to community association board decisionmaking that would apply, regardless of an association's corporate status, when owners in common interest developments seek to litigate ordinary maintenance decisions entrusted to the discretion of their associations' boards of directors. (Cf. *Levandusky v. One Fifth Ave. Apt. Corp.*, *supra*, 75 N.Y.2d at p. 538 [554 N.Y.S.2d at p. 811] [referring "for the purpose of analogy only" to the business judgment rule in adopting a rule of deference].)

Our existing jurisprudence specifically addressing the governance of common interest developments is not voluminous. While we have not previously ***261** examined the question of what standard or test generally governs judicial review of decisions made by the board of directors of a community association, we have examined related questions.

Fifty years ago, in *Hannula v. Hacienda Homes* (1949) 34 Cal.2d 442 [211 P.2d 302, 19 A.L.R.2d 1268], we held that the decision by the board of directors of a real estate development company to deny, under a restrictive covenant in a deed, the owner of a fractional part of a lot permission to build a dwelling thereon "must be a reasonable determination made in good faith." (*Id.* at p. 447, citing *Parsons v. Duryea* (1927) 261 Mass. 314, 316 [158 N.E. 761, 762]; *Jones v. Northwest Real Estate Co.* (1925) 149 Md. 271, 278 [131 A. 446, 449]; *Harmon v. Burow* (1919) 263 Pa. 188, 190 [106 A. 310, 311].) Sixteen years ago, we held that a condominium owners association is a "business establishment" within the meaning of the Unruh Civil Rights Act, section 51 of the Civil Code. (*O'Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790, 796 [191 Cal.Rptr. 320, 662 P.2d 427]; but see *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1175 [278 Cal.Rptr. 614, 805 P.2d 873] [declining to extend *O'Connor*]; *Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal.4th 670, 697 [72 Cal.Rptr.2d 410, 952 P.2d 218] [same].) And 10 years ago, in *Frances T.*, *supra*, 42 Cal.3d 490, we considered "whether a condominium owners association and the individual members of its board of directors may be held liable for injuries to a unit owner caused by third-party criminal conduct." (*Id.* at p. 495.)

(3a) In *Frances T.*, a condominium owner who resided in her unit brought an action against the community association, a nonprofit corporation, and the individual members of its board of directors after she was raped and robbed in her dwelling. She alleged negligence, breach of contract and breach of fiduciary duty, based on the association's failure to install sufficient exterior lighting and its requiring her to

remove additional lighting that she had installed herself. The trial court sustained the defendants' general demurrers to all three causes of action. (*Frances T.*, *supra*, 42 Cal.3d at p. 495.) We reversed. A community association, we concluded, may be held to a landlord's standard of care as to residents' safety in the common areas (*id.* at pp. 499-500), and the plaintiff had alleged particularized facts stating a cause of action against both the association and the individual members of the board (*id.* at p. 498). The plaintiff failed, however, to state a cause of action for breach of contract, as neither the development's governing CC&R's nor the association's bylaws obligated the defendants to install additional lighting. The plaintiff failed likewise to state a cause of action for breach of fiduciary duties, as the defendants had fulfilled their duty to the plaintiff as a shareholder, and the plaintiff had alleged no facts to show that ***262** the association's board members had a fiduciary duty to serve as the condominium project's landlord. (*Id.* at pp. 512-514.)

In discussing the scope of a condominium owners association's common law duty to a unit owner, we observed in *Frances T.* that "the Association is, for all practical purposes, the Project's 'landlord.' " (*Frances T.*, *supra*, 42 Cal.3d at p. 499, fn. omitted.) And, we noted, "traditional tort principles impose on landlords, no less than on homeowner associations that function as a landlord in maintaining the common areas of a large condominium complex, a duty to exercise due care for the residents' safety in those areas under their control." (*Ibid.*, citing *Kwaitkowski v. Superior Trading Co.* (1981) 123 Cal.App.3d 324, 328 [176 Cal.Rptr. 494]; *O'Hara v. Western Seven Trees Corp.* (1977) 75 Cal.App.3d 798, 802-803 [142 Cal.Rptr. 487]; *Kline v. 1500 Massachusetts Avenue Apartment Corp.* (1970) 439 F.2d 477, 480-481 [141 App.D.C. 370, 43 A.L.R.3d 311]; *Scott v. Watson* (1976) 278 Md. 160 [359 A.2d 548, 552].) We concluded that "under the circumstances of this case the Association should be held to the same standard of care as a landlord" (*Frances T.*, *supra*, 42 Cal.3d at p. 499; see also *id.* at pp. 499-501, relying on *O'Connor v. Village Green Owners Assn.*, *supra*, 33 Cal.3d at p. 796 ["association performs all the customary business functions which in the traditional landlord-tenant relationship rest on the landlord's shoulders"] and *White v. Cox*, *supra*, 17 Cal.App.3d at p. 830 [association, as management body over which individual owner has no effective control, may be sued for negligence in maintaining sprinkler].)

More recently, in *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 375 [33 Cal.Rptr.2d 63, 878 P.2d 1275] (*Nahrstedt*), we confronted the question, "When restrictions limiting the use of property within a common interest development satisfy the requirements of covenants running with the land or of equitable servitudes, what standard or test governs their enforceability?" [7]

7 Our opinion in *Nahrstedt* also contains extensive background discussion, which need not be reproduced here. *Nahrstedt*'s background materials discuss the origin and development of condominiums, cooperatives and planned unit developments as widely accepted forms of real property ownership (*Nahrstedt*, *supra*, 8 Cal.4th at pp. 370-375, citing numerous authorities); California's statutory scheme governing condominiums and other common interest developments (*id.* at pp. 377-379 [describing the Davis-Stirling Act]); and general property law principles respecting equitable servitudes and their enforcement (*Nahrstedt*, *supra*, at pp. 380-382).

(4) In *Nahrstedt*, an owner of a condominium unit who had three cats sued the community association, its officers and two of its employees for declaratory relief, seeking to prevent the defendants from enforcing against ***263** her a prohibition on keeping pets that was contained in the community association's recorded CC&R's. In resolving the dispute, we distilled from numerous authorities the principle that "[a]n equitable servitude will be enforced unless it violates public policy; it bears no rational relationship to the protection, preservation, operation or purpose of the affected land; or it otherwise imposes burdens on the affected land that are so disproportionate to the restriction's beneficial effects that the restriction should not be enforced." (*Nahrstedt*, *supra*, 8 Cal.4th at p. 382.) Applying this principle, and noting that a common interest development's recorded use restrictions are "enforceable equitable servitudes, unless unreasonable" (Civ. Code, § 1354, subd. (a)), we held that "such restrictions should be enforced unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit" (*Nahrstedt*, *supra*, at p. 382). (See also *Citizens for Covenant Compliance v. Anderson* (1995) 12 Cal.4th 345, 349 [47 Cal.Rptr.2d 898, 906 P.2d 1314] [previously recorded restriction on property use in common plan for ownership of subdivision property enforceable even if not cited in deed at time of sale].)

In deciding *Nahrstedt*, we noted that ownership of a unit in a common interest development ordinarily "entails mandatory membership in an owners association, which, through an elected board of directors, is empowered to enforce any use restrictions contained in the project's declaration or master deed and to enact new rules governing the use and occupancy of property within the project." (*Nahrstedt*, *supra*, 8 Cal.4th at p. 373, citing Cal. Condominium and Planned Development Practice (Cont.Ed.Bar 1984) § 1.7, p. 13; Note, *Community Association Use Restrictions: Applying the Business Judgment Doctrine* (1988) 64 Chi.-Kent L.Rev. 653; Natelson, Law of Property Owners Associations (1989) § 3.2.2, p. 71 et seq.) "Because of its considerable power in managing and regulating a common interest development," we observed, "the governing board of an owners association must guard against the potential for the abuse of that power." (*Nahrstedt*, *supra*, at pp. 373-374, fn. omitted.) We also noted that a community association's governing board's power to regulate "pertains to a 'wide spectrum of activities,' such as the volume of playing music, hours of social gatherings, use of patio furniture and barbecues, and rental of units." (*Id.* at p. 374, fn. 6.)

We declared in *Nahrstedt* that, "when an association determines that a unit owner has violated a use restriction, the association must do so in good faith, not in an arbitrary or capricious manner, and its enforcement procedures must be fair and applied uniformly." (*Nahrstedt*, *supra*, 8 Cal.4th at p. 383, ***264** citing *Ironwood Owners Assn. IX v. Solomon* (1986) 178 Cal.App.3d 766, 772 [224 Cal.Rptr. 18]; *Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d 642, 650 [191 Cal.Rptr. 209].) Nevertheless, we stated, "Generally, courts will uphold decisions made by the governing board of an owners association so long as they represent good faith efforts to further the purposes of the common interest development, are consistent with the development's governing documents, and comply with public policy." (*Nahrstedt*, *supra*, at p. 374, citing Natelson, *Consent, Coercion, and "Reasonableness" in Private Law: The Special Case of the Property Owners Association* (1990) 51 Ohio State L.J. 41, 43.)

The plaintiff in this case, like the plaintiff in *Nahrstedt*, owns a unit in a common interest development and disagrees with a particular aspect of the development's overall governance as it has impacted her. Whereas the restriction at issue in *Nahrstedt* (a ban on pets), however, was promulgated at the development's inception and enshrined in its founding CC&R's, the decision plaintiff challenges in this case (the choice of secondary over primary termite treatment) was promulgated by the Association's Board long after the Development's inception and after plaintiff had acquired her unit. Our holding in *Nahrstedt*, which established the standard for judicial review of recorded use restrictions that satisfy the requirements of covenants running with the land or equitable servitudes (see *Nahrstedt*, *supra*, 8 Cal.4th at p. 375), therefore, does not directly govern this case, which concerns the standard for judicial review of discretionary economic decisions made by the governing boards of community associations.

In *Nahrstedt*, moreover, some of our reasoning arguably suggested a distinction between originating CC&R's and subsequently promulgated use restrictions. Specifically, we reasoned in *Nahrstedt* that giving deference to a development's originating CC&R's "protects the general expectations of condominium owners 'that restrictions in place at the time they purchase their units will be enforceable.' " (*Nahrstedt*, *supra*, 8 Cal.4th at p. 377, quoting Note, *Judicial Review of Condominium Rulemaking* (1981) 94 Harv. L.Rev. 647, 653.) Thus, our conclusion that judicial review of a common interest development's founding CC&R's should proceed under a deferential standard was, as plaintiff points out, at least partly derived from our understanding (invoked there by way of contrast) that the factors justifying such deference will not necessarily be present when a court considers subsequent, unrecorded community association board decisions. (See *Nahrstedt*, *supra*, at pp. 376-377, discussing *Hidden Harbour Estates v. Basso* (Fla.Dist.Ct.App. 1981) 393 So.2d 637, 639-640.)

(1d) Nevertheless, having reviewed the record in this case, and in light of the foregoing authorities, we conclude that the Board's decision here to ***265** use secondary, rather than primary, treatment in addressing the Development's termite problem, a matter entrusted to its discretion under the Declaration and Civil Code section 1364, falls within *Nahrstedt*'s pronouncement that, "Generally, courts will uphold decisions made by the governing board of an owners association so long as they represent good faith efforts to further the purposes of the common interest development, are consistent with the development's governing documents, and comply with public policy." (*Nahrstedt*, *supra*, 8 Cal.4th at p. 374.) Moreover, our deferring to the Board's discretion in this matter, which, as previously noted, is broadly conferred in the Development's CC&R's, is consistent with *Nahrstedt*' s holding that CC&R's "should be enforced unless they are wholly arbitrary, violate a fundamental public policy, or

impose a burden on the use of affected land that far outweighs any benefit." (*Id.* at p. 382.)

Here, the Board exercised discretion clearly within the scope of its authority under the Declaration and governing statutes to select among means for discharging its obligation to maintain and repair the Development's common areas occasioned by the presence of wood-destroying pests or organisms. The trial court found that the Board acted upon reasonable investigation, in good faith, and in a manner the Board believed was in the best interests of the Association and its members. (See generally, *Nahrstedt*, *supra*, 8 Cal.4th at p. 374; *Frances T.*, *supra*, 42 Cal.3d at pp. 512-514 [association's refusal to install lighting breached no contractual or fiduciary duties]; *Hannula v. Hacienda Homes*, *supra*, 34 Cal.2d at p. 447 ["refusal to approve plans must be a reasonable determination made in good faith"].)

Contrary to the Court of Appeal, we conclude the trial court was correct to defer to the Board's decision. We hold that, where a duly constituted community association board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise.

The foregoing conclusion is consistent with our previous pronouncements, as reviewed above, and also with those of California courts, generally, respecting various aspects of association decisionmaking. (See *Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 550 [116 Cal.Rptr. 245, 526 P.2d 253] [holding "whenever a private association is legally required to refrain from arbitrary action, the association's action must be substantively rational and procedurally fair"]; *Ironwood Owners Assn. IX* ***266** v. *Solomon*, *supra*, 178 Cal.App.3d at p. 772 [holding homeowners association seeking to enforce CC&R's to compel act by member owner must "show that it has followed its own standards and procedures prior to pursuing such a remedy, that those procedures were fair and reasonable and that its substantive decision was made in good faith, and is reasonable, not arbitrary or capricious"]; *Cohen v. Kite Hill Community Assn.*, *supra*, 142 Cal.App.3d at p. 650 [noting "a settled rule of law that homeowners associations must exercise their authority to approve or disapprove an individual homeowner's construction or improvement plans in conformity with the declaration of covenants and restrictions, and in good faith"]; *Laguna Royale Owners Assn. v. Darger* (1981) 119 Cal.App.3d 670, 683-684 [174 Cal.Rptr. 136] [in purporting to test "reasonableness" of owners association's refusal to permit transfer of interest, court considered "whether the reason for withholding approval is rationally related to the protection, preservation or proper operation of the property and the purposes of the Association as set forth in its governing instruments" and "whether the power was exercised in a fair and nondiscriminatory manner"].) [8]

8 Courts in other jurisdictions have adopted similarly deferential rules. (See, e.g., *Levandusky v. One Fifth Ave. Apt. Corp.*, *supra*, 75 N.Y.2d at p. 538 [554 N.Y.S.2d at p. 812, 553 N.E.2d at pp. 1321-1322] [comparing benefits of a "reasonableness" standard with those of a "business judgment rule" and holding that, when "the board acts for the purposes of the cooperative, within the scope of its authority and in good faith, courts will not substitute their judgment for the board's"]; see also authorities cited there and *id.* at p. 545 [554 N.Y.S.2d at p. 816, 553 N.E.2d at p. 1326] (conc. opn. of Titone, J.) [standard analogous to business judgment rule is appropriate where "the challenged action was, in essence, a business judgment, i.e., a choice between competing and equally valid economic options" (italics omitted)].)

Our conclusion also accords with our recognition in *Frances T.* that the relationship between the individual owners and the managing association of a common interest development is complex. (*Frances T.*, *supra*, 42 Cal.3d at pp. 507-509; see also *Duffey v. Superior Court*, *supra*, 3 Cal.App.4th at pp. 428-429 [noting courts "analyze homeowner associations in different ways, depending on the function the association is fulfilling under the facts of each case" and citing examples]; *Laguna Publishing Co. v. Golden Rain Foundation* (1982) 131 Cal.App.3d 816, 844 [182 Cal.Rptr. 813]; *O'Connor v. Village Green Owners Assn.*, *supra*, 33 Cal.3d at p. 796; *Beehan v. Lido Isle Community Assn.*, *supra*, 70 Cal.App.3d at pp. 865-867.) On the one hand, each individual owner has an economic interest in the proper business management of the development as a whole for the sake of maximizing the value of his or her investment. In this aspect, the relationship between homeowner and association is somewhat analogous to that between shareholder and corporation. On the other hand, each individual owner, at least while residing in the

development, has a personal, not strictly economic, ***267** interest in the appropriate management of the development for the sake of maintaining its security against criminal conduct and other foreseeable risks of physical injury. In this aspect, the relationship between owner and association is somewhat analogous to that between tenant and landlord. (See generally, *Frances T., supra*, 42 Cal.3d at p. 507 [business judgment rule "applies to parties (particularly shareholders and creditors) to whom the directors owe a fiduciary obligation," but "does not abrogate the common law duty which every person owes to others—that is, a duty to refrain from conduct that imposes an unreasonable risk of injury on third parties"].)

Relying on *Frances T.*, the Court of Appeal held that a landlord-like common law duty required Association, in discharging its responsibility to maintain and repair the common areas occasioned by the presence of termites, to exercise reasonable care in order to protect plaintiff's unit from undue damage. (3b) As noted, "It is now well established that California law requires landowners to maintain land in their possession and control in a reasonably safe condition. [Citations.] In the case of a landlord, this general duty of maintenance, which is owed to tenants and patrons, has been held to include the duty to take reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674 [25 Cal.Rptr.2d 137, 863 P.2d 207], citing, inter alia, *Frances T., supra*, 42 Cal.3d at pp. 499-501.) (1e) Contrary to the Court of Appeal, however, we do not believe this case implicates such duties. *Frances T.* involved a common interest development resident who suffered " 'physical injury, not pecuniary harm ....' " (*Frances T., supra*, 42 Cal.3d at p. 505, quoting *United States Liab. Ins. Co. v. Haidinger-Hayes, Inc., supra*, 1 Cal.3d at p. 595; see also *id.* at p. 507, fn. 14.) Plaintiff here, by contrast, has not resided in the Development since the time that significant termite infestation was discovered, and she alleges neither a failure by the Association to maintain the common areas in a reasonably safe condition, nor knowledge on the Board's part of any unreasonable risk of physical injury stemming from its failure to do so. Plaintiff alleges simply that the Association failed to effect necessary pest control and repairs, thereby causing her pecuniary damages, including diminution in the value of her unit. Accordingly, *Frances T.* is inapplicable.

Plaintiff warns that judicial deference to the Board's decision in this case would not be appropriate, lest every community association be free to do as little or as much as it pleases in satisfying its obligations to its members. We do not agree. Our respecting the Association's discretion, under this Declaration, to choose among modes of termite treatment does not foreclose the ***268** possibility that more restrictive provisions relating to the same or other topics might be "otherwise provided in the declaration[s]" (Civ. Code, § 1364, subd. (b)(1)) of other common interest developments. As discussed, we have before us today a declaration constituting a general scheme for maintenance, protection and enhancement of value of the Development, one that entrusts to the Association the management, maintenance and preservation of the Development's common areas and confers on the Board the power and authority to maintain and repair those areas.

Thus, the Association's obligation at issue in this case is broadly cast, plainly conferring on the Association the discretion to select, as it did, among available means for addressing the Development's termite infestation. Under the circumstances, our respecting that discretion obviously does not foreclose community association governance provisions that, within the bounds of the law, might more narrowly circumscribe association or board discretion.

Citing Restatement Third of Property, Servitudes, Tentative Draft No. 7, [9] plaintiff suggests that deference to community association discretion will undermine individual owners' previously discussed right, under Civil Code section 1354 and *Nahrstedt, supra*, 8 Cal.4th at page 382, to enforce recorded CC&R's as equitable servitudes, but we think not. (5) "Under well-accepted principles of condominium law, a homeowner can sue the association for damages and an injunction to compel the association to enforce the provisions of the declaration. [Citation.] More importantly here, the homeowner can sue directly to enforce the declaration." (*Posey v. Leavitt* (1991) 229 Cal.App.3d 1236, 1246-1247 [280 Cal.Rptr. 568], citing *Cohen* ***269** v. *Kite Hill Community Assn., supra*, 142 Cal.App.3d 642.) Nothing we say here departs from those principles.

9 The Restatement tentative draft proposes that "In addition to duties imposed by statute and the governing documents, the association has the following duties to the members of the common interest community: [¶] (a) to use ordinary care and prudence in managing the property and financial affairs of the community that are subject to its control." (Rest.3d Property, Servitudes (Tent. Draft

> No. 7, Apr. 15, 1998) ch. 6, § 6.13, p. 325.) "The business judgment rule is not adopted, because the fit between community associations and other types of corporations is not very close, and it provides too little protection against careless or risky management of community property and financial affairs." (*Id.*, com. b at p. 330.) It is not clear to what extent the Restatement tentative draft supports plaintiff's position. As the Association points out, a "member challenging an action of the association under this section has the burden of proving a breach of duty by the association" and, when the action is one within association discretion, "the additional burden of proving that the breach has caused, or threatens to cause, injury to the member individually or to the interests of the common interest community." (Rest.3d Property (Tent. Draft No. 7), *supra*, § 6.13, p. 325.) Depending upon how it is interpreted, such a standard might be inconsistent with the standard we announced in *Nahrstedt*, viz., that a use restriction is enforceable "*not* by reference to facts that are specific to the objecting homeowner, but by reference to the common interest development as a whole." (*Nahrstedt*, *supra*, 8 Cal.4th at p. 386, italics in original.)

(1f) Finally, plaintiff contends a rule of judicial deference will insulate community association boards' decisions from judicial review. We disagree. As illustrated by *Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs* (1998) 67 Cal.App.4th 743, 754-755 [79 Cal.Rptr.2d 248] (*Fountain Valley*), judicial oversight affords significant protection against overreaching by such boards.

In *Fountain Valley*, a homeowners association, threatening litigation against an elderly homeowner with Hodgkin's disease, gained access to the interior of his residence and demanded he remove a number of personal items, including books and papers not constituting "standard reading material," claiming the items posed a fire hazard. (*Fountain Valley*, *supra*, 67 Cal.App.4th at p. 748.) The homeowner settled the original complaint (*id.* at p. 746), but cross-complained for violation of privacy, trespass, negligence and breach of contract (*id.* at p. 748). The jury returned a verdict in his favor, finding specifically that the association had acted unreasonably. (*Id.* at p. 749.)

Putting aside the question whether the jury, rather than the court, should have determined the ultimate question of the reasonableness *vel non* of the association's actions, the Court of Appeal held that, in light of the operative facts found by the jury, it was "virtually impossible" to say the association had acted reasonably. (*Fountain Valley*, *supra*, 67 Cal.App.4th at p. 754.) The city fire department had found no fire hazard, and the association "did not have a good faith, albeit mistaken, belief in that danger." (*Ibid.*) In the absence of such good faith belief, the court determined the jury's verdict must stand (*id.* at p. 756), thus impliedly finding no basis for judicial deference to the association's decision.

Plaintiff suggests that our previous pronouncements establish that when, as here, a community association is charged generally with maintaining the common areas, any member of the association may obtain judicial review of the reasonableness of its choice of means for doing so. To the contrary, in *Nahrstedt* we emphasized that "anyone who buys a unit in a common interest development with knowledge of its owners association's discretionary power accepts 'the risk that the power may be used in a way that benefits the commonality but harms the individual.' " (*Nahrstedt*, *supra*, 8 Cal.4th at p. 374, quoting Natelson, *Consent, Coercion, and "Reasonableness" in Private* ***270** *Law: The Special Case of the Property Owners Association*, *supra*, 51 Ohio State L.J. at p. 67.) [10]

10 In this connection we note that, insofar as the record discloses, plaintiff is the only condominium owner who has challenged the Association's decision not to fumigate her building. To permit one owner to impose her will on all others and in contravention of the governing board's good faith decision would turn the principle of benefit to " 'the commonality but harm[to] the individual' " (*Nahrstedt*, *supra*, 8 Cal.4th at p. 374) on its head.

Nor did we in *Nahrstedt* impose on community associations strict liability for the consequences of their ordinary discretionary economic decisions. As the Association points out, unlike the categorical ban on pets at issue in *Nahrstedt*—which arguably is either valid or not—the Declaration here, in assigning the Association a duty to maintain and repair the common areas, does not specify how the Association is to act, just that it should. Neither the Declaration nor Civil Code section 1364 reasonably can be construed to mandate any particular mode of termite treatment.

Still less do the governing provisions require that the Association render the Development constantly or absolutely

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termite-free. Plainly, we must reject any per se rule "requiring a condominium association and its individual members to indemnify any individual homeowner for any reduction in value to an individual unit caused by damage.... Under this theory the association and individual members would not only have the duty to repair as required by the CC&Rs, but the responsibility to reimburse an individual homeowner for the diminution in value of such unit regardless if the repairs had been made or the success of such repairs." (*Kaye v. Mount La Jolla Homeowners Assn.* (1988) 204 Cal.App.3d 1476, 1487 [252 Cal.Rptr. 67] [disapproving cause of action for lateral and subjacent support based on association's failure, despite efforts, to remedy subsidence problem].)

The formulation we have articulated affords homeowners, community associations, courts and advocates a clear standard for judicial review of discretionary economic decisions by community association boards, mandating a degree of deference to the latter's business judgments sufficient to discourage meritless litigation, yet at the same time without either eviscerating the long-established duty to guard against unreasonable risks to residents' personal safety owed by associations that "function as a landlord in maintaining the common areas" (*Frances T.*, *supra*, 42 Cal.3d at p. 499) or modifying the enforceability of a common interest development's CC&R's (Civ. Code, § 1354, subd. (a); *Nahrstedt*, *supra*, 8 Cal.4th at p. 374).

Common sense suggests that judicial deference in such cases as this is appropriate, in view of the relative competence, over that of courts, possessed by owners and directors of common interest developments to make ***271** the detailed and peculiar economic decisions necessary in the maintenance of those developments. A deferential standard will, by minimizing the likelihood of unproductive litigation over their governing associations' discretionary economic decisions, foster stability, certainty and predictability in the governance and management of common interest developments. Beneficial corollaries include enhancement of the incentives for essential voluntary owner participation in common interest development governance and conservation of scarce judicial resources.

Disposition

For the foregoing reasons, the judgment of the Court of Appeal is reversed.

George, C. J., Mosk, J., Kennard, J., Baxter, J., Chin, J., and Brown, J., concurred. ***272**

Footnotes

FN1 In 1985, the Legislature enacted the Davis-Stirling Common Interest Development Act (Davis-Stirling Act) as division 2, part 4, title 6 of the Civil Code, "Common Interest Developments" (Civ. Code, §§ 1350-1376; Stats. 1985, ch. 874, § 14, pp. 2774-2787), which encompasses community apartment projects, condominium projects, planned developments and stock cooperatives (Civ. Code, § 1351, subd. (c)). "A common interest development shall be managed by an association which may be incorporated or unincorporated. The association may be referred to as a community association." (Civ. Code, § 1363, subd. (a).)

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EX. RLA-5

KeyCite Yellow Flag - Negative Treatment
Disagreed With by Coley v. Eskaton, Cal.App. 3 Dist., June 11, 2020

50 Cal.App.4th 694, 57 Cal.Rptr.2d 798, 96 Cal. Daily Op. Serv. 8021, 96 Daily Journal D.A.R. 13,278

WOO CHUL LEE et al., Plaintiffs and Appellants,
v.
INTERINSURANCE EXCHANGE OF THE AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA et al., Defendants and Respondents.

No. B089335.
Court of Appeal, Second District, Division 3, California.
Oct 31, 1996.

SUMMARY

Subscribers and former subscribers of an interinsurance exchange (a reciprocal insurer) brought an action against the exchange, its board of governors, the exchange's parent organization, and the exchange's corporate attorney-in-fact, to compel defendants to deposit into subscriber savings accounts all surplus funds that exceeded legally required amounts. The trial court entered a judgment of dismissal after sustaining defendants' demurrer to plaintiffs' third amended complaint without leave to amend. (Superior Court of Los Angeles County, No. BC062630, Barnet M. Cooperman, Judge.)

The Court of Appeal affirmed. The court held that the trial court properly sustained defendants' demurrer. Decisions for managing surplus funds of an insurer are exercises of business judgment, and courts are unqualified to second-guess determinations made by an insurer as to the amount of funds necessary to assure adequate funds to cover catastrophic losses, or as to the optimal form in which the funds should be held. The business judgment rule applies to reciprocal insurers, just as it applies to other business concerns. The court also held that Ins. Code, § 1282, did not preclude the exchange's board from the protection of the business judgment rule. The court further held that plaintiffs failed to allege facts that established an exception to the business judgment rule. More was needed than conclusory allegations of improper motives and conflict of interest. The court held that the trial court properly sustained defendants' demurrer, since plaintiffs, in executing the subscriber's agreement, contractually agreed to grant the exchange's board discretion concerning the maintenance and use of surplus funds. Although plaintiffs asserted that they were fraudulently induced to enter into the agreement, based on misrepresentations regarding subscribers' personal liability for the exchange's debts, there were no such misrepresentations, nor did the agreement conceal material facts. (Opinion by Croskey, Acting P. J., with Kitching and Aldrich, JJ., concurring.) ***695**

HEADNOTES

Classified to California Digest of Official Reports

(1)
Appellate Review § 128--Scope of Review--Function of Appellate Court-- Rulings on Demurrers.
In matters coming to the appellate court on a judgment of dismissal following the trial court's order sustaining a defendant's demurrer without leave to amend, the appellate court assumes the truth of all properly pleaded facts, but not contentions, deductions, or conclusions of fact or law. Assuming the truth of the plaintiff's factual allegations, the appellate court then independently determines whether the plaintiff has alleged cognizable claims.

(2a, 2b)
Insurance Companies § 12--Actions Against Interinsurance Exchange--Subscribers' Action to Compel Exchange to Deposit Surplus Funds Into Subscriber Savings Accounts--Business Judgment Rule.
The trial court properly sustained the demurrer of an interinsurance exchange (a reciprocal insurer) to an action by subscribers of the exchange that sought to compel it to deposit into subscriber savings accounts all surplus funds that exceeded legally required amounts. Decisions for managing surplus funds of an insurer are exercises of business judgment, and courts are unqualified to second-guess determinations made by an insurer as to the amount of funds necessary to assure adequate funds to cover catastrophic losses, or as to the optimal form in which the funds should be held. Assuring availability of funds to cover losses is a rational business purpose for an insurer. Moreover, the business judgment rule applies to reciprocal insurers, just as it applies to other business concerns; the relationship between the directors of a reciprocal insurer and its subscribers is identical in all significant ways to the relationship between the directors of any business organization and the organization's investors or other nonmanaging participants. Where the reason is the same, the rule should be the same (Civ. Code, § 3511).

Moreover, management of the exchange's funds did not constitute an unlawful business practice (Bus. & Prof. Code, § 17200). Actions that are reasonable exercises of business judgment, that are not forbidden by law, and that fall within the discretion of the directors of a business under the business judgment rule cannot constitute unlawful business practices.

(3)
Corporations § 39--Officers and Agents--Liability--Business Judgment Rule:Words, Phrases, and Maxims--Business Judgment Rule.
The business judgment rule is a judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions. The rule is based on the ***696** premise that those to whom the management of a business organization has been entrusted, and not the courts, are best able to judge whether a particular act or transaction is helpful to the conduct of the organization's affairs or expedient for the attainment of its purposes. The rule establishes a presumption that directors' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions made by the directors in good faith and in the absence of a conflict of interest.

[See 9 **Witkin,** Summary of Cal. Law (9th ed. 1989) Corporations, § 110.]

(4)
Insurance Companies § 12--Actions Against Interinsurance Exchange-- Subscribers' Action to Compel Exchange to Deposit Surplus Funds Into Subscriber Savings Accounts--Business Judgment Rule--Applicability of Common Law Rule.
In an action by interinsurance exchange subscribers to compel the exchange (a reciprocal insurer) to deposit into subscriber savings accounts all surplus funds that exceeded legally required amounts, the trial court properly sustained defendants' demurrer. Ins. Code, § 1282, did not preclude the exchange's board from the protection of the business judgment rule. Although Ins. Code, § 1282, provides that certain provisions of the Insurance Code do not apply to reciprocal insurers, and while that section apparently precludes application of the statutory business judgment rule (Corp. Code, § 309) to reciprocal insurers, it does not preclude application of the common law business judgment rule. The common law business judgment rule has two components-one that immunizes directors from personal liability if they act in accordance with its requirements and another that insulates from court intervention those management decisions that are made by directors in good faith in what the directors believe is the organization's best interest. Only the first component is embodied in Corp. Code, § 309. Thus, even if Ins. Code, § 1282, makes Corp. Code, § 309, inapplicable to reciprocal insurers, the second component of the common law rule was unaffected, and it was the second component of the rule that applied to reciprocal insurers.

(5a, 5b)
Insurance Companies § 12--Actions Against Interinsurance Exchange--Subscribers' Action to Compel Exchange to Deposit Surplus Funds Into Subscriber Savings Accounts--Business Judgment Rule--Failure to Allege Exceptions to Rule.
In an action by interinsurance exchange subscribers to compel the exchange to deposit into subscriber savings accounts all surplus funds that exceeded legally ***697** required amounts, the trial court properly declined to interfere with the decisions of the exchange's board respecting management of surplus funds, where plaintiffs failed to allege facts that established an exception to the business judgment rule. More was needed to establish an exception to the business judgment rule than conclusory allegations of improper motives and conflict of interest. Nor was it sufficient to generally allege the failure to conduct an active investigation, in the absence of allegations of facts that reasonably called for such an investigation, or allegations of facts that would have been discovered by a reasonable investigation and would have been material to the questioned exercise of business judgment. While the interlocking boards of the exchange, its parent organization, and its attorney-in-fact may have created an opportunity for the parent organization to exercise undue influence over the exchange, that bare opportunity did not establish that fraud, bad faith, or gross overreaching had actually occurred. The parent organization's contingent future interest in the surplus remaining upon dissolution of the exchange was too remote and speculative to create a conflict of interest as to the disposition of present surplus in the absence of any showing or allegation the exchange was at all likely to be dissolved within the foreseeable future.

(6)
Corporations § 39--Officers and Agents--Liability--Business Judgment Rule--Presumption of Good Faith Decisions--Exceptions.
The business judgment rule sets up a presumption that directors' decisions are made in good faith and are based upon

sound and informed business judgment. An exception to this presumption exists in circumstances that inherently raise an inference of conflict of interest. Such circumstances include those in which directors, particularly inside directors, take defensive action against a takeover by another entity, which may be advantageous to the corporation, but threatening to existing corporate officers. Similarly, a conflict of interest is inferable where the directors of a corporation that is being taken over approve generous termination agreements-"golden parachutes"-for existing inside directors. In situations of this kind, directors may reasonably be allocated the burden of showing good faith and reasonable investigation. But in most cases, the presumption created by the business judgment rule can be rebutted only by affirmative allegations of facts which, if proven, would establish fraud, bad faith, overreaching, or an unreasonable failure to investigate material facts. Interference with the discretion of directors is not warranted in doubtful cases.

(7)
Insurance Companies § 12--Actions Against Interinsurance Exchange-- Subscribers' Challenge Concerning Entitlement to Surplus Funds Upon Dissolution of Exchange--Ripeness.
In an action ***698** by interinsurance exchange subscribers to compel the exchange to deposit into subscriber savings accounts all surplus funds that exceeded legally required amounts, the trial court properly found that the issue was not ripe for decision as to whether, upon dissolution of the exchange, the exchange's parent organization or the subscribers would be entitled to the exchange's assets. There had been no showing or any allegation of a likelihood that the exchange would be dissolved within the foreseeable future. Moreover, if the exchange was dissolved, the disposition of its assets would necessarily be overseen by the Commissioner of Insurance (Ins. Code, § 1070 et seq.), and persons claiming an interest in the assets would have the chance to challenge the parent organization's claims in the administrative proceedings.

(8)
Insurance Companies § 12--Actions Against Interinsurance Exchange-- Subscribers' Challenge Concerning Entitlement to Surplus Funds Upon Dissolution of Exchange--Subscribers' Agreement to Grant Exchange Discretion to Handle Surplus--Misrepresentations.
In an action by interinsurance exchange subscribers to compel the exchange to deposit into subscriber savings accounts all surplus funds that exceeded legally required amounts, the trial court properly sustained the exchange's demurrer, since the subscribers agreed in the subscriber's agreement to grant the exchange's board discretion concerning the maintenance and use of surplus. Although the subscribers asserted that they were fraudulently induced to enter into the agreement, based on misrepresentations regarding subscribers' personal liability for the exchange's debts, there were no such misrepresentations. The agreement stated, "No present or future subscriber of the Exchange shall be liable in excess of the amount of his or her premium for any portion of the debts or liabilities of the Exchange." This statement was true since the Commissioner of Insurance had granted the exchange a certificate of perpetual nonassessability under Ins. Code, § 1401.5. A subscriber's liability to a judgment creditor is limited to "such proportion as his interest may appear" (Ins. Code, § 1450). This limitation means that a subscriber is liable for the amount for which each subscriber could be assessed by the exchange's attorney-in-fact or the Commissioner of Insurance. For subscribers of exchanges that are exempt from assessments under Ins. Code, § 1401 or 1401.5, there is no liability beyond the subscriber's paid premium for any debts of the exchange, including judgment debts.

(9a, 9b)
Insurance Companies § 12--Actions Against Interinsurance Exchange--Subscribers' Challenge Concerning Entitlement to Surplus Funds Upon Dissolution of Exchange--Subscribers' ***699** Agreement to Grant Exchange Discretion to Handle Surplus--Concealment of Material Facts.
In an action by interinsurance exchange subscribers to compel the exchange to deposit into subscriber savings accounts all surplus funds that exceeded legally required amounts, the trial court properly sustained the exchange's demurrer, since the subscribers agreed in the subscriber's agreement to grant the exchange's board discretion concerning the maintenance and use of surplus, and the agreement did not conceal material facts. Disbursements and withdrawal rights are entirely at the discretion of the insurers' directors (Ins. Code, § 1420). Thus, the subscribers could have no reasonable expectation of such rights, and there was no basis for claiming they were fraudulently induced to waive them. Nor could plaintiffs legitimately claim rights based upon the representative's manual of the parent organization; the manual was an internal document, was not intended to be communicated to potential subscribers, and made no promises to them. Plaintiffs failed to establish either that the agreement was fraudulent, or that the exchange's management of surplus was an unlawful business practice under Bus. & Prof. Code, § 17200.

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(10)
Insurance Contracts and Coverage § 34--Avoidance of Policy-- Limitations Upon Enforcement.
There are two limitations upon the enforcement of insurance contracts, adhesion contracts generally, or provisions thereof. First, a contract or provision that does not fall within the reasonable expectations of the weaker or adhering party will not be enforced against him or her. Secondly, even if the contract or provision is consistent with the reasonable expectations of the parties, it will not be enforced if it is unduly oppressive or unconscionable.

(11)
Pleading § 67--Amendment--Sustaining Demurrer Without Leave to Amend-- Action Against Interinsurance Exchange-- Subscribers' Challenge Concerning Entitlement to Surplus Funds Upon Dissolution of Exchange.
In an action by interinsurance exchange subscribers to compel the exchange to deposit into subscriber savings accounts all surplus funds that exceeded legally required amounts, the trial court properly sustained the exchange's demurrer without leave to amend. An order sustaining a demurrer without leave to amend is unwarranted and constitutes an abuse of discretion if there is a reasonable possibility that the defect can be cured by amendment, but it is proper to sustain a demurrer without leave to amend if it is probable from the nature of the defects and previous unsuccessful attempts to plead that the plaintiff cannot state a cause of action. Plaintiffs had three opportunities to amend their complaint and were ***700** unable to successfully state a cause of action. Moreover, the defects in the complaints were not defects of form. Rather, the problem was that plaintiffs sought judicial intervention in management decisions as to the level and form of surplus funds of the exchange, even though such matters were within the discretion of the exchange's board and management, provided that those institutions acted in good faith. Since plaintiffs failed to allege facts that tended to establish an absence of good faith and reasonable inquiry, no cause of action existed by which the exchange's actions could be challenged.

COUNSEL
Keith E. Hall, Arter & Hadden, Edwin W. Duncan, Richard N. Ellner, Richard L. Fruin and William S. Davis for Plaintiffs and Appellants.
Morrison & Foerster, Seth M. Hufstedler and John Sobieski for Defendants and Respondents.
Greines, Martin, Stein & Richland, Robert A. Olson, Barry M. Wolf, Pillsbury, Madison & Sutro, Robert M. Westberg and Joseph A. Hearst as Amici Curiae on behalf of Defendants and Respondents.

CROSKEY, Acting P. J.

Three years ago, in *Barnes v. State Farm Mut. Auto. Ins. Co.* (1993) 16 Cal.App.4th 365 [20 Cal.Rptr.2d 87] (hereafter, *Barnes*), this court considered, among other issues, the question of whether a policyholder of a mutual insurance company can object to, or seek judicial assistance to control, the insurer's maintenance, management and disbursement of surplus funds. We answered that question in the negative. (*Id.* at pp. 378-380.)

The present action, brought by subscribers and former subscribers of the Interinsurance Exchange of the Automobile Club of Southern California (hereafter, the Exchange), raises essentially the same question. [1] However, unlike the defendant mutual insurer in *Barnes*, the Exchange is a reciprocal ***701** insurer, organized under chapter 3 (§ 1280 et seq., "Reciprocal Insurers,") of division 1, part 2 of the Insurance Code. [2]

1 Plaintiffs Woo Chul Lee and Rosemarie Flocken are current subscribers; plaintiff Jeung Sook Han, a subscriber for 10 years, withdrew in 1992. The lawsuit is designated in the complaint and in plaintiff-appellants' opening brief on appeal as a class action. However, it does not appear that a class has been certified.

2 All statutory references are to the Insurance Code unless otherwise indicated.

Reciprocal insurers, alternatively called interinsurance exchanges, differ from mutual insurers in some details of structure and legal status. However, as we shall explain, the differences between mutual and reciprocal insurers are not of a kind which justifies different rules respecting their insured's right to control business decisions of the insurer's governing board. We thus conclude that a reciprocal insurer, like a mutual insurer, is subject to the common law business judgment rule, which we relied upon in *Barnes*, and which protects the good faith business decisions of a business organization's directors, including decisions concerning the maintenance, management and disbursement of an insurer's surplus funds, from interference by the courts.

This action is against the Exchange; its board of governors and 11 of its members and former members (hereafter, collectively, the Board); the Automobile Club of Southern California (the Club); and ACSC Management Services, Inc. (ACSC). The plaintiffs appeal from a judgment of dismissal after the defendants' demurrer to the third amended complaint was sustained without leave to amend. We agree with the trial court's conclusion that plaintiffs failed to allege facts sufficient to constitute a cause of action against the defendants on any theory, because (1) the business judgment rule precludes judicial interference with the Board's good faith management of Exchange assets, (2) the plaintiffs have not alleged facts which establish a lack of good faith or a conflict of interest in the Board's management of Exchange assets, and (3) the plaintiffs, in executing subscriber's agreements with the Exchange, have contractually agreed to delegate control over Exchange assets to the Board, and such agreement is neither unconscionable nor unenforceable. We therefore affirm the judgment.

Factual and Procedural Background

1. *Introduction*

The Exchange is a reciprocal insurer, organized by the Club to provide insurance to Club members. The Club is a nonprofit corporation. In addition to the Exchange, the Club also organized, and is the parent organization of, ***702** codefendant ACSC. Section 1305 provides for a reciprocal insurer's insurance contracts to be executed by an attorney-in-fact, which may be a corporation. ACSC is the attorney-in-fact for the Exchange. [3]

3 Section 1305 provides that the contracts of insurance that are exchanged by subscribers of a reciprocal insurer "may be executed by an attorney-in-fact, agent or other representative duly authorized and acting for such subscribers under powers of attorney. Such authorized person is termed the attorney, and may be a corporation."

ACSC derives its management authority from powers of attorney which are included in the subscriber's agreements executed by subscribers when they purchase insurance from the Exchange. The subscriber's agreements also (1) delegate to the Board the subscribers' rights of supervision over the attorney-in-fact; (2) provide that the subscriber agrees to be bound by the bylaws and rules and regulations adopted by the Board; (3) warrant that subscribers shall not be liable in excess of their premiums for any debts or liabilities of the Exchange; and (4) provide that dividends or credits may, by resolution of the Board, be returned to subscribers.

The plaintiffs' theories of recovery have shifted somewhat over the course of this litigation. However, the lawsuit's primary aim throughout the litigation has been to alter the Exchange's practice of maintaining large amounts of unallocated surplus. The plaintiffs claim, in effect, that it is inherent in the concept of interinsurance that subscribers have a greater ownership interest in the funds of an exchange and greater rights of control over the funds than are recognized by the operating rules and practices of the Exchange. They also claim it would be in the best interests of the Exchange and its subscribers if surplus funds were maintained, not as unallocated surplus, but in subscriber savings accounts, from which subscribers may withdraw their accumulated funds upon withdrawal from membership in the Exchange.

2. *The Historical and Current Nature of Reciprocal Insurance*

The first interinsurance exchanges were formed in the 1880's by groups of merchants and manufacturers. These exchanges were a form of organization by which individuals, partnerships or corporations, which were engaged in a similar line of business, undertook to indemnify each other against certain kinds of losses by means of a mutual exchange of insurance contracts, usually through the medium of a common attorney-in-fact, who was appointed for that purpose by each of the underwriters, or "subscribers." (Reinmuth, The Regulation Of Reciprocal Insurance Exchanges (1967) ch. I, The Development and Classification of Reciprocal Exchanges, pp. 1-2 (hereafter, Reinmuth); see also ***703** *Delos v. Farmers Insurance Group* (1979) 93 Cal.App.3d 642, 652 [155 Cal.Rptr. 843].) In the early 20th century, the concept of reciprocal insurance spread to consumer lines. The Exchange, organized by the Club in 1912, was the first reciprocal to offer automobile insurance. (Reinmuth, *supra*, ch. I, p. 3.)

Under the historical form of interinsurance contracts, each subscriber became both an insured and an insurer, and had several, not joint, liability on all obligations of the exchange. (*Delos v. Farmers Insurance Group, Inc.*, *supra*, 93 Cal.App.3d at p. 652; 2 Couch on Insurance 2d (rev. ed. 1984) § 18.11, p. 613) (hereafter, Couch); Reinmuth, *supra*, ch. II, The Legal Status Of Reciprocal Exchanges, pp. 10-20.) Accordingly, reciprocal insurers originally had no stock and no capital. The subscribers' contingent liability stood in place of capital stock. (*Mitchell v. Pacific Greyhound*

Lines (1939) 33 Cal.App.2d 53, 59-60 [91 P.2d 176]; Couch, *supra*, § 18.11, pp. 614-615; Reinmuth, *supra*, ch. I, p. 2.) Originally, funds for the payment of losses and other debts were collected from subscribers as they occurred. However, this system resulted in frequent delays, hence subscribers later agreed to pay annual "premium deposits." (Reinmuth, *supra*, ch. I, p. 2.) These deposits remained to the credit of each subscriber in a separate account. (*Ibid.*; see also *Cal. State Auto. etc. Bureau v. Downey* (1950) 96 Cal.App.2d 876, 879-880 [216 P.2d 882].) Subscribers' pro rata shares of losses and expenses, including a commission to the attorney-in-fact, were deducted as they occurred. Any balance remaining in a subscriber's account at the end of the year reverted to the subscriber as his or her "savings" or "surplus" and was distributed to the subscriber or was available to the subscriber upon withdrawal from the exchange. (Reinmuth, *supra*, ch. I, p. 2, ch. II, pp. 30-31.) On the other hand, if the subscriber's share of losses and expenses was greater than his deposit, the subscriber could be assessed for a specified maximum amount beyond the deposit. (Couch, *supra*, §§ 18:26-18:30, pp. 633-641; Reinmuth, *supra*, ch. I, p. 2.) By approximately the 1960's, this amount, in a number of states, came to be specified by statute and was commonly limited to an amount equal to one additional premium deposit. (Reinmuth, *supra*, ch. II, pp. 17-19; see, e.g., §§ 1397, 1398.)

The original concept of reciprocal insurance contemplated the allocation of all surplus to the individual subscribers. (Reinmuth, *supra*, ch. II, pp. 30-31.) Over time, however, it became customary for reciprocals to accumulate unallocated surplus, which was not subject to withdrawal by departing subscribers, but was held perpetually in anticipation of catastrophic losses. (Reinmuth, *supra*, ch. II, pp. 32-37; ch. X, Conclusions and Policy Alternatives, pp. 186-187.) By maintaining substantial surpluses of this kind, many reciprocals eventually obtained statutory rights to issue nonassessable policies, ***704** under which subscribers had no contingent liability for claims, expenses or losses of the exchange. The practice of issuing nonassessable policies is now common both in California and elsewhere. (Reinmuth, *supra*, ch. II, p. 18.) This, together with other lesser differences between today's reciprocals and those of the past, has led one commentator to conclude that the only remaining substantive difference between a reciprocal exchange and a mutual company is that some exchanges are managed by corporate proprietary attorneys-in-fact. (Reinmuth, *supra*, ch. II, p. 39.)

The reciprocal form of insurance organization as it now exists in California has been characterized by both parties to this action as difficult to define. However, the trial court gave an apt definition of this kind of enterprise: "This is what it is: it's an interinsurance exchange defined by the Insurance Code." As defined by the Code, a California reciprocal insurer retains little similarity to the reciprocals of the 19th century. The defining statutory characteristics of an interinsurance exchange which are relevant to the present controversy are as follows.

First, section 1303 now provides that reciprocals are no longer truly reciprocal enterprises, i.e., it is no longer true that each subscriber is both an insurer and an insured. Rather, section 1303 provides that a reciprocal insurance company, or interinsurance exchange, "shall be deemed the insurer while each subscriber shall be deemed an insured."

As in historical times, a present-day interinsurance exchange is managed by an attorney-in-fact, who is appointed pursuant to powers-of-attorney executed by the exchange's subscribers. (§ 1305.) The attorney-in-fact may be a corporation (*ibid.*); the code does not require an exchange's attorney-in-fact to be a nonprofit corporation. An exchange's power of attorney and contracts may provide for the exercise of the subscribers' rights by a board. (§ 1307, subd. (d).) The board must be selected under rules adopted by the subscribers and is required to supervise the exchange's finances and operations to assure conformity with the subscriber's agreement and power of attorney. (§ 1308.) The board must be composed of subscribers or agents of subscribers; not more than one-third of the board members may be agents, employees or shareholders of the attorney-in-fact. (§ 1310.)

In accord with the modern trend toward accumulating unallocated reserves rather than distributing surplus to the subscribers, the directors of a modern ***705** California exchange may, but are not required to, return savings or credits to the subscribers. (§ 1420.) However, such distributions are permissible only if there is no impairment of the assets required to be maintained by sections 1370 and following. (*Ibid.*) [4]

4 Section 1370 provides for the forms of investment in which a reciprocal's surplus must be maintained. Section 1370.2 requires most reciprocal insurers to maintain minimum surplus governed by the same standards for minimum paid-in capital and surplus applicable to capital stock insurers. Section 1370.4

provides that reciprocal insurers established before October 1, 1961, were initially exempt from section 1370.2 and establishes a schedule of the dates after which such reciprocals became progressively subject to section 1370.2. Under the schedule in section 1370.4, all reciprocals were fully subject to section 1370.2 by 1976.

The minimum surplus requirements do not apply to all exchanges. An exchange formed by a local hospital district and its staff physicians under section 32000 et seq., of the Health and Safety Code is not subject to the above requirements if it meets alternative requirements. (§ 1284.)

In accord with the modern trend away from subscriber liability for a reciprocal's debts, section 1401 provides that, if an exchange maintains surpluses that are sufficiently beyond the legal minimum, it may obtain a certificate from the Insurance Commissioner authorizing the issuance of nonassessable policies. While such a certificate is in effect, subscribers have no contingent liability for claims, expenses or losses of the exchange. Under section 1401.5, an exchange which maintains surpluses of more than $3 million for five successive years may obtain a certificate of perpetual nonassessability. [5]

5 The Exchange obtained such a perpetual certificate in 1987.

If an exchange issues assessable policies, each subscriber is liable, beyond his or her annual premium, for assessments levied by the attorney-in-fact or the commissioner to satisfy claims against the exchange which exceed the exchange's surplus. (§§ 1391, 1392, 1398.) An exchange's power of attorney may limit the amount of assessments (§ 1397), but each subscriber's contingent liability must be at least equal to one additional premium (§ 1398). The personal liability of subscribers can be asserted by the attorney-in-fact or the commissioner. (§ 1391.) However, if a debtor of the exchange obtains a judgment against the exchange, and it remains unsatisfied for 30 days, such debtor may proceed directly against the subscribers for any amount for which each subscriber could be assessed by the attorney-in-fact or the commissioner. (§§ 1450, 1451.) An individual subscriber can avoid liability for assessments, even if the exchange issues assessable policies, if the subscriber, in addition to his or her annual premium, maintains a surplus deposit in an amount equal to the annual premium. (§§ 1399, 1400.) ***706**

3. *Procedural History of This Action*

This action began as a challenge to the composition of the Board, which the plaintiffs claimed was in violation of section 1310. [6] On August 5, 1992, plaintiffs' attorney wrote a letter to the defendants' attorney, in which counsel said he had recently discovered that the Exchange was being operated in violation of section 1310, in that, of eight Board members listed in the letter, all were also directors or officers of the Club, and three were also directors or officers of ACSC. Counsel demanded that the entire Board resign and that control of the Exchange be vested in the subscribers. Counsel also expressed the view, among others, that the Exchange's policyholders should be the ones to determine the amount of surplus retained by the Exchange, and that the amount then retained appeared excessive. Counsel threatened a lawsuit if an agreement concerning the matters raised by his letter were not reached by August 14..

6 Section 1310 provides that: "Such body shall be composed of subscribers or agents of subscribers. Not more than one-third of the members serving on such body shall be agents, employees or shareholders of the attorney."

On August 21, 1992, the plaintiffs filed their original complaint. The defendants generally demurred, and on October 30, before the date set for the hearing on the demurrer, the plaintiffs filed a first amended complaint, in which they alleged that more than one-third of the Board members were agents, employees or shareholders of the attorney-in-fact, ACSC, in violation of section 1310. The plaintiffs also alleged that the Board's unlawful composition violated Business and Professions Code section 17200. [7] Plaintiffs prayed that the defendants be enjoined from continuing to allow the Board to be so constituted. They further alleged that, because of the unlawful constitution of the Board, its actions were not protected by the business judgment rule, respecting directors' discretion over the management of a company's funds, and consequently, the subscribers were entitled to an accounting and distribution of improperly retained surplus.

7 Business and Professions Code section 17200 provides that any "unlawful," "unfair," or "fraudulent" business act or practice is deemed to be unfair competition. Business and Professions Code section 17203 authorizes injunctive relief to prevent such conduct and/or restitution of money

or property wrongfully obtained "by means of such unfair competition."

A demurrer to the first amended complaint was sustained with leave to amend, and plaintiffs thereafter filed a second amended complaint, in which it was alleged that (1) the Board was not selected by subscribers, in what the plaintiffs now claimed was a violation of section 1308 [8] ; (2) the subscribers were unlawfully deprived of control over the conduct of the Exchange; (3) ***707** the subscriber's agreement was a contract of adhesion; (4) the Board was a fiduciary of the subscribers; and (5) the Board had breached its fiduciary duties by failing to provide insurance at cost and by mismanaging and misappropriating surplus funds which rightfully belonged to the subscribers. The second amended complaint prayed for declaratory and injunctive relief, an accounting, a constructive trust over improperly held surplus and compensatory and punitive damages.

8 Section 1308 provides that: "The body exercising the subscribers' rights shall be selected under such rules as the subscribers adopt. It shall supervise the finances of the exchange and shall supervise its operations to such extent as to assure conformity with the subscriber's agreement and power of attorney."

After the filing of a demurrer to the second amended complaint, the action was referred to the Commissioner of Insurance pursuant to the "primary jurisdiction doctrine." (*Farmers Insurance Exchange v. Superior Court* (1992) 2 Cal.4th 377, 386-392 [6 Cal.Rptr.2d 487, 826 P.2d 730].) However, the commissioner refused to assume jurisdiction and also declined a request by the plaintiffs to intervene. [9] The trial court then sustained the defendants' demurrer to the second amended complaint with leave to amend and issued a detailed explanation of its ruling.

9 In an apparent effort to provide guidance to both the trial court and the parties, the commissioner did express the following comments: (1) The Exchange has no duty to limit its surplus funds to the statutory minimum surplus amount; (2) the Exchange has no duty to pay dividends; (3) Exchange subscribers do have ownership rights in surplus funds; (4) the Exchange has no duty to provide insurance coverage "at cost," but has a duty to exercise sound accounting principles in managing surplus; (5) the manner in which the Board is selected appears to violate section 1308 (see fn. 10, *post*); (6) the plaintiffs' challenge to the structure of the Board reflects inadequacies in the statutes governing reciprocals, which, in the commissioner's view, do not provide for sufficient accountability of reciprocal governing boards to subscribers; and (7) the question of how surplus funds of the Exchange should be disposed of upon any dissolution of the Exchange is not ripe for decision.

The court held, as a general matter, that the common law business judgment rule applies to the directors of a reciprocal insurer and precludes the courts from interfering with the management of such an insurer's surplus funds. The court further held that the plaintiffs: (1) did not allege that the delegation of authority and waiver of the right of control over the Exchange, which is included in the subscriber's agreement, is contrary to section 1308; (2) did not allege sufficient facts to render the subscriber's agreement unenforceable under the doctrine of unconscionability set out in *Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 Cal.App.3d 758 [259 Cal.Rptr. 789]; (3) cited no legal authority for their claim that a reciprocal insurer must provide insurance at cost; (4) did not plead facts showing that the Exchange maintained more than a reasonably necessary level of surplus; (5) did not allege facts which establish an exception to the business judgment rule; (6) cited no authority for their claim that, upon expiration of their policies, they have a legal right to repayment of sums paid by them and ***708** placed in surplus; (7) failed to state a presently cognizable claim of entitlement to a distribution of surplus upon dissolution of the Exchange; and (8) did not state facts sufficient to give the defendants notice of claimed misconduct by ACSC, for which expenses were allegedly incurred and then allegedly defrayed with funds properly belonging to the subscribers.

The plaintiffs' third amended complaint, the one before us, is substantially similar to the second. However, the plaintiffs have deleted their previous allegations that ACSC has committed misconduct for which the Exchange has incurred expenses and that the Board is illegally constituted. [10] The third amended complaint adds to the plaintiffs' previous allegations the further claims that: (1) an interinsurance exchange is similar to a joint venture, in which the general partners have fiduciary duties to the limited partners; and (2) the defendants have engaged in unlawful and fraudulent business practices, as defined in Business and Professions Code section 17200 by: (a) mismanaging Exchange funds; (b) failing to inform potential subscribers of all provisions

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of the Exchange's bylaws and rules and regulations; and (c) affirmatively representing in the subscriber's agreement that subscribers are not personally liable on judgments against the Exchange, a representation that plaintiffs claim is false.

10 For reasons not appearing in the record, the plaintiffs deleted the latter allegation despite the fact that the commissioner, in his letter to the trial court declining jurisdiction over the case, expressed the view that the manner of selecting the Exchange's Board appeared to violate section 1308. (See fns. 8 & 9, *ante*.) Inasmuch as the plaintiffs have apparently abandoned their claims respecting the selection and composition of the Board, and the trial court therefore did not take such claim into account, we shall give no further consideration to this issue.

The defendants again demurred, and this time the trial court sustained the demurrer without leave to amend. The trial court ruled essentially as it did on the previous demurrer, with additional findings that (1) there is no basis for the claim that an interinsurance exchange is a kind of joint venture, although an exchange's board and attorney-in-fact do have fiduciary duties to the subscribers; (2) subscribers of the Exchange are not liable beyond their premium deposits for judgments against the Exchange; and (3) neither the Exchange's failure to fully spell out its rules in the subscriber's agreement nor the rules themselves are unconscionable.

A judgment of dismissal was then entered, and the plaintiffs filed this timely appeal.

Contentions

The plaintiffs challenge the practices of the Exchange, the Board and ACSC in managing surplus funds of the Exchange; they challenge the ***709** practices of the Club in marketing subscriptions to the Exchange. They contend that (1) the Exchange, the Board and ACSC mismanage Exchange funds by maintaining funds as unallocated surplus, rather than in subscriber savings accounts; (2) the Club misinformed them, when they became subscribers, as to the structure and rules of the Exchange, and consequently the plaintiffs are not bound by the subscriber's agreement, by which they delegated to the Board the authority to manage Exchange assets; (3) the defendants' mismanagement of Exchange assets and misrepresentations when marketing Exchange subscriptions constitute unlawful and fraudulent business practices under Business and Professions Code section 17200.

The plaintiffs further contend the Exchange should be compelled to (1) maintain surplus funds in subscriber savings accounts, and (2) expunge from its rules and regulations certain rules which limit subscribers' rights respecting surplus funds. They contend the Club should be compelled to disclose all material facts about the Exchange to future subscribers and make restitution to the Exchange's present and former subscribers of funds that were unlawfully and fraudulently obtained. Finally, plaintiffs claim the trial court abused its discretion in denying leave to amend the complaint.

Discussion

1. *Standard of Review*

(1) As this matter comes to us on a judgment of dismissal following the trial court's order sustaining the defendants' demurrer without leave to amend, we assume the truth of all properly pleaded facts, but not contentions, deductions or conclusions of fact or law. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967 [9 Cal.Rptr.2d 92, 831 P.2d 317].) Assuming the truth of the plaintiffs' factual allegations, we then independently determine whether they have alleged cognizable claims. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr. 718, 703 P.2d 58].) As we shall explain, they have not.

2. *Issues Concerning the Ownership and Management of Surplus*

a. *Decisions as to the Manner of Maintaining Surplus Constitute Exercises of Business Judgment*

(2a) Plaintiffs make a point of distinguishing their claim—that the Exchange has a duty to maintain a substantial surplus in subscriber savings accounts—from claims like that made in *Barnes*, *supra*, 16 Cal.App.4th 365—that a corporation or other organization has a duty to pay a dividend or ***710** other distribution. In 1993, according to the plaintiffs, the Exchange had approximately $787 million in unallocated surplus funds, a surplus which is significantly greater than is required by law. The plaintiffs do not ask us to compel a distribution or otherwise dictate actions affecting the *level* of surplus. Instead, they ask us to make orders respecting the *form* in which surplus is held. Specifically, the plaintiffs pray for an order requiring the Exchange to deposit into subscriber savings accounts all surplus that exceeds the legally required amounts.

The plaintiffs argue that the use of subscriber savings accounts will bring about substantial savings in federal taxes for the Exchange, because, under section 832(f) of the Internal Revenue Code (26 U.S.C. § 832(f)), surplus funds deposited by a reciprocal insurer into such accounts is not taxable income to the insurer, and under section 172(a) and (b) of the Internal Revenue Code (26 U.S.C. § 172(a), (b)), up to three years of prior taxes can be recaptured by depositing into subscriber accounts funds which were previously maintained as general surplus. The plaintiffs also argue that the use of subscriber savings accounts will protect subscribers' legitimate interests in surplus funds. Finally, they argue that subscriber savings accounts are successfully used by other reciprocal insurers.

The defendants and amici curiae respond with several arguments tending to show that deposits of surplus into subscriber saving accounts would reduce the funds which the Exchange could rely upon in the event of catastrophic losses, and thus would not be advantageous to the Exchange or its subscribers. However, the defendants do not ask us to resolve the question of whether the use of subscriber savings accounts would be beneficial. To the contrary. The defendants and amici contend the resolution of that question depends upon how one weighs the potential tax advantages of subscriber savings accounts against the risks entailed if large amounts of surplus are held in a form which can be withdrawn by subscribers. The defendants contend, and the trial court so held, that such a weighing of benefits against costs and risks is a prototypical application of business judgment. The defendants thus argue, and the trial court also so held, that, as is the case with other forms of business organization, courts may not interfere with such decisions of a reciprocal insurer if the decision made by the directors can be attributed to a rational business purpose. The defendants rely primarily on our decision in *Barnes*, *supra*, 16 Cal.App.4th 365 for this proposition.

We can hardly disagree with the proposition that decisions as to strategies for managing the surplus funds of an insurer are quintessential exercises of business judgment. Likewise, there can be no doubt that the courts are ***711** unqualified to second-guess the determinations made by an insurer, based upon actuarial analysis, as to the amount of funds that are reasonably necessary to assure adequate funds to cover catastrophic losses, or as to the optimal form in which the funds should be held. (*Barnes*, *supra*, 16 Cal.App.4th at p. 378; *Gaillard v. Natomas Co.* (1989) 208 Cal.App.3d 1250, 1263 [256 Cal.Rptr. 702].) Finally, assuring the availability of adequate funds to cover losses is plainly a rational business purpose for an insurer. Thus, if the business judgment rule applies to reciprocal insurers, it would preclude plaintiffs' efforts to dictate the form in which the Exchange maintains its surplus. (*Barnes*, *supra*, 16 Cal.App.4th at p. 378.)

(3) The business judgment rule is " 'a judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions.' " (*Barnes*, *supra*, 16 Cal.App.4th at p. 378; *Gaillard v. Natomas Co.*, *supra*, 208 Cal.App.3d at p. 1263.) The rule is based on the premise that those to whom the management of a business organization has been entrusted, and not the courts, are best able to judge whether a particular act or transaction is helpful to the conduct of the organization's affairs or expedient for the attainment of its purposes. (*Barnes*, *supra*, 16 Cal.App.4th at p. 378; *Eldridge v. Tymshare, Inc.* (1986) 186 Cal.App.3d 767, 776 [230 Cal.Rptr. 815].) The rule establishes a presumption that directors' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions made by the directors in good faith and in the absence of a conflict of interest. (*Katz v. Chevron Corp.* (1994) 22 Cal.App.4th 1352, 1366 [27 Cal.Rptr.2d 681]; *Barnes*, *supra*, 16 Cal.App.4th at pp. 379-380.)

(2b) In *Barnes*, we concluded that the rule applies to mutual insurance companies and that it precluded Barnes's effort to compel the defendant insurance company to pay a dividend. (16 Cal.App.4th at p. 378.) We now must consider whether the rule applies to reciprocals.

b. *The Governing Board of a Reciprocal Insurer Is Entitled to the Protection of the Business Judgment Rule*

The trial court in this case recognized that the business judgment rule is most commonly applied to corporations, but nevertheless held that "practical experience and common sense suggest that the rule is appropriately extended to members of the Board of Governors of the Exchange." We agree.

The plaintiffs contend that, for two reasons, the business judgment rule does not and should not apply to an interinsurance exchange. First, they contend there are significant differences between reciprocal insurers on the ***712** one hand and corporate and mutual insurers on the other, which make it inappropriate to apply the business judgment rule to reciprocals. In particular, the plaintiffs argue that, unlike the policyholders of a mutual insurer, subscribers

to a reciprocal insurer execute subscriber's agreements and powers-of-attorney, which create contractual and fiduciary duties that are not subject to the business judgment rule. Secondly, they argue that section 1282, subdivision (a)(7) and (a)(20), preclude application to reciprocal insurers of the statutes governing corporations and mutual insurers, including the statutory business judgment rule stated in Corporations Code section 309.

The contention that the business judgment rule should not apply to reciprocal insurers because the boards and attorneys-in-fact of reciprocals are the agents of the subscribers and have fiduciary duties to them is without a legal basis. The existence of a fiduciary relationship between the board and the participants in an enterprise has never precluded application of the rule. For example, the courts have applied the business judgment rule to limited partnerships, although general partners are held to be agents and fiduciaries of the limited partners. (*Wallner v. Parry Professional Bldg., Ltd.* (1994) 22 Cal.App.4th 1446, 1453-1454 [27 Cal.Rptr.2d 834]; *Wyler v. Feuer* (1978) 85 Cal.App.3d 392, 402 [149 Cal.Rptr. 626].) Similarly, the directors and controlling shareholders of for-profit corporations and the directors of nonprofit corporations and mutual insurance companies are deemed to be agents and fiduciaries of the shareholders and members (*Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 114-115 [81 Cal.Rptr. 592, 460 P.2d 464]; *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 505, 507 [229 Cal.Rptr. 456, 723 P.2d 573, 59 A.L.R.4th 447]; *Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 31 [216 Cal.Rptr. 130, 702 P.2d 212]; *Barnes*, *supra*, 16 Cal.App.4th at p. 375), yet their management decisions are shielded by the business judgment rule. (*Frances T. v. Village Green Owners Assn.*, *supra*, 42 Cal.3d at pp. 507-509; *Katz v. Chevron Corp.*, *supra*, 22 Cal.App.4th at p. 1366; *Barnes*, *supra*, 16 Cal.App.4th at p. 379.)

Courts which have considered the relationship between a reciprocal insurer's board, its attorney-in-fact and its subscribers have concluded the relationship is analogous to the relationship between the directors, management and participants in other kinds of organizations. For example, at least one court has held that "[t]he position of the attorney-in-fact of a reciprocal insurance exchange, who manages the business of the exchange under powers of attorney of the subscribers ... is fiduciary in character *to the same extent as that of the management of an incorporated mutual insurance company* ...." (*Industrial Indem. Co. v. Golden State Co.* (1953) 117 Cal.App.2d 519, 533 [256 P.2d 677], italics added.) Another court has ***713** observed that a reciprocal insurer's "basic differences from [a mutual insurance company] are in mechanics of operation and in legal theory, rather than in substance." (*Cal. State Auto. etc. Bureau v. Downey* (1950) 96 Cal.App.2d 876, 880 [216 P.2d 882].)

If we look to the substance of the matter, it is clear that the relationship between the directors of a reciprocal insurer and its subscribers is identical in all significant ways to the relationship between the directors of any business organization and the organization's investors or other nonmanaging participants—*the directors are entrusted with the governance and management of the organization's affairs*. This being the case, the directors of a reciprocal exchange should be entitled to the protection of the business judgment rule to the same extent as the directors of other concerns. For reasons which have been fully discussed in numerous judicial authorities, California courts have consistently refused to interfere with directors' exercise of business judgment in making business decisions. (See, e.g., *Mutual Life Insurance v. City of Los Angeles* (1990) 50 Cal.3d 402, 417 [267 Cal.Rptr. 589, 787 P.2d 996] [declining to constrain insurers' business judgment as to how to maximize return on investment]; *Barnes*, *supra*, 16 Cal.App.4th at p. 378 [declining to interfere with insurer's business judgment as to level of surplus]; *Beehan v. Lido Isle Community Assn.* (1977) 70 Cal.App.3d 858, 865-867 [137 Cal.Rptr. 528] [refusing to compel homeowners association to pay attorney fees incurred by member in enforcing "CC & R's"]; *Findley v. Garrett* (1952) 109 Cal.App.2d 166, 174-175 [240 P.2d 421] [refusing to overturn directors' decision not to commence a lawsuit].)

Where the reason is the same, the rule should be the same. (Civ. Code, § 3511.) The boards of reciprocal insurers, based upon recommendations by the attorneys-in-fact, must make substantive financial decisions, such as setting and investing premiums and arriving at appropriate surplus levels, which are no different from those required of corporate and mutual insurers, and courts are no better qualified to second-guess the directors of reciprocal insurers than we are to second-guess the directors of other organizations as to similar decisions. Thus, for the same reasons that apply to other organizations, the courts may not interfere with the reasonable business decisions of reciprocal insurers. We therefore fully agree with the trial court's conclusion that practical experience and common sense require application of the business judgment rule to reciprocal insurers.

For the same reasons, we also reject the plaintiffs' claims that the defendants' management of Exchange funds constitutes an unlawful business practice. (Bus. & Prof. Code, § 17200.) Obviously, actions which are reasonable ***714** exercises of business judgment, are not forbidden by law, and fall within the discretion of the directors of a business under the business judgment rule cannot constitute unlawful business practices. (Cf. *Farmers' Ins. Exchange v. Superior Court*, *supra*, 2 Cal.4th at pp. 383-384.)

c. *Section 1282 Does Not Affect the Common Law Business Judgment Rule*

(4) The plaintiffs claim section 1282 precludes application of the business judgment rule to reciprocal insurers. We disagree. The most that can be said for plaintiffs' argument is that it suggests reciprocal insurers are not subject to the *statutory* business judgment rule. (Corp. Code, § 309.) Section 1282 provides that certain provisions of the Insurance Code do not apply to reciprocal insurers. Among these are section 1140 and all of chapter 4 of part I, division 2, which relates to general mutual insurers. (§ 1282, subd. (a)(7) & (a)(20).) Section 1140 provides that incorporated insurers are subject to general corporation law; the statutes in chapter 4 of part I of division 2 set forth the special characteristics of mutual insurance plans. While section 1282 would seem to preclude application of Corporations Code section 309 to reciprocal insurers, it by no means precludes application of the common law business judgment rule.

The common law business judgment rule has two components —one which immunizes directors from personal liability if they act in accordance with its requirements, and another which insulates from court intervention those management decisions which are made by directors in good faith in what the directors believe is the organization's best interest. (2 Marsh & Finkle, Marsh's Cal. Corporation Law (3d ed., 1996 supp.) § 11.3, pp. 796-797.) Only the first component is embodied in Corporations Code section 309. Thus, even if Insurance Code section 1282 makes Corporations Code section 309 inapplicable to reciprocals, the second component of the common law rule is unaffected. It was, of course, the second component of the rule which we applied to mutual insurers in *Barnes*, *supra*, 16 Cal.App.4th 365, 378-379, and which we here apply to reciprocals.

d. *The Plaintiffs Have Not Alleged Facts Which Establish an Exception to the Business Judgment Rule*

(5a) The plaintiffs contend that even if the business judgment rule applies to reciprocal insurers, they have alleged facts constituting exceptions to the rule. Specifically, they allege that (1) the Exchange and the Board did not make a reasonable inquiry concerning the advisability of maintaining surplus in subscriber savings accounts, and (2) in managing surplus funds, ***715** the Exchange has acted for improper motives and as a result of a conflict of interest. It is, of course, true that the business judgment rule does not shield actions taken without reasonable inquiry, with improper motives, or as a result of a conflict of interest. (*Gaillard v. Natomas Co.*, *supra*, 208 Cal.App.3d at pp. 1263-1264; *Eldridge v. Tymshare, Inc.*, *supra*, 186 Cal.App.3d at pp. 776-777.) However, the plaintiffs have not alleged sufficient facts to establish such exceptions in this case. More is needed to establish an exception to the rule than conclusory allegations of improper motives and conflict of interest. Neither is it sufficient to generally allege the failure to conduct an active investigation, in the absence of (1) allegations of facts which would reasonably call for such an investigation, or (2) allegations of facts which would have been discovered by a reasonable investigation and would have been material to the questioned exercise of business judgment.

(6) The business judgment rule sets up a *presumption* that directors' decisions are made in good faith and are based upon sound and informed business judgment. (*Barnes*, *supra*, 16 Cal.App.4th at p. 378; *Katz v. Chevron Corp.*, *supra*, 22 Cal.App.4th at pp. 1366-1367.) An exception to this presumption exists in circumstances which inherently raise an inference of conflict of interest. (*Id.* at p. 1367.) Such circumstances include those in which directors, particularly inside directors, take defensive action against a take-over by another entity, which may be advantageous to the corpor ation, but threatening to existing corporate officers. (*Ibid.*) Similarly, a conflict of interest is inferrable where the directors of a corporation which is being taken over approve generous termination agreements—"golden parachutes"—for existing inside directors. (*Gaillard v. Natomas Co.*, *supra*, 208 Cal.App.3d at pp. 1268-1271.) In situations of this kind, directors may reasonably be allocated the burden of showing good faith and reasonable investigation. (*Katz v. Chevron Corp.*, *supra*, 22 Cal.App.4th at p. 1367; cf. *Gaillard v. Natomas Co.*, *supra*, 208 Cal.App.3d at p. 1271 [under circumstances raising an inference that corporate interests were not served, trier of fact could find that directors should have independently reviewed the terms of challenged "golden parachutes"].) But in most cases, the presumption created by the business judgment rule can be rebutted only

by affirmative allegations of facts which, if proven, would establish fraud, bad faith, overreaching or an unreasonable failure to investigate material facts. (*Eldridge v. Tymshare, Inc.*, *supra*, 186 Cal.App.3d at p. 776-777.) Interference with the discretion of directors is not warranted in doubtful cases. (*Beehan v. Lido Isle Community Assn.*, *supra*, 70 Cal.App.3d 858, 865.)

(5b) The plaintiffs do not claim that the defendants failed to ascertain that federal tax savings could result from depositing surplus funds in subscriber savings accounts. The true thrust of their argument is that the ***716** defendants have refused to avail the Exchange of such savings. In effect, the argument is that the defendants' inquiry into the use of subscriber saving accounts was not a reasonable inquiry because the defendants reached a conclusion with which the plaintiffs disagree. However, it is the essence of the business judgment rule that the conclusions of an entity's directors concerning business strategy will not be scrutinized by the courts absent allegations of facts tending to show that the conclusions were based upon inadequate information or were made in bad faith.

The plaintiffs contend bad faith and overreaching are established by the facts that (1) the Club, the Exchange and ACSC have interlocking boards, (2) the Club appoints the Exchange's Board, and (3) the Exchange makes certain payments to the Club. Plaintiffs contend that, through the interlocking boards and the Club's power to appoint the Exchange's Board, the Club is able to exert undue influence on the Exchange's Board, resulting in the Exchange's (1) having a conflict of interest between the Club and its subscribers, (2) operating for the benefit of the Club and adverse to the interests of the subscribers, and (3) paying allegedly "secret profits" to the Club.

Plaintiffs claim that two categories of secret profits are paid to the Club: (1) current distributions to the Club and ACSC and (2) a contingent future interest retained by the Club in Exchange assets upon dissolution of the Exchange. The challenged current distributions consist of the following: (1) ACSC is compensated for its services to the Exchange at the actual cost of the services plus 1 percent of annual earned premiums; (2) ACSC, a wholly owned subsidiary of the Club, pays dividends to the Club; and (3) the Club receives directly from the Exchange 1 percent of the net annual premium deposits, a payment which the plaintiffs allege has exceeded $48 million since 1989.

The Club's contingent future interest in Exchange assets arises from rules 24 through 27 of the Exchange's rules and regulations. Rule 24 authorizes, but does not require, the Board to declare dividends and return savings to subscribers upon expiration of their policies; rule 25 declares that subscribers have no entitlement to a repayment of any sums upon expiration of their policies; rule 26 provides that, upon dissolution of the Exchange, all of its assets remaining after the repayment of debts are to become the property of the Club; rule 27 provides that rule 26 shall operate to the same effect and purpose as if each subscriber made an individual assignment to the Club of his or her interest in Exchange upon its dissolution. The plaintiffs claim the above rules effect a forfeiture of subscriber rights in Exchange assets.

The plaintiffs allege that the Exchange's decision to forfeit subscriber rights in favor of the Club is motivated by a desire to perpetuate the current ***717** and future transfers of Exchange assets to the Club and ACSC, not by the defendants' avowed purpose of funding adequate reserves against contingencies. However, it is the very essence of the business judgment rule that, where a reasonable business purpose is asserted, the motives of directors will not be scrutinized, absent a basis for overcoming the presumption of good faith embodied by the business judgment rule. (*Katz v. Chevron Corp.*, *supra*, 22 Cal.App.4th at pp. 1366-1367.) Examples of such a basis include actions (1) which are inconsistent with the business purpose that is asserted (*Gaillard v. Natomas Co.*, *supra*, 208 Cal.App.3d at pp. 1269-1271 ["golden parachutes," which were challenged by the plaintiffs, encouraged officers of a taken-over corporation to leave the company, an effect inconsistent with the asserted corporate purpose of ensuring continuity of management]), (2) or which are so clearly against the interests of the affected organization that the challenged actions must have been the result of undue influence or a conflict of interest. (*Findley v. Garrett*, *supra*, 109 Cal.App.2d at p. 177.)

Here, the defendants assert they have determined it is prudent for the Exchange to maintain large unallocated surpluses in order to ensure that adequate funds will be available to cover the risks the Exchange insures. The plaintiffs have not alleged conduct which would establish that the defendants have acted for any other purpose. While the interlocking boards of the Club, the Exchange and ACSC may create an opportunity for the Club to exercise undue influence over the Exchange, that bare opportunity does not establish that fraud, bad faith or gross overreaching has actually occurred. Moreover, no facts are alleged which establish that the ongoing payments

to ACSC of the actual costs of its services plus 1 percent of annual earned premiums, and to the Club of an additional 1 percent of annual earned premiums, are either inconsistent with the asserted goal of maintaining adequate reserves or so clearly against the interests of the Exchange and its subscribers that the payments must be the result of undue influence or a conflict of interest. The Club's contingent future interest in the surplus remaining upon dissolution of the Exchange is simply too remote and speculative to create a conflict of interest as to the disposition of present surplus in the absence of any showing or allegation the Exchange is at all likely to be dissolved within the foreseeable future.

In sum, the plaintiffs have not alleged facts which establish an exception to the business judgment rule. The trial court thus properly declined to interfere with the decisions of the Board respecting the management of surplus funds of the Exchange.

e. *Issues Respecting the Disposition of Accumulated Surplus Upon Dissolution of the Exchange Are Not Ripe for Decision*

(7) Little discussion need be devoted to the plaintiffs' claim that the Exchange must be compelled to expunge from its rules and regulations rules ***718** 26 and 27, which assign to the Club a contingent future interest in Exchange assets in the event of its dissolution. As we have observed above, there has been no showing nor any allegation of a likelihood that the Exchange will be dissolved within the foreseeable future. Moreover, if the Exchange is dissolved, the disposition of its assets will necessarily be overseen by the commissioner. (§ 1070 et seq.) Persons claiming an interest in the assets will have the chance to challenge the Club's claims in the administrative proceedings. Under these circumstances, the trial court correctly held that the issue of whether the Club or the subscribers are entitled to Exchange assets upon dissolution is not now ripe for decision.

3. *Issues Concerning the Marketing of Subscriptions*

a. *Introduction*

(8) The business judgment rule was not the sole basis for the court's determination not to interfere with the Exchange's management of its surplus. The court also observed that Exchange subscribers agreed in the subscriber's agreement to grant the Board discretion concerning the maintenance and use of surplus, and they are bound by that agreement.

The plaintiffs claim they are not bound by limitations in the subscriber's agreement upon their claimed rights respecting surplus funds, because they were fraudulently induced to enter into the agreement. The plaintiffs contend the subscriber's agreement affirmatively and falsely represents to potential subscribers that subscribers have no personal liability for losses and debts of the Exchange, although sections 1450, 1451 and 1453 provide that a judgment creditor of a reciprocal insurance company can proceed directly against the subscribers if the judgment remains unsatisfied after 30 days. They also contend the subscriber's agreement fails to disclose the material facts that (1) an exchange's subscribers have inherent rights in the exchange's assets; (2) the representative's manual, which is provided to sales personnel of the Club, states that the Exchange is "organized as a not-for-profit reciprocal insurer" and that premium deposits which are not used to assure the adequacy of reserves against contingencies "are returned to subscribers as policyholder's dividends"; and (3) the ownership and distribution rights which subscribers have under general law and the Club's internal operating rules are limited by the rules and regulations of the Exchange. They contend the subscriber's agreement is an insurance contract of adhesion, requiring that any limitations upon subscriber rights must be plain and conspicuous, or will be denied enforcement. They cite *Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 808 [180 Cal.Rptr. 628, 640 P.2d 764]; *Ponder v. Blue Cross of Southern California* (1983) 145 Cal.App.3d 709, 719 [***719** 193 Cal.Rptr. 632]; and *Westrick v. State Farm Ins.* (1982) 137 Cal.App.3d 685, 692 [187 Cal.Rptr. 214] for this proposition.

The plaintiffs also contend that, by making the foregoing misrepresentations and failing to fully inform potential subscribers of the rules and regulations which govern the Exchange and the subscriber rights which are limited by the rules, the defendants have fraudulently induced subscribers to execute the subscriber's agreement, and therein have engaged in a fraudulent business practice within the meaning of Business and Professions Code section 17200.[11] The plaintiffs contend the defendants must make restitution to the Exchange's subscribers for all funds obtained through the misrepresentations and nondisclosures complained of.

11 We have recently held that an insured can maintain an action under section 17200 and following for acts by an insurer amounting to fraud. (*State Farm Fire Casualty Co. v. Superior Court* (1996)

45 Cal.App.4th 1093, 1110-1111 [53 Cal.Rptr.2d 229].)

There is no merit in the above claims. As we shall explain, all material representations in the subscriber's agreement are true, and no material facts are concealed.

b. *The Subscriber's Agreement Contains No Misrepresentations*

It is simply not true that the subscriber's agreement includes misrepresentations regarding subscribers' personal liability for the Exchange's debts. The truth is that, just as the subscriber's agreement states, "No present or future subscriber of the Exchange shall be liable in excess of the amount of his or her premium for any portion of the debts or liabilities of the Exchange." This is so, because, in 1987, the commissioner granted the Exchange a certificate of perpetual nonassessability pursuant to section 1401.5.

The plaintiffs insist that a certificate under section 1401.5 eliminates only a subscriber's liability for assessments by an exchange's attorney-in-fact or the commissioner; they contend the certificate has no effect upon subscribers' contingent liability to unpaid judgment creditors of an exchange. However, a fair reading of the statutes governing assessments (§ 1390 et seq.) and those governing lawsuits against reciprocal insurers (§ 1450 et seq.) demonstrates that this contention is not correct.

In the absence of a certificate of nonassessability, the subscribers of a reciprocal insurer are liable for "all liabilities" of the exchange, including claims, debts and any deficiency in required surplus. (§§ 1391-1392.) Subscriber liability is subject to certain limits which are stated in the statutes and other limits which may be stated in an exchange's power of attorney. ***720** (§§ 1397-1400.) Whenever the assets of an exchange are insufficient to meet *all* of its liabilities of every kind and maintain the required surplus, an assessment must be made by the attorney-in-fact or by the commissioner. (§ 1391.) Subscribers are required to pay their proportionate share of assessments, except as provided by statute. (§ 1392.)

Contrary to the plaintiffs' argument, nothing in sections 1391, 1392 or the statutes governing lawsuits against reciprocals suggests that liabilities to judgment creditors are not among the liabilities for which assessments must be made. It is quite correct that, if a judgment is obtained against an exchange, and it is not paid within 30 days either out of the exchange's surplus or through an assessment, the judgment creditor is entitled to proceed directly against the subscribers. (§ 1451.) However, a subscriber's liability to a judgment creditor is limited to "such proportion as his interest may appear." (§ 1450.) This limitation logically means that a subscriber is liable for the amount for which each subscriber could be assessed by the attorney-in-fact or the commissioner. For subscribers of exchanges which issue assessable policies, that amount is limited to an amount equal and in addition to one annual premium, or any greater amount which is provided in the exchange's power of attorney. (§§ 1397, 1398; cf. *Mitchell v. Pacific Greyhound Lines* (1939) 33 Cal.App.2d 53, 66-68 [91 P.2d 176] [Upon liquidation of the California Highway Indemnity Exchange, subscribers' liability to creditors was limited to the amount agreed upon in the subscribers' agreement, namely an amount in addition and equal to each subscriber's annual premium].)[12] For subscribers of exchanges that are exempt from assessments under section 1401 or 1401.5, there is *no liability* beyond the ***721** subscriber's paid premium for any debts of the exchange, including judgment debts.

12 *Mitchell* is the only case of which we are aware, which considers the manner in which subscriber liability may be enforced by judgment creditors of an exchange. The defendants, who were subscribers of the exchange, contended that any personal liability which they might have to the exchange's creditors *must* be enforced by actions brought by the creditors directly against each subscriber, and could not be enforced through an assessment. (33 Cal.App.2d at pp. 61, 64.) The Court of Appeal rejected this contention and ruled that, under the exchange's subscriber agreement, the then existing statutes governing reciprocals and the then existing liquidation statutes, subscriber liability to exchange creditors, like other obligations, was enforceable through an assessment. (*Id.* at pp. 64-65.) It is even more clear today than it was when *Mitchell* was decided that subscriber liability to an exchange's judgment creditors is one of the obligations covered by subscriber liability for assessments, and is not, as the plaintiffs contend, a distinct obligation unaffected by a certificate of nonassessability. The *Mitchell* court observed that the statute then governing subscribers' contingent liability gave exchanges "the right to limit 'the contingent liability for the payment of losses' but not for other expenses." (*Id.* at p. 60.) The present statutes

> are more inclusive. Section 1391 provides that assessments must be made when an exchange is not possessed of admitted assets sufficient to discharge "all liabilities" and maintain required surplus. Section 1397 allows an exchange to limit liability for "assessments *under this article* [i.e.. article 6 (§§ 1391-1400.5) of chapter 3 ("Reciprocal Insurers") of part 2 of division 1 of the Insurance Code)]...."

The Exchange has obtained a certificate of perpetual nonassessability under section 1401.5. The representation in subscriber agreements executed since 1987, that "no present or future subscriber of the Exchange shall be liable in excess of the amount of his or her premium for any portion of the debts or liabilities of the Exchange," is thus true. [13]

13 In their reply, plaintiffs assert that the existence of the Exchange's certificate under section 1401.5 *establishes* the *falsity* of the representation that subscribers are not personally liable for Exchange debts. They base this assertion upon language in section 1401.5, subdivision (b), which states that an exchange which obtains an order of perpetual nonassessability "shall no longer be subject to or entitled to the benefits of: subdivision (c) of Section 1307 ... and Article 6 (commencing with Section 1390) of this chapter." Article 6 provides for assessments; section 1307, subdivision (c) authorizes limits upon assessments. We disagree with the plaintiffs' reading of the provision in section 1401.5, subdivision (b), that article 6 and section 1307, subdivision (c), do not apply to a holder of a perpetual nonassessability certificate. That provision can only sensibly mean that an exchange whose subscribers have *no* personal liability for its debts will have no need to provide in its power of attorney for *limits* to such liability.

c. *The Subscriber's Agreement Does Not Conceal Material Facts*

(9a) The plaintiffs contend that, because the subscriber's agreement is an insurance contract of adhesion, any limitations upon subscriber rights must be plain and conspicuous, or such limitations will be denied enforcement. (See *Reserve Insurance Co. v. Pisciotta*, *supra*, 30 Cal.3d at p. 808; *Ponder v. Blue Cross of Southern California*, *supra*, 145 Cal.App.3d at p. 719; *Westrick v. State Farm Ins.*, *supra*, 137 Cal.App.3d at p. 692; see also *Shepard v. Cal. Life Ins. Co., Inc.* (1992) 5 Cal.App.4th 1067, 1077 [7 Cal.Rptr.2d 428].) Plaintiffs claim that the limitations which the subscriber's agreement places upon their rights of ownership and control of surplus are not plain and conspicuous, hence the subscriber's agreement is not binding upon them.

Initially, we note that the plaintiffs are relying upon principles stated in *Reserve Insurance*, *Ponder*, and related cases, which exist to protect an insured's reasonable expectations of *coverage.* The rights which plaintiffs assert here are of a different character, being more analogous to rights held by a shareholder in a corporation, and it is not clear that the principles stated in *Reserve Insurance* and *Ponder* should apply with the same force and effect to rights other than coverage. However, assuming arguendo that they do, we nevertheless are unable to conclude that the reasonable expectations of Exchange subscribers are frustrated by the matters complained of in this lawsuit. ***722**

(10) There are two limitations upon the enforcement of insurance contracts, adhesion contracts generally, or provisions thereof. First, a contract or provision which does not fall within the reasonable expectations of the weaker or adhering party will not be enforced against him or her. (*Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 669-670 [42 Cal.Rptr.2d 324, 897 P.2d 1]; *California Grocers Assn. v. Bank of America* (1994) 22 Cal.App.4th 205, 213 [27 Cal.Rptr.2d 396].) Secondly, even if the contract or provision is consistent with the reasonable expectations of the parties, it will not be enforced if it is unduly oppressive or unconscionable. (*California Grocers Assn. v. Bank of America*, *supra*, 22 Cal.App.4th at p. 213; *Dean Witter Reynolds, Inc. v. Superior Court*, *supra*, 211 Cal.App.3d at pp. 767-768.)

(9b) Here, we have already concluded that the challenged provisions of the subscriber's agreement are in accord with well-established principles of law under which the directors of an insurance concern have discretion in the management of surplus funds. It follows that, as the trial court found, the provisions are not unduly oppressive or unconscionable. However, we must consider whether they are within the reasonable expectations of the parties.

The plaintiffs claim that, as subscribers of the Exchange, they have reasonable expectations of distributions of surplus, either as dividends, withdrawal rights upon expiration of their policies, or an interest in Exchange assets upon its

dissolution. It is axiomatic that the reasonable expectations of the parties to a contract are defined in the first instance by the provisions of the contract. In this case, that would be the subscriber's agreement. However, the plaintiffs base their claims not upon the subscriber's agreement, but upon matters outside of it. Specifically, they base their claim upon (1) supposed obligations of reciprocal insurers in general, and (2) statements in the Club's representative's manual to the effect that the Exchange is organized as a not-for-profit reciprocal insurer, that premium deposits collected from subscribers are to be at the lowest level necessary to pay losses and expenses and to fund adequate reserves, and that deposits not used for these purposes are returned to subscribers as dividends.

The plaintiffs claim that the subscriber's agreement conceals from potential subscribers that (1) the subscribers of an interinsurance exchange have property interests in the exchange's surplus funds and (2) such property interests of Exchange subscribers are purportedly waived by provisions in the subscriber's agreement by which subscribers agree to give the Board discretion over the management of surplus. The plaintiffs further contend that the nondisclosures in the subscriber's agreement are exacerbated by the ***723** fact that the Exchange's rules and regulations are not provided to prospective subscribers except upon request, and the Club's sales personnel do not discuss them. Thus, unless a subscriber makes extraordinary efforts, he or she is kept unaware of ownership rights of subscribers in the Exchange's assets and is likewise kept unaware of rules 26 and 27 in the Exchanges rules and regulations, by which subscribers' ownership rights are allegedly forfeited. Finally, the plaintiffs contend that potential subscribers are misled and confused by the placement of the signature line on the form which serves both as the Exchange's application for insurance and as its subscriber's agreement. The plaintiffs complain that the text of the subscriber's agreement and the signature line appear on separate pages, with the result that many potential subscribers do not read the subscriber's agreement or even notice that they are executing such an agreement. The plaintiffs claim that, through the combined impacts of the material nondisclosures in the subscriber's agreement, the failure of Club personnel to inform potential subscribers of Exchange rules and regulations, and the misleading placement of the subscriber's agreement signature line, consumers are deceived into believing they are only purchasing insurance and never realize they are in truth becoming participants in an insurance enterprise in which they have an interest as owners as well as insureds.

The above contentions are without merit. First, the claims based upon general law are mistaken. As we have observed, the plaintiffs' claim that reciprocal insurers generally have an obligation to return surplus to their subscribers is based upon a misunderstanding of the nature of a California reciprocal insurer, as presently defined in the Insurance Code. Whatever may have been the case in the past, California reciprocal insurers of the present day have no obligation to disburse accumulated surplus to subscribers or to maintain it in a form which can be withdrawn by subscribers upon departure from the exchange. Under the Insurance Code, disbursements and withdrawal rights are entirely at the discretion of the insurers' directors. (§ 1420.) Where the plaintiffs have no withdrawal rights or rights to disbursements of Exchange surplus under general laws governing reciprocal insurers, they can have no reasonable expectation of such rights, and there is no basis for claiming they were fraudulently induced to waive them. Secondly, the plaintiffs cannot legitimately claim rights based upon the Club's representative's manual, which describes the Exchange's vision of itself as a not-for-profit enterprise and its aspirations to distribute to subscribers surplus that is not needed to maintain adequate reserves. The manual is an internal document, is not intended to be communicated to potential subscribers, and makes no promises to them.

In truth, the reasonable expectation of one who executes a subscriber's agreement with the Exchange is that he or she is purchasing insurance and ***724** *may*, in the discretion of the Board, receive dividends or other distributions. Plaintiffs do not complain that they have not obtained the coverage for which they bargained. [14] Instead, they contend that, in addition to the bargained-for coverage, they are entitled to the distributions which are plainly designated in the subscriber's agreement as discretionary. However, they allege no factual or legal basis for such entitlement.

14 Nor, as the trial court observed, do the plaintiffs complain that they are charged an unreasonable rate for their coverage.

In sum, under the law governing reciprocal insurance companies, all representations in the subscriber's agreement are truthful, and the plaintiffs' objectively reasonable expectations of insurance coverage based upon the agreement have been met. There is thus no basis for the plaintiffs' argument that they were fraudulently induced to execute the agreement and are therefore not bound by it. For the same reasons, the plaintiffs have not established either that the subscriber's agreement is fraudulent, or that the Exchange's

management of surplus is unlawful within the meaning of Business and Professions Code section 17200. The trial court thus correctly sustained the defendants' demurrers.

4. *Leave to Amend*

(11) Finally, the trial court properly sustained the defendants' demurrer without leave to amend. An order sustaining a demurrer without leave to amend is unwarranted and constitutes an abuse of discretion if there is a reasonable possibility that the defect can be cured by amendment (*Aubry v. Tri-City Hospital Dist.*, *supra*, 2 Cal.4th at p. 967), but it is proper to sustain a demurrer without leave to amend if it is probable from the nature of the defects and previous unsuccessful attempts to plead that plaintiff cannot state a cause of action. (*Krawitz v. Rusch* (1989) 209 Cal.App.3d 957, 967 [257 Cal.Rptr. 610].) Plaintiffs have had three opportunities to amend their complaint and have been unable to successfully state a cause of action against the defendants. Moreover, the defects in the complaints have not been defects of form. Rather, the problem is that plaintiffs seek judicial intervention in management decisions as to the level and form of surplus funds of the Exchange. Under well-established rules devised in enterprises to which the Exchange is sufficiently analogous, these matters lie within the discretion of the Board and management of the Exchange, where these institutions act in good faith. The plaintiffs having failed to allege facts which tend to establish an absence of good faith and reasonable inquiry, no cause of action exists by which the defendants' actions can be challenged. ***725**

Disposition

The judgment of dismissal is affirmed. Costs on appeal are awarded to the defendants.

Kitching, J., and Aldrich, J., concurred.

A petition for a rehearing was denied December 2, 1996, and appellants' petition for review by the Supreme Court was denied January 22, 1997. ***726**

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