

INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTER FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LTD.,

Claimant,

and

INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS,

Respondent,

and

VERISIGN, INC. and NU DOTCO, LLC.

Amicus Curiae.

ICDR CASE NO: 01-18-0004-2702

AMICUS CURIAE BRIEF OF NU DOTCO, LLC

26 June 2020

HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY

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I. INTRODUCTION

1. In July 2016, *Amicus Nu Dotco LLC* (“NDC”) won the public ICANN auction for the .WEB generic top level domain (“gTLD”), outbidding six other applicants, including Claimant *Afilias Domains No. 3 Ltd.* (“Afilias”). Over four years later the public still has no access to .WEB and NDC remains unable to operate, assign, or otherwise make productive use of .WEB due to delays caused by serial accusations by Afilias and other disgruntled competitors—accusations that repeatedly have been found to be factually inaccurate and legally meritless—designed to undo the legitimate results of the ICANN auction and, in the case of Afilias here, to obtain .WEB for itself.

2. Afilias’ contentions in this IRP are misplaced for many reasons, including the following: First, under ICANN’s Bylaws, the Panel’s jurisdiction is limited to determining whether ICANN violated those Bylaws when it decided to defer a decision on Afilias’ objections to the .WEB auction award in 2016. In no event is the Panel authorized to strip NDC of .WEB or to award that gTLD to Afilias.

3. Second, in the event the Panel does consider the merits of Afilias’ claims, the facts demonstrate that NDC did not violate any ICANN rules in connection with its .WEB application. Among other things, NDC retains a present interest in that application and still could be the party that operates .WEB, thus belying Afilias’ claims that NDC improperly assigned any rights in that application to VeriSign, Inc. (“Verisign”). Third, it is not NDC, but Afilias that comes to the Panel with unclean hands, having engaged in a purposeful violation of the auction rules for the .WEB TLD.

4. Accordingly, for the reasons discussed in more detail below, as well as in the submissions by ICANN and Verisign, Afilias is not entitled to any of the relief it seeks in its Amended Petition in this IRP.

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Amici, Parties, and ICANN's New gTLD Process

5. NDC was founded in March 2012 by Jose Rasco, Juan Diego Calle, and Nicolai Bezsonoff for the purpose of participating in ICANN's New gTLD Program. Messrs. Rasco, Calle, and Bezsonoff were experienced members of the TLD industry, having previously co-founded, in 2009, a company that acquired, developed, and operated the .CO TLD.¹ Under their leadership, .CO, the ccTLD for the country of Colombia, was successfully repositioned as a generic TLD that operated on par with top-echelon gTLDs.²

6. Verisign is a global provider of domain name registry services and Internet infrastructure. Verisign is the registry operator and/or backend registry services provider for multiple TLDs, including .COM and .NET.³ For more than 21 years, Verisign has maintained 100% operational accuracy and stability for .COM and .NET, including managing and protecting the Domain Name System ("DNS") infrastructure for over 160.7 million domain names,⁴ and processing more than 192 billion queries daily.⁵

7. Afilias is a wholly-owned subsidiary of Afilias plc, the registry operator of .INFO, .MOBI, and .PRO, among others.⁶ Afilias plc claims to be the world's second largest registry operator, with over 20 million domain name registrations under management,⁷ and evidently created Afilias for the sole purpose of applying for the rights to operate the .WEB gTLD.

¹ Witness Statement of Jose I. Rasco ("Rasco Stmt.") (June 1, 2020), ¶ 3.

² *Id.*

³ Verisign, Annual Report 2019 at 1, 4, available at <https://investor.verisign.com/static-files/523a313a-05d5-4a01-9035-b1fe3bd3e585>.

⁴ The Domain Name Industry Brief, Vol. 17, Issue 2, May 2020 at 2, available at <https://www.verisign.com/assets/domain-name-report-Q12020.pdf>.

⁵ Verisign, Annual Report 2019 at 1, 4, available at <https://investor.verisign.com/static-files/523a313a-05d5-4a01-9035-b1fe3bd3e585>.

⁶ ICANN RE-16 (Afilias, "About Us," available at <https://afilias.info/about-us>).

⁷ *Id.*

8. ICANN is a private, non-governmental California non-profit public benefit corporation that oversees the technical coordination of the Internet’s DNS. The DNS’s essential function is to convert easily remembered domain names, such as “uscourts.gov” or “verisign.com,” into numeric Internet Protocol (“IP”) addresses understood by computers. ICANN was created in 1998 as part of a United States government plan to withdraw from direct administration of the DNS and instead have the technical infrastructure of the DNS administered by a non-governmental entity.⁸ That plan did not include any transfer of regulatory authority to ICANN, including the government’s authority to act as a competition regulator.⁹ ICANN explicitly was not created to supplant existing law or to set up a new system of Internet governance. ICANN’s purpose was and is to handle the technical management of Internet names and addresses.¹⁰

9. ICANN’s Bylaws are clear that ICANN “shall not act outside its Mission,” which is limited to ensuring “the stable and secure operation of the Internet’s unique identifier systems.”¹¹ ICANN’s Bylaws further state that “[f]or the avoidance of doubt, ICANN does not hold any governmentally recognized regulatory authority.”¹²

10. ICANN’s relationship with the U.S. government, which began in 1999 with a limited transfer of responsibilities related to the technical management of the DNS pursuant to a

⁸ Witness Statement of J. Beckwith Burr (“Burr Stmt.”) (May 31, 2019), ¶ 5.

⁹ *Id.*, ¶ 25; Kneuer Report (May 29, 2020), ¶ 4; Kneuer Ex. S (Department of Commerce (“DOC”), Statement of Policy on the Management of Internet Names and Addresses (the “White Paper”), 63 Fed. Reg. 31741 (June 5, 1998) at 6, available at <https://www.ntia.doc.gov/federal-register-notice/1998/statement-policy-management-internet-names-and-addresses>); Kneuer Ex. R (National Telecommunications and Information Administration (“NTIA”), Improvement of Technical Management of Internet Names and Addresses (the “Green Paper”), 63 Fed. Reg. 8826 (proposed Feb. 20, 1998), available at <https://www.ntia.doc.gov/files/ntia/publications/022098fedreg.txt>).

¹⁰ Kneuer Ex. B (Memorandum of Understanding (“MOU”), DOC-ICANN (Nov. 25, 1998), § II.B, available at <https://www.ntia.doc.gov/page/1998/memorandum-understanding-between-us-department-commerce-and-internet-corporation-assigned->); Kneuer Ex. S (“White Paper,” *supra* note 9, at 6) (ICANN was “not intended to displace other legal regimes (international law, competition law, tax law and principles of international taxation, intellectual property law, etc.)).

¹¹ Burr Stmt. (May 31, 2019), ¶ 25; Afiliis C-1 (Bylaws for ICANN (“Bylaws”), § 1.1(a), available at <https://www.icann.org/resources/pages/governance/bylaws-en>).

¹² Afiliis C-1 (Bylaws, *supra* note 11, § 1.1(c) (emphasis added)). In this brief, all emphasis is added unless otherwise noted.

“Memorandum of Understandings”¹³ between ICANN and the U.S. government, terminated in January 2017.¹⁴ There currently is no direct link, contractual or otherwise, between ICANN and the U.S. government, and ICANN operates solely as a private, not-for-profit entity organized under California law. As a consequence, ICANN’s only authority over the registries, registrars, and other entities that participate in the DNS derives from contracts between ICANN and those entities.

11. Those contracts, in particular ICANN’s .COM registry agreement with Verisign, confirm ICANN’s lack of legal or regulatory authority to police competition. Verisign originally operated the .COM registry pursuant to the terms of a 1993 Cooperative Agreement with the U.S. Department of Commerce (“DOC”).¹⁵ When Verisign subsequently entered into a registry agreement with ICANN in 1999, the Cooperative Agreement between Verisign and the DOC remained in effect and continued to govern matters relating to competition.¹⁶ The same is true today, as is reflected in the provision of the .COM registry agreement requiring ICANN to refer any competition issues relating to a proposed registry service by Verisign to an appropriate competition authority.¹⁷ Following such referral, neither ICANN nor Verisign has any further responsibility to the other with respect to competition issues.¹⁸ ICANN’s only remedy for competition issues relating to a registry service is referral to a competition authority. Similar provisions requiring referral of competition issues to a competent competition authority are now part of the base registry agreement ICANN uses for all new gTLDs.

¹³ Kneuer Ex. B (MOU, *supra* note 10).

¹⁴ Kneuer Ex. C (Letter from Lawrence E. Strickling, Assistant Secretary for Communications and Information, Department of Commerce, to Stephen D. Crocker, Chairman of the Board of Directors, ICANN (Jan. 6, 2017), available at <https://www.icann.org/en/system/files/correspondence/strickling-to-crocker-06jan17-en.pdf>).

¹⁵ Kneuer Ex. D (Cooperative Agreement, NCR 92-18742 NSF-NSI, (Jan. 1, 1993), available at <https://archive.icann.org/en/nsi/coopagmt-01jan93.htm>).

¹⁶ Kneuer Ex. F (Registry Agreement (1999), ICANN-NSI (Nov. 10, 1999), § 16, available at <https://archive.icann.org/en/nsi/nsi-registry-agreement-04nov99.htm>).

¹⁷ Kneuer Ex. J (.com Registry Agreement (2006) ICANN-VeriSign, (Mar. 1, 2006, amended Sept. 22, 2010), § 3.1(d)(iv)(E)), available at <https://www.icann.org/resources/unthemed-pages/registry-agmt-com-2010-09-22-en>).

¹⁸ *Id.*

12. While ICANN is not a regulator with authority to police competition, it does take steps consistent with its limited Mission to “enable competition and open entry in Internet related markets.”¹⁹ One of the primary ways in which ICANN fulfills this mandate is by facilitating open entry of competition into Internet-related markets.

1. The New gTLD Program and Application

13. In 2011, ICANN announced an initiative to introduce new gTLDs to enhance competition and consumer choice (the “New gTLD Program”).²⁰ In 2012, ICANN invited interested parties to apply to create and operate new gTLDs and received almost 2,000 applications, primarily from private, non-governmental entities—including some of the world’s largest companies—interested in acquiring the right to operate gTLDs for their own business purposes.²¹ As operators, successful applicants would be responsible for managing the assignment of names within the gTLD and maintaining the gTLD’s database of names and IP addresses.

14. In connection with the New gTLD Program, ICANN published the Applicant Guidebook (the “Applicant Guidebook” or “Guidebook”)²² and the Auction Rules for New gTLDs (“Auction Rules”),²³ which prescribe the criteria on which new gTLD applications are evaluated and the requirements for approval. The Guidebook was developed over a four year period and involved numerous public consultations, review periods, and opportunities for public comment on draft versions. ICANN adopted the operative Guidebook, which spans 338 pages, in June 2012.²⁴

¹⁹ Afiliat C-1 (Bylaws, *supra* note 11, § 1.2(a)).

²⁰ Zittrain Ex. JZ-45 (ICANN, *ICANN Board Rationales for the Approval of the Launch of the New gTLD Program* (June 20, 2011) at 27, available at <https://www.icann.org/en/system/files/bm/rationale-board-approval-new-gtld-program-launch-20jun11-en.pdf>).

²¹ ICANN’s Response to Amended IRP Request (May 31, 2019), ¶ 24; *see also* Verisign VRSN-3 (Screenshots From ICANN Website, About the Program, ICANN New gTLDs; Program Statistics (last accessed Dec. 11, 2018)).

²² Afiliat C-3 (*gTLD Applicant Guidebook* (“Guidebook”), available at <https://newgtlds.icann.org/en/applicants/agb>).

²³ Afiliat C-4 (ICANN, *Auction Rules for New gTLDs, Indirect Contentions Edition, Version 2015-02-24*, available at <https://newgtlds.icann.org/en/applicants/auctions>).

²⁴ Afiliat C-3 (Guidebook, *supra* note 22, at Preamble); Witness Statement of Christine Willett (“Willett Stmt.”) (May 31, 2019), ¶ 4.

15. The Guidebook vests ICANN with significant discretion over the New gTLD Program, including reserving for the ICANN Board “the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community.”²⁵ Likewise, it states that ICANN’s “decision to review, consider and approve an application to establish one or more gTLDs and to delegate new gTLDs after such approval is entirely at ICANN’s discretion.”²⁶ Further, it provides that ICANN has discretion to determine the appropriate remedy, if any, for any alleged violation of the Guidebook.²⁷

16. The Guidebook provides a step-by-step procedure for new gTLD applicants. Applicants are required to submit responses to a series of questions that primarily concern the applicant’s technical and financial ability to operate a new gTLD.²⁸ The Guidebook does not include any evaluation criteria based on competition concerns. The only reference to competition is in Module 1, Section 1.2.1, which provides that ICANN reserves the right to refer concerns regarding registrar-registry cross-ownership to an appropriate competition authority for review.²⁹

17. The new gTLD application form requests information regarding the “mission” and “purpose” envisioned by the applicant for the proposed new gTLD.³⁰ The application, however, makes clear that this information is “intended to inform the post-launch review of the New gTLD Program ... *This information is not used as part of the evaluation or scoring of the application*, except to the extent that the information may overlap with questions or evaluation areas that are scored.”³¹

²⁵ Afilias C-3 (Guidebook, *supra* note 22, at Module 5, § 5.1).

²⁶ *Id.* at Module 6, § 3.

²⁷ Afilias C-5 (ICANN, New gTLD Auctions Bidder Agreement (Apr. 3, 2014), ¶ 72, available at <https://newgtlds.icann.org/en/applicants/auctions>); *see also* ICANN’s Rejoinder Memorial (June 1, 2020), ¶ 23.

²⁸ Afilias C-3 (Guidebook, *supra* note 22, at Attachment to Module 2).

²⁹ *Id.* at Module 1, § 1.2.1.

³⁰ *Id.* at Question 18.

³¹ *Id.*

18. Applicants also are required to submit to a background check to determine if the applicant or its principals should be disqualified for reasons set forth in detail in the Guidebook, such as past criminal activity. With this sole exception however, the Guidebook does not include any automatic disqualifiers from participation in the New gTLD Program. Any entity that meets the qualification criteria may participate in that program. The Guidebook does not identify any specific entity that is prohibited from participating in the program, including Verisign. In fact, Verisign has participated in the New gTLD Program.³²

2. Third-Party Participation in the Application Process

19. An entire industry has built up around the new gTLD application process, with third-party companies providing applicants with services addressing every step in the process, including filling out the initial application, providing backend registry services, liaising with ICANN, and arranging financing for the gTLD—including for auctions.³³ Afilias itself has advertised its new gTLD services, stating “we’d be happy to help you with the application and technology needed for the next round” of gTLD applications.³⁴

3. Contention Set Resolution Under the Guidebook

20. In the event that there are multiple applicants for the same gTLD, the applications are placed in a string contention set (“Contention Set”)—because only one registry operator can

³² See <https://gtldresult.icann.org/applicationstatus/viewstatus> (Verisign TLD applications in the New gTLD Program).

³³ AC-63 (Kevin Murphy, Domain Incite, “You might be surprised how many new gTLDs have changed hands already” (July 1, 2015), available at <http://domainincite.com/18849-you-might-be-surprised-how-many-new-gtlds-have-changed-hands-already>); AC-64 (“Afilias Wants to Buy Your Failed gTLD,” (July 7, 2015), available at <http://domainincite.com/18898-afiliass-wants-to-buy-your-failed-gtld>); AC-56 (CentralNic, “A Different Take on New TLDs from the CEO of a Well Established Company With a Big Footprint in Both .Com AND New TLD Camps” (May–June 2012), available at <https://www.centralnic.com/company/news/2012/a-different-take-on-new-tlds-from-a-company-with-a-big-footprint-in-both-dotcom-and-new-tld-camps>); AC-55 (Valideus, “New gTLD Application Management,” available at <http://www.valideus.com/services/new-gtld-application-management>); AC-54 (Fairwinds Partners, “Services,” available at <https://www.fairwindspartners.com/services/>).

³⁴ AC-44 (Afilias, “New TLDs: Top Level Domain Registry Services,” available at <https://afiliass.info/global-registry-services/new-tlds>).

operate a gTLD consisting of the same letters—to be resolved through a public auction governed by ICANN’s Auction Rules or by private resolution among members of the Contention Set. The Guidebook provides that a Contention Set will be resolved by public auction absent agreement to the contrary by all members of the Contention Set.³⁵ In an ICANN public auction, the auction proceeds are set aside in a special fund for the benefit of the Internet community.³⁶

21. Because ICANN does not specify how applicants must resolve a Contention Set, applicants may do so through a private auction, the terms of which may vary depending on the agreement of the members of the Contention Set. Unlike with an ICANN public auction, neither ICANN nor the Internet community generally receives any proceeds from a private auction. Instead, the money paid by the highest bidder is typically distributed to the losing bidders.³⁷

22. Contention set resolution is not the final step in the delegation of a new gTLD. Instead, “[a]n application that prevails in a contention set resolution procedure, either community priority evaluation or auction, may proceed to the next stage.”³⁸ That “next stage” is the execution of a registry agreement with ICANN to operate the gTLD,³⁹ which “[a]ll applicants that have successfully completed the evaluation process” are required to enter before delegation.”⁴⁰

B. Factual Background of this Dispute

1. NDC’s Application for .WEB

23. On June 13, 2012, NDC submitted an application to ICANN to acquire the right to

³⁵ Afiliat C-3 (Guidebook, *supra* note 22, at Module 4, § 4.3).

³⁶ *Id.*, § 4.3 n.1 (“Possible uses of auction funds include formation of a foundation with a clear mission and a transparent way to allocate funds to projects that are of interest to the greater Internet community, such as grants to support new gTLD applications or registry operators from communities in subsequent gTLD rounds, the creation of an ICANN-administered/community-based fund for specific projects for the benefit of the Internet community, the creation of a registry continuity fund for the protection of registrants....” etc.).

³⁷ Rasco Stmt. (June 1, 2020), ¶ 34.

³⁸ Afiliat C-3 (Guidebook, *supra* note 22, at Module 4, § 4.1.4).

³⁹ *Id.*, § 4.4.

⁴⁰ *Id.* at Module 5, § 5.1.

operate .WEB.⁴¹ Six other entities also applied for .WEB: (1) Web.com Group, Inc.; (2) Charleston Road Registry Inc. (a subsidiary of Google LLC); (3) Schlund Technologies GmbH (“Schlund”); (4) Dot Web Inc. (“Dot Web”), a subsidiary of Radix FZC (“Radix”); (5) Ruby Glen LLC (“Ruby Glen”), a subsidiary of Donuts Inc. (“Donuts”); and (6) Afilias.⁴²

24. Per ICANN’s requirements, in its application NDC listed three people as its officers: Mr. Rasco (CFO); Mr. Calle (CEO); and Mr. Bezsonoff (COO).⁴³ NDC listed Mr. Rasco as its “Primary Contact” and Mr. Bezsonoff as its “Secondary Contact,”⁴⁴ and identified two owners having at least 15% interests: Domain Marketing Holdings, LLC, and Nuco LP, LLC.⁴⁵

25. The Guidebook provides that, “[i]f at any time during the evaluation process information previously submitted by an applicant *becomes untrue or inaccurate*, the applicant must promptly notify ICANN.”⁴⁶ As set forth in Mr. Rasco’s sworn Witness Statement, the management and ownership information NDC provided on its .WEB application remains accurate to this day.⁴⁷ Accordingly, NDC has never notified—nor been obligated to notify—ICANN of any change in management or ownership.⁴⁸ Likewise, no changes in circumstances occurred that rendered untrue or inaccurate any other information in NDC’s application.⁴⁹

26. NDC’s application passed all applicable ICANN evaluations in June 2013 and, pursuant to the Guidebook’s procedures, was placed in a Contention Set with the six other applicants for .WEB.⁵⁰

⁴¹ Rasco Stmt. (June 1, 2020), ¶ 9; *see also* Rasco Ex. A (NDC Application (.WEB) (June 13, 2012)).

⁴² Rasco Stmt. (June 1, 2020), ¶ 26.

⁴³ *Id.*, ¶ 11.

⁴⁴ *Id.*

⁴⁵ *Id.* ¶ 12.

⁴⁶ Afilias C-3 (Guidebook, *supra* note 22, at Module 1, § 1.2.7).

⁴⁷ Rasco Stmt. (June 1, 2020), ¶ 7.

⁴⁸ *E.g., id.*, ¶¶ 91-92.

⁴⁹ *Id.*

⁵⁰ *Id.*, ¶¶ 24, 26.

27. On April 27, 2016, ICANN scheduled a public auction for .WEB and provided the .WEB Contention Set with instructions and deadlines to participate in that auction,⁵¹ including a deadline of June 12, 2016 to notify ICANN whether the Contention Set unanimously agreed to instead resolve the Contention Set privately. Although certain members of the Contention Set requested (repeatedly, *see infra*) a private resolution, NDC informed the other applicants that it wished to proceed with a public auction.⁵² ICANN set the public auction date for July 27, 2016.⁵³

2. The Agreement Between NDC and Verisign

28. On August 25, 2015, more than three years after NDC submitted its .WEB application, NDC and Verisign entered into an executory agreement (“DAA” or “Agreement”) by which (i) Verisign agreed to provide the funds for NDC to bid in the auction for .WEB, and (ii) if NDC prevailed at the auction, upon execution of the registry agreement between ICANN and NDC, and *upon further application to ICANN and with ICANN’s consent*, NDC would assign the registry agreement for .WEB to Verisign.⁵⁴ Contrary to Afilias’ false claims in this proceeding and elsewhere, Redacted - Third Party Designated Confidential Information

29. On or about July 26, 2016, in light of false accusations by other members of the Contention Set that there had been a change of management or control of NDC (*see* Part II.B.5, *infra*), Verisign and NDC entered into a “Confirmation of Understandings,”

Redacted - Third Party Designated Confidential Information

The DAA Supplement

⁵¹ *Id.*, ¶ 27.

⁵² *Id.*, ¶¶ 68, 73, 74.

⁵³ *Id.*, ¶ 27.

⁵⁴ Livesay Ex. D (Domain Acquisition Agreement (“DAA”) (Aug. 25, 2015)).

⁵⁵ Rasco Stmt. (June 1, 2020), ¶ 52; Witness Statement of Paul Livesay (“Livesay Stmt.”) (June 1, 2020), ¶ 22.

⁵⁶ Livesay Ex. H (Domain Acquisition Agreement Supplement (“DAA Supplement”) (July 26, 2016)).

confirmed that: Redacted - Third Party Designated Confidential Information

30. Verisign advised NDC that Redacted - Third Party Designated Confidential Information

31. Under the terms of ICANN’s new gTLD Registry Agreement (the “Registry Agreement”), neither ICANN nor the gTLD operator “may assign any of its rights and obligations under [the Registry Agreement] without the prior written approval of the other party, which approval will not be unreasonably withheld.”⁶⁰ Redacted - Third Party Designated Confidential Information NDC and Verisign intend to seek ICANN’s consent to any assignment of the .WEB Registry Agreement from NDC to Verisign. As the long-standing operator of the .COM and .NET gTLDs, there is no question regarding Verisign’s qualifications to operate .WEB pursuant to ICANN’s requirements.

3. Post-Application Funding and Transfer Obligations Are Common in the New gTLD Program

32. Hundreds of gTLDs have been assigned after ICANN’s delegation to a particular applicant.⁶¹ The terms of agreements governing these assignments vary widely, and have included the funding of a resolution of the contention set, through auction or otherwise, in exchange for post-delegation transfers of rights with respect to the new gTLD at issue. Many of these

⁵⁷ *Id.*, ¶¶ A–D; Livesay Stmt. (June 1, 2020), ¶ 19.

⁵⁸ Rasco Stmt. (June 1, 2020), ¶ 66; Livesay Stmt. (June 1, 2020), ¶ 17; *see also* AC-57 (Kevin Murphy, Domain Incite, “DOJ says new gTLD private auctions might be illegal” (Mar. 19, 2013) *available at* <http://domainincite.com/12308-breaking-doj-says-new-gtld-private-auctions-might-be-illegal>).

⁵⁹ Rasco Stmt. (June 1, 2020) ¶ 66; Livesay Stmt. (June 1, 2020), ¶ 17.

⁶⁰ Verisign VRSN-6 (ICANN, Registry Agreement (July 31, 2017), § 7.5, *available at* <https://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-31jul17-en.pdf>).

⁶¹ Willett Stmt. (May 31, 2019), ¶ 37.

transactions have not been disclosed to ICANN or others during the application process by the applicants who agreed to such post-delegation transfers of rights. And to *amici's* knowledge, none of these applicants were disqualified from applying for a gTLD as a result of those agreements, whether disclosed or not. *See infra*. Indeed, the Guidebook does not require disclosure of the source of funding for the resolution of a Contention Set or in support of an auction bid.⁶² The Guidebook and Auction Rules further recognize that members of a Contention Set may consider “post auction transfer arrangements” prior to resolution of a Contention Set or delegation (other than during the pre-auction “Blackout Period,” *infra*) or form joint ventures while an application is pending.⁶³ ICANN has approved many post-delegation assignments of registry agreements pursuant to pre-delegation financing and other agreements. Examples follow below.

(1) *Donuts and Demand Media*

33. In 2012, Demand Media, Inc. (“Demand Media”), acknowledged (but, to *amici's* knowledge, did not disclose to ICANN) that it had entered into a partnership with Donuts with respect to 107 of the 307 gTLD applications submitted by Donuts through entities (like Ruby Glen) formed by Donuts for the sole purpose of participating in the New gTLD Program.⁶⁴ This

⁶² Afilias C-3 (Guidebook, *supra* note 22, at Module 4, § 4.3.2. & Questions 48(a) – 50(b) of Application).

⁶³ *See* Afilias C-4 (Auction Rules for New gTLDs, *supra* note 23, at Clause 68(a) (“During the Blackout Period, all applicants for Contention Strings within the Contention Set are prohibited from cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other's, or any other competing applicants' bids or bidding strategies, or discussing or negotiating settlement agreements or post-Auction ownership transfer arrangements, with respect to any Contention Strings in the Auction”); *see also* Afilias C-3 (Guidebook, *supra* note 22, at Module 4, 4.1.3 (“It is understood that applicants may seek to establish joint ventures in their efforts to resolve string contention.”)).

⁶⁴ *See* AC-59 (Business Wire, “Donuts Launches Domain Namespace Expansion with 307 gTLD Applications, More than \$100 Million in Funding” (June 5, 2012), *available at* <https://www.businesswire.com/news/home/20120605006141/en/Donuts-Launches-Domain-Namespace-Expansion-307-gTLD>); *see also* Livesay Ex. A (Leaf Group, “Demand Media to Participate in Historic Expansion of Generic Top-Level Domain Name Extensions (June 11, 2012), *available at* <https://ir.leafgroup.com/investor-overview/investor-press-releases/press-release-details/2012/Demand-Media-to-Participate-in-Historic-Expansion-of-Generic-Top-Level-Web-Domain-Name-Extensions/default.aspx>) (“Demand Media has entered into a strategic arrangement with Donuts Inc., an Internet domain name registry founded by industry veterans, through which it may acquire rights in certain gTLDs after they have been awarded to Donuts by ICANN.”)).

arrangement was described by Demand Media in a May 2013 filing with the U.S. Securities and Exchange Commission, in which Demand Media stated, *inter alia*, that it had entered into an agreement with Donuts that provided it “with rights to acquire the operating and economic rights to certain gTLDs” for which “Donuts is the applicant under the New gTLD Program” and “the right, but not the obligation, to make further deposits with Donuts in the pursuit of” those gTLDs.⁶⁵

34. Notwithstanding this agreement, none of the 307 applications Donuts submitted to ICANN publicly disclosed any relationship with Demand Media. Nor did Donuts amend those applications to reflect its arrangement with Demand Media, including statements of its “Mission/Purpose” for any gTLD subject to that arrangement, even though at least some applications explicitly referenced *Donuts’* plans and resources for the new gTLD. For example, in the application for .ATTORNEY (ultimately assigned to Demand Media⁶⁶), Donuts identified itself as the “parent applicant for this and multiple other TLDs,” referred to *Donuts’* “inten[tion] to increase competition and consumer choice at the top level,” and referred to *Donuts’* capital resources and ability to use those resources to “operate these TLDs and benefit Internet users.”⁶⁷

35. ICANN approved the assignment of at least 24 gTLDs from Donuts to United TLD, a Demand Media company. For example, a Donuts subsidiary executed a registry agreement for .ATTORNEY in March 2014, which it assigned to United TLD in May 2014.⁶⁸ Notably, Donuts

⁶⁵ AC-50 (Demand Media, Quarterly Report, Form 10-Q (May 10, 2013), at 19, *available at* <https://ir.leafgroup.com/investor-overview/sec-filings/sec-filings-details/default.aspx?FilingId=9285596>).

⁶⁶ .ATTORNEY Assignment and Assumption Agreement, Victor North, LLC to United TLD Holdco, Ltd (May 7, 2014), *available at* <https://www.icann.org/sites/default/files/tlds/attorney/attorney-assign-pdf-07may14-en.pdf>. In or about August 2014, Demand Media spun off subsidiary businesses into Rightside Group Limited (“Rightside”). The assignments from Donuts were ultimately made to United TLD Holdco, Ltd. (“United TLD”), a Rightside subsidiary.

⁶⁷ Victor North, LCC, New gTLD Application (.ATTORNEY) (June 13, 2012), at §18(a), *available at* <https://gtldresult.icann.org/applicationstatus/applicationdetails/883>.

⁶⁸ .ATTORNEY Registry Agreement, ICANN-Victor North, LLC (Mar. 20, 2014), *available at* <https://www.icann.org/resources/agreement/attorney-2014-03-20-en>; .ATTORNEY Assignment and Assumption Agreement, *supra* note 66.

first requested the assignment in April 2014, after executing the registry agreement with ICANN.⁶⁹

(2) *BLOG and Primer Nivel*

36. On April 29, 2016, ICANN consented to the assignment of .BLOG from Primer Nivel (“Primer”), the private auction winner, to a subsidiary of Automattic.⁷⁰ According to press reports, Automattic financed Primer’s winning auction bid but “wanted to stay stealth while in the bidding process and afterward in order not to draw too much attention.”⁷¹ To *amici*’s knowledge, neither Primer nor Automattic disclosed their financing relationship to ICANN, and Primer never amended the public portions of its .BLOG application to disclose its agreement with Automattic.

(3) *Tech and Radix*

37. Radix Registry (“Radix”), one of the members of the .WEB Contention Set, acquired .TECH by means of a pre-auction agreement whereby it financed the auction bid by Dot Tech, LLC (“Dot Tech”) in exchange for Dot Tech’s agreement to sell its assets to Radix upon winning the .TECH auction.⁷² Radix’s involvement in Dot Tech’s application was not disclosed to the .TECH Contention Set or to ICANN prior to the .TECH auction. Instead, after Dot Tech won that auction, its application was updated to list Radix as Dot Tech’s owner and to add Radix personnel as Dot Tech’s officers.⁷³

4. Afilias’ Own Participation in the New gTLD Secondary Market

38. As ICANN described in its June 1, 2020 Rejoinder, Afilias has participated extensively in the secondary market for new gTLDs.⁷⁴ For example, Afilias has an active program

⁶⁹ .ATTORNEY Assignment and Assumption Agreement, *supra* note 66, Recital B.

⁷⁰ AC-2 (.BLOG Assignment and Assumption Agreement, Primer Nivel S.A. to Knock Knock WHOIS There, LLC (Apr. 29, 2016), available at <https://www.icann.org/sites/default/files/tlds/blog/blog-assign-pdf-29apr16-en.pdf>); see also Kneuer Ex. E (Kevin Murphy, Domain Incite, “WordPress Reveals It Bought .blog for \$19 Million” (May 13, 2016), available at <http://domainincite.com/20440-wordpress-reveals-it-bought-blog-for-19-million>).

⁷¹ Kneuer Ex. E (“WordPress Reveals It Bought .blog for \$19 Million, *supra* note 70).

⁷² Livesay Stmt. (June 1, 2020), ¶ 14; Rasco Stmt. (June 1, 2020), ¶ 44.

⁷³ *Id.*; Rasco Ex. E (Dot Tech LLC, New gTLD Application (.TECH) (Oct. 23, 2014)).

⁷⁴ ICANN’s Rejoinder Memorial (June 1, 2020), ¶ 83.

for acquiring new TLDs, advertising to the Internet community that “We Buy TLDs”⁷⁵ and successfully acquiring numerous new TLDs, including .PROMO, .ARCHI, .BIO, and .SKI.⁷⁶

39. Afilias has also assigned registry agreements for new gTLDs that it obtained through the New gTLD Program, such as .MEET. When Afilias applied for .MEET, its application stated that it planned to make the TLD into a “popular, accessible, and innovative destination on the Internet” for “people seeking online dating and companionship services.”⁷⁷ Google, however, changed the “Mission” and “Purpose” of .MEET to a platform for “web-based business meetings.”⁷⁸ Nonetheless, ICANN approved the transfer even though Google’s objective was radically different than that expressed in Afilias’ application because Google met ICANN’s technical and financial requirements for operation of a new gTLD.⁷⁹

5. Afilias’ Misconduct in Connection with the .WEB Auction

40. Prior to the July 27, 2016 public auction date for .WEB, Afilias, and other Contention Set members acting in concert with Afilias, attempted to coerce NDC to agree to resolve the Contention Set by private auction such that the proceeds would be distributed to the losing bidders, rather than be invested by ICANN for the benefit of the Internet community.

⁷⁵ AC-45 (Afilias TLD Image 1 “We buy TLDs”); *see also*, AC-46 (Afilias TLD Image 2 “We buy TLDs”); AC-47 (Afilias TLD Image 3 “We buy TLDs”); *see also* AC-64 (Kevin Murphy, Domain Incite, “Afilias Wants to Buy Your Failed gTLD” (July 7, 2015), available at <http://domainincite.com/18898-afilias-wants-to-buy-your-failed-gtld>).

⁷⁶ ICANN’s Opposition to Request for Emergency Panelist and Interim Measures of Protection (Dec. 17, 2018), ¶ 30; ICANN’s Response to Amended IRP Request (May 31, 2020), ¶ 29; *see also* Willett Stmt. (Dec. 18, 2018), ¶ 35.

⁷⁷ Afilias plc, New gTLD Application (.MEET) (June 13, 2012), at §18(b), available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1835>.

⁷⁸ *See* Kevin Murphy, Domain Incite, “Google launches meet gTLD after Meet service goes free during lockdown” (May 18, 2020), available at <http://domainincite.com/25533-google-launches-meet-gtld-after-meet-service-goes-free-during-lockdown>.

⁷⁹ .MEET Assignment and Assumption Agreement, Afilias Limited to Charleston Road Registry Inc. d/b/a Google Registry (Feb. 6, 2015), available at <https://www.icann.org/sites/default/files/tlds/meet/meet-assign-pdf-06feb15-en.pdf>; Willett Stmt. (May 31, 2019), ¶ 18 (“In fact, ICANN has received over 2,700 application change requests. Nearly 800 of those requests made changes to the responses provided to questions pertaining to ownership or control of the applicant. To date, ICANN has not disqualified a single application in connection with a change to responses to those questions.”).

41. On June 6, 2016, Donuts, the parent company of Contention Set member Ruby Glen, asked NDC to reconsider its decision to forego a private resolution of the Contention Set and agree to a two-month delay of the public auction.⁸⁰ On June 7, 2016, Mr. Rasco, on behalf of NDC, informed Donuts that NDC would not change its decision to proceed with a public auction and would not agree to a postponement of the public auction.⁸¹ On June 7, 2016, Steve Heflin, Afilias' Vice President of Sales, contacted Juan Calle of NDC to similarly ask NDC to reconsider its decision to forego a private resolution of the Contention Set.⁸² In an effort to persuade NDC, Afilias offered to “guarantee [NDC] score[s] at least **16 mil if you go into the private auction and lose.**”⁸³ NDC declined, whereupon Afilias offered to increase the guaranteed payment to \$17.02” million.⁸⁴ NDC again declined.⁸⁵

42. On June 23, 2016, in another bid to delay the upcoming public auction, Donuts and Ruby Glen falsely represented to ICANN that NDC had changed its ownership and/or management structure without reporting that change to ICANN.⁸⁶ Donuts and Ruby Glen requested that ICANN delay the public auction as a result.⁸⁷ ICANN contacted NDC on June 27, 2016 to investigate the accuracy of Donuts' and Ruby Glen's complaint.⁸⁸ Mr. Rasco responded that same day and confirmed that there had been no changes to NDC's ownership and/or management.⁸⁹

⁸⁰ Rasco Stmt. (June 1, 2020), ¶ 68; Rasco Ex. I (Email from J. Nevett (Donuts) to J. Rasco (NDC) (June 6, 2016)).

⁸¹ Rasco Stmt. (June 1, 2020), ¶ 68.

⁸² *Id.*, ¶ 73; Rasco Ex. J (Text message from S. Heflin (Afilias) to J. Calle (NDC) (June 7, 2016)).

⁸³ Rasco Stmt. (June 1, 2020) ¶ 73; Rasco Ex. J (Text message from S. Heflin (Afilias) to J. Calle (NDC) (June 7, 2016)).

⁸⁴ Rasco Stmt. (June 1, 2020) ¶ 73; Rasco Ex. J (Text message from S. Heflin (Afilias) to J. Calle (NDC) (June 7, 2016)).

⁸⁵ Rasco Stmt. (June 1, 2020), ¶ 73.

⁸⁶ *Id.*, ¶ 75; Rasco, Ex. L (Email from D. Schindler (Ruby Glen, LLC) to ICANN (June 23, 2016)).

⁸⁷ *Id.*, ¶ 75; Rasco, Ex. L (Email from D. Schindler (Ruby Glen, LLC) to ICANN (June 23, 2016)).

⁸⁸ Rasco Ex. M (Email from ICANN to J. Rasco (NDC) (June 27, 2020)).

⁸⁹ *Id.*

43. Afiliás also attempted to delay the scheduled public auction in late June 2016 by making the same misrepresentations to the ICANN Ombudsman that Donuts and Ruby Glen had made to ICANN staff regarding an alleged change in management and/or control of NDC.⁹⁰ After making inquiries of NDC, the Ombudsman advised ICANN and Afiliás that there were no grounds for a delay in the auction.⁹¹

44. On July 5, 2016, Oliver Mauss of Schlund, another member of the .WEB Contention Set, emailed NDC a proposal for an “alternative private auction.”⁹² According to Mr. Mauss, supposed “benefits” of this alternative model included that it “divides the participants into groups of strong and weak”; the “weak players are *meant to lose and are compensated for this with a pre-defined sum*”; “the strong players bid for the asset”; and “the losing weak players receive a lower return than in the Applicant Auction.”⁹³ In the end, under Schlund’s model, the winning participant would pay less for the gTLD than in an ICANN public auction.

45. On July 8, 2016, Mr. Rasco spoke with Christine Willett, the Vice President of Operations, Global Domains Division, for ICANN.⁹⁴ Mr. Rasco told Ms. Willett that there was no basis to delay the scheduled public auction for .WEB.⁹⁵ Mr. Rasco reiterated to Ms. Willett that neither the ownership nor the management of NDC had changed since NDC filed its .WEB application and, accordingly, there was no need to update NDC’s application.⁹⁶ During their call, Ms. Willett agreed with Mr. Rasco that the attempt to delay the public auction was motivated by

⁹⁰ Rasco Ex. N (Email from C. LaHatte (ICANN) to J. Rasco (NDC) (July 7, 2020)).

⁹¹ Rasco Ex. P (Letter from C. Willet (ICANN) to .WEB Contention Set (July 27, 2020)).

⁹² Rasco Stmt. (June 1, 2020), ¶ 35; Rasco Ex. C (Email from O. Mauss (1 & 1 Internet) to J. Calle (NDC) (July 5, 2016)).

⁹³ Rasco Ex. C (Email from O. Mauss (1 & 1 Internet) to J. Calle (NDC) (July 5, 2016)).

⁹⁴ Rasco Stmt. (June 1, 2020), ¶¶ 83–86.

⁹⁵ *Id.*; see also Willett Ex. D (Email from C. Willett (ICANN) to C. LaHatte (ICANN) (July 9, 2016) (summarizing Ms. Willett’s call with Mr. Rasco)).

⁹⁶ Rasco Stmt. (June 1, 2020), ¶ 84; Willett Ex. D (Email from C. Willett (ICANN) to C. LaHatte (ICANN) (July 9, 2016)).

the desire of Afilias, Donuts, and other applicants to hold a private auction.⁹⁷ On July 11, 2016, Mr. Rasco reiterated to Ms. Willett, in writing, the contents of their July 8 conversation and informed Ms. Willett that NDC had made clear to the other Contention Set members that NDC had no desire to participate in a private auction and that it was committed to participating in ICANN’s scheduled public auction.⁹⁸

46. On July 11, 2016, two other applicants—Radix, on behalf of applicant Dot Web, and Schlund—objected to proceeding with the .WEB public auction.⁹⁹ Based on the same grounds as the objections raised by Donuts and Ruby Glen, Radix’s and Schlund’s objections even used identical language.¹⁰⁰ They each told ICANN: “We support a postponement of the .WEB auction to give ICANN and the other applicants time to investigate whether there has been a change of leadership and/or control of [NDC]. To do otherwise would be unfair, as we do not have transparency into who leads and controls that applicant as the auction approaches.”¹⁰¹

47. Despite the concerted efforts by Afilias, Donuts, and other members of the Contention Set to avoid a .WEB public auction, on July 13, 2016, ICANN denied the requests for a postponement.¹⁰² ICANN found “no basis to initiate the application change request process or postpone the auction” based on any change in NDC’s management. ICANN also informed the other applicants that their requests must be denied because they came too late: the deadline for requesting a postponement had expired on June 12, 2016.¹⁰³

⁹⁷ Rasco Stmt. (June 1, 2020), ¶ 86.

⁹⁸ Rasco Ex. O (Email from J. Rasco (NDC) to C. Willett (ICANN) (July 11, 2016)).

⁹⁹ Verisign VRSN-8 (Email from B. Joshi (Dot Web) to ICANN (July 11, 2016)); Verisign VRSN-9 (Letter from T. Moarz (Schlund) to ICANN (July 11, 2016)).

¹⁰⁰ Verisign VRSN-8 (Email from B. Joshi (Dot Web) to ICANN (July 11, 2016)); Verisign VRSN-9 (Letter from T. Moarz (Schlund) to ICANN (July 11, 2016)).

¹⁰¹ Verisign VRSN-8 (Email from B. Joshi (Dot Web) to ICANN (July 11, 2016)); Verisign VRSN-9 (Letter from T. Moarz (Schlund) to ICANN (July 11, 2016)).

¹⁰² Rasco Ex. P (Letter from C. Willett (ICANN) to .WEB Contention Set (July 13, 2016)).

¹⁰³ *Id.*

48. On July 17, 2016, Donuts/Ruby Glen and Radix jointly filed a request for reconsideration (“RFR”) of ICANN’s determination that the auction proceed as planned.¹⁰⁴ As with the previous attempts to delay the auction, the RFR contained a number of false allegations with respect to NDC. Once again, Ruby Glen and Radix accused NDC of failing to report a change in control, when in fact no such change had occurred.¹⁰⁵ Ruby Glen and Radix also falsely alleged that NDC and ICANN had violated the Guidebook¹⁰⁶ and misrepresented that any delay in the auction would be harmless.¹⁰⁷ To the contrary, applicants, financiers, and consumers have an interest in allowing gTLD auctions to proceed in a timely and orderly fashion. On July 21, 2016, ICANN denied the RFR, again rejecting the Contention Set’s attempts to delay the .WEB auction.¹⁰⁸ ICANN found no change in control of NDC and, therefore, no requirement that NDC update or change its .WEB application and no reason to delay the July 27 auction.¹⁰⁹

49. In the weeks leading up to that auction, members of the .WEB Contention Set continued to attempt to pressure NDC into resolving the Contention Set via a private auction in lieu of ICANN’s public auction. Importantly, on July 22, 2016, five days before the auction’s July 27, 2016 commencement date, after the deposit deadline for the auction had passed—and **during the Blackout Period**—Afilias reiterated its earlier offers to NDC. John Kane of Afilias sent this text message to Mr. Rasco of NDC: “If ICANN delays the auction next week would you again consider a private auction? Y-N.”¹¹⁰

50. Mr. Rasco did not respond to Afilias’ text message, as it was sent during the

¹⁰⁴ Verisign VRSN-11 (“Reconsideration Request by Ruby Glen, LLC and Radix FZC” (July 17, 2016), at 1–2).

¹⁰⁵ *Id.* at 2.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 11.

¹⁰⁸ Verisign VRSN-12 (“Determination of the Board Governance Committee (BGC) Reconsideration Request,” (July 21, 2016), at 11–12).

¹⁰⁹ *Id.* at 10–11.

¹¹⁰ Rasco Ex. R (Text message from J. Kane (Afilias) to J. Rasco (NDC) (July 22, 2016)).

Blackout Period when such discussions are prohibited by ICANN rules. In particular, Clause 68 of the Auction Rules prohibits applicants within a Contention Set from “cooperating or collaborating with respect to, *discussing with each other, or disclosing to each other in any manner the substance of their own, or each other’s, or any other competing applicants’ bids or bidding strategies or discussing or negotiating settlement agreements...*” once the Blackout Period has begun and until the auction has been completed and full payment has been received from the winner.¹¹¹ A breach of Clause 68 is a “serious violation” of ICANN’s rules, so much so that applicants are warned that such violations may result in forfeiture of their gTLD application.¹¹²

6. The Ruby Glen Action

51. On July 22, 2016, despite ICANN’s repeated rejections of the Contention Set’s objections, and contrary to an express covenant not to sue in the Guidebook, Ruby Glen filed a civil action against ICANN in the United States District Court for the Central District of California seeking delay of the public auction through a temporary restraining order (“TRO”).¹¹³ Ruby Glen’s claims were based on the same false allegations that ICANN had investigated and rejected.

52. The District Court denied Ruby Glen’s TRO on July 26, 2016. In its Order, the Court noted “*the weakness of Plaintiff’s efforts* to enforce vague terms contained in ICANN’s bylaws” and Guidebook and held that Ruby Glen had failed to “establish that it is likely to succeed on the merits” and “*failed to demonstrate that its allegations raise[d] serious issues.*”¹¹⁴

53. Ruby Glen did not abandon its complaint. Instead, on August 8, 2016, *i.e.*, after the .WEB auction, Ruby Glen filed an amended complaint against ICANN challenging the

¹¹¹ See Afiliac C-5 (Bidder Agreement, *supra* note 27, § 2.6); Afiliac C-4 (Auction Rules for New gTLDs, *supra* note 23, at Clause 68).

¹¹² See Afiliac C-5 (Bidder Agreement, *supra* note 27, §§ 2.6, 2.10; Afiliac C-4 (Auction Rules for New gTLDs, *supra* note 23, at Clauses 61, 68).

¹¹³ Verisign VRSN-15 (*Ruby Glen, LLC v. ICANN*, Complaint (Case No. 16-5505) (July 22, 2016)).

¹¹⁴ Verisign VRSN-16 (*Ruby Glen, LLC v. ICANN*, Court Order Denying Ex Parte Application (July 26, 2016)).

outcome of that auction and seeking to preliminarily enjoin ICANN from delegating .WEB to NDC or Verisign.¹¹⁵ The amended complaint was based on Ruby Glen’s misrepresentations that NDC and/or Verisign had “admitted violation of a number of provisions of the” Guidebook including by making an improper “end run around the application process to the detriment of ... other legitimate applicants for the .WEB gTLD and the Internet community.”¹¹⁶

54. On November 28, 2016, the Court granted ICANN’s motion to dismiss Ruby Glen’s amended complaint and entered judgment.¹¹⁷ Ruby Glen appealed that dismissal to the Court of Appeals for the Ninth Circuit, which affirmed the District Court’s decision.¹¹⁸

7. The Public Auction for .WEB

55. Despite the efforts of Afilias and other members of the .WEB Contention Set to force NDC into a private auction, the public auction proceeded as scheduled on July 27, 2016.¹¹⁹

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Shortly after the auction, NDC paid ICANN \$135 million (the second-highest bid which, under the ICANN rules, becomes the payment amount) for .WEB.¹²¹ Over four years later, ICANN continues to retain those funds, without paying interest to NDC or anyone else.

56. Having won the auction, under the Guidebook, NDC has the right and ICANN has the obligation to execute the .WEB Registry Agreement (subject to compliance with appropriate conditions). Although additional steps remain before the gTLD is officially delegated to NDC,

¹¹⁵ ICANN R-4 (*Ruby Glen v. ICANN*, First Amended Complaint (Aug. 8, 2016)).

¹¹⁶ *Id.*, ¶ 2.

¹¹⁷ ICANN’s Response to Amended IRP Request (May 31, 2020), ¶ 48 (citing *Ruby Glen, LLC v. ICANN*, Memorandum (Nov. 28, 2016), available at <https://www.icann.org/en/system/files/files/litigation-ruby-glen-court-order-motion-dismiss-first-amended-complaint-28nov16-en.pdf>).

¹¹⁸ ICANN R-14 (*Ruby Glen, LLC v. ICANN*, Memorandum (Oct. 15, 2018) (9th Cir. 2018)).

¹¹⁹ Rasco Stmt. (June 1, 2020), ¶ 98.

¹²⁰ *Id.*, ¶ 101.

¹²¹ *Id.*, ¶ 103.

those steps are routine and administrative. Generally, ICANN will execute a registry agreement without further Board approval so long as no material changes are made to ICANN’s form registry agreement.¹²² Here, ICANN delivered the registry agreement to NDC on June 13, 2018, and NDC executed and returned that agreement without change by the next day.¹²³ ICANN, however, has yet to execute that agreement.¹²⁴

8. Post-Auction Efforts by Afilias and Others to Interfere with the Auction Results

57. On August 2, 2016, shortly after the public auction, Donuts/Ruby Glen initiated a “Cooperative Engagement Process” (“CEP”) with ICANN with respect to .WEB.¹²⁵ The CEP was based on the same misrepresentations regarding NDC’s application that ICANN and the District Court had rejected. Under ICANN’s procedures, a CEP may be invoked by a complainant prior to the filing of an IRP to resolve or narrow the issues that are contemplated to be raised in the IRP. The CEP was closed on January 31, 2018.¹²⁶ ICANN gave Donuts/Ruby Glen until February 14, 2018 to commence an IRP, else it would proceed with the delegation of .WEB to NDC.¹²⁷ Donuts/Ruby Glen did not commence an IRP by the February 14 deadline, or at any time since.

58. On August 8, 2016, Scott Hemphill, Afilias’ General Counsel, wrote to ICANN (i) asserting that NDC should be disqualified from its participation in the .WEB Contention Set due to purported violations of the Guidebook and (ii) demanding that ICANN “proceed to the next highest bidder in the auction to contract for the string, at the price at which the third highest bidder

¹²² Afilias C-3 (Guidebook, *supra* note 22, at Module 5, § 5.1(4)).

¹²³ See ICANN’s Rejoinder Memorial (June 1, 2020), ¶ 49.

¹²⁴ In its Rejoinder, ICANN stated that its Board decided in November 2016 to defer action regarding .WEB because an Accountability Mechanism was pending at the time. *E.g., id.*, ¶¶ 41, 91.

¹²⁵ Verisign VRSN-17 (“Cooperative Engagement and Independent Review Processes Status Update” (Sept. 22, 2017)).

¹²⁶ Verisign VRSN-18 (“Cooperative Engagement and Independent Review Processes Status Update” (Mar. 29, 2018)).

¹²⁷ *Id.*

exited the auction.”¹²⁸ Under Mr. Hemphill’s demand, Afiliias, as the second-highest bidder in the .WEB auction,¹²⁹ stood to benefit from NDC’s disqualification by obtaining .WEB for a windfall price far below the competitive amount paid by NDC.

59. In Mr. Hemphill’s letter, Afiliias also requested that ICANN stay any further action with respect to .WEB, including executing a registry agreement with NDC or acting on any request by NDC to assign that agreement to Verisign.¹³⁰ Finally, Mr. Hemphill asserted that Afiliias was filing a complaint with ICANN’s Ombudsman with regard to .WEB.¹³¹ Mr. Hemphill repeated his allegations in a second letter to ICANN dated September 9, 2016.¹³²

60. On or about September 16, 2016, ICANN invited NDC, Verisign, Ruby Glen, and Afiliias to provide written responses to twenty questions regarding the propriety of NDC participating in the .WEB auction.¹³³ NDC and Verisign provided timely responses.¹³⁴ Afiliias also responded, essentially repeating its prior allegations.¹³⁵ Neither NDC nor Verisign was informed in advance that ICANN would be requesting this information, and neither provided any input to ICANN regarding the subject matter of the questions posed.¹³⁶

61. On October 7, 2016, Mr. Hemphill again wrote to ICANN advocating NDC’s disqualification from the .WEB Contention Set because it purportedly failed to disclose material information to ICANN.¹³⁷ Afiliias further alleged that Verisign funded NDC’s bid to “preserve a

¹²⁸ Verisign VRSN-19 (Letter from M. Scott Hemphill (Afiliias) to A. Atallah (ICANN) (Aug. 8, 2016)).

¹²⁹ Afiliias’ Amended IRP Request (March 21, 2019), ¶ 4.

¹³⁰ Verisign VRSN-19 (Letter from M. Scott Hemphill, *supra* note 127).

¹³¹ *Id.*

¹³² Verisign VRSN-20 (Letter from M. Scott Hemphill (Afiliias) to A. Atallah (ICANN) (Sept. 9, 2016)).

¹³³ Rasco Stmt. (June 1, 2020), ¶ 105; Rasco Ex. S (Email from C. Willett (ICANN) to J. Rasco (NDC) (Sept. 16, 2016)).

¹³⁴ Rasco Ex. T (Email from J. Rasco (NDC) to C. Willett (ICANN) answering ICANN’s questions (Oct. 10, 2016)); Afiliias C-109 (Email from R. Johnston (Verisign) to C. Willett (ICANN) answering ICANN’s questions (Oct. 7, 2016)).

¹³⁵ Afiliias C-51 (Letter from Afiliias to C. Willett (ICANN) (Oct. 7, 2016)).

¹³⁶ Rasco Stmt. (June 1, 2020), ¶¶ 104-108; Livesay Stmt. (June 1, 2020), ¶ 38.

¹³⁷ Verisign VRSN-21 (Letter from M. Scott Hemphill (Afiliias) to C. Willett (ICANN) (Oct. 7, 2016)).

monopoly,” reduce competition, and harm consumers.¹³⁸ Afilias did not cite—and has never cited—any evidence in support of these allegations. In fact, Verisign has publicly and repeatedly stated its intent to market .WEB vigorously, and to maximize .WEB’s potential.¹³⁹

9. The DOJ Investigation of .WEB and the Alleged Harm to Competition from Verisign’s Operation of .WEB

62. In January 2017, the Antitrust Division of the Department of Justice (“DOJ”) commenced an investigation into competition issues related to Verisign’s operation of .WEB.¹⁴⁰ NDC and Verisign fully cooperated in the DOJ’s investigation, including in response to Civil Investigative Demands (“CID”) each received from the DOJ.¹⁴¹

63. The DOJ’s investigation focused on whether Verisign’s potential operation of .WEB would reduce competition in the market for TLDs. The “Transaction,” as defined in the CID, was the DAA “and all conduct undertaken in furtherance of that agreement.”¹⁴² The DOJ closed its investigation in January 2018, without taking any action.¹⁴³

¹³⁸ *Id.*

¹³⁹ *See, e.g.*, Murphy Ex. KM-51 (Verisign, “Verisign Press Release” (Aug. 1, 2016) (“Our expertise, infrastructure, and partner relationships will enable us to quickly grow .WEB and establish it as an additional option for registrants worldwide in the growing TLD marketplace . . . And these users, along with our global distribution partners, will benefit from the many new domain name choices .WEB will offer.”)); Murphy Ex. KM-52 (Verisign, Verisign FQ3 2016 Earnings Call Transcript (Oct. 27, 2016) (“we are excited about the .WEB opportunity as we believe we are well positioned to make it successful.”)); Murphy Ex. KM-53 (Verisign, Verisign FQ4 2016 Earnings Call Transcript (Feb. 9, 2017) (“We strongly believe Verisign is well positioned to grow and widely distribute .WEB to provide an additional option to the marketplace given our proven track record of reliability and security.”)).

¹⁴⁰ AC-31 (Letter from Kent Brown, U.S. Department of Justice, Antitrust Division, to Thomas Indelicarto, Executive Vice President, Verisign, “Civil Investigative Demand No. 28931,” (Jan. 6, 2017)).

¹⁴¹ *See id.*

¹⁴² *Id.*

¹⁴³ *See* AC-67 (“DOJ closes investigation on Verisign running .web”).

III. ARGUMENT

A. The Panel is Only Authorized to Determine Whether ICANN Violated Its Bylaws—The Panel Does Not Have Authority to Decide Afilias’ Claims on the Merits or Grant the Affirmative Relief Requested by Afilias

64. Afilias argues that the Panel is empowered to “order affirmative declaratory relief.”¹⁴⁴ More specifically, Afilias wants the Panel to “*require* ICANN to disqualify NDC’s application and bid and to offer Afilias the rights to .WEB,”¹⁴⁵ and to “specify[] the bid price to be paid by Afilias.”¹⁴⁶ In substance, Afilias asks this Panel to decide Afilias’ objections to the auction award to NDC on the merits—an issue ICANN has *not* addressed—and enter a mandatory injunction against ICANN that would usurp the ICANN Board’s authority to decide those objections and determine the rights of third parties to this proceeding, namely, *amici*. It is clear the Panel has no such authority. The Panel’s only authority is to determine whether ICANN violated its Bylaws when it decided to defer a decision on Afilias’ objections to the auction award. In other words, this Panel has authority only to decide whether ICANN should have made a decision on Afilias’ objections— not how ICANN should decide Afilias’ objections or whether ICANN should now reverse the result of the public auction, set a price for .WEB, and give .WEB to Afilias rather than NDC. Those are determinations that must be made by ICANN.

65. As shown below, and as further explained by ICANN in its Rejoinder, the Panel lacks authority to order the affirmative relief that Afilias requests. In its arguments to the contrary, Afilias studiously evades the central governing provision from the Bylaws, Section 4.3(o), which expressly defines—and circumscribes—the Panel’s jurisdiction.¹⁴⁷ Apparently finding the text of

¹⁴⁴ Afilias’ Revised Reply Memorial (May 4, 2020), ¶¶ 148, 155.

¹⁴⁵ *Id.*, ¶ 155; *see also* Afilias’ Amended IRP Request (March 21, 2019), ¶ 89 (requesting (i) a declaration that ICANN must disqualify NDC’s bid for .WEB; (ii) a declaration that ICANN must proceed with contracting the Registry Agreement for .WEB with Afilias; and (iii) a declaration specifying the price to be paid by Afilias).

¹⁴⁶ Afilias’ Amended IRP Request (March 21, 2019), ¶ 89(4) (emphasis in original).

¹⁴⁷ *See* Afilias’ Revised Reply Memorial (May 4, 2020), ¶¶ 147–55.

this provision insurmountable, Afiliias makes *no mention* of Section 4.3(o) in its seventy-three (73) page Reply Memorial. Instead, Afiliias requests relief from this Panel that is irreconcilable with both the Bylaws and the precedential rulings of numerous prior IRP panels.

1. The Panel’s Remedial Jurisdiction Is Circumscribed by the Express Terms of the Bylaws and other Applicable Rules

66. As with traditional arbitral tribunals and other forms of alternative dispute resolution, an IRP panel’s remedial powers are limited by the terms of the applicable dispute resolution agreement and governing dispute resolution rules. It is a fundamental principle that “[t]he remedial powers of an international arbitral tribunal are defined in the first instance by the parties’ arbitration agreement.”¹⁴⁸ Here, Afiliias submitted an application for .WEB and accepted the Terms and Conditions set forth in Module 6 of the Guidebook. By doing so, Afiliias expressly agreed that its only recourse against ICANN “for purposes of challenging any final decision made by ICANN with respect to [its .WEB] application” would be through the “accountability mechanism[s] set forth in ICANN’s Bylaws.”¹⁴⁹ The Bylaws, in turn, establish the Independent Review Process that Afiliias has invoked here. The Bylaws and the Guidebook, therefore, constitute the applicable dispute resolution agreement for this IRP. As shown below, these governance documents significantly circumscribe the Panel’s remedial powers in this dispute.¹⁵⁰

¹⁴⁸ AA-51 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION (2d ed. 2014) (“BORN”), p. 3068; *see also*, e.g., AA-50 English Arbitration Act 1996, § 48(1) (“The parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies.”); AA-47 DAVID ST. JOHN SUTTON, JUDITH GILL, & MATTHEW GEARING, RUSSELL ON ARBITRATION (23d Ed., 2009) (“RUSSELL ON ARBITRATION”), ¶ 6-097 (“[Section 48 of the English Arbitration Act] makes clear that party autonomy prevails and preserves the parties’ right to extend or restrict the tribunal’s powers as regards remedies by agreement in writing.”).

¹⁴⁹ Afiliias C-3 (Guidebook, *supra* note 22, at Module 6, § 6) (capitalization omitted).

¹⁵⁰ As discussed during Phase I of these proceedings, while the Bylaws provide that the IRP process shall be informed by and consistent with international arbitration norms, the Bylaws do not provide that the IRP process shall constitute a *per se* international arbitration. It plainly is not so intended. Instead, an IRP is a bespoke internal corporate accountability mechanism (albeit one administered by independent third-parties), designed to ensure ICANN’s compliance with its Bylaws and Articles of Association. *See generally* Afiliias C-1 (Bylaws, *supra* note 11, § 4.3(a) (describing the “Purposes of IRP,” including to “[e]nsure that ICANN does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws”). Similarly, the IRP is described in the Bylaws as being “[i]n addition to the reconsideration process,” which is a separate internal corporate accountability mechanism.

67. In the words of one IRP panel, “[t]he jurisdiction and authority of an IRP panel is expressly prescribed—and expressly limited—by the ICANN Bylaws.”¹⁵¹ The scope of the authority of an IRP panel is expressly stated in Section 4.3(o) of the Bylaws, which provides that, “[s]ubject 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).”¹⁵²

68. The text of Section 4.3(o) constitutes a closed list that *only* authorizes an IRP panel to take the actions enumerated therein. Pursuant to Section 4.3(o)(iii) of the Bylaws, if an IRP panel were to find that ICANN violated its Articles of Incorporation or Bylaws, the panel may

See Afiliis C-1 (Bylaws, *supra* note 11, § 4.3(a)(viii) (one of the “[p]urposes of the IRP” is to “[l]ead to binding, final resolutions consistent with international arbitration norms . . .”) and § 4.3(n)(i)–(ii) (Moreover, the IRP shall “conform with” and “be informed by” “international arbitration norms.”)).

¹⁵¹ Afiliis CA-11 (*Booking.com B.V. v. ICANN*, ICDR Case No.: 50-20-1400-0247, Final Declaration (Drymer, Matz, Bernstein) (“*Booking.com*, Final Declaration”) (2015), ¶ 104); *see also*, AA-55 (*Merck KGaA v. ICANN*, ICDR Case No. 01-14-0000-9604, Final Declaration (Reichert, Matz, Dinwoodie) (“*Merck*, Final Declaration”) (2015), ¶ 22 (“[T]he Independent Review Process is a bespoke process, precisely circumscribed.”)); AA-43 (*Asia Green IT System v. ICANN*, ICDR Case No. 01-15-0005-9838, Final Declaration, (Hamilton, Cahill, Reichert) (2017), ¶ 4 (“The authority of the IRP is found at Article IV, Section 3 of the ICANN Bylaws. The IRP Panel is charged with ‘declaring whether the Board has acted consistently with the Provision of ICANN’s Articles of Incorporation and Bylaws.’”)).

¹⁵² Afiliis C-1 (Bylaws, *supra* note 11, § 4.3(o)(iii)).

“[d]eclare” as much.¹⁵³ Further, while Section 4.3(o)(iv) of the Bylaws permits an IRP panel to “[r]ecommend” that ICANN take some interim action until ICANN considers such panel’s opinions,¹⁵⁴ the authority to make a *recommendation* is, by definition, not authority to dictate a remedy, and any such recommendation is not binding on ICANN.¹⁵⁵

69. Thus, Section 4.3(o) does *not* authorize—either explicitly or implicitly—an IRP panel to order affirmative relief or otherwise dictate ICANN’s remedial actions if a panel were to find that ICANN violated its Articles of Incorporation or Bylaws. Had the drafters of the Bylaws intended to grant IRP panels the authority to order affirmative relief, or otherwise dictate ICANN’s remedial actions, then such authority would have been expressly enumerated. In view of Section 4.3(o), and consistent with the contract and statutory interpretation principle *expressio unius est exclusio alterius*,¹⁵⁶ IRP panels therefore lack authority to order affirmative relief.

70. Under the circumstances here, Section 4.3(o) also would *not* permit an IRP Panel to second-guess the reasonable business judgment of the ICANN Board. This is stated expressly in Section 4.3(i)(iii) of the Bylaws, which provides that “[f]or 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

¹⁵³ *Id.*

¹⁵⁴ *Id.*, § 4.3(o)(iv).

¹⁵⁵ See *Afilias CA-2 (Vistaprint Limited v. ICANN)*, ICDR Case No. 01-14-0000-6505, Final Declaration (Gibson, Glas, Elsing) (“*Vistaprint*, Final Declaration”) (2015), ¶ 131 (“[T]he Panel determines on the basis of the charter instruments, as well as the drafting history of those documents, that its declaration is binding only with respect to the finding of compliance or not with the Articles and Bylaws, and non-binding with respect to any measures that the Panel might recommend the Board take or refrain from taking.”); *id.* ¶ 138 (“The Panel’s authority is thus limited (and in this sense non-binding) when it comes to providing ICANN’s Board with potential courses of action or inaction in view of Board’s non-compliance with the Articles or Bylaws.”).

¹⁵⁶ See, e.g., *AA-46 Crawford-Hall v. United States*, 394 F. Supp. 3d 1122, 1143 (C.D. Cal. 2019) (“The canon of statutory construction *expressio unius est exclusio alterius* . . . ‘creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions;’” holding that a government administrator’s decision-making authority in certain adjudicatory proceedings was limited to two expressly defined types of decisions) (internal citations omitted); *AA-61 White v. W. Title Ins. Co.*, 40 Cal. 3d 870, 882 n.4 (1985) (“This canon [*expressio unius est exclusio alterius*], based on common patterns of usage and drafting, is equally applicable to the construction of contracts.”).

judgment.”¹⁵⁷ This provision—read together with Section 4.3(o) of the Bylaws—means (as ICANN recognizes) that “[i]f the Panel finds that there is merit to Afilias’ claim that ICANN’s Board, Officers, Directors, or Staff members violated the Bylaws, then the proper remedy is to issue a declaration to that effect pursuant to Section 4.3(o)(iii) [and it] will then be up to the Board to exercise its business judgment and decide what action to take in light of any such declaration.”¹⁵⁸

2. IRP Precedent Confirms the Panel Lacks Authority to Grant the Relief Requested by Afilias

71. Numerous prior IRP decisions confirm that a panel’s remedial authority is significantly circumscribed under the Bylaws, and that such authority does not include the authority to order affirmative relief.¹⁵⁹ For example, in the *Booking.com* IRP, the claimant asked the panel to: (i) order ICANN to reject a determination by an independent String Similarity Panel that “.HOTELS” and “.HOTEIS” are confusingly similar, and (ii) affirmatively delegate those gTLDs to the claimant.¹⁶⁰ ICANN objected on the basis that, among other things, such relief would exceed the panel’s authority.¹⁶¹ The panel agreed, holding that it “cannot grant [the claimant] the relief that it seeks [because] [*a*] panel such as ours can only declare whether, on the facts as we find them, *the challenged actions of ICANN are or are not inconsistent with ICANN’s Articles of Incorporation and Bylaws.*”¹⁶²

¹⁵⁷ Afilias C-1 (Bylaws, *supra* note 11, § 4.3(i)(iii)).

¹⁵⁸ ICANN’s Supplemental Brief Regarding Phase I Issues (September 27, 2019), ¶ 29.

¹⁵⁹ The authority granted to the present IRP Panel by the current Bylaws is substantially the same as the authority granted to previous IRP panels under earlier versions of the Bylaws. For example, as the current version of the Bylaws provides that “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” (Bylaws, *supra* note 11, ¶ 4.3(i)(i)), prior versions of the Bylaws similarly provided that the Panel “shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provision of those Articles of Incorporation and Bylaws.” *See, e.g.*, Afilias C-1 (Bylaws, *supra* note 11, § 3.4). Prior decisions decided under the same or similar rules—such as those decisions described in this section—are instructive precedent. *See* Afilias C-1 (Bylaws, *supra* note 11, § 4.3(a)(vi)).

¹⁶⁰ Afilias CA-11 (*Booking.com*, Final Declaration, ¶¶ 22–23, 83–84).

¹⁶¹ *Id.*, ¶ 91.

¹⁶² *Id.*, ¶ 153.

72. The panel in the *Vistaprint* IRP similarly rejected a claimant’s requests that the panel require ICANN to: (i) reject an expert’s determination that two proposed gTLD strings—.WEBS and .WEB—are confusingly similar, and (ii) allow the claimant’s .WEBS application to proceed.¹⁶³ In assessing the claimant’s requests, the panel found that it did “*not have authority to render affirmative relief* requiring ICANN’s Board to take, or refrain from taking, any action or decision” and it therefore did “*not have authority to order the relief requested by [the claimant].*”¹⁶⁴

73. The decision issued in the *Asia Green IT System* IRP is also instructive.¹⁶⁵ There, the IRP panel agreed with claimant that ICANN violated its Bylaws by deferring indefinitely a decision on the claimant’s gTLD applications. Nevertheless, that panel emphasized that “nothing as to the substance of [ICANN’s ultimate] decision [on the claimant’s applications] should be inferred by the parties from the Panel’s opinion in this regard. *The decision, whether yes or no [to the claimant’s applications], is for [ICANN].*”¹⁶⁶

74. A key principle that emerges from the Bylaws and decisions described above (and others¹⁶⁷) was summed up neatly by the panel in the *Donuts* IRP, which explained that an IRP

¹⁶³ Afiliat CA-2 (*Vistaprint Limited v. ICANN*, ICDR Case No. 01-14-0000-6505, Final Declaration (Gibson, Glas, Elsing) (“*Vistaprint*, Final Declaration”) (2015), ¶ 6).

¹⁶⁴ Afiliat CA-2 (*Vistaprint*, Final Declaration, ¶¶ 149, 196).

¹⁶⁵ AA-43 *Asia Green IT System v. ICANN*, ICDR Case No. 01-15-0005-9838, Final Declaration (Hamilton, Cahill, Reichert) (“*AGIT*, Final Declaration”) (2017), ¶ 149.

¹⁶⁶ *AGIT*, Final Declaration, ¶ 149.

¹⁶⁷ See, e.g., AA-49 *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Final Declaration (Brower (dissenting), Kantor, Donahey) (“*Dot Registry*, Declaration”) (2016), ¶ 70 (“An IRP Panel is tasked with declaring whether the ICANN Board has, by its action or inaction, acted inconsistently with the Articles and Bylaws. *It is not asked to declare whether the applicant who sought reconsideration should have prevailed.*”); AA-55 *Merck*, Final Declaration, ¶ 21 (“[I]t is clear that the [p]anel may not substitute its own view of the merits of the underlying dispute.”); AA-56 *Namecheap, Inc. v. ICANN*, ICDR Case No. 0120-0000-6787, Decision on Request for Emergency Relief (Benton (Emergency Panelist) (2020)), ¶ 114 (“To the extent there are competing Core Values involved, it is for the Board to exercise its judgment as to which competing Core Values are most relevant and to find an appropriate balance.”); AA-42 *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-0000-7056, Final Declaration (Bonner, O’Brien, Matz (concurring and partially dissenting) (2017), ¶¶ 83, 124–25 (declining to grant the claimant’s request for “affirmative relief in the form of a direction to ICANN to grant [claimant’s] applications,” and instead recommending that the Board make an objective and independent judgment regarding whether there were reasons for denying the claimant’s applications); CA-016, *Corn Lake, LLC v. ICANN*, ICDR Case No. 01-15-0002-9938, Final Declaration (Miles, Morril, Ostrove) (2016), ¶¶ 8.15, 10.1, 11.1 (quoting with approval the holding from *Booking.com* that “it is not for the Panel to opine on whether the Board could have acted differently than it did; rather, our role is to

panel is not permitted to “base its determinations on what it, itself, might have done, had it been the Board.”¹⁶⁸ Put differently, while an IRP panel may *declare* that ICANN violated its Articles of Incorporation or Bylaws, and while an IRP panel might even *recommend* interim steps for ICANN to take as it considers the IRP panel’s opinion, any remedial action would ultimately be for ICANN alone to determine.

3. The Guidebook Places All Decisions Approving gTLD Applications Solely within ICANN’s Discretion; ICANN Has Made No Such Decision for this Panel to Review

75. The limited remedial authority of IRP panels described above is also consistent with the express terms of the Guidebook. Because such terms comprise a part of the applicable dispute resolution agreement between ICANN and Afilias, they too serve to define the powers of an IRP panel.¹⁶⁹ Specifically, the Guidebook is clear that ICANN (and not the IRP panel) retains sole decision-making authority with respect to Afilias’ objections and NDC’s .WEB application, providing, among other things, that: (i) “[t]he decision to review, consider and approve an application to establish one or more gTLDs and to delegate new gTLDs after such approval is *entirely at ICANN’s discretion*”¹⁷⁰ and (ii) it is the ICANN Board that “has ultimate responsibility for the New gTLD Program.”¹⁷¹ Contrary to these provisions of the Guidebook and ICANN’s

assess whether the Board’s action was consistent with applicable rules found in the Articles, Bylaws and Guidebook;” the panel also declined to grant the claimant’s request to direct ICANN to take certain steps in connection with the claimant’s gTLD application).

¹⁶⁸ AA-48 *Donuts, Inc. v. ICANN*, ICDR Case No. 01-14-0001-6263, Final Declaration of the Panel, 5 May 2016 (Coe, Boesch, Hamilton) (“*Donuts*, Final Declaration”), ¶ 133 (continuing that, consistent with the Bylaws, “the ICANN board enjoys a large degree of discretion in its decisions and actions,” and “the Board . . . shall itself ‘determine which [of ICANN’s] core values are most relevant and how they apply to the specific circumstances of the case at hand’” (quoting *Booking.com*, Final Declaration, ¶ 129)).

¹⁶⁹ AA-51 BORN, p. 3068, *supra* note 148.

¹⁷⁰ Afilias C-3 (Guidebook, *supra* note 22, at Module 6, § 3) (emphasis added); *see also id.* at Module 6, § 1 (“Applicant acknowledges that any material misstatement or misrepresentation (or omission of material information) may cause ICANN and the evaluators to reject the application without a refund of any fees paid by Applicant.”); Module 1 § 1.2.7 (“Failure to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading may result in denial of the application.”).

¹⁷¹ *Id.*, *supra* note 22, at Module 5 § 4 (continuing: “The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under

Bylaws defining this Panel’s authority, Afilias seeks to turn the Panel into an Internet policy making body, a role that it is not equipped to perform and that is prohibited by the Bylaws under which it has been appointed.

76. Remitting the delegation of new gTLDs and the running of the New gTLD Program exclusively to ICANN and its Board of Directors under the circumstances here is sound policy. ICANN possesses the required expertise and resources to craft DNS policy—through ICANN’s consensus-driven model—and to make decisions consistent with such policy. ICANN knows the complexities of Internet governance and industry practices, as well as the policies ICANN has applied in approving past transactions like that between NDC and Verisign. Further, ICANN is required under the Bylaws to weigh competing Core Values, interests, and policies in making decisions on particular issues, and to make consistent non-discriminatory decisions.¹⁷²

77. An IRP Panel has no background or experience in such matters or the same ability as the ICANN Board—based on years of experience in running the New gTLD Program—to weigh the competing interests and policies that would factor into a decision on .WEB. IRP panels generally are not comprised of DNS specialists and therefore lack the necessary expertise and resources to craft or dictate Internet policy. By analogy, courts regularly decline to assume the

exceptional circumstances, the Board *may* individually consider a gTLD application. For example, the Board *might* individually consider an application as a result of . . . the use of an ICANN accountability mechanism.”); *accord* Amended IRP Request (May 31, 2019), ¶ 64 (“[T]he Guidebook grants ICANN discretion to determine whether information not disclosed to ICANN—or any other potential Guidebook violation—warrants disqualification.”) (citing Guidebook, at § 1.2.7). Even Afilias has acknowledged that the Board has “ultimate responsibility for the New gTLD Program’ (Bylaws, Art. II, § 1; Guidebook, § 5.1)” and that the Board has the power to review and approve any “material changes in circumstances” before formal approval of a registry agreement for the delegation of a gTLD. *See* Letter from Afilias to Mr. A. Attallah (President, Global Domains Division, ICANN) (September 9, 2016), p. 4, *available at* <https://www.icann.org/en/system/files/correspondence/hemphill-to-atallah-09sep16-en.pdf>.

¹⁷² Bylaws, § 1.2(c) (“The Commitments and Core Values are intended to apply in the broadest possible range of circumstances....The specific way in which Core Values are applied, individually and collectively, to any given situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible. Accordingly, in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN’s Mission.”).

functions of administering bodies, and therefore will abstain from ruling on issues that are best handled by relevant administrative agencies.¹⁷³ As the California Court of Appeal has explained, “abstention is appropriate when granting the requested relief would require a trial court to assume the functions of an administrative agency, or to interfere with the functions of an administrative agency.”¹⁷⁴

4. Only ICANN Would Have Authority to Determine the Appropriate Remedy if the Panel Were to Declare the Board’s November 2016 Decision to Be a Violation

78. According to Afilias, the principal issue presented to the Panel is whether ICANN’s failure to disqualify NDC from the .WEB auction violated the Bylaws.¹⁷⁵ As explained by ICANN, this misstates what is at issue because ICANN has not yet decided Afilias’ Guidebook violation claim. Rather, ICANN’s Board “specifically cho[se] in November 2016 not to address the issues surrounding .WEB while an Accountability Mechanism regarding .WEB was pending.”¹⁷⁶ ICANN has set out its policy position in this regard, and submitted to the Panel that its Board’s decision arose “out of the Board’s exercise of its fiduciary duties,” “was ‘within the realm of reasonable business judgment,’” and therefore “must be viewed by the Panel with deference.” In

¹⁷³ See, e.g., AA-53 *Hambrick v. Healthcare Partners Med. Grp., Inc.*, 238 Cal. App. 4th 124, 147 (2015) (“Under the abstention doctrine, ‘a trial court may abstain from adjudicating a suit that seeks equitable remedies if ‘granting the requested relief would require a trial court to assume the functions of an administrative agency, or to interfere with the functions of an administrative agency.’ Abstention may also be appropriate if ‘the lawsuit involves determining complex economic policy, which is best handled by the Legislature or an administrative agency,’ or if ‘granting injunctive relief would be unnecessarily burdensome for the trial court to monitor and enforce given the availability of more effective means of redress.’”) (internal citations omitted); AA-44 *Bernstein v. Real Estate Comm’n of Md.*, 221 Md. 221, 230 (1959) (“... it is clear that the statute did not intend that the court should substitute its judgment for the expertise of those persons who constitute the administrative agency from which the appeal is taken. . . . Generally, when the entire record shows that the findings of fact and conclusions of law are supported by competent, material and substantial evidence taken before the agency, and such *de novo* evidence, if any, as may be taken by the court, and such findings and conclusions are not against the weight of such evidence, it is the function of the court to affirm the order of the agency, or remand the case for further proceedings, if that be necessary.”).

¹⁷⁴ AA-41 *Alvarado v. Selma Convalescent Hosp.*, 153 Cal. App. 4th 1292, 1298 (2007); see also *id.* at 1306 (“Courts may abstain when an administrative agency is better equipped to provide an alternative and more effective remedy.”).

¹⁷⁵ Afilias’ Revised Reply Memorial (May 4, 2020), ¶ 16.

¹⁷⁶ ICANN’s Rejoinder Memorial (June 1, 2020), ¶ 3.

view of ICANN’s submission, the only issue properly before this Panel is whether ICANN’s determination to defer the ultimate decision on Afilias’ claims was within the Board’s business judgment.

79. Even if the Panel were to disagree that ICANN acted within the realm of its reasonable business judgement, and conclude instead that ICANN *did* violate its Articles of Incorporation or Bylaws by virtue of the Board’s November 2016 decision to suspend any determination of the issues surrounding .WEB, the Panel would be authorized only to *declare* as much—that ICANN violated its Articles of Incorporation and/or Bylaws by failing to make a decision on Afilias’ objections. As required by the Bylaws, ICANN must then be permitted to proceed to undertake a full evaluation of the .WEB allegations and to exercise its reasonable judgment to determine an appropriate remedy, if any.

80. For example, in those circumstances, if ICANN were to find that NDC violated the Guidebook or other applicable rules (which is denied), ICANN’s discretion to make determinations regarding gTLD applications would offer it a wide range of possible relief that it could grant after finding such a violation.¹⁷⁷ Such potential relief would hardly be limited to (and may not even include) the relief that Afilias has asked this Panel to grant (*i.e.*, setting aside the auction results and dictating the price for Afilias to buy the .WEB gTLD).¹⁷⁸ The relief that Afilias seeks from this Panel, therefore, not only contravenes the clear limits on this Panel’s remedial authority (as described above), but it also impermissibly and unjustifiably attempts to deprive ICANN of the right to exercise its own discretionary powers to make a decision on the merits of Afilias’ objections and craft an appropriate remedy (if any).

¹⁷⁷For example, as ICANN has explained, “ICANN could order an unwinding of the .WEB auction and either bar NDC from participating, bar NDC from participating in accordance with the DAA, or permit NDC to participate in accordance with the DAA.” ICANN’s Rejoinder Memorial (June 1, 2020), ¶ 88.

¹⁷⁸ Afilias’ Revised Reply Memorial (May 4, 2020), ¶ 155; Afilias’ Amended IRP Request (March 21, 2019), ¶ 89.

5. Afilias' Arguments to the Contrary Are Fundamentally Flawed

81. In addition to ignoring the express limitation on the Panel's authority that is found in Section 4.3(o) of the Bylaws, Afilias advances a number of flawed arguments by misconstruing: (i) other, tangential provisions of the Bylaws; (ii) the recommendations of the Cross-Community Working Group for Accountability ("CCWG"), which was established to revise and improve ICANN's constitutive documents; and (iii) prior IRP decisions. Afilias' arguments in this regard do not withstand scrutiny.

(1) *Afilias Misconstrues the Bylaws*

82. Afilias contends that the Panel's alleged authority to issue affirmative relief arises out of the "Purposes of the IRP" listed in Section 4.3(a) of the Bylaws.¹⁷⁹ But none of the "Purposes of the IRP" quoted by Afilias grants—either explicitly or implicitly—an IRP panel the authority to impose a remedy for an alleged violation by ICANN of the Articles of Incorporation or Bylaws. As discussed above, if the drafters of the Bylaws intended for IRP panels to have such authority, they would have expressly included such authority in Section 4.3(o).¹⁸⁰

¹⁷⁹ See Afilias' Revised Reply Memorial (May 4, 2020), ¶ 151. Afilias refers to the following "Purposes of the IRP," which are listed in Section 4.3(a) of the Bylaws: (i) "Ensure that ICANN does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws;" (ii) "Empower the global Internet community and Claimants to enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable and accessible expert review of Covered Actions . . ."; (iii) "Ensure that ICANN is accountable to the global Internet community and Claimants;" (iv) "Reduce Disputes by creating precedent to guide and inform the Board, Officers (as defined in Section 15.1), Staff members, Supporting Organizations, Advisory Committees, and the global Internet community in connection with policy development and implementation;" (v) "Secure the accessible, transparent, efficient, coherent, and just resolution of Disputes;" (vi) "Lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction;" and (vii) "Provide a mechanism for the resolution of Disputes, as an alternative to legal action in the civil courts of the United States or other jurisdictions." *Id.* (quoting Bylaws, §§ 4.3(a)(i)–(iii), (vi)–(ix)).

¹⁸⁰ Further, as ICANN explained in its Rejoinder, even if the general provisions setting out the "purpose" of IRPs could be construed to expand an IRP panel's authority, such general provisions would yield to the specific provisions of Article 4.3(o), which limit such authority. See ICANN's Rejoinder, ¶ 122 (citing *CAZA Drilling (California), Inc. v. TEG Oil & Gas U.S.A., Inc.*, 142 Cal. App. 4th 453, 466 (2006) ("when general and specific provisions are inconsistent, the latter control"); AA-45 Cal. Civ. Proc. Code § 1859 ("when a general and particular provision are inconsistent, the latter is paramount to the former.")).

83. Afilias also stresses that the Bylaws state that “[t]he IRP is intended as a final, binding arbitration process,” and that “IRP Panel decisions . . . are intended to be enforceable.”¹⁸¹ Afilias then suggests that these facts somehow mean that an IRP Panel has authority to order affirmative relief.¹⁸² This is a *non-sequitur*. 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 expressly circumscribed remedial jurisdiction. For example, if a commercial contract called for binding arbitration, but restricted the arbitral tribunal’s remedial jurisdiction to awarding monetary damages, the tribunal could not award specific performance simply because the arbitration is binding in nature. In fact, if such tribunal were to award specific performance in those circumstances, the award would be rendered unenforceable because the tribunal would have exceeded its powers.¹⁸³

84. The same result would arise in the present case: If this Panel were to disregard the express constraints on its remedial powers by ordering the affirmative relief that Afilias requests, any such decision would be contrary to the dispute resolution agreement between Afilias and ICANN. Such a decision would therefore be *ultra vires* and unenforceable.¹⁸⁴

¹⁸¹ See Afilias’ Revised Reply Memorial (May 4, 2020), ¶ 152; Afilias C-1 (Bylaws, *supra* note 11, § 4.3(x)).

¹⁸² See Afilias’ Revised Reply Memorial (May 4, 2020), ¶ 153.

¹⁸³ See, e.g., AA-51 BORN, p. 371, *supra* note 148, (“[R]elief ordered by an arbitrator can potentially be challenged in either annulment or recognition proceedings on the grounds that it exceeds the arbitrator’s authority (an ‘excess of authority’), particularly where . . . a tribunal exercises an authority that the parties’ arbitration agreement clearly denies it.”); see also ICANN’s Rejoinder Memorial (June 1, 2020), ¶ 124 (explaining that “an order [to require ICANN to disqualify NDC’s application and bid and to offer Afilias the rights to .WEB] would exceed the Panel’s authority as defined by the Bylaws and render the Panel’s declaration invalid and subject to challenge under Article V(1)(c) of the New York Convention, which states that recognition and enforcement of an arbitral award may be refused where it ‘contains decisions on matters beyond the scope of the submission to arbitration.’”).

¹⁸⁴ Further, if the Panel were to grant Afilias’ request for affirmative relief, such decision would deprive Verisign and NDC of their common law right to a fair procedure. In the *status quo ante*, NDC would be entitled to enter into a Registry Agreement with ICANN for the .WEB gTLD. But if the Panel were to order ICANN to offer .WEB to Afilias—as Afilias has requested—such an order would effectively deprive NDC of its rights to .WEB without a full and fair hearing. The effective expulsion of NDC (and Verisign) from participation in the .WEB gTLD would be procedurally unfair and contrary to ICANN’s own rules, as it would have been ordered by the Panel despite the Panel’s lack of authority to make such an order.

(2) *Afilias Misconstrues the CCWG Recommendations*

85. Afilias is equally misguided in its reliance on the report prepared by the CCWG in recommending revisions to the Bylaws' IRP provisions. Specifically, Afilias argues that an IRP panel can order affirmative relief on the basis that: (i) the CCWG sought to strengthen the IRP process to ensure that IRP panels could “hear *and resolve* claims that ICANN . . . has acted (or has failed to act) in violation of its Articles of Incorporation or Bylaws”;¹⁸⁵ and (ii) the drafters of the new Bylaws incorporated most of the CCWG's recommendations.¹⁸⁶ Once again, this argument is a *non-sequitur*, and it lacks merit for several additional reasons.

86. As an initial matter, a declaration as to whether or not ICANN violated its Articles of Incorporation or Bylaws would, in fact, “resolve” a claim that ICANN violated its Articles of Incorporation or Bylaws. To “resolve” such a claim would not also require an IRP panel to take the further step of ordering a remedy through affirmative relief.

87. Second, the CCWG did *not* recommend that IRP panels should be authorized to dictate a remedy in cases in which ICANN is found to have violated its Articles of Incorporation or Bylaws. Nothing in the text of the CCWG reports cited by Afilias suggests otherwise.¹⁸⁷ To the contrary, in a section of the CCWG report titled “Possible Outcomes of the Independent Review Process,” the CCWG confirmed that “[a]n IRP would result in a declaration that an

¹⁸⁵ Afilias' Revised Reply Memorial (May 4, 2020), ¶ 150 (emphasis in original) (quoting and citing Afilias Ex. C-291 (CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 February 2016), ¶ 177 (p. 34)); Afilias Ex. C-220 (CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Annex 07 – Recommendation #7: Strengthening ICANN's Independent Review Process (23 February 2016), ¶¶ 2, 16 (pp. 1, 6)).

¹⁸⁶ Afilias' Revised Reply Memorial (May 4, 2020), ¶ 150.

¹⁸⁷ See generally Afilias Ex. C-291 (CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 February 2016), Recommendation # 7, ¶¶ 174–81 (pp. 33–36)); Afilias Ex. C-220, CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Annex 07 – Recommendation #7: Strengthening ICANN's Independent Review Process (23 February 2016)).

action/failure to act complied or did not comply with ICANN’s Articles of Incorporation and/or Bylaws.”¹⁸⁸

88. Third, the CCWG squarely recognized that a declaration—as opposed to any other sort of remedy—represented a “*limitation* to the type of decision made [by an IRP panel].”¹⁸⁹ In other words, the CCWG understood that a panel’s remedial authority should be limited. According to the CCWG, one of the reasons for imposing such a limitation was “to mitigate the potential effect that one key decision of the panel might have on *several third parties*.”¹⁹⁰ Here, if the Panel were to exceed its authority by granting the affirmative relief requested by Afiliias, such decision would seek to deprive NDC of its right to the .WEB gTLD. This is precisely the type of effect on third parties that the CCWG sought to mitigate when it recommended that the authority of IRP panels should be limited.

89. Finally, the CCWG report also confirms that while a panel may “direct [the ICANN Board and staff] to take appropriate action to remedy [a] breach [of the Articles of Incorporation or Bylaws,] *the Panel shall not replace the Board’s fiduciary judgment with its own judgment.*”¹⁹¹ Put differently, in the view of the CCWG, it should be left to the ICANN Board and staff—and not the IRP panel—to determine what “appropriate action” should be taken to remedy any breach of the Articles of Incorporation or Bylaws.

(3) *Afiliias Misconstrues the IRP Decisions in the DCA and GCC Cases*

90. Afiliias makes the unfounded assertion that “IRP Panels [have] consistently rejected ICANN’s arguments that IRP Panels lack authority to issue affirmative declaratory relief.”¹⁹² As

¹⁸⁸ Afiliias Ex. C-220 (CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Annex 07 – Recommendation #7: Strengthening ICANN’s Independent Review Process (23 February 2016), ¶ 16).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*, ¶ 57.

¹⁹² Afiliias’ Revised Reply Memorial (May 4, 2020), ¶ 153.

shown above, *numerous* prior IRP decisions have, in fact, expressly confirmed that their remedial authority is significantly circumscribed under the Bylaws, and that such authority does *not* include the authority to order affirmative relief.¹⁹³ Afilias completely ignores such decisions.

91. Instead, Afilias seeks to rely on the decisions in only two prior IRPs: *DotConnectAfrica Trust v. ICANN* (“DCA”) and *Gulf Cooperation Council v. ICANN* (“GCC”).¹⁹⁴

But even those two IRP decisions do not support Afilias’ position:

- While the *DCA* panel determined that it could recommend a course of action for ICANN to follow, the panel did not go so far as to *order* affirmative relief; nor did that panel even assert any authority to do so.¹⁹⁵
- Likewise, the *GCC* panel did not purport to *order* or *direct* ICANN to take remedial steps; instead, the panel *recommended* such steps.¹⁹⁶

92. Notably, the *GCC* panel also confirmed that “an IRP Panel cannot abuse [its] independence to substitute its own view of the underlying merits of the contested action for the view of the Board, which has substantive discretion.” The *GCC* panel thus reinforced that “an IRP Panel is *not entrusted with second-guessing the Board*, but rather ‘with *declaring whether the Board has acted consistently* with the provisions of Articles of Incorporation and Bylaws.’”¹⁹⁷ Further, as the *GCC* panel explained, the role of an IRP panel is to examine the *process* undertaken by ICANN, and not whether ICANN is “right or wrong on the merits.”¹⁹⁸

93. To conclude, Afilias has failed to establish that the Panel has authority to order the

¹⁹³ See *supra* Section III.A.2.

¹⁹⁴ Afilias’ Revised Reply Memorial (May 4, 2020), ¶ 153.

¹⁹⁵ See Afilias CA-5 (*DotConnectAfrica Trust v. ICANN*, ICDIR Case No. 50-2103-001083, Final Declaration (Barin, Kessedjian, Cahill) (2015), ¶¶ 126–28, 148–51).

¹⁹⁶ See Afilias CA-6 (*Gulf Cooperation Council v. ICANN*, ICDR Case No. 01-14-0002-1065, Partial Final Declaration of the Independent Review Process Panel “GCC, Partial Final Declaration” (Reed, Sabater, van den Berg) (2016), p. 44).

¹⁹⁷ *Id.*, ¶ 94 (emphasis added)).

¹⁹⁸ *Id.*, ¶ 95 (“It is irrelevant whether the IRP Panel considers [ICANN’s] decision to be right or wrong on the merits, much less to be politically wise or unwise. Our role is to examine the **process** of the Board’s decision-making . . .” (emphasis in original)).

affirmative relief that Afilias requests. The core documents that govern this IRP are clear: while the Panel is empowered to “[d]eclare whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws,”¹⁹⁹ the Panel does *not* have any authority to dictate a *remedy* for any such violation or replace the reasonable judgment of the ICANN Board. The authority to decide an appropriate remedy for any violation of the Bylaws or Articles of Incorporation resides exclusively with ICANN.

B. To the Extent the Panel Considers the Merits of Afilias’ Claims against NDC, the Evidence Establishes that NDC Acted Consistent With ICANN’s Rules and Common Industry Practices

94. Notwithstanding the foregoing discussion, in the event the Panel were to consider Afilias’ claims, they should be rejected as unsound and unsupported for several reasons. First, Afilias’ recycled allegation that NDC, through Mr. Rasco, made “material misstatements” to ICANN is wrong. Nothing NDC told ICANN was false or misleading—let alone an “outright lie” as Afilias contends.

95. Second, NDC did not violate any ICANN Rule in connection with the DAA. As Verisign’s brief explains, by its express terms, the DAA ^{Redacted Third Party Designated Confidential Information}

Moreover, NDC did not violate any ICANN Rules by agreeing to transfer .WEB to Verisign after prevailing at auction and upon ICANN’s consent. To the contrary, (i) the ICANN Rules expressly contemplate such post-auction transfer agreements,

¹⁹⁹ Afilias Ex. C-1 (Bylaws, *supra* note 11, § 4.3(o)(iii)).

²⁰⁰ See Verisign’s Pre-Hearing Brief Regarding Phase II Issues “Verisign Brief” (26 June 2020), ¶¶ 21-34. As noted, to avoid duplication, NDC will not repeat the discussion of this point here. We merely note that NDC *did not intend* to assign or otherwise transfer its .WEB application to Verisign and did not do so. It is well-settled in California that “[t]he fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.” AA-62 *Wolf v. Superior Court*, 114 Cal. App. 4th 1343, 1356 (2004). “[R]ational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties,” including “testimony as to the circumstances surrounding the making of the agreement.” AA-57 *Pac. Gas & E. Co. v. G. W. Thomas Drayage etc. Co.*, 69 Cal. 2d 33, 39-40 (1968). Here, both signatories to the DAA submitted sworn declarations that, as also expressly stated in the DAA, ^{Redacted - Third Party Designated Confidential Information}

Rasco Stmt., ¶¶ 47-51; Livesay Stmt., ¶ 19-23, 27-28.

(ii) NDC was aware when it executed the DAA that gTLD Program participants had made such transfers, and (iii) ICANN has regularly approved such transfers since the inception of the Program—including transfers to which Afilias was a party. We briefly address these points below.

1. NDC Did Not Make Any Material Misrepresentations to ICANN

96. Like Donuts and Ruby Glen (unsuccessfully) before it, Afilias contends that NDC violated the ICANN Rules by making allegedly material misrepresentations to ICANN regarding its .WEB application. Afilias’ contention is premised on the same email exchange between Mr. Rasco and Jon Nevett of Donuts between June 6-7, 2016,²⁰¹ on which Donuts and Ruby Glen relied when they attempted to delay the .WEB public auction after failing to persuade NDC to participate in a private auction for .WEB and its argument fares no better.²⁰²

97. First, Mr. Rasco’s June 7 email to Mr. Nevett provides no basis for Afilias’ complaints. Mr. Rasco’s informal communication to Mr. Nevett has been taken out of context and twisted to fit the self-serving goals of first Donuts and Ruby Glen and now Afilias.²⁰³ The message “was an informal email between colleagues who, though also competitors, had a cordial and even friendly relationship. In that context, [Mr. Rasco] sought to politely respond to Mr. Nevett’s inquiry and deflect further questions.”²⁰⁴ Mr. Rasco “never intended to suggest any of the changes to the ownership or control of NDC that have been alleged. Nor did [he] have any obligation or intention to provide detailed, formal information about [NDC] or its management to Donuts.”²⁰⁵

²⁰¹ Afilias’ Revised Reply Memorial (May 4, 2020), ¶¶ 70-81.

²⁰² As noted, both ICANN and the United States District Court for the Central District of California considered the evidence presented and rejected those attempts. Indeed, in denying Ruby Glen a TRO, the District Court specifically noted “*the weakness of Plaintiff’s efforts* to enforce vague terms contained in ICANN’s bylaws and Applicant Guidebook” and concluded that Ruby Glen had failed to “establish that it is likely to succeed on the merits” and “*failed to demonstrate that its allegations raise[d] serious issues.*” Verisign VRSN-16 (*Ruby Glen, LLC v. ICANN*, Court Order Denying Ex Parte Application (July 26, 2016)).

²⁰³ Rasco Stmt. (June 1, 2020), ¶¶ 70-72.

²⁰⁴ *Id.*, ¶70.

²⁰⁵ *Id.*

98. Second, Mr. Rasco never misrepresented the status of NDC’s ownership or management to ICANN, nor told ICANN an “outright lie” or a “blatant falsehood” as Afilias asserts in its *ad hominem* attacks on Mr. Rasco.²⁰⁶ As Mr. Rasco has testified: “Although my June 7, 2016 email to Mr. Nevett was taken entirely out of context, my responses to ICANN’s inquiries were unequivocal and accurate....I repeatedly told Ms. Willett and Mr. LaHatte in July 2016 that there had been no change to NDC’s management, control, or ownership since the filing of NDC’s .WEB Application, Redacted - Third Party Designated Confidential Information

Those statements were unequivocally true.”²⁰⁷

99. Moreover, as the DAA did not transfer any ownership or control of NDC to Verisign,²⁰⁸ Mr. Rasco was not obligated to reference Verisign or the DAA in his responses to ICANN when asked about changes to NDC’s ownership or control. Afilias relies on the *ipse dixit* argument that Mr. Rasco was obligated to disclose to ICANN everyone with whom he discussed his auction strategy and everyone that might have an interest in the outcome of that auction. But **nothing** in the ICANN Rules requires such disclosures, as Afilias itself demonstrated by not disclosing the bank or other lender that financed Afilias’ .WEB bid and restricted Afilias from bidding any higher than \$135 million.²⁰⁹

2. NDC Did Not Violate any ICANN Rules in Agreeing to a Post-Auction Transfer Agreement

100. There is nothing in the ICANN Rules that prohibits the post-auction transfer of .WEB, Redacted - Third Party Designated Confidential Information. To the contrary, the ICANN Auction Rules state that applicants within a Contention Set may discuss and negotiate, among other things, “settlement

²⁰⁶ See *id.* ¶¶ 78, 87.

²⁰⁷ *Id.*, ¶ 90.

²⁰⁸ See, e.g., Livesay Ex. D (DAA, §3).

²⁰⁹ See Witness Statement of Ram Mohan (November 1, 2018), ¶ 25, 35.

agreements *or post-Auction ownership transfer arrangements*” for the domain at issue, as long as those discussions do not take place during a restricted Blackout Period shortly before the auction itself.²¹⁰ Here, the Blackout Period for .WEB did not commence until July 20, 2016.²¹¹ NDC executed the DAA with Verisign in August 2015, almost a year earlier, and thus under the ICANN Auction Rules NDC was free to arrange for a post-Auction ownership transfer at that time,

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101. Moreover, in arranging for that post-auction transfer, NDC also acted consistently with what the industry understood was permissible; Afilias’ contention that there is an “absolute bar” to such arrangements is wrong both as a matter of law and practice.²¹² Indeed, the secondary market is an integral part of ICANN’s New gTLD Program and has created many opportunities for novel means of obtaining and transferring gTLDs.²¹³ Mr. Rasco explained that he was aware of several of these transactions before executing the DAA, and, to NDC’s knowledge, no one challenged those or similar transactions, including Afilias.²¹⁴ In fact, such transactions are commonplace, with many parties—again *including Afilias*—regularly taking part.²¹⁵

102. Accordingly, by 2015, it was common knowledge that applicants had monetized their gTLD applications in different ways, including through agreements with third parties to whom the gTLD was subsequently assigned, and that ICANN had approved of these transactions and assignments.²¹⁶ Participants in the New gTLD Program, including NDC, thus understood that such transactions were permissible. For this reason, Redacted - Third Party Designated Confidential Information

²¹⁰ Afilias C-4 (Auction Rules for New gTLDs, *supra* note 23, at 68(a)-(b)).

²¹¹ Afilias C-4 (Auction Rules for New gTLDs, *supra* note 23, at Clause 68; Rasco Ex. Q (Email from L. Ausubel (Power Auctions) to J. Rasco (NDC) (July 20, 2016)).

²¹² Afilias’ Revised Reply Memorial (4 May 2020), ¶ 32.

²¹³ Rasco Stmt. (June 1, 2020), Part IV; *see also* Verisign Brief, ¶¶ 35-45.

²¹⁴ *See* Rasco Stmt. (June 1, 2020), ¶¶ 42-44, 61.

²¹⁵ *See id.*, ¶¶ 43-44; *see also* Verisign Brief, ¶¶ 37-40.

²¹⁶ Rasco Stmt. (June 1, 2020), ¶ 42.

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103. Afiliás, therefore, is alone in pretending, as it does in this IRP, that the secondary market and post-auction transactions ^{Redacted Third Party Designated C} are objectionable. As discussed in Part III.D, *infra*, however, Afiliás' own conduct in that market should bar it from obtaining any relief in this action as a matter of equity. Indeed, Afiliás' false protestations throughout this IRP—protestations worthy of Captain Renault in *Casablanca*—must be understood for the inequitable and opportunistic fabrications that they are.

C. NDC Was Not Required to Update its .WEB Application Because NDC Maintains a Present Interest in that Application

104. Afiliás' contention that NDC sold, assigned, or transferred its interest in the .WEB Application—and thus NDC was obliged to update that application upon executing the DAA—is incorrect for the additional reason that NDC presently maintains all of its interests in that application. As the winner of the .WEB auction, NDC could still operate .WEB as described in its application, thereby belying Afiliás' claims that any material changes have occurred and that there is any issue with NDC's application that ICANN must address.

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²¹⁷ Afiliás C-100 (Email from C. Willett (ICANN) to J. Rasco (NDC) (5 August 2016)).

Second, were the proposed assignment to Verisign rejected by ICANN, or were NDC and Verisign to otherwise decide to alter their agreement, nothing prevents NDC from negotiating with Verisign to operate .WEB, Redacted - Third Party Designated Confidential Information

106. In any of these scenarios, NDC would be free to raise financing, such as through a sale or license or through a private equity or bank transaction (the same way Afilias financed its own bid for .WEB), Redacted - Third Party Designated Confidential Information NDC could, for example, operate .WEB as it operated .CO—*e.g.*, in conjunction with a third party such as Neustar, Inc., precisely as described in its .WEB application.²¹⁹

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In this event, NDC would not be situated any differently than Afilias had Afilias won the .WEB auction: Operating the domain pursuant to financing used to secure the successful auction bid.

107. Critically, the very fact that these scenarios remain available to NDC illustrates that NDC retains all rights and interests in the .WEB application, and thus, contrary to Afilias' contentions, NDC has never assigned any of those interests to Verisign or to any other party. Moreover, that these scenarios remain available to NDC further demonstrates that no update to ICANN has been or would be warranted until it is determined which entity—NDC, Verisign, or a third party—will operate .WEB. Then, and only then, would ICANN have cause to examine the appropriate financial and technical abilities of that entity, if other than NDC. Accordingly, Afilias

²¹⁸ Livesay Ex. D (DAA, §9(b)).

²¹⁹ Rasco Stmt. (June 1, 2020), ¶ 21.

²²⁰ Verisign Brief, ¶ 57.

is incorrect that NDC was obligated to update its application, including portions concerning NDC’s “mission and purpose” in operating .WEB, upon execution of the DAA.²²¹

D. Afilias’ Conduct Violates Established Principles of Equity and Bars Its Requested Relief

1. Afilias’ Own Participation in the Secondary Market Belies its Current Contentions

108. “He who comes into Equity must come with clean hands.”²²² And litigants may not “‘play fast and loose’ with courts of justice according to the vicissitudes of self-interest.”²²³ These maxims ring true in this IRP, where Afilias suddenly decries behavior that is not only commonplace in the industry, but also that it has actively participated in, encouraged, and benefited from. Afilias thus enters this dispute with unclean hands, which precludes its relief.²²⁴

109. Afilias’ “misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character.”²²⁵ Rather, the doctrine of unclean hands broadly applies to “any inequitable, unconscionable, or bad faith conduct that is connected to the case.”²²⁶ Here, this standard is easily met: Afilias previously participated in the very behavior of which it now complains, a prime example of inequitable conduct that should not be rewarded by this Panel.

110. First, as ICANN demonstrates, Afilias has participated in various transfers effectively identical to the DAA.²²⁷ Afilias has operated on both sides of those transfers, buying

²²¹ *Id.*, ¶¶ 78-87.

²²² AA-54 *Kendall-Jackson Winery, Ltd. v. Sup. Ct.*, 76 Cal. App. 4th 970, 978 (1999).

²²³ AA-52 *Guinness PLC v. Ward*, 955 F.2d 875, 899 (4th Cir. 1992).

²²⁴ AA-54 *Kendall-Jackson*, 76 Cal. App. 4th at 978 (A plaintiff “must come into court with clean hands, and keep them clean, or he will be denied relief, regardless of the merits of his claim.”); *see also* AA-58 *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945) (“This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief....”).

²²⁵ *Precision Instrument*, 324 U.S. at 815.

²²⁶ AA-59 T. Leigh Anenson, *Limiting Legal Remedies: An Analysis of Unclean Hands*, 99 Ky. L.J. 63, 64 (2011).

²²⁷ ICANN’s Response to Amended IRP Request (May 31, 2019), ¶¶ 27-29.

gTLDs it had not applied for and selling gTLDs it obtained to parties who were not a part of the relevant Contention Sets.²²⁸ For example, in 2015, ICANN approved a transfer of the .PROMO Registry Agreement to Afilias, even though Afilias was not the original applicant.²²⁹ Similarly, in 2012, Afilias applied for and subsequently won the .MEET domain, “stating its intent to make .MEET into an online dating destination.”²³⁰ After signing a registry agreement with ICANN, however, and apparently before servicing a single customer, Afilias transferred .MEET to a Google entity that planned to convert it “to a gTLD that provided ‘web-based business meetings.’”²³¹ As ICANN has noted, it “approved the transfer even though the new objective for the gTLD was radically different than that expressed in the Afilias application.”²³²

111. In this IRP, however, Afilias cries foul that NDC agreed to transfer .WEB to Verisign, which, like Afilias in .PROMO was not the original applicant, and, like Google in .MEET, would acquire the gTLD before NDC launched the domain as described in its application. Afilias’ baseless arguments that the public deserved to know that Verisign, not NDC, would operate .WEB and that the “mission and purpose” sections of NDC’s .WEB Application are somehow now misleading thus ring hollow.²³³

112. Second, Afilias also sought and benefited from external financing and transfer agreements, including using a third party to finance its bid for .WEB—the very gTLD at issue here.²³⁴ Although Afilias’ arrangement with its financier shaped *its* bidding strategy and defined

²²⁸ *Id.*; Verisign Brief, ¶¶ 38-39.

²²⁹ .PROMO Registry Agreement ICANN-Afilias, available at <https://www.icann.org/resources/agreement/promo-2014-12-18-en>; see also Willett Stmt. (31 May 2019), ¶ 39.

²³⁰ ICANN’s Opposition to Request for Emergency Panelist and Interim Measures of Protection (Dec. 17, 2018), ¶¶ 25-28.

²³¹ *Id.*; see also ICANN R-3 (Application for Assignment – Registry Agreement (Material Subcontracting Arrangement) for .MEET).

²³² ICANN’s Opposition to Request for Emergency Panelist and Interim Measures of Protection (Dec. 17, 2018), ¶¶ 25-28

²³³ Verisign Brief, ¶¶ 78-87.

²³⁴ *Id.*, ¶ 45; Mohan Stmt. (November 1, 2018), ¶ 25.

its maximum bid amount, Afilias contends that *Verisign* was improperly controlling *NDC* through the DAA. That accusation is factually incorrect,²³⁵ but it also reveals how Afilias continues to talk out of both sides of its mouth. The Panel should not allow Afilias to wield inconsistent positions as a tactical tool in this regard.²³⁶

113. Third, Afilias has repeatedly failed to object to third party transactions employed by other applicants where, unlike here, it did not have a particular interest in the outcome or an ulterior motive. For example, although Afilias was a member of the Contention Set for .BLOG with Primer, Afilias evidently made no objection when WordPress financed Primer's winning bid in exchange for an assignment of .BLOG following the auction or when Primer subsequently assigned .BLOG to WordPress.²³⁷ There are many more examples,²³⁸ each of which demonstrates Afilias' hypocrisy in accusing NDC and Verisign of acting beyond the scope of ICANN's Rules and industry practice. Under long-standing principles of equity, however, Afilias cannot shift positions to suit its business purposes in this particular instance.²³⁹

2. Afilias Violated the Auction Rules by Attempting to Pressure NDC into a Private Auction During the Blackout Period

114. In addition to ignoring its own use of financing and transfer agreements to acquire and sell gTLDs, Afilias also ignores its violation of the Guidebook's Blackout Period, a serious breach of the ICANN Rules that subjects it to financial penalties and forfeiture of its .WEB application. In particular, the Auction Rules state that, for each Contention Set, a "Blackout Period" shall be in effect from the deposit deadline for the auction in question until the Auction

²³⁵ Verisign Brief, ¶¶ 52-62.

²³⁶ See AA-60 *UZ Engineered Prod. Co. v. Midwest Motor Supply Co.*, 770 N.E.2d 1068, 1079 (Ohio Ct. App. 2001) (finding it proper to estop party from taking a position contrary to its prior, contradictory actions).

²³⁷ Verisign Brief, ¶ 40.

²³⁸ *Id.*, ¶¶ 41-45.

²³⁹ See AA-40 *Aerojet-Gen. Corp. v. Superior Court*, 211 Cal. App. 3d 216, 240 (1989) ("One may not alter one's ... argument as the chameleon does his color, to suit whatever terrain one inhabits at the moment.") *abrogated on other grounds by AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807 (1990).

Bank Account receives payment in full from the winner of the Contention Set.²⁴⁰ As set forth in Clause 68 of the Auction Rules, during this Blackout Period, applicants within a Contention Set are, *inter alia*, “prohibited from cooperating or collaborating with respect to ... each other’s, or any other competing applicants’ bids or bidding strategies, or discussing or negotiating settlement agreements.”²⁴¹

115. And Clause 61 of the Auction Rules is unequivocal: violation of the Blackout Period is considered a “serious violation” of those Rules such that an applicant who violates the Blackout Period “*will be subject to*” prescribed penalties, including “forfeiture of its Applications and/or termination of any or all of its registry agreements.”²⁴² Here, Afilias breached the Blackout Period and it is well within ICANN’s discretion to penalize Afilias for that breach.

116. As discussed in Part I, *infra*, and as further described in Mr. Rasco’s Witness Statement, most Contention Sets are resolved through private auctions in which the winner secures the rights to the gTLD at issue and, unlike in a public auction, the winning bid is shared among the losing parties. A private auction, however, requires the consent of all members of the Contention Set. NDC’s decision to proceed to a public auction for .WEB thus threatened Afilias’ recovery of its portion of the losers’ share and prevented Afilias from securing .WEB without the unknown risks of a public auction.²⁴³

117. Afilias tried everything to avoid that result. First, on two separate occasions before the .WEB Blackout Period, Afilias tried to buy NDC’s assent to a private auction, offering NDC \$16 million, and then \$17.02 million, to proceed to a private auction and lose.²⁴⁴ NDC declined.

²⁴⁰ Afilias C-4 (Auction Rules for New gTLDs, *supra* note 23, at Clause 68).

²⁴¹ *Id.* at Clause 68(a).

²⁴² *Id.*

²⁴³ See Rasco Stmt. (June 1, 2020), ¶ 67.

²⁴⁴ Rasco Ex. J (Text message from Afilias to J. Calle (NDC) (7 June 2016)); Rasco Ex. K (Text message from J. Kane (Afilias) to J. Rasco (NDC)).

Then, on July 22, 2016, two days *after* the Blackout Period for .WEB officially commenced, Afilias *again* texted NDC requesting to “Talk?” and proposing “If ICANN delays the auction next week would you again consider a private auction? Y-N.”²⁴⁵ NDC did not respond.²⁴⁶

118. Because Afilias had previously attempted to induce NDC to agree to a private auction and lose, these last text messages were a clear reiteration of Afilias’ prior offer and constituted an effort by Afilias to again discuss those same issues and to belatedly and improperly negotiate a settlement agreement of .WEB. But because Afilias sent these text messages *after* the commencement of the Blackout Period, they also constituted a “serious violation” of the Auction Rules under Clauses 61 and 68.

119. Afilias is a sophisticated applicant with full knowledge and awareness of the rules, including the unambiguous rules pertaining to the Blackout Period. Moreover, Larry Ausubel of Power Auctions LLC (the administrator appointed by ICANN to conduct the .WEB auction) emailed every member of the Contention Set on July 20, 2016—two days before Afilias reiterated its offer of guaranteeing money to NDC in a private auction—expressly reminding them that “the Deposit Deadline for .WEB/.WEBS has passed and *we are now in the Blackout Period.*”²⁴⁷ Afilias simply, and inexcusably, ignored that warning.

IV. CONCLUSION

120. For the foregoing reasons, and as further articulated in Verisign’s *amicus curiae* brief, NDC respectfully requests that the Panel deny all relief requested by Afilias.

²⁴⁵ Rasco Ex. R (Text message from J. Kane (Afilias) to J. Rasco (NDC) (22 July 2016)).

²⁴⁶ Rasco Stmt. (June 1, 2020), ¶ 96.

²⁴⁷ Rasco Ex. Q (Email from L. Ausubel (Power Auctions) to J. Rasco (NDC) (July 20, 2016)).

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Respectfully Submitted,

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