

ARIF HYDER ALI

Contact Information Redacted

April 23, 2018

VIA E-MAIL

ICANN Board of Directors
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: ICANN's Response to DIDP Request No. 20180223-1

Dear Members of the ICANN Board:

We write on behalf of our client, Afilias Domains No. 3 Limited (“**Afilias**”), regarding ICANN’s 24 March 2018 response (the “**DIDP Response**”) to Afilias’ Request No. 20180223-1 (the “**DIDP Request**”) pursuant to ICANN’s Documentary Information Disclosure Policy (“**DIDP**”).¹ Afilias objects to the DIDP Response as detailed below.

However, in order to achieve an efficient and mutually acceptable resolution of this dispute, Afilias writes to offer a proposed solution.² In part, ICANN refuses to produce certain information pursuant to Afilias’ DIDP Request because ICANN deems such materials to be confidential. While Afilias has no means to verify ICANN’s position, in the interests of resolving this issue, Afilias will agree to limit disclosure of any such material identified by ICANN to its outside counsel for review. In addition, to further facilitate documentary disclosure, Afilias amends several of its document requests, as set forth in **Section 02** below, in response to the articulated concerns in ICANN’s DIDP Response.

¹ See DIDP Request 20180223-1 (23 Feb. 2018), <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-request-23feb18-en.pdf> (hereinafter, “DIDP Request”); see also Response to DIDP Request 20180223-1 (24 Mar. 2018), <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-response-24mar18-en.pdf> (hereinafter, “DIDP Response”).

² See ICANN Bylaws (22 Jul. 2017), Art. 4, <https://www.icann.org/resources/pages/governance/bylaws-en> (hereinafter, “ICANN Bylaws”).

01. The Proposed Confidentiality Agreement Governing Requests 01, 04, 06, and 09(a-c, e)

ICANN has asserted that several of Afilias' document requests—specifically Requests 01,³ 04,⁴ 06,⁵ and 09(a-c, e)⁶—seek documents that cannot be publically disclosed because they are subject to the DIDP's Nondisclosure Conditions.⁷ Afilias agrees to limiting the disclosure of any material produced by ICANN pursuant to these requests, and identified by ICANN as “highly confidential,” to Afilias' outside counsel. This agreement will protect the documents from public disclosure while permitting Afilias' attorneys to review documents relevant to Afilias' participation in the .WEB contention set.

Should ICANN find this proposal amenable, Afilias is willing to negotiate the specific terms of such a confidentiality agreement with ICANN's counsel in order to reach a speedy resolution of this matter.

02. The Amendments to Requests 01, 04, 05, 06(a-b), and 09(a) Pursuant to the DIDP Response

Afilias has further amended certain document requests—specifically Requests 01, 04, 05, 06(a-b), and 09(a)—in order to facilitate further documentary disclosure from ICANN. These amendments take into account ICANN's stated concerns regarding the scope and clarity of these requests, as articulated in the DIDP Response.⁸ In making these amendments, Afilias reserves its right to ask for additional information, should the materials produced by ICANN pursuant to these amended requests prove inadequate or insufficient.

³ Request 01 seeks “[a]ll documents received from Ruby Glen, NDC, and Verisign in response to ICANN's 16 September 2016 request for additional information.” DIDP Request, p. 3.

⁴ Request 04 seeks “[a]ll applications, and all documents submitted with the applications, for the rights to .WEB.” *Id.*

⁵ Request 06 seeks “[a]ll documents concerning any investigation or discussion related to: (a) the .WEB contention set, [and] (b) NDC's application for the .WEB gTLD, (c) Verisign's agreement with NDC to assign the rights to .WEB to Verisign, and (d) Verisign's involvement in the .WEB contention set, including all communications with NDC or Verisign.” *Id.*, p. 4.

⁶ Request 09 seeks “[a]ll documents relating to the Department of Justice, Antitrust Division's ('DOJ') investigation into Verisign becoming the registry operator for .WEB ('DOJ Investigation'), including: (a) document productions to the DOJ; (b) communications with the DOJ; (c) submissions to DOJ, including letters, presentations, interrogatory responses, or other submissions; ... and (e) internal communications relating to the investigation, including all discussions by ICANN Staff and the ICANN Board.” *Id.*

⁷ DIDP Response, pp. 5, 7-15.

⁸ *See id.* at pp. 8-9; Email to John Kane from Christine Willett (31 Mar. 2018).

02.01 Request 01: Documents Responsive to the 16 September 2016 Letter

The DIDP Response, and ICANN's subsequent actions, warrant an amendment to Request 01. The request seeks "[a]ll documents received from Ruby Glen, NDC, and Verisign in response to ICANN's 16 September 2016 request for additional information."⁹ In its DIDP Response, ICANN refused to disclose the documents received from Ruby Glen, LLC ("**Ruby Glen**"), Nu Dot Co LLC ("**NDC**"), and Verisign, Inc. ("**Verisign**") in response to ICANN's 16 September 2016 letter requesting information from the aforementioned parties.¹⁰ ICANN asserted that the documents are subject to the DIDP's Nondisclosure Conditions.¹¹

However, ICANN also committed itself to "continue to review potentially responsive materials and consult with relevant third parties, as needed, to determine if additional documentary information is appropriate for disclosure under the DIDP."¹² In accordance with this commitment, on 31 March 2018, ICANN requested permission from Afilias to disclose its response to the 16 September 2016 letter.¹³ ICANN's request indicated that it also asked Ruby Glen, NDC, and Verisign for permission to disclose their responses to the 16 September 2016 letter as well.¹⁴

Therefore, Afilias now requests the responses from Ruby Glen, NDC, and Verisign, indicating whether they consent to the public disclosure of their responses to ICANN's 16 September 2016 request for information. Afilias further reiterates its request for the prompt disclosure of the documents received from Ruby Glen, NDC, and Verisign related to the 16 September 2016 letter.¹⁵

⁹ DIDP Request, p. 3.

¹⁰ Letter to John Kane from Christine Willett (16 Sep. 2016).

¹¹ DIDP Response, p. 5.

¹² *Id.*

¹³ Email to John Kane from Christine Willett (31 Mar. 2018). Afilias has given ICANN permission to disclose its own response to the 16 September 2016 letter.

¹⁴ *Id.*

¹⁵ As stated below, Afilias reserves its rights to contest any decision regarding the disclosure of these documents pursuant to the DIDP once it receives ICANN's response to this letter.

02.02 Request 04: Documents Related to the .WEB Applications

Given ICANN's stated concerns regarding the disclosure of documents related to the .WEB applications, Afiliat is willing to further narrow Request 04, subject to its right to request additional information at a later date. The initial request sought "[a]ll applications, and all documents submitted with the applications, for the rights to .WEB."¹⁶ Afiliat's amended Request 04 narrows the scope of the request, and seeks only NDC's responses to Items 12 and 45 through 50 in its .WEB application, as well as any amendments, changes, revisions, supplements, or correspondence concerning those Items.

02.03 Request 05: Documents on the Importance of .WEB to Competition

Afiliat's Request 05 seeks "[a]ll documents discussing the importance of .WEB to bringing competition to the provision of registry services."¹⁷ Despite this straightforward language, ICANN asserts that Request 05 is "unclear," "overbroad," and "vague."¹⁸ To assist ICANN, the request seeks any documents, analyses, or studies that contain information regarding potential competition, substitution, and interchangeability between or among .WEB and .COM, .NET, or other gTLDs.

02.04 Request 06(a-b): Documents Related to the .WEB Investigation

Afiliat is willing to narrow Request 6(a-b), subject to Afiliat's right to request additional information at a later date.¹⁹ The initial request sought "[a]ll documents concerning any investigation or discussion related to: (a) the .WEB contention set, [and] (b) NDC's application for the .WEB gTLD."²⁰ The amended Request 6(a-b) now seeks the following documents:

1. all documents reflecting NDC's board structure and any changes thereto since NDC submitted its .WEB application on 13 June 2012;²¹

¹⁶ DIDP Request, p. 3.

¹⁷ *Id.*, p. 4.

¹⁸ DIDP Response, p. 8.

¹⁹ ICANN determined that "these requests are exceedingly overbroad and vague." *Id.*

²⁰ DIDP Request, p. 4. ICANN determined that "these requests are exceedingly overbroad and vague." *Id.*

²¹ See "New gTLD Application Submitted to ICANN by: NU DOT CO LLC," ICANN (13 June 2012), <https://gtdresult.icann.org/applicationstatus/applicationdetails/downloadapplication/1053?t:ac=1053>.

2. all documents concerning any investigation or discussion related to NDC's board structure and any changes thereto since NDC submitted its .WEB application on 13 June 2012;
3. documents sufficient to show the date on which ICANN first learned that Verisign was going to or had in fact funded NDC's bids for the .WEB gTLD at the 28-28 July 2016 auction; and
4. documents sufficient to show the date on which ICANN first learned that NDC did not intend to operate the .WEB registry itself, but rather intended to assign the rights it acquired related to .WEB to a third party.

02.05 Request 09(a): Documents related to the Department of Justice Investigation

Moreover, in its DIDP Response, ICANN stated that several documents responsive to Request 09(a)²² were “in the Requestor’s possession, custody, or control.”²³ In order to further ease any burden on ICANN in responding to Afilias’ document requests, Afilias amends Request 09(a) to exclude those documents that ICANN has reasonably identified as already being in Afilias’ possession.

Afilias further reserves all of its rights and remedies in all available fora whether within or outside of the United States of America.

Sincerely,



Arif Hyder Ali
Partner

²² Request 09(a) includes “[a]ll documents relating to the Department of Justice, Antitrust’s Division’s (‘DOJ’) investigation into Verisign becoming the registry operator for .WEB (‘DOJ Investigation’), including: (a) document productions to the DOJ.” DIDP Response, p. 11.

²³ *Id.*, pp. 11-12.