

APPENDIX A
INDEX OF AFILIAS' CAUSES OF ACTION AND REQUESTS FOR RELIEF
AND ICANN's DEFENSES

CLAIM	PLEADING WHERE FIRST ASSERTED	DEFENSES
<p>ICANN violated its Bylaws' provision stating that it should "[m]ake decisions by applying its documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment," by not immediately disqualifying NDC's application or auction bids in 2016 when ICANN became aware of NDC's arrangement with Verisign regarding .WEB.</p>	<p>Afilias Amended IRP Request ¶¶ 68 & 78 (bullets 1-3, 7))</p>	<ul style="list-style-type: none"> • <u>Time Bar</u>. This claim is time-barred by Rule 4 of the Interim Supplementary Procedures, and it is therefore outside the Panel's jurisdiction. (ICANN's Post-Hearing Brief, Section II.) • <u>No Violation of the Articles or Bylaws</u>. The Guidebook and Auction Rules grant ICANN significant discretion to determine whether a breach of their terms has occurred, and if so, the appropriate remedy. There is a good-faith dispute between the <i>Amici</i> and Afilias about whether the DAA violates the Guidebook or Auction Rules, and it is not a foregone conclusion that NDC is or is not in breach. (ICANN's Post-Hearing Brief, Section III.) • <u>Business Judgment Rule</u>. The Board exercised reasonable business judgment in deciding not to make any material decisions regarding .WEB while a related Accountability Mechanism was pending. (ICANN's Post-Hearing Brief, Section IV.)
<p>ICANN violated its Bylaws' provision stating that ICANN should "[m]ake decisions by applying its documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment," by the manner in</p>	<p>Afilias Amended IRP Request ¶ 78 (bullets 4, 5))</p>	<ul style="list-style-type: none"> • <u>Time Bar</u>. This claim is time-barred by Rule 4 of the Interim Supplementary Procedures, and it is therefore outside the Panel's jurisdiction. (ICANN's Post-Hearing Brief, Section II.)

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<p>which ICANN conducted its pre-auction investigation of allegations by Ruby Glen that there had been a change of ownership or control of NDC.</p>		<ul style="list-style-type: none"> • <u>The Investigation Was Done Properly.</u> ICANN's pre-auction investigation was prompt and thorough and it correctly concluded that NDC had not undergone a change in ownership and control. (ICANN's Post-Hearing Brief, Section VI.) • <u>No Violation of the Articles or Bylaws.</u> Afilias has not identified any provisions of the Articles or Bylaws purportedly violated by ICANN's investigation. (ICANN's Post-Hearing Brief, Section VI.)
<p>Assertion that ICANN violated the Articles and Bylaws in its investigation of post-auction complaints by Afilias regarding NDC's arrangement with Verisign regarding .WEB.</p>	<p>Afilias Reply Memorial ¶¶ 8, 102-118</p>	<ul style="list-style-type: none"> • <u>Not Pled.</u> This "claim" was not asserted in Afilias original or Amended IRP Request. Therefore, it is not part of the "Claim," as defined by Section 4.3(d) of the Bylaws, and is not properly before the Panel. (ICANN's Post-Hearing Brief, Section VI.) • <u>Time Bar.</u> This "claim" is time-barred by Rule 4 of the Interim Supplementary Procedures, and it is therefore outside the Panel's jurisdiction. (ICANN's Post-Hearing Brief, Section II.) • <u>The Investigation Was Done Properly.</u> ICANN's post-auction investigation was prompt and thorough. Indeed, Afilias' assertion that the investigation was insufficient is internally inconsistent with its

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		<p>contention that by August 2016 ICANN had gathered all of the information necessary to disqualify NDC's application. (ICANN's Post-Hearing Brief, Section VI.)</p> <ul style="list-style-type: none"> • <u>No Violation of the Articles or Bylaws.</u> Afilias has not identified any provisions of the Articles or Bylaws purportedly violated by ICANN's investigation. (ICANN's Post-Hearing Brief, Section VI.)
<p>ICANN acted inconsistent with the provision in its Bylaws that ICANN's decisions and actions "should [be] guid[ed]" by the Core Values "to promote and sustain a competitive environment in the DNS market" "[w]here feasible and appropriate" and "depending on market mechanisms" as set forth in Bylaws Sections 1.2(b)(iii) and (iv), when ICANN sent a form registry agreement to NDC after NDC had prevailed in the .WEB auction, and the previously pending Accountability Mechanisms and DOJ investigation had all been concluded.</p>	<p>Afilias Amended IRP Request, Sec. 5 (¶¶ 79-83)</p>	<ul style="list-style-type: none"> • <u>No Violation of the Articles or Bylaws.</u> ICANN's Articles and Bylaws do not require or allow it to act as a competition regulator by awarding or withholding gTLDs based on its view of which applicant will most effectively contribute to competition. Nor does ICANN have the mandate, resources or expertise to evaluate and block anticompetitive conduct or transactions the way a government regulator would. (ICANN's Post-Hearing Brief, Section III.A.) • <u>No Anticompetitive Impact.</u> Afilias has not shown that Verisign's potential operation of .WEB would be anticompetitive. (ICANN's Post-Hearing Brief, Section III.B.) • <u>The DOJ's Investigation is Dispositive.</u> The DOJ's decision not to challenge Verisign's potential operation of .WEB establishes that

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		ICANN was not under a duty block Verisign’s possible operation of the TLD. (ICANN’s Post-Hearing Brief, Section III.B.)
ICANN violated its “policy of transparency,” or its Bylaws provision stating that ICANN should “[m]ake decisions by applying its documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment,” by allegedly “conceal[ing] the terms of the DAA and its [purported] decision to delegate .WEB to NDC.”	Afilias’ Amended IRP Request for IRP, ¶ 78, (bullet 6)	<ul style="list-style-type: none"> • <u>ICANN Complied With Its Transparency Obligations.</u> ICANN’s obligations to act transparently did not require ICANN to disclose to Afilias the terms of the DAA. (ICANN’s Post-Hearing Brief, Section IV.) • <u>No Decision Was Made.</u> ICANN never made a decision to grant operation of .WEB to NDC. (ICANN’s Post-Hearing Brief, Sections V, IV.)
Verisign “exploited its leadership position on the IOT to ensure that the Interim Supplementary Procedures gave Verisign an absolute right to participate in this IRP,” and ICANN staff violated the Articles and Bylaws by allegedly knowingly assisting Verisign in doing so.	Amended IRP Request ¶ 84	<ul style="list-style-type: none"> • <u>Mr. McAuley Did Not Exploit His Leadership of IOT.</u> Afilias bases its claim on changes to Rule 7 that were made in October 2018. However, before any such changes, the draft Rule 7 already allowed <i>amicus curiae</i> participation by interested parties, such as Verisign and NDC. Further, Mr. McAuley testified that he was not aware of Afilias’ CEP or planned IRP, and his proposed changes were not motivated by those proceedings. (ICANN’s Post-Hearing Brief, Section VII.) • <u>Ms. Eisner Did Not Knowingly Assist Mr. McAuley.</u> Ms. Eisner was not aware of

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		Afilias' CEP or planned IRP, and those proceedings had no impact on her work with the IOT. The changes to Rule 7 made in October 2018 were not meant to expand the scope of <i>amicus curiae</i> participation. They were intended to improve efficiency in circumstances where a proposed <i>amicus curiae</i> already had a clear right to participate. (ICANN's Post-Hearing Brief, Section VII.)

REQUESTS FOR RELIEF	PLEADING WHERE FIRST ASSERTED	DEFENSES
A declaration that ICANN has acted inconsistently with its Articles and Bylaws, breached the binding commitments contained in the AGB, and violated international law.	Afilias Amended IRP Request ¶ 89(1)	<ul style="list-style-type: none"> • <u>Merits</u>. Afilias' request for a declaration that ICANN acted inconsistently with its Articles and Bylaws should be denied because its claims lack merit.¹ (ICANN's Post-Hearing Brief, Sections III-VII.)
An order requiring ICANN to disqualify NDC's bid for .WEB for violating the AGB and Auction Rules.	Afilias Amended IRP Request ¶ 89(2)	<ul style="list-style-type: none"> • <u>Jurisdiction</u>. The Panel's authority is defined and circumscribed by Section 4.3(o) of the Bylaws, and its authority does not allow the

¹ ICANN understands Afilias' references to the AGB and international law as contending that ICANN violated provisions in its Bylaws stating ICANN should make decisions by applying documented policies consistently, neutrally, objectively and fairly, and to carry out its activities in accordance with international law. ICANN does not understand Afilias to be asserting a claim that ICANN violated the Guidebook and/or international law separate and apart from the alleged Articles/Bylaws violations. However, if Afilias were to assert such a claim it would be outside the Panel's jurisdiction, which is limited to determining if a Covered Action violated the Articles and Bylaws.

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		<p>relief that Afilias requests. (ICANN's Post-Hearing Brief, Section I.)</p> <ul style="list-style-type: none"> • <u>Merits</u>. Afilias' claims should be rejected on the merits. (ICANN's Post-Hearing Brief, Sections III-VII.)
An order requiring ICANN to enter a Registry Agreement with Afilias.	Afilias Amended IRP Request ¶ 89(3)	<ul style="list-style-type: none"> • <u>Jurisdiction</u>. The Panel's authority is defined and circumscribed by Section 4.3(o) of the Bylaws, and its authority does not allow the relief that Afilias requests. (ICANN's Post-Hearing Brief, Section I.) • <u>Merits</u>. Afilias' claims should be rejected on the merits. (ICANN's Post-Hearing Brief, Sections III-VII.)
An order specifying the price to be paid by Afilias for the right to operate .WEB.	Afilias Amended IRP Request ¶ 89(4)	<ul style="list-style-type: none"> • <u>Jurisdiction</u>. The Panel's authority is defined and circumscribed by Section 4.3(o) of the Bylaws, and its authority does not allow the relief that Afilias requests. (ICANN's Post-Hearing Brief, Section I.) • <u>Merits</u>. Afilias' claims should be rejected on the merits. (ICANN's Post-Hearing Brief, Sections III-VII.)
An order that Rule 7 is unenforceable.	Afilias Amended IRP Request ¶ 89(5)	<ul style="list-style-type: none"> • <u>Jurisdiction</u>. The Panel's authority is defined and circumscribed by Section 4.3(o) of the Bylaws, and its authority does not allow the

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		<p>relief that Afilias requests. (ICANN's Post-Hearing Brief, Section I.)</p> <ul style="list-style-type: none"> • <u>Merits</u>. Afilias' claims should be rejected on the merits. (ICANN's Post-Hearing Brief, Sections III-VII.)
An order awarding Afilias damages in the amount of all costs associated with work addressing arguments and filings by Verisign and/or NDC.		<ul style="list-style-type: none"> • <u>Jurisdiction</u>. The Panel's authority is defined and circumscribed by Section 4.3(o) of the Bylaws, and its authority does not allow the relief that Afilias requests. (ICANN's Post-Hearing Brief, Section I.) • <u>Merits</u>. Afilias' claims should be rejected on the merits. (ICANN's Post-Hearing Brief, Sections III-VII.)
An order awarding Afilias the costs of these proceedings.	Afilias Amended IRP Request ¶ 89(6)	<ul style="list-style-type: none"> • <u>Merits</u>. Pursuant to Section 4.3(r) of the Bylaws, the Panel may shift costs only on a finding that a Party's Claim or defense as a whole is frivolous or abusive. That standard is not met. ICANN's defense is not frivolous or abusive. (ICANN's Post-Hearing Brief, Section VIII.)
An order providing such other relief as the Panel may consider appropriate.	Afilias Amended IRP Request ¶ 89(7)	<ul style="list-style-type: none"> • <u>Jurisdiction</u>. Insofar as this request seeks relief not authorized by Section 4.3(r) of the Bylaws, it is outside the Panel's jurisdiction. (ICANN's Post-Hearing Brief, Section I.)