

IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS  
BEFORE THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LIMITED,

*Claimant*

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

*Respondent*

ICDR Case No. 01-18-0004-2702

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REPLY MEMORIAL IN SUPPORT OF AMENDED REQUEST BY  
AFILIAS DOMAINS NO. 3 LIMITED FOR INDEPENDENT REVIEW

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## I. INTRODUCTION AND OVERVIEW OF AFILIAS' REPLY MEMORIAL

1. In ICANN's Response (the "**Response**") to Afiliat's Amended IRP Request (the "**Amended Request**"), ICANN portrays itself as a mere California not-for-profit corporation with a narrow, limited purpose—to "oversee[] the technical coordination of the Internet's domain system ('DNS') on behalf of the Internet community."<sup>1</sup> ICANN suggests its role is simply to enter into contracts with entities that "operate generic top-level domains ('gTLDs')...."<sup>2</sup> According to ICANN, it is "caught in the middle of this dispute between powerful and well-funded businesses."<sup>3</sup> ICANN tells this Panel that because Afiliat's claims are "fiercely contested by NDC and Verisign,"<sup>4</sup> ICANN's Board determined—at some unspecified time and in some unspecified manner—to defer "consideration" of Afiliat's claims "until this Panel renders its final decision...."<sup>5</sup> ICANN further asserts that once this Panel issues its final decision, the ICANN Board "will seriously consider and evaluate this Panel's findings to determine what action, *if any*, is appropriate in order to make .WEB finally available to consumers."<sup>6</sup> In other words, ICANN tells this Panel that its final decision in this IRP will be merely advisory—to be followed (or not) as the Board deems fit within "the realm of reasonable business judgment."<sup>7</sup>

2. For an organization that is required by its own Articles of Incorporation and Bylaws to operate according to principles of openness, transparency, neutrality, fairness, good faith and accountability, ICANN's misrepresentations of its Mission, the IRP process, and the record of its conduct in this matter are truly stunning. We must therefore begin this Reply by recalling several basic facts and principles.

3. *First*, ICANN serves as the de facto international regulator and gatekeeper to the Internet's DNS space, with no government oversight. ICANN—and ICANN alone—decides which companies obtain the exclusive gTLD registry rights that typically carry extraordinary value (whether measured financially, culturally, politically, or otherwise). As recognized by the Panel in the first IRP, *ICM v. ICANN*—and by numerous IRP Panels since then—"ICANN *is no ordinary non-profit California corporation. The Government of the United States vested regulatory authority of vast dimension and pervasive global*

**reach in ICANN.**<sup>8</sup> As discussed further below, since the *ICM* case, the U.S. government has now transferred virtually *all* regulatory authority over the DNS to ICANN.

4. According to ICANN's own Articles of Incorporation, ICANN exercises sweeping power over the DNS on a global basis:

In furtherance of ... [its] purposes, **and in recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization, [ICANN] shall ... pursue the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet** by carrying out the mission set forth in the bylaws of the Corporation ("Bylaws").<sup>9</sup>

Consistent with the global reach of its powers as a regulator and gatekeeper, ICANN's Articles require ICANN to "operate in a manner consistent with these Articles and its Bylaws **for the benefit of the Internet community as a whole**, carrying out its activities in conformity with **relevant principles of international law** and international conventions and applicable local law **and through open and transparent processes that enable competition and open entry in Internet-related markets.**"<sup>10</sup>

5. As stated in ICANN's Bylaws, ICANN's Mission goes far beyond simply "oversee[ing] the technical coordination of the Internet's domain system ('DNS') on behalf of the Internet community" (as stated in its Response<sup>11</sup>). ICANN's Mission includes "**[c]oordinating the allocation and assignment of names in the root zone of the [DNS] and coordinat[ing] the development and implementation of policies concerning the registration of second-level domain names in generic top-level domains ('gTLDs')**."<sup>12</sup>

In allocating thousands of gTLD names, ICANN distributes billions of dollars in international property rights around the world.<sup>13</sup>

6. *Second*, as recognized by other IRP Panels, despite ICANN's sweeping powers, "the IRP is the only accountability mechanism by which ICANN holds itself accountable through *independent third-party review* of its actions or inactions."<sup>14</sup> For that reason, IRP Panels have consistently rejected ICANN's assertions that IRP decisions and declarations are advisory, that IRP Panels must review ICANN's actions

or inaction with deference, and that IRP Panels may not order affirmative declaratory relief.<sup>15</sup> As the IRP Panel held in *ICM v. ICANN*—and as numerous IRP Panels have since confirmed—the “business judgment rule” with respect to ICANN is “to be treated as a default rule that might be called upon ***in the absence of relevant provisions of ICANN’s Articles and Bylaws and of specific representations of ICANN ... that bear on the propriety of its conduct.***”<sup>16</sup>

7. *Third*, in anticipation of the complete transfer of the Internet Assigned Numbers Authority (“IANA”) functions from the U.S. Commerce Department to ICANN in 2016, a Cross-Community Working Group for Accountability (the “CCWG”) was established to revise and improve ICANN’s constitutive documents—including its Bylaws and the accountability mechanisms required by its Bylaws—to provide for greater accountability for ICANN in light of the transition. As stated in the CCWG’s Supplemental Final Proposal in February 2016:

This effort is integral to the transition of the United States’ stewardship of the IANA functions to the global Internet community, reflecting the ICANN community’s conclusion that ***improvements to ICANN’s accountability were necessary in the absence of the accountability backstop that the historical contractual relationship with the United States government provided.***<sup>17</sup>

As a result of the CCWG’s recommendations, the drafters of ICANN’s new Bylaws significantly strengthened IRPs—in part to prevent the type of arguments that ICANN had made in past IRP cases (and which ICANN nonetheless tries to make here).

8. This is the first case brought under ICANN’s new Bylaws, which were adopted on 1 October 2016. As discussed in the Sections below (and contrary to many of the assertions in ICANN’s Response), there is no longer any doubt concerning this Panel’s standard of review (an “objective, de novo examination of the Dispute”<sup>18</sup>) or the Panel’s mandate, which is to achieve a “binding” and “final” resolution of the Dispute that is “consistent with international arbitration norms” and “enforceable in any court with proper jurisdiction.”<sup>19</sup> In addition, while prior versions of the Bylaws limited IRPs to actions or inactions only of the ICANN Board, the new Bylaws specifically provide for IRPs to apply to “any actions or failures to act by or within ICANN

committed by the Board, *individual Directors, Officers, or Staff members* that gives rise to a Dispute<sup>20</sup>—which include claims that such actions or failures to act violated the Articles or Bylaws. Contrary to ICANN’s Response, this IRP is not just about the ICANN Board’s supposed determination to defer “consideration” of Afiliias’ claims until after this Panel has issued its final decision—and whether any such determination was “within the realm of reasonable business judgment.”<sup>21</sup> It is about ICANN Staff’s flawed analysis of the New gTLD Program Rules,<sup>22</sup> its biased and inadequate investigation of NDC’s and Verisign’s conduct, its recommendation (if one was made) to the ICANN Board to take no action, its decision without Board approval or oversight to proceed with contracting (quite likely relying on the cover provided by Verisign’s and NDC’s submissions in the context of the so-called investigation), and the Board’s complete abdication of its responsibility to ensure implementation of the New gTLD Program Rules in accordance with ICANN’s Articles and Bylaws. As stated by other IRP Panels in evaluating ICANN actions and inactions in the New gTLD Program (albeit under earlier versions of the Bylaws), the question is whether ICANN’s actions or failures to act “are in fact consistent with the Articles, Bylaws, and [New gTLD Program Rules],” which the Panel must address “independently, and without any presumption of correctness.”<sup>23</sup>

9. ICANN fails in its Response to engage seriously with any of the claims stated in Afiliias’ Amended Request, but the record before this Panel no longer leaves any doubt. In August 2016, after NDC improperly won the ICANN Auction for the registry rights for .WEB, ICANN apparently received for the first time a copy of the Domain Acquisition Agreement (the “**DAA**”) that Verisign and NDC had entered into in August 2015.<sup>24</sup> The DAA plainly demonstrated that NDC had committed numerous material breaches of the New gTLD Program Rules, which—based on the plain terms of the New gTLD Program Rules and ICANN’s Articles and Bylaws—required ICANN to disqualify NDC’s bid and application. ICANN never disclosed the DAA to Afiliias until December 2018, when the Emergency Arbitrator ordered its production to Afiliias in this IRP.<sup>25</sup> After Afiliias raised concerns about NDC’s application and bid (which were based only on incomplete but still troubling public statements made by Verisign), ICANN committed in September 2016 to undertake

an investigation (an “informed resolution”) of Afilias’ concerns and to keep Afilias apprised of the status of .WEB. ICANN’s investigation, consisting of a single questionnaire based largely on information that Verisign had provided to ICANN, was neither fair nor neutral, transparent or in good faith, its ultimate objective being to create a documentary record to protect ICANN, Verisign and NDC from criticism.

10. In January 2018—after a year-long hiatus resulting from the U.S. Department of Justice’s (“DOJ’s”) investigation into whether the DAA violated U.S. antitrust laws (during which the DOJ asked ICANN to take no action concerning .WEB)—ICANN secretly began to take steps to delegate .WEB to NDC (and hence Verisign). Despite numerous requests by Afilias to ICANN as to the status of its investigation—and its intentions with respect to .WEB—ICANN refused to provide Afilias with any information (even after Afilias filed a DIDP Request<sup>26</sup> seeking the information in February 2018, which ICANN denied almost in its entirety). On 6 June 2018, ICANN—without warning or explanation—provided notice to Afilias that it had taken the .WEB contention set off-hold. Afilias initiated ICANN’s Cooperative Engagement Process (“CEP”) on 18 June 2018. When ICANN terminated the CEP on 13 November 2018, Afilias commenced this IRP the next day.

11. In **Section II** below, we set forth the proper standard of review for the IRP, which ICANN has completely misstated in its Response. In **Section III**, we demonstrate that ICANN violated its Bylaws and Articles by not disqualifying NDC’s application and bid upon receiving the DAA, and by instead proceeding to contract with NDC (and therefore Verisign) for the .WEB Registry Agreement. In **Section IV**, we explain that ICANN’s exercise of any discretion it has to remedy NDC’s breaches must be consistent with ICANN’s mandate to promote competition. In **Section V**, we show that ICANN’s time-bar defense is entirely without merit. In **Section VI**, we explain the proper relief to be ordered by the Panel in this IRP. We state our Conclusion in **Section VII**. For the avoidance of doubt, with respect to Afilias’ Rule 7 claim, we rely on our prior submissions concerning that claim, consistent with the Panel’s Phase I Decision.<sup>27</sup>

## II. STANDARD OF REVIEW

12. ICANN’s Response includes a brief section on the Panel’s “Standard of Review” that is

inaccurate and incomplete. ICANN’s “Standard of Review” section states in its entirety:

An IRP Panel is asked to evaluate whether an ICANN action or inaction was consistent with ICANN’s Articles, Bylaws, and internal policies and procedures. But with respect to IRPs challenging the ICANN Board’s exercise of its fiduciary duties, an IRP Panel is not empowered to substitute its judgment for that of ICANN. Rather, the core task of an IRP panel is to determine whether ICANN has exceeded the scope of its Mission or otherwise failed to comply with its foundational documents and procedures.<sup>28</sup>

13. ICANN’s statement concerning the “Standard of Review” in this IRP seriously misstates the Panel’s mandate.

14. Rule 11 of ICANN’s Interim Procedures<sup>29</sup> (“Standard of Review”)—which repeats almost *verbatim* Section 4.3(i) of the Bylaws—states in relevant part:

Each IRP PANEL shall conduct ***an objective, de novo examination*** of the DISPUTE.

- a. With respect to COVERED ACTIONS, ***the IRP PANEL shall make findings of fact to determine whether the COVERED ACTION constituted an action or inaction that violated ICANN’S Articles or Bylaws.***
- b. All DISPUTES ***shall be decided in compliance with ICANN’S Articles and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.***
- c. For Claims arising out of the Board’s exercise of its fiduciary duties, the IRP PANEL shall not replace the Board’s reasonable judgment with its own so long as the Board’s action or inaction is within the realm of reasonable business judgment.<sup>30</sup>

15. In its Response, ICANN omits nearly all of the relevant provisions of its own “Standard of Review” requirements for IRPs, as stated both in its Bylaws and Interim Procedures. ICANN only partially cites the provisions with respect to the Board’s exercise of its fiduciary duties—and even there leaves out the *proviso* that the Panel will not replace the Board’s “reasonable judgment ***so long as the Board’s action or inaction is within the realm of reasonable business judgment***”.

16. As stated above, this case does not involve the Board’s exercise of its fiduciary duties. There is no evidence in this case that ICANN’s Board exercised or attempted to exercise any fiduciary duties—or that the Board did anything at all with respect to the .WEB contention set. ICANN says as much. Rather,

Afilias claims that ICANN’s “Covered Actions” (defined in the Bylaws “as any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members”<sup>31</sup>) violated ICANN’s Articles and Bylaws. Afilias’ principal claim is that ICANN’s failure to disqualify NDC’s application and bid for the .WEB Registry Agreement—based on NDC’s material violations of the New gTLD Program Rules—violated (*inter alia*) the requirement in the Bylaws that ICANN “[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment....”<sup>32</sup> By August 2016, ICANN had all the information it needed to determine that NDC’s application and bid had to be disqualified. ICANN failed to take the required action, and moreover, failed to disclose any of the information it had received. Instead, ICANN officers and staff led Afilias to believe that ICANN was investigating Afilias’ claims, and then undertook a superficial investigation that is best described as an attempted cover-up by ICANN of its own failings and of Verisign’s and NDC’s subterfuge.

17. Therefore—contrary to the assertion in ICANN’s Response—the Standard of Review in this IRP has nothing to do with whether the Panel is “empowered to substitute its judgment for that of ICANN.” Rather, ICANN’s constituent documents require this Panel to conduct “an objective, de novo examination of the DISPUTE” (*i.e.*, that actions or failures to act committed by the ICANN Board, individual Directors, Officers, or Staff members violated ICANN’s Articles of Bylaws). The Panel must then make “findings of fact to determine whether the COVERED ACTION” (*i.e.*, the actions or failures to act committed by the Board, individual Directors, Officers, or Staff members) “constituted an action or inaction that violated ICANN’s Articles or Bylaws.” The Panel must then decide the DISPUTE “in compliance with ICANN’s Articles and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.”

18. As discussed further below in Section VI (addressing the relief to which Afilias is entitled in this IRP), the Panel’s decision “shall reflect a well-reasoned application of how the DISPUTE was **resolved in compliance with ICANN’s Articles and Bylaws**”<sup>33</sup>—including, *inter alia*, the Bylaws’ requirement that IRPs “[l]ead to **binding, final resolutions consistent with international arbitration norms that are**

***enforceable in any court with proper jurisdiction.***<sup>34</sup>

### **III. ICANN VIOLATED ITS BYLAWS AND ARTICLES BY NOT DISQUALIFYING NDC'S APPLICATION AND BID AND IN PROCEEDING TO CONTRACT WITH NDC (AND THEREFORE VERISIGN) FOR THE .WEB REGISTRY AGREEMENT**

19. In its Amended Request, Afilias described the various violations of the New gTLD Program Rules<sup>35</sup> by NDC—which *required* ICANN to disqualify NDC's application and bid when ICANN learned of the violations in August 2016.<sup>36</sup> ICANN offers no substantive response. ICANN does not explain why, based on the plain language of the New gTLD Program Rules and the requirements of ICANN's Articles and Bylaws, it did not have to disqualify NDC's application and bid, or must be considered to have acted within its reasonable discretion in not doing so, but rather proceeded to contracting with NDC (and hence effectively Verisign) in spite of NDC's obvious and material violations of the New gTLD Program Rules.

20. Instead, ICANN offers various baseless and self-contradictory defenses. *First*, ICANN states that it “complied with its Articles, Bylaws and internal policies and procedures in facilitating the .WEB auction and in handling the disputes regarding .WEB since the auction.”<sup>37</sup> It does not explain how it complied, or indeed reveal what “internal” policies and procedures it followed. *Second*, after claiming to have appropriately “handled” Afilias' concerns, ICANN asserts that at some point in time (which it never identifies), the ICANN Board decided on “[d]eferring such consideration [*i.e.*, of Afilias' concerns] until this Panel renders its final decision....”<sup>38</sup> There is no evidence of any decision by the Board to “defer” consideration of Afilias' concerns (and ICANN never notified Afilias of any such decision) or the bases for Staff's apparent recommendation to the Board to take no action. Yet ICANN maintains that the Board's decision was “well within the realm of reasonable business judgment”<sup>39</sup>—apparently because Afilias' concerns “are vigorously denied by NDC and Verisign.”<sup>40</sup> This is not a sufficient reason for the Board to have decided (if it did) not to take any action or not to have looked in to whether Staff were acting strictly in accordance with the New gTLD Program Rules. In so arguing, ICANN ignores, *inter alia*, its mandate to “[m]ake decisions by applying documented policies consistently, neutrally, objective, and fairly....”<sup>41</sup> ICANN is not permitted to arbitrarily “defer” decisions in

response to the “vigor” with which arguments are made—or because (as in this case) they are made by the largest and most powerful Internet registry in the world. *Third*, ICANN asserts that none of the violations Afilias identified “call for automatic disqualification.”<sup>42</sup> ICANN does not pretend to base that assertion on the New gTLD Program Rules. Instead, it asserts that “automatic disqualification” would have been inappropriate “due to the pendency of government investigations and Accountability Mechanisms, ***including this IRP.***”<sup>43</sup> This IRP, however, claims that ICANN was required to disqualify NDC’s application and bid in August 2016 when ICANN first learned of NDC’s violations, whether as a matter of automatic disqualification pursuant to the applicable standards, or as a matter of the reasonable exercise of ICANN’s discretion pursuant to those same standards (*i.e.*, those set out in the new gTLD Program Rules and ICANN’s Articles and Bylaws).

21. As set out below, ICANN violated its Articles and Bylaws by not disqualifying NDC’s Application and bid (Section III(A)) and by its self-serving “investigation” of Afilias’ bid and its decision to proceed to contracting with NDC for the .WEB gTLD Registry Agreement (Section III(B)).

**A. ICANN’s Failure To Disqualify NDC’s Application and Bid**

22. ICANN’s “Mission” includes “coordinat[ing] the development and implementation of policies concerning the registration of second-level domain names in generic top-level domains (‘gTLDs’),” ensuring that the policies are “developed through a bottom-up consensus-based multistakeholder process,” and implementing those policies consistent with the requirements of its Articles and Bylaws.<sup>44</sup> ICANN’s allocation of gTLD rights through the New gTLD Program goes to the heart of its Mission. ICANN has described the program as constituting “by far ICANN’s most ambitious expansion of the Internet’s naming system.”<sup>45</sup>

23. Section 1.2 of ICANN’s Bylaws states that “[i]n performing its Mission, ICANN will act in a manner that complies with and reflects ICANN’s Commitments and respects ICANN’s Core Values, each as described below.”<sup>46</sup> Of particular relevance here, ICANN is required to:

[m]ake decisions by ***applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment*** (*i.e.*, making an unjustified prejudicial distinction between or among different parties).<sup>47</sup>

The prohibition against discriminatory or preferential treatment in ICANN's application of its documented rules and policies is stated in Section 2.3 of the Bylaws:

ICANN **shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment** unless justified by substantial and reasonable cause, such as the promotion of effective competition.<sup>48</sup>

Furthermore, in all of its activities—including the enforcement of its rules and policies:

ICANN and its constituent bodies shall operate **to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness**.[<sup>49</sup>

24. As recognized by other IRP Panels, and as acknowledged by ICANN itself, the new gTLD Program Rules arose from years of “carefully deliberated policy development work’ by the ICANN community.”<sup>50</sup> In developing the New gTLD Program Rules, ICANN implemented “an application and evaluation process for new gTLDs that is **aligned with policy recommendations** and provides **a clear roadmap** for **applicants** to reach delegation, including Board approval.”<sup>51</sup> The New gTLD Program Rules—and in particular, the AGB—are “**the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs**.”<sup>52</sup>

25. As described by the IRP Panel in *Gulf Cooperation Council (GCC) v. ICANN*:

The Guidebook, running to almost 350 pages, sets out **comprehensive procedures** for the gTLD application and review process. It includes instructions for applicants, procedures for ICANN's evaluation of applications, and procedures for objections to applications. In line with ICANN's policies of transparency and accountability, applications for new gTLDs are posted on the ICANN website for community review and comment.<sup>53</sup>

26. Pursuant to ICANN's Articles and Bylaws, the New gTLD Program Rules **must** be applied and enforced “in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values.”<sup>54</sup> Thus, ICANN committed and represented to applicants that the New gTLD Program Rules would be implemented consistently, neutrally, objectively, fairly, non-discriminatorily, and transparently. Pursuant to its Articles, ICANN must also “carry[] out its activities in conformity with relevant principles of international law,” which fundamentally requires “good faith.”<sup>55</sup> Applicants thus had the legitimate expectation

that the New gTLD Program Rules and the application review and gTLD delegation process would be conducted and implemented by ICANN consistently, neutrally, objectively, fairly, non-discriminatory, transparently, and in good faith.

27. Pursuant to this compact between ICANN and applicants, the New gTLD Program Rules are not precatory; they are mandatory. It is not within ICANN's "discretion" to overlook material violations of the New gTLD Program Rules for particular applicants (or non-applicants). Nor is it within ICANN's discretion to decide that certain applicants must follow the "clear roadmap ... to reach delegation", but that non-applicants (such as Verisign)—are free to circumvent the roadmap and reach delegation by enlisting a shell like NDC, who won the .WEB Auction on Verisign's behalf through multiple and material violations of the New gTLD Program Rules. Moreover, to the extent that the New gTLD Program Rules provide ICANN with discretion, ICANN must exercise that discretion in strict compliance with its Articles and Bylaws.<sup>56</sup>

28. We review below the specific material violations committed by NDC in light of ICANN's Response, as well as arguments offered by ICANN, Verisign, and NDC in prior submissions in this IRP. NDC's disqualifying violations include:

- Its violation of the AGB's prohibition against the resale, transfer, or assignment of NDC's rights or obligations in connection with its .WEB Application (Section III(A)(1));
- Its failure to amend its .WEB Application to reveal that Verisign had acquired rights and obligations in NDC's application, and would effectively control in all material respects that application, and that the information contained in its application regarding NDC's plans for developing and marketing .WEB were no longer true, accurate, complete, and not false or misleading in all material respects (Section III(A)(2));
- NDC's violation of the Auction Rules that precluded NDC from submitting bids on behalf of any entity other than itself (Section III(A)(3)).

**1. ICANN Improperly Ignored NDC's Sale, Transfer or Assignment of its Application to Verisign**

**(i) *The Prohibition against the Resale, Transfer or Assignment of Rights and Obligations in a New gTLD Application***

29. Module 6 of the AGB is entitled "Top-Level Domain Application—Terms and Conditions." It

prohibits the resale, assignment, or transfer of any of an applicant's rights or obligations in connection with its application:

Applicant ***may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application.***<sup>57</sup>

The prohibition does not provide for any exceptions, consistent with the ICANN's Board's Resolution that requires "process fidelity" to the New gTLD Program Rules.<sup>58</sup>

30. The AGB's rule against an applicant reselling, assigning, or transferring "any" of its rights or obligations in connection with its application reflects the fundamental premise of transparency upon which the New gTLD Program and this specific rule are based—mirroring the obligations of openness and transparency enshrined in ICANN's Articles and Bylaws. Transparency was required not only to ensure the stability and security of the Internet, but also so that the entire Internet community would know the identity of each applicant that was seeking to obtain the registry rights to a particular gTLD—and why they were seeking to obtain them. Again, as stated by the IRP Panel in *GCC v. ICANN*: "***In line with ICANN's policies of transparency and accountability, applications for new gTLDs are posted on the ICANN website for community review and comment.***"<sup>59</sup> An applicant who sells, transfers, or assigns its application rights to a non-applicant (particularly where, as here, it does so in secrecy) violates the plain terms of the New gTLD Program Rules and eviscerates the fundamental principles on which they are based.

31. The AGB's public comments section underscores the fundamental requirement that the identity of each applicant—and its intentions for obtaining rights to the gTLD in question—be disclosed to the public, in fulfillment of ICANN's Commitments and Core Values of openness and transparency. Thus, as stated in the AGB:

ICANN will post the public portions of all applications considered complete and ready for evaluation within two weeks of the close of the application submission period. ...

***Public comment mechanisms are part of ICANN's policy development, implementation, and operational processes.*** As a private-public partnership, ICANN is dedicated to: preserving the operational security and stability of the Internet, promoting

competition, achieving broad representation of global Internet communities, and **developing policy appropriate to its mission through bottom-up, consensus-based processes. This necessarily involves the participation of many stakeholder groups in a public discussion.**

ICANN will open a comment period (the Application Comment period) at the time applications are publicly posted on ICANN's website (refer to subsection 1.1.2.2). **This period will allow time for the community to review and submit comments on posted application materials** (referred to as 'application comments'). ...

In the new gTLD application process, **all applicants should be aware that comment fora are a mechanism for the public to bring relevant information and issues to the attention of those charged with handling new gTLD applications.** Anyone may submit a comment in a public comment forum. ...

A general public comment forum will remain open through all stages of the evaluation process, **to provide a means for the public to bring forward any other relevant information or issues.**<sup>60</sup>

32. If an applicant were permitted to resell, assign, or transfer its rights or obligations in connection with its application—and especially if it could do so without disclosing that fact until **after** the application process ended—the fundamental principles underlying the New gTLD Program, and ICANN's Articles and Bylaws, would be gutted. Thus, the only good faith interpretation of the rule, consistent with ICANN's Articles and Bylaws, is that it imposes an absolute bar against the resale, assignment or transfer of any of an applicant's rights or obligations in connection with its application. Even assuming *arguendo* that ICANN has discretion to waive this prohibition, it could not have properly done so consistent with its Articles and Bylaws (particularly where, as here, NDC never asked for a waiver, and, to the contrary, affirmatively concealed that it had sold, transferred, or assigned its rights and obligations under its Application).

**(ii) NDC's Application**

33. NDC submitted its Application for .WEB on or about 13 June 2012. ICANN posted the public portions of the NDC Application the same day.<sup>61</sup> NDC identified itself as a limited liability company established under Delaware law, with its principal place of business in Miami, Florida.<sup>62</sup> It stated that it had three directors: Jose Ignacio Rasco III; Juan Diego Calle; and Nicolai Bezsonoff.<sup>63</sup> When asked to identify its officers or

partners, NDC identified the same three individuals.<sup>64</sup> NDC identified two shareholders as owning at least 15% of its shares.

34. As called for by the application, NDC made extensive representations concerning its “Mission/Purpose” in seeking the registry rights to .WEB. ICANN in its Response—and Verisign and NDC—suggest that the only relevant criteria in which ICANN was interested in was whether the applicant had the “requisite financial and technical ability to operate a gTLD.”<sup>65</sup> The AGB explicitly rejects any such suggestion.

35. Module 2 of the AGB (“Evaluation Procedures”) sets forth the *Evaluation Questions and Criteria*.<sup>66</sup> The AGB’s *Evaluation Questions and Criteria* explained that the evaluation process for applications would, among other things, consider whether applicants had “provide[d] **a thorough and thoughtful analysis** of the technical requirements to operate a registry **and the proposed business model**.”<sup>67</sup> As the *Evaluation Questions and Criteria* plainly stated, ICANN intended the New gTLD Program to promote its mandate “to maintain and build on processes **that will ensure competition and consumer interests**”:

[A]n important objective of the new TLD process is **to diversify the namespace, with different registry business models** and target audiences. ...

ICANN is not seeking to certify business success but **instead seeks to encourage innovation** while providing certain safeguards for registrants.<sup>68</sup>

By their plain terms, the *Evaluation Questions and Criteria* refute the assertion made at various times by ICANN, Verisign, and NDC that ICANN was interested only in an applicant’s financial and technical ability to operate a gTLD.

36. No doubt with the AGB’s actual criteria in mind, the public portions of NDC’s .WEB Application made extensive representations about NDC’s proposed “business model” and NDC’s unique capabilities and experience to innovate and diversify the Internet name space if it could add .WEB to its existing “product portfolio.”<sup>69</sup> NDC further represented itself as being strongly positioned to market .WEB as an alternative to .COM. According to NDC’s Application:

The mission of .WEB is to provide the internet community at-large **with an alternative 'home domain' for their on-line presence**.... This general domain will provide new registrants with **better, more relevant alternatives to the limited options remaining for current commercial TLD names**.<sup>70</sup>

37. In a thinly veiled reference to commercial website names using the .COM TLD—essentially to Verisign itself—NDC asserted that “[c]ongestion in the current availability of commercial TLD names **fundamentally advantages older incumbent players**.”<sup>71</sup> NDC touted its experience in having launched and operated the .CO ccTLD—which was intended (and remains) as the country-code TLD for Colombia, but which has also become an increasingly popular alternative to .COM.<sup>72</sup> Thus, NDC’s application asserted:

Prospective users [will] benefit from **the long-term commitment of a proven executive team that has a track-record of building and successfully marketing affinity TLD’s (e.g., .CO targeting innovative business and entrepreneurs)**. ...

**The experienced team behind this application initially launched and currently operates the .CO cc TLD. The intention is for .WEB to be added to .CO’s product portfolio**, where it can benefit from economies of scale **along with the firm’s [i.e. NDC’s] experience and expertise in marketing and branding TLD properties**.<sup>73</sup>

38. Indeed, NDC specifically relied on its experience in marketing .CO **as an alternative to .COM**—and represented that NDC would do the same if it obtained the registry rights for .WEB:

Since its launch, .CO’s marketing has primarily focused on developing a worldwide ecosystem of innovative small businesses and entrepreneurs.... **In addition, .CO has become the standard secondary option to .COM for the leading global registrars, having the most conversions when presented with a non-.COM option**. ...

.CO has differentiated itself from other existing TLDs by combining innovative branding with the highest standards in trademark protection, unprecedented marketing campaigns, and pro-active security monitoring. **We plan to implement a very similar strategy for .WEB in its launch, operation, promotion and growth**.<sup>74</sup>

39. The public comment period closed on 26 September 2012.<sup>75</sup> At that point, the Internet community understood that the applicant behind NDC’s .WEB Application was the company identified and portrayed in its application: *i.e.*, a relatively small but ambitious and innovative limited liability company that had publicly represented, *inter alia*, the “long-term commitment” of its “proven executive team” to aggressively market .WEB as an alternative to .COM, its “intention” to add .WEB to “.CO’s product portfolio,” and its “plan

to implement a very similar strategy for .WEB in its launch, operation, promotion and growth.” No mention was made of Verisign. However, we do now know that on 25 August 2015, NDC and Verisign entered in to the DAA—approximately a year before the .WEB contention set resolution commenced.

40. Prior to the .WEB Auction in July 2016, no one knew that NDC had in fact sold, transferred, and assigned virtually all of its rights in its .WEB Application to Verisign—by far the largest registry in the world, which already dominates the TLD space with .COM and .NET—nearly one year earlier.<sup>76</sup> When it entered into the DAA and failed to notify ICANN and the Internet community that it had done so, NDC turned the public posting and comment process—designed to advance ICANN’s guiding principles of openness, transparency, and accountability—into a mechanism for concealment. The public portions of NDC’s Application, left unchanged, affirmatively deceived the Internet community in a significant and material way as to the identity and motivations of the true party-in-interest behind the Application. As discussed further below, ICANN—despite being fully aware of all of the relevant facts in August 2016—did nothing to redress this deceit and everything to help NDC and Verisign.

***(iii) NDC’s Sale, Transfer, and Assignment of its Rights and Obligations in the .WEB Application to Verisign through the DAA***

41. It bears repeating that Afiliis only obtained a copy of the DAA from ICANN in December 2018, after the Emergency Arbitrator ordered ICANN to produce it in this IRP. As the Panel will recall, on 28 July 2016 (the day after the .WEB Auction), Verisign filed a 10-Q Statement with the U.S. Securities and Exchange Commission (the “SEC”), which stated that “[s]ubsequent to June 30, 2016, the Company incurred a commitment to pay approximately \$130.0 million for the future assignment of contractual rights, which are subject to third-party consent.”<sup>77</sup> Since that time, and continuing into this IRP, Verisign and NDC have repeatedly mischaracterized the DAA as an “executory” or “conditional” contract, which merely provides for the assignment of the .WEB Registry Agreement *if* NDC enters the Agreement with ICANN and *if* ICANN thereafter approves the Agreement’s assignment to Verisign. ICANN has mischaracterized the DAA in this

IRP in the same manner.<sup>78</sup> We have seen no disclosure from ICANN as to whether this is how Staff construed the DAA prior to this IRP or how it represented the import of that document to the Board.

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42. As acknowledged in its Response, ICANN has a different set of procedures for the situation in which a registry operator has already entered into a Registry Agreement with ICANN, and then seeks ICANN's permission to transfer and assign that Registry Agreement to a different registry operator. That is not remotely what happened in this case, and the rules and procedures for seeking assignment of an executed gTLD registry agreement are not at issue in this case.<sup>79</sup> Here, long before NDC made it through the application and bidding process, NDC secretly sold, transferred, and assigned its rights and obligations in the application to a non-applicant (*i.e.*, Verisign), in plain violation of the Terms and Conditions of the AGB, including that "Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application."<sup>80</sup> Below, we identify the relevant rights and obligations at issue in Subsection A(1)(iii)(a). We then show that NDC plainly and impermissibly sold, assigned, and transferred those rights and obligations to Verisign through the DAA in Subsection A(1)(iii)(b), which ICANN completely chose to ignore.

(a) **Rights and Obligations under the Application**

43. The New gTLD Program Rules clearly set out the various rights and obligations that applicants have in connection with their new gTLD application in detail. Under the AGB, applicants are required to submit their applications by "**23:59 UTC 12 April 2012**."<sup>81</sup> Applicants are also required to register in the TLD Application System ("**TAS**"). According to the AGB, TAS user registration—which created a TAS user profile for each applicant—"requires submission of preliminary information, ***which will be used to validate the identity of the parties involved in the application***."<sup>82</sup> The AGB provides that "[a]n application will not be considered, in the absence of exceptional circumstances, if:"

- “It is received after the close of the application period.”
- “The application form is incomplete (either the questions have not been fully answered or required supporting documents are missing). **Applicants will not ordinarily be permitted to supplement their applications after submission.**”<sup>83</sup>

Thus, an entity such as Verisign—which did not submit an application by the deadline—could not be an applicant for .WEB unless it had submitted its own application in the first instance.

44. The “Terms and Conditions” section of the AGB provides additional obligations in connection with a new gTLD application. That section opens with the following language:

By submitting this application through ICANN’s online interface for a generic Top Level Domain (gTLD) (this application), applicant (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any and all others acting on its behalf) **agrees to the following terms and conditions** (these terms and conditions) **without modification**. Applicant understands and agrees that **these terms and conditions are binding on applicant and are a material part of this application.**<sup>84</sup>

In other words, in exchange for being allowed to apply and be considered for a gTLD, the applicant “agree[d]” to be bound by the terms and conditions set forth in this section “without modification”—and agreed that the terms and conditions were not only “binding” but also “material.”

45. In addition to the requirement that “Applicants may not resell, assign, or transfer any of applicant’s rights or obligations in connection with the application,” the AGB’s Terms and Conditions set forth other obligations and commitments on the part of applicants. For example:

- “Applicant warrants that the statements and representations contained in the application (including any documents submitted and oral statements made and confirmed in writing in connection with the application) **are true and accurate and complete in all material respects.**”<sup>85</sup>
- “Applicant agrees to notify ICANN in writing of **any change in circumstances** that would render any information provided in the application **false or misleading.**”<sup>86</sup>
- “Applicant hereby authorizes ICANN **to publish on ICANN’s website**, and to disclose or publicize in any other manner, any materials submitted to, or obtain or generated by, ICANN and the ICANN Affiliated Parties in connection with the application....”<sup>87</sup>

All of these obligations were mandated by ICANN’s obligations of openness, transparency, fairness, and

accountability.

46. The New gTLD Program Rules also provided that applicants had certain rights. Of particular relevance to this case, the AGB recognized that there would be instances when more than one applicant would successfully make it through the application process (including the public notice and comment period and the evaluation process)—resulting in a “contention set” of qualified applicants. The New gTLD Program Rules therefore provided applicants with rights to settle contention sets in various ways. Indeed, the AGB specifically “encouraged” applicants to settle “string contention” among themselves.

47. Thus, the AGB specifically provided that applicants had the right to enter arrangements in which one or more applicant withdrew their applications and/or entered into joint ventures or royalty or revenue sharing agreements. The only restriction on such arrangements was that they could not materially change the application—as such changes would violate the principles of transparency and accountability that were supposed to govern the New gTLD Program. According to the AGB:

Applicants that are identified as being in contention are encouraged to reach a settlement or agreement among themselves that resolves the contention. This may occur at any stage of the process, once ICANN publicly posts the applications received and the preliminary contention sets on its website.

Applicants may resolve string contention [sets] in a manner whereby one or more applicants withdraw their applications. An applicant may not resolve string contention by selecting a new string or by replacing itself with a joint venture. It is understood that applicants may seek to establish joint ventures in their efforts to resolve string contention [sets]. **However, material changes in applications** (for example, combinations of applicants to resolve contention) **will require re-evaluation**.<sup>88</sup>

48. Contention set members could also resolve their competing claims by a “private” auction administered by the contention set, provided that all members of the contention set agreed to do so.<sup>89</sup> Each applicant involved in a contention set, therefore, had the right to propose a private auction as a means to resolve the contention, the right to join in any such private auction, or the right to refuse to do so. The vast majority of contention sets have been resolved through such private auctions.<sup>90</sup> If, however, the members of a contention set cannot resolve the string contention among themselves, they then proceed to an ICANN-

administered auction (in which the auction proceeds are paid to ICANN, rather than distributed to the losing bidders, as in a private auction).

49. Participation in an ICANN Auction also creates obligations for the applicants. Among other things, the AGB specifically states: “Only bids that comply with all aspects of the auction rules will be considered valid.”<sup>91</sup> The Auction Rules—under the heading “Validity of Bids”—provide that “the Bid **must** be placed by a Bidder for its Application in an Open Contention set.”<sup>92</sup> The Auction Rules further provide that “[a] Bid represents a price, which a Bidder is willing to pay to resolve string contention within a Contention Set in favor of its Application.”<sup>93</sup> The Auction Rules define “Bidder” as a “Qualified Applicant or its Designated Bidder....”<sup>94</sup> The Auction Rules define a “Qualified Applicant” as:

An entity that has submitted an Application for a new gTLD, has received all necessary approvals from ICANN, and which is included within a Contention Set to be resolved by Auction.<sup>95</sup>

The Rules define a “Designated Bidder” as “[a] party designated by a Qualified Applicant to bid on its behalf in an Auction.”<sup>96</sup> Thus, an Applicant is obligated to submit bids only on its own behalf and in an amount that the Applicant itself is willing to pay—or to designate a Designated Bidder—the identity of which would have to be disclosed—to do so on the Applicants’ behalf. (As discussed below, NDC did neither in this case.)

50. The Auction Rules, in tandem with the New gTLD Program Rules, also confer rights on the applicant. Specifically, the applicant who submits the highest, valid bid is declared the “Winner” in the contention set. Its application is declared as the “Winning Application”—*i.e.*, the “Application that prevails contention.”<sup>97</sup> The applicant with the Winning Application is entitled to proceed to negotiate and (if negotiations are successful) to enter a Registry Agreement with ICANN for the gTLD in question.<sup>98</sup>

51. In reviewing the terms of the DAA with these rights and obligations in mind, there is no question that NDC impermissibly sold, assigned, and transferred them to Verisign through the DAA, and that ICANN should have recognized as much and acted to disqualify NDC’s application and bids. As we show below, and as the Panel will gather from its own review of the DAA, through the DAA, Verisign secretly

became the .WEB Applicant, and NDC became nothing but a cloak to conceal that fact.

(b) The DAA

52. Verisign and NDC executed the DAA on 25 August 2015. Under the DAA, Verisign agreed to pay NDC:

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<sup>100</sup> and

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53. We will address the argument that Verisign/NDC has made in the past that the DAA was “executory” with respect to the future assignment of the .WEB registry agreement, if and when they make in their *Amici* submission. But there can be no serious question—and ICANN should have immediately recognized as much—that upon the execution of the DAA in August 2015, NDC—Redacted Third Party Designated Confidential Informa

—sold, assigned, and transferred some if not all of the various rights and obligations NDC had in its .WEB Application to Verisign, in violation of the Terms and Conditions of the AGB, which are expressly “binding on applicant and are a material part of th[e] application.”<sup>102</sup>

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54. Following its entering into the DAA with Verisign, NDC could no longer fulfill key obligations associated with the .WEB Application, because NDC had sold, assigned, and transferred complete control over the Application to Verisign in all material respects. Nor did NDC have any material rights left in its

Application. Those, too, had been sold, assigned, and transferred to Verisign. Thus, as described above, the AGB's "Terms and Conditions" obligated each applicant to warrant that the statements in its application "are true and accurate and complete in all material respects, and that ICANN may rely on those statements and representations in fully evaluating this application."<sup>105</sup> The AGB's "Terms and Conditions" further obligated NDC to notify ICANN in writing of **any change in circumstances** that would render **any information** provided in the application **false or misleading, whether by way of an affirmative representation or as a result of an omission of information.**<sup>106</sup>

55. Under the DAA, however, NDC could no longer fulfill those obligations.

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56. Redacted - Third Party Designated Confidential Information

Those obligations were of course unfulfilled, as Verisign/NDC kept Verisign's acquisition of NDC's .WEB application a secret from the

Internet community (including, apparently, ICANN) until after the ICANN Auction. If, indeed, as ICANN, Verisign, and NDC claim, there was nothing improper about the arrangement agreed between NDC and Verisign, or that the arrangement did not constitute a material change to NDC's application, it bears asking why NDC and Verisign did not disclose the DAA to ICANN when it was concluded. ICANN certainly appears not to have entertained this obvious question at all.

57. Nor did NDC have any rights under the Application, or any control over how .WEB would be pursued, after it entered into the DAA. Redacted - Third Party Designated Confidential Information

Thus, Verisign had stepped into NDC's shoes and became the true applicant and the true "Bidder" for .WEB, Redacted - Third Party Designated Confidential Information it became Verisign's undisclosed agent, with the sole purpose of secretly pursuing the .WEB Application solely for the benefit of Verisign, a non-applicant for the .WEB gTLD.

58. Redacted - Third Party Designated Confidential Information

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59. As discussed in Afilias' Amended Request (and discussed further below), Verisign evidently determined that NDC should not participate in a Private Auction, and instead should proceed to an ICANN Auction—where ICANN would receive all of the proceeds (as opposed to a private auction, where the proceeds are allocated among the other bidders).

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60. In the event that NDC won the .WEB Auction—which seemed a likely scenario, given Verisign’s deep pockets and the fact that none of the other Applicants knew that Verisign was in the competition (which would likely have changed their bidding strategy)—

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61. Thus, by entering the DAA, NDC impermissibly sold, transferred, and assigned virtually all of its rights and obligations in the .WEB Application to Verisign. As of August 2015, NDC was falsely holding itself out as the applicant—seeking to obtain the rights to .WEB for its own benefit and for the purposes set forth in its Application. In reality, NDC was acting “exclusively” for “the benefit of Verisign” and solely to advance Verisign’s undisclosed purposes to obtain the rights to .WEB for itself as a non-applicant. Verisign had become the true applicant for .WEB—with full control over all of the rights and obligations of NDC’s .WEB Application—despite never having submitted an application, never having gone through the notice and comment period and the application process, and never having disclosed to the Internet community that it was seeking to acquire .WEB.

62. The DAA prevented any scenario under which NDC could or would retain any role or ownership interest in .WEB—whether during or after the application and auction process—except as a recipient of the money that Verisign was contractually obligated to pay to NDC in exchange for having sold, assigned, and transferred its rights and obligations in its .WEB application.

63. In sum, there is no remotely plausible argument under which NDC did not sell, assign, or transfer rights and obligations in connection with the .WEB Application to Verisign, which, again, was a “binding” and “material” term of the New gTLD Program Rules.<sup>123</sup> ICANN Staff should have easily recognized this. There is nothing anywhere in the language of the New gTLD Program Rules to suggest that ICANN has “discretion” to enforce the rule that an “Applicant may not resell, assign, or transfer any of the applicant’s rights or obligations in connection with the application.” Even if the New gTLD Program Rules provided ICANN with such discretion, ICANN could not exercise such discretion consistent with its Articles and Bylaws under the circumstances of this case. The manner in which NDC sold, assigned, and transferred its rights and obligations in the .WEB application to Verisign rendered key elements of the application process meaningless, including: the public notice and comment period; the evaluation criteria concerning the applicant’s business plan and its intentions in seeking the gTLD registry rights; the ability for Qualified Applicants to resolve contention sets amicably and among themselves; and the requirement that Qualified Applicants bid on their own behalf (so as not to render the prior steps in the process meaningless). Both the plain language of the Rule, and the Bylaw’s mandate that ICANN perform its Mission openly and transparently—and by making “decisions by applying documented policies consistently, neutrally, objectively, and fairly”—required ICANN to disqualify NDC’s application for this violation. ICANN breached its Articles and Bylaws by failing to do so.

2. **NDC's Failure to Amend its Application to Correct False, Misleading, and Incomplete Information**

(i) ***The AGB's Disclosure Requirements***

64. Applicants such as NDC were required to warrant that all of the statements in their applications were true, accurate, and complete, and agreed to notify ICANN “promptly” if any “change in circumstances” rendered the application to be “false or misleading,” whether by virtue of material information included in or omitted from the application. As stated in Module 6 of the AGB (“Top-Legal Domain Application – Terms and Conditions”):

***Applicant warrants that the statements and representations contained in the application*** (including any documents submitted and oral statements made and confirmed in writing in connection with the application) ***are true and accurate and complete in all material respects***, and that ICANN may rely on these statements and representations fully in evaluating this application. ***Applicant acknowledges that any material misstatement or misrepresentation (or omission of material information) may cause ICANN and the evaluators to reject the application without a refund of any fees paid by Applicant. Applicant agrees to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading.***<sup>124</sup>

(ii) ***The DAA Constituted Material Information that NDC was Required to Disclose***

65. As soon as NDC entered into the DAA with ICANN, almost *none* of the information in NDC's .WEB Application—and certainly, almost none of the information that had been posted for public comment—was true, accurate, or complete. Nor were the statements made by NDC's representatives, in phone calls and in writing, to ICANN. There can be little argument that NDC's failure to update its application constituted an “omission of material information” that rendered its application to be false and certainly misleading.

66. As discussed above, the AGB stated that an important application criterion was the presentation of “a thorough and thoughtful analysis” of the “proposed business model” for the new gTLD. The AGB said that ICANN was not merely seeking “to certify business success.” In addition, “an important objective of the new TLD process” was “to diversify the name space, with different registry business models and target audiences.”<sup>125</sup> According to the AGB, ICANN was not merely seeking “safeguards for registrants”;

it was also seeking “to encourage innovation.”<sup>126</sup> Most of the public portion of NDC’s .WEB application was dedicated to addressing these specific issues. Thus, NDC made the representations not only to ICANN; NDC made them to the entire Internet community as part of ICANN’s public comment mechanism, which, as explained above, are meant to “involve[] the participation of many stakeholder groups in a public discussion,” “allow time for the community to review and submit comments on posted application materials,” and “provide a means for the public to bring forward any other relevant information or issues.”<sup>127</sup>

67. Yet after NDC’s entry into the DAA, all of NDC’s representations on these issues—concerning, for example, NDC’s proposed business plan, NDC’s “proven executive team” with the “long-term commitment” to execute the plan, and the manner in which NDC’s team intended to implement the plan—became false or misleading, whether by omission or commission. For example:

- NDC represented that if its Application prevailed, users of .WEB would “benefit from **the long-term commitment** of a **proven executive team** that has a **track-record of building and successfully marketing affinity TLD’s**” such as .CO.<sup>128</sup> After entering the DAA, this representation was false and misleading.
- NDC represented that if its Application prevailed, NDC’s “intention” was “for .WEB to be added to .CO’s product portfolio, where it can benefit from economies of scale along with the firm’s [i.e., NDC’s] experience and expertise in marketing and branding TLD properties.”<sup>129</sup> After entering the DAA, this representation was false and misleading.
- NDC represented that under its stewardship, .CO had “differentiated itself from other existing TLDs by combining **innovative branding**” with, *inter alia*, “**unprecedented marketing campaigns**,” and that NDC “**plan[ned] to implement a very similar strategy for .WEB in its launch, operation, promotion and growth**.”<sup>130</sup> After entering the DAA, this representation was false and misleading.
- NDC represented that if its Application prevailed: “**We [i.e., NDC] plan to target a similar [i.e., to .CO] community of entrepreneurs, startups, and progressive corporate entities** that are looking for an online presence with a suitable domain name,” and that NDC’s “**marketing strategy will utilize a 3 pillar framework, similar to that used with .CO**.”<sup>131</sup> After entering the DAA, this representation was false and misleading.
- NDC represented that if its Application prevailed: “We [i.e., NDC] plan to foster the community of users of .WEB via a combination [of] community engagement and outreach, use-case development and direct marketing to base.”<sup>132</sup> After entering the DAA, this representation was false misleading.

68. Not only were all of these specific representations to ICANN and the Internet community false and misleading after NDC entered into the DAA with Verisign, through the DAA, the entire premise underlying the Application—*i.e.*, that NDC was applying for the .WEB gTLD rights on its own behalf and for the reasons stated in its Application (rather than on behalf of an undisclosed, non-applicant)—became false and misleading. NDC gave up virtually all of its rights in the .WEB Application, along with any possibility of obtaining the .WEB registry rights for itself.

69. The DAA plainly constituted a “change of circumstances” that rendered “information provided in the application false or misleading.”<sup>133</sup> Indeed, it would be difficult to imagine a change of circumstances more dramatic than that represented by the DAA—in which an entirely different entity (and one vastly different in every respect from NDC) was taking over all of the rights in the application. Yet NDC did not, as required, “notify ICANN in writing” about this “change in circumstances” that rendered its application false or misleading. In fact, as previously mentioned, Redacted Third Party Designated Confidential information

<sup>134</sup> Thus, under the

DAA, NDC was no longer able to comply with its obligations in connection with the .WEB Application; and NDC plainly failed to do so.<sup>135</sup>

**(iii) Material Misstatements by NDC’s Representative**

70. The Terms and Conditions for Top-Level Domain Applications also expressly applied to the Applicant’s “oral statements made and confirmed in writing in connection with the application.”<sup>136</sup> Such statements also had to be “true and accurate and complete in all material respects.”<sup>137</sup> NDC also violated this “binding” and “material” requirement of the New gTLD Program Rules.

71. As set forth in Afiliias’ Amended Request, shortly before the private auction that was scheduled for 15-16 June 2016, NDC informed other members of the .WEB contention set that NDC would not be participating in the private auction and would insist on proceeding to the ICANN Auction. Mr. Rasco indicated that it was not his—or even NDC’s decision—as to whether to participate in the private auction or

the ICANN Auction. Mr. Rasco's comments to that effect were consistent with NDC's obligations to Verisign under DAA. Redacted - Third Party Designated Confidential Information

<sup>138</sup> Thus, on 6 June 2016, Jon Nevett, an executive at Ruby Glen (a .WEB applicant owned by Donuts Inc.), wrote to Mr. Rasco, as well as to Messrs. Juan Diego Calle and Nicolai Bezonoff. (As stated above, NDC's .WEB Application listed Rasco, Calle, and Bezonoff as NDC's three "directors" and also as its three "officers and partners.") Mr. Nevett wrote:

Hi guys. Jose and I corresponded last week, but I wanted to take another run at the three of you. Not sure if you three are still the Board members of your applicant, but I wanted to reach out to discuss a couple of ideas. Until Monday, I believe that we have a right to ask for a 2 month delay of the ICANN auction with the agreement of all applicants. Would you be ok with an extension while we try to work this out cooperatively?<sup>139</sup>

Mr. Rasco responded (with Mr. Calle in copy) in relevant part:

The three of us are still **technically** the managers of the LLC, **but the decision goes beyond just us**. Nicolai is at NSR full time and no longer involved with our TLD applications. I'm still running our program and Juan sits on the board with me and several others. Based on your request, **I went back to check with all the powers that be and there was no change in the response and [we] will not be seeking an extension**. It pains me personally to stroke a check to ICANN like this, but that's what we're going to have to do just like others did on .app and .shop.<sup>140</sup>

72. Rasco's response led Ruby Glen to complain to ICANN that a third party (as represented by the other "powers that be") was likely controlling NDC. In response, on 27 June 2016, an official in ICANN's New gTLD Operations, Mr. Jared Erwin, wrote to Mr. Rasco of NDC:

We would like to confirm that that there have not been **changes to your application or the [NDC] organization that need to be reported to ICANN. This may include any information that is no longer true and accurate in the application**, including changes that occur as part of regular business operations (e.g., changes to officers or directors, application contacts).<sup>141</sup>

73. Recalling that the AGB also prohibits the "omission of material information," Rasco's carefully crafted answer only addressed part of ICANN's inquiry: "I can confirm that there have been no changes to the [NDC] organization that would need to be reported to ICANN."<sup>142</sup> While stating that there had been no changes to NDC's organization, however, Mr. Rasco failed to address ICANN's inquiry as to whether

there was “any information that is no longer true and accurate in the application.” As set forth above, there were now numerous representations in NDC’s application that were patently false. Again, the entire premise of the application—*i.e.*, that NDC was seeking .WEB for its own benefit, to be deployed pursuant to the business plan and for the reasons described in the application—was no longer remotely “true and accurate.” It was now an outright lie.

74. On 7 July 2016, ICANN’s Ombudsman contacted Mr. Rasco, again focusing on whether there had been any changes to the NDC organization. The Ombudsman wrote:

I have been shown an email which suggests that one of your directors is no longer taking an active part in the application, and that there are other directors now involved. The complainant also suggested that your shareholders have now changed since the original application. It was suggested that this would change the auction by making knowledge of your applicant company different, and therefore it was unfair to the other applicants. I’m sure you can clarify this.<sup>143</sup>

75. This time, Mr. Rasco specifically misrepresented to the ICANN Ombudsman that nothing had changed about NDC’s .WEB application, and misrepresented that he (Rasco) and NDC’s other “Members (*i.e.* shareholders)—who had “never changed”—were still making all of NDC’s “major decisions”:

***There have been no changes to the [NDC] application.*** Neither the governance, management nor the ownership ... has changed. In an LLC, there are no directors, it is a manager managed company, as designated by Members of the LLC within the Operating Agreement of the Limited Liability Company. There has never been an amendment to that operating agreement. There are no new “directors,” nor have any left the company, and while the managers are ultimately responsible for the LLC, as a Manager, ***I take my duties very seriously and for major decisions, I confer with the Members (i.e. shareholders), which again for clarification, have never changed.*** I hope this clarification puts the matter to rest.<sup>144</sup>

76. There is simply no way to reconcile Mr. Rasco’s representations to the ICANN Ombudsman with the terms of the DAA. At this point, under the terms of the DAA, neither Mr. Rasco nor the other Managers of NDC were making any “major decisions” (or even minor ones) in connection with NDC’s .WEB Application. Verisign was making all such decisions.

77. On 8 July 2016, Ms. Christine Willett (Vice President, gTLD Operations, Global Domains

Division) apparently followed up with Mr. Rasco by telephone.<sup>145</sup> In Ms. Willett's summary of the telephone conversation, which she sent to the ICANN Ombudsman later the same day, she advised the Ombudsman that Mr. Rasco had assured her that NDC's "application materials were still true and accurate."<sup>146</sup> Regarding Mr. Rasco's representation to other applicants that he (Rasco) had not made the decision for NDC to skip the private auction, Mr. Rasco apparently advised Ms. Willett that he had intentionally misled these other applicants. Ms. Willett summarized Mr. Rasco's account as follows:

[Rasco] was contacted by a competitor [i.e., Ruby Glen] who took some of his words out of context and [was] using them as evidence regarding the alleged change in ownership. In communicating with that competitor, he used language to give the impression that the decision to not resolve the contention privately was not entirely his. **However, this decision was in fact his.**<sup>147</sup>

78. To the contrary, based on the DAA, Mr. Rasco's representation to Mr. Nevett of Ruby Glen that other "powers" had decided that NDC would skip the private auction and proceed to the ICANN Auction was closer to the truth than the blatant falsehoods that Rasco was now serving up to ICANN.

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79. Redacted - Third Party Designated Confidential Information

This, for the reasons set forth above, was not true. Redacted - Third Party Designated Confidential Information

80. The assertion that “NDC has not sold, assigned or transferred its rights or obligations in the Application to any party, including Verisign, and will not in the future sell, assign, or transfer any such rights or obligations” does not withstand even modest scrutiny.

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81. ICANN Staff should have recognized that NDC plainly and blatantly breached its warranty to ICANN that “the statements and representations contained in the application (including any documents submitted and oral statements made and confirmed in writing in connection with the application) are true and accurate and complete in all material respects.”<sup>154</sup> Moreover, NDC breached its obligation “to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading.”<sup>155</sup> When expressly given the opportunity to notify ICANN that NDC’s application had in fact undergone a dramatic change in circumstances—rendering virtually all of the public statements in the

application to be false and misleading—NDC (via Mr. Rasco) responded by lying to and misleading ICANN. Mr. Rasco’s oral assertions—which he confirmed to ICANN in writing—that there had been no changes to NDC’s application, and that he (Rasco) was continuing to make all “major decisions” in connection with the .WEB application—were plainly and demonstrably false and misleading. This should all have been readily apparent to ICANN, yet ICANN did nothing.

**(iv) ICANN’s Failure to Disqualify NDC’s Application**

82. Based on an even cursory analysis of the DAA—let alone one based on a good faith application of the New gTLD Program Rules in accordance with ICANN’s obligations pursuant to its Articles and Bylaws—ICANN knew that NDC had committed these material breaches of the New gTLD Program Rules by (at the latest) August 2016, when Verisign provided ICANN with the DAA (and also the 26 July 2016 letter from Mr. Livesay to Mr. Rasco). Yet ICANN failed to act in accordance with the New gTLD Program Rules and its Articles and Bylaws.

83. Here, the AGB provides that each applicant “acknowledges that any material misstatement or misrepresentation (or omission of material information) *may* cause ICANN and the evaluators to reject the application without a refund of any fees paid by Applicant.”<sup>156</sup> Both ICANN and the *Amici* have suggested that the word “may” provides ICANN with discretion on whether to reject the application for a material misstatement, misrepresentation, or omission. But again, ICANN must exercise any discretion that it has consistent with its Articles and Bylaws. The breaches here made a mockery of the most basic principles by which ICANN was required to implement the New gTLD program, including openness, transparency, fairness, equal treatment of the applicants, and “the participation of many stakeholder groups in a public discussion.”<sup>157</sup>

84. ICANN must operate consistently with its Articles and Bylaws not only for its own sake, but for the sake of the entire Internet community. By failing to disqualify NDC’s application and bid for its material misstatements, misrepresentations, and omissions, ICANN allowed NDC and Verisign to deceive not only ICANN, but the entire Internet community that ICANN is meant to serve—ranging from the other applicants

for .WEB who acted in good faith and followed the New gTLD Program Rules, to the consumers and users of Internet services who were falsely led to believe that they had the opportunity to review and comment on the applications of all applicants who were seeking the gTLD rights in .WEB.

85. Moreover, by allowing Verisign secretly to take over NDC's application—to “indirectly participate” in the contention set and to seek to become the registry operator for .WEB under the cover of NDC's application—ICANN wiped away the years of “carefully deliberated policy development work” by the ICANN community,” which had resulted in “an application and evaluation process for new gTLDs that is aligned with the policy recommendations” made by the Internet community, and which were meant to advance ICANN's Mission in a manner that is consistent with its Articles and Bylaws.<sup>158</sup> Other applicants in the .WEB contention set—who followed the “clear roadmap”<sup>159</sup> provided by the New gTLD Program Rules for reaching delegation of the .WEB domain—were plainly treated differently from Verisign, who was allowed by ICANN to participate “indirectly” in the .WEB contention set without ever having submitted an application, without being the subject to the public notice and comment and evaluation process, and without ever being required to disclose even its interest in the .WEB gTLD until *after* the contention set was resolved in favor of its agent, NDC.

86. ICANN's failure to disqualify NDC's application and bid resulted in an application and auction process that was devoid of transparency, openness, and accountability; that failed to enable competition and open entry in Internet-related markets; that failed to apply documented policies consistently, neutrally, objective, and fairly; and that failed to apply standards, policies, or practices in a non-discriminatory manner. For all of these reasons, ICANN violated its Articles and Bylaws when it failed to disqualify NDC's bid and application upon receiving the DAA in August 2016.

### **3. ICANN Staff Failed to Disqualify NDC's Bids**

#### ***(i) The Auction Rules***

87. We briefly summarized the Auction Rules above regarding NDC's rights and obligations in

connection with its .WEB Application in the section above. Like the rest of the New gTLD Program Rules, the Auction Rules were meant to advance, *inter alia*, ICANN’s governing principles of transparency, fairness, and accountability. They were designed to ensure that Applicants were bidding on their own behalf—not on behalf of a non-applicant, concealing itself behind the Applicant.

88. As stated above, the AGB provides: “**Only** bids that comply with **all aspects of the auction rules will be considered valid.**”<sup>160</sup> The Auction Rules state at the outset, under the heading “**Participation in the Auction,**” who is eligible to participate in an ICANN Auction:

Prior to the scheduling of an Auction, an Intent to Auction notice will be provided to all members of an eligible Contention Set via the ICANN Customer Portal. **To be eligible to receive an Intent to Auction notice from ICANN, requirements a-d below must be met:**

All active applications in the Contention Set have:

- a) Passed evaluation
- b) Resolved any applicable GAC advice
- c) Resolve any objections
- d) No pending ICANN Accountability Mechanisms<sup>161</sup>

89. Here, Verisign was never subjected to and did not pass any evaluation. More broadly, if a non-applicant were allowed to conceal its “indirect” participation in an application Redacted third Party Designated Confidential Information

,<sup>162</sup> there would be no opportunity for GAC advice, objections, or ICANN Accountability Mechanism based on the non-applicant’s concealed identity and purposes in seeking the TLD. Here, too, Verisign’s and NDC’s deceptive conduct rendered the Auction Rules’ “participation” requirements meaningless.

90. The Auction Rules further stipulated that “[p]**articipation in an Auction is limited to Bidders.**”<sup>163</sup> The Auction Rules defined “Bidders” as either: (1) a “Qualified Applicant”; or (2) a “Designated Bidder” of a Qualified Applicant.<sup>164</sup>

91. Under the Auction Rules, a Qualified Applicant is defined as “[a]n entity **that has submitted an Application for a new gTLD, has received all necessary approvals from ICANN,** and which **is**

*included in a Contention Set* to be resolved by an Auction.”<sup>165</sup> At the risk of stating the obvious, Verisign did not submit an application for .WEB, did not receive any approvals from ICANN, and was not part of the .WEB contention set. Verisign was not a Qualified Applicant.

92. The Auction Rules define a “Designated Bidder” as “[a] party designated by a Qualified Applicant to bid *on its behalf* in an Auction.”<sup>166</sup> NDC does not appear to have designated a “Bidder” for the .WEB Auction, but any such “Designated Bidder” would not have been bidding on NDC’s behalf, but rather on Verisign’s. In any event, NDC certainly did not designate and disclose any Designated Bidder prior to the .WEB Auction.

93. Lest there be any doubt, the Auction Rules also provided (under the heading “**Validity of Bids**”) that each “Bid must be placed *by a Bidder for its Application in an Open Contention Set*[.]”<sup>167</sup> The Auction Rules provided further that a Bidder may only “bid on *its behalf*” and that all such bids must reflect “a price, which the *Bidder* is willing to pay to resolve string contention within a Contention Set in favor of its Application.”<sup>168</sup>

94. Moreover, the Auction Rules required each Bidder to enter a Bidder Agreement with the Auction Manager (appointed by ICANN to conduct the ICANN Auction). The new gTLD Auctions Bidder Agreement also provided that that “the Qualified Applicant will place bids in the Auction *on its own behalf or may designate an agent (“Designated Bidder”) to enter bids in the Auction on the Qualified Applicant’s behalf*.”<sup>169</sup>

95. Thus, the prohibition against bids being made on behalf of any entity other than a Qualified Applicant was stated plainly and repeatedly throughout the Auction Rules. A simple review of the DAA’s terms demonstrate that they *required* NDC to violate and subvert the Auction Rules—which is precisely what NDC did. NDC—the “Qualified Applicant”—was *not* making bids “on its own behalf.” Nor could it appoint a “Designated Bidder” to bid on NDC’s behalf. Redacted - Third Party Designated Confidential Information

96. Through the DAA, Verisign and NDC turned the terms and conditions of the Auction Rules and the Bidder Agreement upside down—emptying them of the basic principles they were designed to secure. Instead of a Qualified Applicant being able to appoint a Designated Bidder to act as the Qualified Applicant’s agent to enter bids on its behalf, the DAA enabled Verisign—a non-qualified, non-applicant, hiding from the Internet community under the cover of NDC’s application—to use NDC as its undisclosed agent to make bids exclusively on Verisign’s behalf and solely for Verisign’s benefit. Needless to say, since NDC bore no economic risk in submitting any of its bids at the .WEB Auction, each of the bids NDC submitted necessarily reflected an amount that Verisign was willing to pay for .WEB, and which Verisign was obligated to pay under the DAA.

**(ii) ICANN was Required to Automatically Disqualify NDC’s Bid for Violating the Auction Rules**

97. Each bid that NDC placed on Verisign’s behalf was therefore an invalid bid under the New gTLD Program Rules.<sup>172</sup> Under the Auction Rules, an invalid bid **must** be treated as “an exit bid at the start-of-round price for the current auction round.”<sup>173</sup> In other words, under the New gTLD Program Rules, each of NDC’s bids was required to be treated as “an exit bid.” NDC should never have been allowed to move to the next bidding round, and once its subterfuge was discovered, all of its bids should have been declared in default—from its opening bid to its winning bid. As stated by the Auction Rules:

Once declared in default, any Winner is subject to immediate forfeiture of its position in the Auction and assessment of default penalties.

After a Winner is declared in default, the remaining Applications (that have not withdrawn from the New gTLD Program) which are not in a Direct Contention relationship with any of the non-defaulting Winning Applications will receive offers to have their Applications accepted, one at a time, in descending order of and subject to payment of its respective final Exit Bid. ***In this way, the next Bidder would be declared the winner subject to payment of its Exit Bid.***<sup>174</sup>

98. The Auction Rules provided further:

If, ***at any time following the conclusion of an Auction***, the Winner is determined by ICANN to be ineligible to sign a Registry Agreement for the Contention String that was the subject of the Auction, the remaining Bidders (with applications that have not been withdrawn from the new gTLD Program) ***will receive offers to have their Applications accepted, one at a time, in descending order of and subject payment of its Exit Bid.*** In this way, ***the next Bidder would be declared the Winner subject to payment of its Exit Bid.***<sup>175</sup>

99. Therefore, the New gTLD Program Rules plainly required ICANN to declare NDC's bids in default and award the .WEB TLD to Afilias as the next highest bidder. There is nothing in the New gTLD Program Rules to suggest that ICANN may overlook the requirement that only a "Qualified Applicant" (or its "Designated Bidder") may place bids in an ICANN Action. Nor is there anything in the Rules to suggest that ICANN may overlook the requirement that a Qualified Applicant "will place bids in the Auction "on its own behalf," or "designate an agent ('Designated Bidder') to enter bids in the Auction on the Qualified Applicant's behalf." Similarly, there is nothing in the New gTLD Program Rules to allow ICANN to ignore the rule that "[o]nly bids that comply with all aspects of the auction rules will be considered valid"—and that that an invalid bid must be treated as "an exit bid at the start-of-round price for the current auction round."

100. Even assuming *arguendo* that the language of the rules are not plainly mandatory—and that ICANN had discretion in their application—ICANN could not choose to overlook these violations in the context of this case. Allowing NDC secretly to bid on Verisign's behalf rendered all of the preceding steps in the application process meaningless. ICANN was not permitted by its Articles and Bylaws to overlook such a violation, which again made the bidding process inconsistent with the same requirements as stated above with respect to NDC's violation of the no resale, assignment, or transfer rules, and NDC's failure to correct the material misstatements, misrepresentations, and omissions in its application.

101. Similarly, nothing in the New gTLD Program Rules suggests that ICANN has any discretion in enforcing the provision in the Auction Rules that states that if a Winner is declared in default, or is determined to be ineligible to sign a Registry Agreement for Domain at any time following the conclusion of an Auction, then “the remaining Bidders (with applications that have not been withdrawn from the New gTLD Program), will receive offers to have their Applications accepted, one at a time, in descending order of and subject to payment of its respective Exit Bid.” Again, this rule—and ICANN’s lack of discretion in enforcing it—is consistent with ICANN’s governing principles of openness, fairness, accountability, good faith and non-discrimination. If the application or the bid of a “Winning Bidder” is disqualified by ICANN, then it is only fair that the “Qualified Applicant” with the next highest bid should be offered the opportunity to obtain the TLD rights subject to payment of its Exit Bid. That applicant (in this case, Afilias) will have gone through the expensive, arduous, and multi-year process of reaching the ICANN Auction phase, and will have submitted the highest valid Bid to acquire the rights to the Domain. There is nothing in the New gTLD Program Rules to suggest that ICANN can in its “discretion” ignore or deviate from these plainly stated procedures. Moreover, because the Auction Rules apply the “second-highest-bid” principle—*i.e.*, that the “Winning Bidder” pays the bid amount of the second highest bid—ICANN is required to offer .WEB to Afilias at the second highest bid after NDC’s bid is disqualified.<sup>176</sup>

**B. ICANN’s Self-serving and Superficial Investigation of Afilias’ Concerns and Decision to Proceed to Contracting with NDC and Verisign Breached the Articles and Bylaws**

102. Instead of disqualifying NDC’s application and auction bids, as it was required to under the New gTLD Program Rules and Articles and Bylaws, ICANN took steps to protect itself (*i.e.*, cover-up), NDC and Verisign from criticism. It did so under the pretext of seeking information from certain contention set members (Ruby Glen, NDC, and Afilias) and Verisign for the purposes of making an “informed resolution” of various concerns that had been raised by Afilias and Ruby Glen. As described below, ICANN was far from open and transparent in how it handled this information gathering exercise, and its actions far from neutral,

objective, fair, non-discriminatory, or in good faith.

#### 1. ICANN Receives the DAA on 23 August 2016

103. Assuming *arguendo* that ICANN did not know about Verisign's involvement in NDC's .WEB application prior to the ICANN Auction on 27 July 2016, it did not take long for ICANN to find out. As the Panel is by now aware, Verisign filed a 10-Q statement with the U.S. Securities and Exchange Commission on 28 July 2016 that stated in a footnote:

Subsequent to June 30, 2016, [Verisign] incurred a commitment to pay approximately \$130.0 million for the future assignment of contractual rights, which are subject to a third-party consent.<sup>177</sup>

Verisign's disclosure was incomplete and inaccurate. Redacted - Third Party Designated Confidential Information

104. Verisign's "disclosure" caught the attention of the press, which issued headlines like: *It looks like Verisign bought .Web domain for \$135 million (SEC Filing)*;<sup>178</sup> *Verisign likely \$135 million winner of .web gTLD*;<sup>179</sup> and *Someone (cough, cough, VeriSign) just gave ICANN \$135m for the rights to .web*.<sup>180</sup> According to one such press article: "Industry speculation is that the owner of the dot-com registry, Verisign, is secretly behind Nu Dot Co and plans to purchase .web in order to remove what could be a serious competitor to its dot-com crown."<sup>181</sup>

105. A few days following Verisign's 10Q, on 31 July 2016, NDC's Jose Ignacio Rasco emailed ICANN's Christine Willett. The Panel will recall that, several weeks earlier, Mr. Rasco had assured Ms. Willett

that NDC's "application materials were still true and accurate." He had also made representations about NDC's application and who controlled it to ICANN's Ombudsman.<sup>182</sup> Redacted - Third Party Designated Confidential Information

106. ICANN has produced no documents to identify the person(s) from Verisign who contacted Mr. Atallah, or what they discussed (although ICANN's privilege log shows that Mr. Atallah was involved in multiple communications about .WEB during this time frame—all of which ICANN claims are privileged<sup>185</sup>).

But on 1 August 2016, Verisign issued its press release, in which Verisign simply stated:

[Verisign] entered into an agreement with [NDC] wherein [Verisign] provided funds for [NDC's] bid for the .web TLD. We are pleased that the [NDC] bid was successful.

We anticipate that [NDC] will execute the .web Registry Agreement with [ICANN] and will then seek to assign the Registry Agreement to Verisign upon consent from ICANN.<sup>186</sup>

Once again, Verisign's description of its "agreement" with NDC was at best incomplete and misleading. To mention just one material omission: Verisign made no mention of the date that it had entered in to its agreement with NDC, let alone provide any other details of the transaction.

107. On 8 August 2016, in light of Verisign's press release, Mr. Scott Hemphill, Afiliat's Vice President and General Counsel, wrote to Mr. Atallah to state Afiliat's concerns based on the public reports

concerning Verisign's involvement in NDC's application. Mr. Hemphill did not at this point know the terms of the DAA (and indeed, would not know them until December 2018 after ICANN produced the DAA pursuant to a document production order by the Emergency Arbitrator in this IRP). Mr. Hemphill stated in his letter:

We have not been able to review a copy of the agreement(s) between NDC and Verisign with respect to [their reported] arrangement, but it appears likely, given the public statements of VeriSign, that [NDC] and VeriSign entered into an agreement in the form of an option or similar arrangement with respect to the rights and obligations of NDC regarding its .WEB application.<sup>187</sup>

Mr. Hemphill observed—based on the limited information available to him—that the reported arrangement likely violated numerous provisions of the New gTLD Program Rules. For example, Mr. Hemphill wrote: “[T]he type of option agreement that apparently exists between NDC and Verisign likely constitutes a change in control of the applicant. A change in control can be effected by contract as well as by changes in equity ownership.”<sup>188</sup> Accordingly, Mr. Hemphill requested on behalf of Afilias that “ICANN promptly undertake an investigation of the matters set forth in this letter and take appropriate action against NDC and its .WEB application for violations of the Guidebook....”<sup>189</sup> Shortly thereafter, Mr. Hemphill also lodged a complaint on behalf of Afilias with the ICANN Ombudsman.<sup>190</sup>

108. On 23 August 2016, Mr. Ronald L. Johnston of Arnold & Porter (acting for Verisign) wrote a lengthy letter to Mr. Eric Enson of Jones Day (acting for ICANN),<sup>191</sup> Redacted - Third Party Designated Confidential Information

<sup>192</sup> Afilias has not had sight of ICANN's “request for information” and does not know when it was sent, its contents, or its genesis. Notwithstanding ICANN's agreement in this IRP to search for and produce the “request for information” to which Mr. Johnston's letter was apparently responding, ICANN has failed to produce the request (or any other communications between Verisign and ICANN prior to 23 August 2016 for that matter).<sup>193</sup>

109. Redacted - Third Party Designated Confidential Information

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Anyone at ICANN who had actually read the DAA would have recognized that Mr. Johnston's description of the agreement was woefully incomplete. Redacted - Third Party Designated Confidential Information

Moreover, anyone familiar with the New gTLD Program Rules would have recognized that even under the incomplete description of the DAA as provided by Mr. Johnston, NDC had still violated its material obligations as an applicant, as discussed above in Section III.A.

110. As discussed in Section III.A above, once ICANN learned of the terms of the DAA, it was required to disqualify NDC's application and bid. Instead, ICANN proceeded to commence an "investigation" designed to protect itself.

## **2. ICANN's "Investigation" of Afiliás' Concerns**

111. Having received no response to his 8 August 2016 letter, Mr. Hemphill wrote again to Mr. Atallah on 9 September 2016, asking him, *inter alia*, to confirm that ICANN would not enter into a Registry Agreement with NDC for .WEB until the Ombudsman had completed its investigation, the ICANN Board had reviewed the matter, and that any ICANN accountability mechanisms had been completed.<sup>197</sup> There would be no response to this letter until the end of September.

112. On 16 September 2016, Ms. Willett sent a letter with a series of detailed questions (the

“**Questionnaire**”) to representatives of Afilias, Verisign, NDC, and Ruby Glen. Ms. Willett stated in her letter:

In various fora, Ruby Glen LLC (Ruby Glen) and Afilias Domains No. 3 Limited (Afilias) have raised questions regarding, among other things, whether NU DOT CO LLC (NDC) should have participated in the 27-28 July 2016 auction for the .WEB contention set and whether NDC’s application for the .WEB gTLD should be rejected. **To help facilitate informed resolution of these questions, ICANN would find it useful to have additional information.**<sup>198</sup>

113. At this point, ICANN was already in possession of Mr. Johnston’s lengthy 23 August 2016 letter to Mr. Enson, the DAA, and other documents that had been submitted with Mr. Johnston’s letter. Remarkably, Ms. Willett’s letter made no mention of these documents or provided any hint that ICANN had already sought and received input from Verisign. To state the obvious, the deck was stacked: Verisign and NDC knew why Ms. Willett was writing and the substantive motivations behind the questions she was asking. Afilias and Ruby Glen did not.

114. With the advantage of now having the DAA in our possession<sup>199</sup>—and knowing that ICANN had had the DAA in its possession for several weeks before dispatching the Questionnaire—it is apparent that the Questionnaire was designed to elicit answers that would not only help Verisign’s cause if its arrangement with NDC was challenged at a later date, but would also protect ICANN from the type of criticism and concerns being raised in Afilias’ letters.<sup>200</sup> ICANN already knew in the main what Verisign’s and NDC’s responses would be. The exercise of the questionnaire was thus a pure artifice intended to create the impression that ICANN was engaging in a fair and balanced process.

115. The questions included, for example:

- “Please provide or describe any evidence of which you are aware regarding whether ownership or control of NDC changed after NDC applied for the .WEB gTLD [(sic)]?”
- “Do you think that a change regarding only one of many activities of an applicant constitutes a change in ownership and control within the meaning of AGB Section 1.2.7? Please explain why or why not?”
- “In his 8 August 2016 letter, Scott Hemphill stated: ‘A change in control can be effected by contract as well as by changes in equity ownership.’ Do you think that an applicant’s making a

contractual promise to conduct particular activities in which it is engaged in a particular manner constitutes a 'change of control' of the applicant?"<sup>201</sup>

116. Many other questions are argumentative and/or misleading on their face with respect to Afilias, given that Afilias did not know the contents of the DAA. Indeed, many questions reflected the self-serving arguments that Mr. Johnston had stated in his 23 August 2016 letter to Mr. Enson, all of which adopted Verisign's incorrect reading of the substance of the DAA wholesale. For example:

- "Do you think that AGB Section 1.2.7 requires an applicant to disclose to ICANN all contractual commitments it makes to conduct its affairs in particular ways? If not, in what circumstances (if any) would disclosure be required?"
- "Do you think that AGB Module 6, Paragraph 10 would be violated by a contractual promise by an applicant to request ICANN's consent to transfer to another party any registry agreement it receives as the result of its application?"
- "Do you think that AGB Module 6, Paragraph 10 would be violated by a contractual promise by an applicant to seek to transfer to another party, but only upon the consent of ICANN, any registry agreement it receives as the result of its application?"<sup>202</sup>

117. On 7 October 2016, Afilias submitted its answers to Ms. Willett's Questionnaire.<sup>203</sup> Until ICANN's recent document production in this IRP in April 2020, Afilias knew nothing about the contents of Verisign and NDC's responses (even though Afilias sought their responses through DIDP requests in 2018). ICANN's April 2020 document production included Verisign's response dated 7 October 2016 and NDC's response dated 10 October 2016.<sup>204</sup> For the most part, Verisign's and NDC's responses elaborated on the arguments in Mr. Johnston's 23 August 2016 letter to Mr. Enson.<sup>205</sup>

118. There is no indication in the record of this IRP, or through publicly available sources, that ICANN did anything with the responses to Ms. Willett's Questionnaire, or what steps it took to reach the "informed resolution" of the concerns raised by Afilias (as promised in Ms. Willett's 16 September 2016 letter). All we know, based on ICANN's Response in this IRP is that at some unspecified time and in some unspecified manner, "ICANN decided not to make a determination on the merits of Afilias' contentions against Verisign and NDC until accountability mechanisms had concluded."<sup>206</sup> This assertion, however, is

inconsistent with the fact that on 6 June 2018, ICANN decided to take the .WEB contention set off hold status and to commence the registry agreement contracting process with NDC and Verisign—which suggests that ICANN had in fact “made a determination on the merits of Afiliás’ contentions” and had done so in NDC’s and Verisign’s favor. When or on what basis it did so is still a mystery; or perhaps Ms. Willett’s Questionnaire had served its intended cover-up purpose.

### 3. ICANN Proceeds Toward Contracting with NDC (and Hence Verisign) for the .WEB Registry Agreement

119. Following the United States Department of Justice’s closure of its investigation in January 2018, Afiliás and its counsel at Dechert made repeated requests to ICANN for updates on whether it had reached any decision on how it intended to proceed with .WEB.<sup>207</sup> Redacted Third Party Designated Confidential Information

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120. On 28 April 2018, ICANN’s counsel responded to Afiliás’ counsel that “**the .WEB contention set is on hold**. When the contention set is updated, your client – along with all other members of the contention set – will be notified promptly[.]”<sup>209</sup> ICANN’s counsel also rejected Afiliás’ contention that ICANN was not being transparent as to how it was proceeding with respect to the .WEB contention set. In response to that letter, Afiliás’ counsel wrote on 1 May 2018:

[W]e do not understand the basis for your assertion that ‘in this particular matter, ICANN has been quite transparent’ about its conduct. To date, ICANN has provided **no** information about the investigation (if any) it has undertaken regarding the concerns raised by Afiliás – viz., that the bid for .WEB that NDC supposedly made on its own behalf was in fact secretly funded by and made for the benefit of Verisign.<sup>210</sup>

121. Afiliás never received a response to this letter. Instead, on 6 June 2018, ICANN notified Afiliás that it had decided to remove the .WEB contention set from its on-hold status—signaling that it intended to proceed with the delegation of .WEB to NDC, and therefore to Verisign.<sup>211</sup> And on 14 June 2018,

ICANN in fact sent NDC the .WEB registry agreement—which NDC signed and returned to ICANN.<sup>212</sup>

#### IV. ICANN’S EXERCISE OF ANY DISCRETION IT HAS TO REMEDY NDC’S BREACHES MUST BE CONSISTENT WITH ICANN’S MANDATE TO PROMOTE COMPETITION

122. ICANN’s main argument is that the “Guidebook gives ICANN discretion to determine ... what consequence, if any, should follow from a failure” to comply with the New gTLD Program Rules.<sup>213</sup> In earlier sections we have addressed why that discretion is constrained by ICANN’s Bylaws-based obligations of transparency, neutrality, non-discrimination, fairness, objectivity and good faith. In this section we discuss why it is also constrained by ICANN’s Bylaws-based duty to act and make decisions consistently with its competition mandate. That is, why ICANN must exercise its discretion insofar as application of the New gTLD Program Rules is concerned to promote competition, not inhibit its growth.

123. ICANN’s Bylaws are unambiguous and compulsory in respect of its competition promotion mandate: “In performing its Mission, **ICANN must operate** in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law, **through open and transparent processes that enable competition and open entry in Internet-related markets.**”<sup>214</sup> Further, ICANN’s “core values should also guide [its] decisions and actions.”<sup>215</sup> Among those “core values” is ICANN’s mandate to “[i]ntroduc[e] and promot[e] competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process.”<sup>216</sup> ICANN’s mandate to promote competition is thus “woven into ICANN’s ongoing work.”<sup>217</sup>

124. In sum, and as the ICANN Board has previously opined, ICANN’s competition mandate means that “**ICANN’s ‘default’ position should be for creating more competition** as opposed to having rules that restrict the ability of Internet stakeholders to innovate.”<sup>218</sup> Accordingly, ICANN’s “default position” here should be (and should have been) to create more competition for Verisign’s dominant .COM registry. Any exercise of ICANN’s discretion that would result in Verisign controlling the .WEB registry is wholly

inconsistent with ICANN's affirmative mandate to promote competition.

**A. The New gTLD Program Was Created to Realize ICANN's Competition Mandate**

125. ICANN admits in its Response that it, at least in part, "fulfills its competition mandate by enacting policies that promote competition."<sup>219</sup> Indeed, the New gTLD Program was specifically and expressly developed to realize ICANN's competition mandate, as evidenced by the undisputed and contemporaneous 2010 Congressional testimony of those who oversaw its development:

***The launch of the new gTLD program was part of ICANN's founding mandate*** when it was formed by the U.S. Government over 12 years ago. ***That mandate is to introduce competition and choice into the domain name system*** in a stable and secure manner.... The Board's approval ... is consistent with ICANN's mission to increase consumer choice, competition and innovation.... After years of policy and implementation work, the Internet community and Board determined that the launch of the ***new gTLD program was necessary and important in order to increase competition and innovation in the DNS-***and I strongly believe this remains the right decision.<sup>220</sup>

126. The ICANN Board's Rationales for approving the launch of the New gTLD Program confirm the views expressed at the Congressional hearing. First, the ICANN Board observed that, under the *status quo*, competition was constrained:

The launch of the new generic top-level domain (gTLD) program will allow for more innovation, choice and change to the Internet's addressing system, now constrained by only 22 gTLDs.<sup>221</sup>

The adoption of policies and processes to introduce and promote competition, was therefore fundamental to ICANN's core mission.

When ICANN was formed in 1998..., [its] purpose was to promote competition in the DNS marketplace, including by developing a process for the introduction of new top-level domains while ensuring internet security and stability. The introduction of new top-level domains into the DNS has thus been ***a fundamental part of ICANN's mission from its inception***, and was specified in ICANN's Memorandum of Understanding and Joint Project Agreement with the U.S. Department of Commerce.<sup>222</sup>

The launch of the new gTLD program is in fulfillment of a core part of ICANN's Bylaws: the introduction of competition and consumer choice in the DNS.<sup>223</sup>

In approving and adopting the New gTLD Program, the Board repeatedly stressed that the various processes

set forth in the Guidebook should be followed both in letter and in spirit.

The Board determined that the evaluation and section procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination.<sup>224</sup>

Indeed, the Board specifically cautioned that “**process fidelity** is given priority.”<sup>225</sup>

127. As the ICANN Board also noted in its Resolutions adopting the New gTLD Program, “economic studies indicate[] that, while benefits accruing from innovation are difficult to predict, the introduction of new gTLDs will bring benefits in the form of increased competition, choice and new services to Internet users.”<sup>226</sup> These studies were conducted by Dr. Dennis Carlton, ICANN’s economic expert in this IRP. In his 2009 reports, Dr. Carlton opined on the various competitive benefits that ICANN sought to achieve by introducing new gTLDs to the DNS. For example, Dr. Carlton opined:

ICANN’s plan to introduce new gTLDs is likely to benefit consumers ... and **mitigate market power associated with .com** and other major TLDs and to increase innovation.

...

**Removing entry barriers also is likely to foster innovation.** In the absence of competition from new gTLDs, registries and registrars that serve .com and other major TLDs face limited incentives to develop new technologies and/or improved services that may help attract new customers. However, absent restrictions on new gTLDs, potential new entrants will be motivated to **develop new technologies and methods as a way to overcome .com’s first mover advantage.**<sup>227</sup>

128. Promoting competition—and specifically constraining the market power of .COM—was thus the primary motivating policy underlying the New gTLD Program.

129. Dr. Carlton further warned that restricting opportunities for new gTLDs to enter the market and compete with .COM would have the **necessary effect** of “preserving the profits” of the .COM registry controlled by Verisign:<sup>228</sup>

The DOJ, for example, speculates that “the network effects that make .com registrations so valuable to consumers will be difficult for other TLDs to overcome.” However, any market power associated with .com will attract entrants with strategies built around bringing new registrants to the new gTLDs. **Restricting the opportunity for entrants to compete for such profits necessarily has the effect of protecting and preserving the profits of the .com registry and its registrars.**<sup>229</sup>

130. ICANN's actions here breach the Board's commitment to "process fidelity" in the New gTLD Program. Worse still, ICANN's decision to ignore NDC's willful process violations would allow .WEB, the most promising new gTLD, to fall under the control of the entity that controls .COM. ICANN's decision to exercise its discretion to benefit Verisign is a complete perversion of ICANN's Bylaws, the Board's stated intention for adopting the New gTLD Program, and the entire purpose of the Program itself.<sup>230</sup>

**B. The United States' Department of Justice's Investigation Is Irrelevant to Deciding this IRP**

131. ICANN's Bylaws provide that ICANN must apply standards, policies, procedures, and practices equitably and not single out any entity for disparate treatment, unless, specifically, disparate treatment is justified by ICANN's "promotion of effective competition."<sup>231</sup> Ironically, ICANN has exercised its discretion here to provide disparate and favorable treatment for Verisign.

132. ICANN justifies exercising its discretion to favor Verisign here because (1) "Afilias' alleged competition concerns were addressed in [the DOJ] year-long investigation of the NDC/Verisign agreement," (2) the DOJ's decision to "close[] its investigation without taking any action ... typically is interpreted as meaning the government did not find a threat to competition that warranted further action," and (3) ICANN may defer to the DOJ's decision here.<sup>232</sup> ICANN is wrong.

133. *First*, the standard that guided the DOJ review of Verisign's proposed acquisition of .WEB is materially different from ICANN's mandate to affirmatively promote competition in the DNS that is discussed above. While some U.S. agencies are granted broad authority to act "in the public interest" where the United States Congress has determined that government control will produce better outcomes than the free market,<sup>233</sup> other U.S. agencies are granted narrower and more limited regulatory authority, such as the DOJ's authority to enforce the antitrust laws.<sup>234</sup> These more circumscribed forms of law enforcement "are intended to operate essentially at the periphery of the markets affected. Their role is generally conceived as one of maintaining the institutions *within* whose framework the free market can continue to function...."<sup>235</sup>

134. Accordingly, under governing U.S. antitrust law, the DOJ is authorized to challenge acquisitions only where the DOJ can prove that such acquisitions may “**substantially lessen competition**” in the relevant market.<sup>236</sup> The DOJ’s “default position” is thus one of non-intervention, consistent with its law enforcement mandate. ICANN, in contrast to the DOJ, has an affirmative mandate to promote competition—ICANN’s “default position” is to act to create more competition. In short, Afiliis’ competition concerns, that ICANN is not acting in a manner consistent with its “default position” to create more competition, was not the subject of the DOJ’s investigation.

135. *Second*, ICANN and its expert impermissibly infer from the DOJ’s decision to close its .WEB investigation without taking any action that the agency determined that Verisign’s proposed acquisition of .WEB did not pose any threat to competition. In fact, and contrary to the representations made by Dr. Carlton, the DOJ’s official policy is that “no inference should be drawn from the [DOJ]’s decision to close an investigation into a merger without taking further action.”<sup>237</sup> This DOJ policy is the necessary consequence of the practical limits of the agency’s enforcement capabilities: even if the evidence adduced during the course of an investigation reveals competitive concerns, the DOJ may decline to take an enforcement action due to competing demands on the agency’s limited resources or for some other reasons completely unrelated to the merits of a given case.

136. *Finally*, ICANN represents in its Response that “ICANN, as an administrator of the DNS, fulfills its competition mandate ... by deferring to an appropriate government regulator – such as [the DOJ] – for investigation of potential competition issues.”<sup>238</sup> This is clearly not true. In fact, and contrary to ICANN’s representation that it defers to government antitrust authorities’ opinions on competition law issues, ICANN implemented its New gTLD Program in 2012 over the objections of the DOJ. In connection with the development of the New gTLD Program, the DOJ was asked to provide its opinion on the competitive merits of introducing new gTLDs to the DNS. The DOJ opined that the introduction of new gTLDs were unlikely to produce competitive benefits that outweighed the competitive harm caused by forcing companies to purchase

“defensive registrations” in each of the myriad new registries.<sup>239</sup> ICANN disagreed with the DOJ and ignored the DOJ’s recommendations. It seems, therefore, that ICANN only defers to the DOJ when it suits ICANN to do so. Such inconsistent deference is hardly sufficient to fulfill ICANN’s competition mandate.

## V. AFILIAS’ CLAIMS ARE NOT TIME-BARRED

137. The lack of merit in ICANN’s time-bar argument is underscored by its assertion that “Afilias’ claims are, in a sense, premature, and in another sense, overdue.”<sup>240</sup> At the risk of stating the obvious, they cannot be both. ICANN asserts that the claims are “premature in that the ICANN Board has not fully evaluated Afilias’ allegations that NDC violated the Guidebook....”<sup>241</sup> But, ICANN says, Afilias’ claims are also time-barred because they should have been asserted sometime in 2016. Just as the Panel rejected ICANN’s time-bar argument regarding Rule 7 in its Phase I decision, so too should the Panel reject ICANN’s time-bar argument regarding the rest of Afilias’ claims.<sup>242</sup>

138. As the Panel will recall, the issue is governed by Rule 4 of the Interim Procedures, which states that a “CLAIMANT shall file a written statement of a DISPUTE ... no more than 120 days after a CLAIMANT *becomes aware of the material effect of the action or inaction giving rise to the DISPUTE*[.]”<sup>243</sup> The Bylaws expressly provide for IRPs based on ICANN Staff actions and decisions, a fact which was affirmed by this Panel in its Phase I Decision.<sup>244</sup> As explained by this IRP Panel,<sup>245</sup> an IRP is a process “intended to hear and resolve Disputes” in order to achieve certain purposes, including ICANN’s compliance with its Articles and Bylaws.<sup>246</sup> There are several different types of “Disputes” that can be resolved in an IRP; this IRP concerns a “Dispute” involving “[c]laims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws.”<sup>247</sup> Covered Actions are expressly defined as “any actions or failures to act by or within ICANN *committed by* the Board, individual Directors, Officers, or *Staff members that give rise to a Dispute*.”<sup>248</sup> As set out above, Afilias’ various claims are based on actions or failures to act by or within ICANN *by* the Board and ICANN Staff.

139. The chronology of events relevant to ICANN’s time-bar defense is not in dispute, but it is

worth recalling the key events here. As an overview, the chronology leading up to Afilias' invocation of the CEP falls essentially in to three distinct phases: (1) **August 2016 through the end of 2016**, when, after the ICANN Auction, Afilias requested that ICANN investigate the Verisign-NDC arrangement, and ICANN represented that it would seek the “informed resolution” of Afilias' concerns and keep Afilias informed of the outcome; (2) **January 2017 to January 2018**, during which the DOJ was conducting its antitrust investigation of the Verisign-NDC arrangement, and asked ICANN to take no action on .WEB; and (3) **January 2018 to June 2018**, when, after the DOJ closed its investigation, Afilias repeatedly asked ICANN for information about the status of .WEB—which ICANN failed to provide, before notifying Afilias by email that it had taken the .WEB contention set off-hold. The key dates and events within these three phases include the following:

**1 August 2016:** Following the ICANN Auction in late July, Verisign issued its press statement, revealing for the first time that it had entered into an agreement with NDC, but without providing any details of the date of entry or substance of the agreement.<sup>249</sup>

**8 August 2016:** Afilias' General Counsel (Mr. Hemphill) wrote to the President of ICANN's Global Domains Division (Mr. Atallah) and, based on publicly available information, “request[ed] that ICANN promptly undertake an investigation of the matters set forth in this letter and take appropriate action against NDC and its .WEB application for violations of the Guidebook as we have requested.”<sup>250</sup>

**23 August 2016:** Verisign's counsel (Mr. Johnston) wrote to ICANN's counsel on behalf of Verisign and NDC, providing the DAA (and various other documents), and purporting to rebut the assertions in Mr. Hemphill's 8 August 2016 letter. ICANN did not disclose these materials to Afilias (or at all for that matter)—and did not even acknowledge that it had the DAA in its possession—until required to do so by the Emergency Arbitrator in the IRP in **December 2018**.<sup>251</sup>

**9 September 2016:** Mr. Hemphill again wrote to Mr. Atallah reiterating Afilias' concerns, and asking for ICANN's assurances that ICANN would not enter into a .WEB Registry Agreement until after the ICANN Board had reviewed the matter and any ICANN accountability mechanisms had been completed.<sup>252</sup>

**16 September 2016:** ICANN's Vice President for gTLD Operations (Ms. Willett) dispatched ICANN's Questionnaire to representatives of Afilias, Verisign, NDC, and Ruby Glen, stating that its purpose is to assist ICANN to “**facilitate informed resolution**” of the concerns raised by Afilias and Ruby Glen.<sup>253</sup> Nothing in that letter even hinted at the fact that ICANN had the DAA and related information in its possession.

**30 September 2016:** Mr. Atallah responded to Mr. Hemphill’s 8 August and 9 September 2016 letters. He assured Afiliás that “[a]s an applicant in the contention set, the primary contact for Afiliás’ application *will be notified of [any] future changes to the contention set status or updates regarding the status of relevant Accountability Mechanisms*” and that ICANN “*will continue to take Afiliás’ comments, and other inputs we have sought, into consideration as we consider this matter.*”<sup>254</sup>

**7 October 2016:** Afiliás submitted its answers to ICANN’s Questionnaire.<sup>255</sup>

**Early 2017:** The DOJ commenced its antitrust investigation into the Verisign and NDC arrangement and requested that ICANN take no action on .WEB during the pendency of the investigation.<sup>256</sup>

**January 2018:** The DOJ closed its antitrust investigation.<sup>257</sup>

**February-May 2018:** Beginning with its 23 February 2018 letter and DIDP, Afiliás repeatedly requested “an update on ICANN’s investigation of the .WEB contention set” and also requested documents such as Verisign’s and NDC’s responses to ICANN’s Questionnaire. ICANN consistently refused to provide any information, even as it proceeded to contract with NDC for the .WEB registry.<sup>258</sup>

**June 2018:** ICANN notified Afiliás that it was removing the .WEB contention set’s hold status.

140. When ICANN removed the .WEB contention set from its on-hold status on 6 June 2018—without any warning or explanation—Afiliás believed it had no choice but to invoke the CEP. ICANN is disingenuous at best when it asserts in its Response that the claims asserted by Afiliás in this IRP “are precisely the same alleged Guidebook violations” that Mr. Hemphill complained of in his 8 August 2016 letter to Mr. Atallah.<sup>259</sup> They are not.

141. In Mr. Hemphill’s 8 August letter, he specifically acknowledged that Afiliás’ concerns were based on public information and requested that ICANN “undertake an investigation.”<sup>260</sup> In his 9 September 2016 letter, Mr. Hemphill asked that ICANN not enter a .WEB Registry Agreement until the ICANN Board had reviewed the matter and ICANN accountability mechanisms had been completed. Afiliás was entitled to rely on the subsequent representations by Ms. Willett and Mr. Atallah that ICANN would seek an “informed resolution” of the questions raised by Afiliás; that ICANN would “consider” Afiliás’ concerns; and that Afiliás would “be notified of any changes to the contention status set or updates regarding the status of .WEB....”<sup>261</sup>

142. ICANN has still failed to explain the basis (if any) on which and when it decided to take the .WEB contention set off-hold on 6 June 2018 and proceeded to contract with NDC for the .WEB registry agreement. But until ICANN “notified [Afilias] of any changes to the contention set or updates regarding the status of .WEB” (to use Mr. Atallah’s words), Afilias had no basis to “become aware of the material effect of the action or inaction giving rise to the DISPUTE.”

143. ICANN’s Bylaws “strongly encourage” potential IRP claimants to engage in the CEP, which is intended to “resolve and/or narrow the Dispute.”<sup>262</sup> That is why the invocation of the CEP tolls the time to file an IRP Request. According to ICANN’s CEP rules, after engaging in a CEP that does not resolve all of the issues in dispute, then “**the requestor’s time to file a request for independent review designated in the Bylaws shall be extended for each day of the cooperative engagement process**, but in no event, absent mutual written agreement by the parties, shall the extension be for more than fourteen (14) days.”<sup>263</sup> Here, Afilias commenced the CEP on 18 June 2018—eleven days after learning that ICANN had removed the .WEB contention set from its on-hold status.

144. ICANN terminated the CEP on 13 November 2018.<sup>264</sup> When doing so, ICANN expressly recognized its policy for extending the time limitation to account for the CEP and informed Afilias that: “**ICANN will grant Afilias an extension of time to 27 November 2018 (14 days following the close of CEP) to file an IRP** ... this extension will not alter any deadlines that may have expired before the initiation of the CEP.”<sup>265</sup> Afilias commenced this IRP on 14 November 2018—the very next day. Given the stay that existed under the CEP Rules, Afilias filed its IRP Request within twelve days of becoming “aware of the material effect of the action or inaction giving rise to the DISPUTE.” Specifically, ICANN became aware that, although ICANN was required by its Articles and Bylaws to disqualify NDC’s application and bid and proceed to award .WEB to Afilias, ICANN had nonetheless taken the contention set off-hold—signaling that it was proceeding to contract with NDC (and thus Verisign).

145. Finally, although we do not believe that it is possible to conclude that Afilias was “aware of

the material effect of the action or inaction giving rise to the DISPUTE” *before* ICANN took the .WEB contention set off-hold on 6 June 2018, ICANN would nonetheless be estopped from invoking the time-bar where, as here, ICANN affirmatively represented to Afilias that it was seeking “informed resolution” of its concerns, that Afilias would be “notified of future changes to the contention set status or update regarding the status of [.WEB],” and that ICANN would “continue to take Afilias’ comments, and other inputs we have sought, into consideration as we consider this matter.”<sup>266</sup> As stated by the IRP Panel in *GCC v. ICANN*, in considering ICANN’s prior iteration of its time-bar rule (which provided for a 30-day rather than 120-day IRP deadline):

It suffices to record that, under an equitable reliance theory, a requesting party should be allowed to request an IRP after expiry of the 30-day IRP Deadline if that party can show reliance on a representation or representations by ICANN inviting or allowing extension of the IRP Deadline.<sup>267</sup>

In other words, even if someone could somehow conclude that Afilias became aware of the material effect of ICANN’s failure to comply with its Articles and Bylaws before 6 June 2018, ICANN cannot be allowed to benefit from its own misrepresentations and lack of transparency—in violation of its Articles and Bylaws—in order to invoke the time-bar defense.

146. For the foregoing reasons, the Panel should reject ICANN’s time-bar defense to Afilias’ other claims, just as it did with respect to Afilias’ Rule 7 claim.

## **VI. THE PROPER RELIEF TO BE ORDERED BY THE PANEL**

147. Just as ICANN misstated the Standard of Review for this IRP (see Section II above), ICANN also misstates the relief that the Panel may order.

148. ICANN asserts—incorrectly and misleadingly—that “Afilias’ requested relief from this IRP Panel goes far beyond what is permitted by ICANN’s Bylaws and calls for the Panel to decide issues that are reserved to the discretion of the ICANN Board.”<sup>268</sup> According to ICANN, this Panel can only offer its views on the subject matter. Thereafter, ICANN’s Board will “seriously consider and evaluate” the Panel’s final decision

before it determines, in its discretion, “what action, **if any**, is appropriate in order to make .WEB finally available to consumers.”<sup>269</sup> In other words, ICANN argues that the Panel has no power to order affirmative declaratory relief—and, moreover, that the ICANN Board can exercise its “business judgment” to ignore the Panel’s decision in any event. This is simply incorrect.

149. As it has done throughout this entire matter—from its failure to disqualify NDC on receiving the DAA through the defense of this IRP—ICANN again makes a mockery of the basic principles according to which ICANN is *required* to operate, based on the plain terms of its own constitutive documents.

150. As stated at the outset of this Reply, ICANN revised its Bylaws—including the sections of the Bylaws governing IRPs—in connection with the transition of IANA functions from the U.S. Department of Commerce to ICANN. As part of that transition, the CCWG concluded that the IRP process had to be strengthened, to leave no doubt that Panels can “hear **and resolve** claims that ICANN, through its Board of Directors or staff, has acted (or has failed to act) in violation of its Articles of Incorporation or Bylaws[,]” and to issue decisions that “**shall be binding on ICANN.**”<sup>270</sup> The drafters of the new Bylaws incorporated virtually all of the CCWG’s recommendations in order to obtain that goal.

151. Thus, Section 4.3 (“INDEPENDENT REVIEW PROCESS FOR COVERED ACTIONS”) provides that “[t]he IRP is intended to hear **and resolve** Disputes” in order to achieve the following “Purposes of the IRP,” *viz.*, to:

- “**Ensure** that ICANN does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws.”
- “**Empower** the global Internet community and Claimants **to enforce compliance** with the Articles of Incorporation and Bylaws through meaningful, affordable and accessible expert review of Covered Actions....”
- “Ensure that ICANN is accountable to the global Internet community and Claimants.”
- “**Reduce Disputes by creating precedent** to guide and inform the Board, Officers (as defined in Section 15.1), Staff members, Supporting Organizations, Advisory Committees, and the global Internet community in connection with policy development and implementation.”

- “Secure the accessible, transparent, efficient, coherent, and just resolution of Disputes.”
- “Lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction.”
- Provide a mechanism for the resolution of Disputes, as an alternative to legal action in the civil courts of the United States or other jurisdictions.”<sup>271</sup>

Section 4.3(a) provides further that “[t]his Section 4.3 shall be construed, implemented, and administered in a manner consistent with these Purposes of the IRP.”<sup>272</sup>

152. Lest there be any doubt, Section 4.3(x) provides further that “[t]he IRP is **intended as a final, binding arbitration process**[.]”<sup>273</sup> and that:

- “IRP Panel decisions are binding final decisions to the extent allowed by law....”
- “IRP Panel decisions ... are intended to be enforceable in any court with jurisdiction over ICANN....”
- “ICANN intends, agrees, and consents to be bound by all IRP Panel decisions of Disputes of Covered Actions as a final, binding arbitration.”<sup>274</sup>

As stated in Section 4.3’s provisions applicable to the IRP’s “Rules of Procedures,” the IRP Rules must “**conform with international arbitration norms**,” and, moreover, must be “administered by **a well-respected international dispute provider**....”<sup>275</sup>

153. Even under previous versions of the Bylaws and IRP Procedural Rules, IRP Panels consistently rejected ICANN’s arguments that IRP Panels lack authority to issue affirmative declaratory relief and that IRP decisions are merely advisory.<sup>276</sup> As stated by the IRP Panel in *DotConnectAfrica Trust v.*

*ICANN*:

One of the hallmarks of international arbitration is the binding and final nature of the decisions made by the adjudicators. Binding arbitration is the essence of what the ICDR Rules, the ICDR itself and its parent, the [AAA], offer. The selection the ICDR Rules as the baseline set of procedures for IRP’s, therefore, points to a binding adjudicative process.<sup>277</sup>

After further analysis of the text of the Bylaws and procedural rules in place at the time, the *DotConnectAfrica* Panel stated that its conclusion that IRP decisions and declarations are binding rested on two additional

factors—which are just as relevant now:

1) the exclusive nature of the IRP whereby the non-binding argument would be clearly in contradiction with such a factor; and, 2) the special, unique, and publicly important function of ICANN. As stated before, ICANN is not an ordinary private non-profit entity deciding for its own sake who it wishes to conduct business with, and who it does not. ***ICANN rather, is the steward of a highly valuable and important international resource.***<sup>278</sup>

As the Panel in *GCC v. ICANN* succinctly stated, based on the reasoning in *DotConnectAfrica*: “[***We do not accept ICANN’s position that we lack authority to include affirmative relief.***”<sup>279</sup>

154. The weight of these prior decisions, combined with the far more robust and definitive language of the new Bylaws as quoted above, leave no doubt that this Panel’s mandate is to issue a “binding” and “final” “resolution” of this dispute—one that is “consistent with international arbitration norms” and that is “enforceable in any court with jurisdiction over ICANN.” The scope and effect of the Panel’s mandate is further underscored in this case in light of ICANN’s apparent decision to take no action against NDC and Verisign.

155. Here, the Panel’s mandate necessarily requires the Panel to issue a final decision declaring that ICANN breached its Articles and Bylaws by: (a) failing to disqualify NDC’s application and bid upon receiving the DAA in August 2016; (b) failing to offer Afilias the rights to .WEB, as the next highest bidder, as provided for in the New gTLD Program Rules; and (c) following a biased, superficial and self-serving investigation, proceeding to contract with NDC (and hence Verisign) for the .WEB registry agreement, notwithstanding NDC’s disqualifying violations. To ensure that this dispute is finally resolved—and that its decision is “enforceable in any court with jurisdiction over ICANN”—the Panel must also order affirmative declaratory relief: specifically, the Panel must declare that the New gTLD Program Rules, applied consistently with ICANN’S Articles and Bylaws, *require* ICANN to disqualify NDC’s application and bid and to offer Afilias the rights to .WEB, as provided for in the New gTLD Program Rules.

**VII. CONCLUSION**

156. For the foregoing reasons, and those stated in Afiliias' other submissions, the Tribunal should grant Afiliias' the relief requested in its Amended Request.

Respectfully submitted,



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## ENDNOTES

- 1 ICANN's Response to Amended Request for Independent Review Process (31 May 2019) ("**ICANN's Response to Amended IRP**"), ¶ 1.
- 2 *Id.*
- 3 *Id.* ¶ 4.
- 4 *Id.* ¶ 7.
- 5 *Id.* ¶ 66.
- 6 *Id.* ¶ 10 (emphasis added).
- 7 See *id.* ¶¶ 65-66.
- 8 *ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, Declaration of the Independent Review Panel (19 Feb. 2010) ("**ICM v. ICANN, Declaration**"), [Ex. CA-1], ¶ 136 (some emphasis in original; some emphasis added); *quoted with approval by Booking.com B.V. v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration (3 Mar. 2015) ("**Booking.com B.V. v. ICANN, Final Declaration**"), [Ex. CA-11], ¶ 112; see also *DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50 2013 001083, Final Declaration (9 July 2015) ("**DotConnectAfrica v. ICANN, Final Declaration**"), [Ex. CA-15], ¶ 66 ("ICANN is not an ordinary California nonprofit organization. Rather, it has an international purpose and responsibility to coordinate and ensure the stable and secure operation of the Internet's unique identifier systems.").
- 9 ICANN, Articles of Incorporation (approved on 9 Aug. 2016, filed on 3 Oct. 2016) ("**Articles**"), [Ex. C-2], Art. II (emphasis added).
- 10 *Id.* Art. III (emphasis added).
- 11 See ICANN's Response to Amended IRP Request, ¶ 1.
- 12 ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018) ("**Bylaws**"), [Ex. C-1], Sec. 1.1(a)(i) (emphasis added).
- 13 According to its most recent Annual Report, ICANN itself has over half-a-billion dollars in assets. See ICANN Annual Report for FY2019, [Ex. C-89], p. 45. For its fiscal years 2019, ICANN reported approximately USD 140 million in expenses—around half of which goes to its approximately 390 employees. *Id.* p. 42. Senior officers at this non-for-profit corporation often make salaries in excess of USD 500,000 per year. See ICANN, Remuneration Practices - FY2020 (as of 1 July 2019), [Ex. C-90].
- 14 *Corn Lake, LLC v. ICANN*, ICDR Case No. 01-15-0002-9938, Final Declaration (17 Oct. 2016) ("**Corn Lake v. ICANN, Final Declaration**"), [Ex. CA-16], ¶ 8.16 (quoting *Vistaprint Ltd. v. ICANN*, ICDR Case No. 01-14-0000-6505, Final Declaration of the Independent Review Panel (9 Oct. 2015), [Ex. CA-2], ¶ 124) (emphasis in original).
- 15 See, e.g., *DotConnectAfrica v. ICANN*, Final Declaration, [Ex. CA-15], ¶ 23 ("Various provisions of ICANN's Bylaws and the Supplementary Procedures support the conclusion that the Panel's decisions, opinions and declarations **are binding**".) (emphasis added); *Booking.com v. ICANN*, Final Declaration, [Ex. CA-11], ¶ 111 (rejecting the assertion "that the IRP Panel may only review ICANN Board actions or inactions under the deferential standard advocated by ICANN...", and holding that ICANN's "**conduct be appraised independently, and without any presumption of correctness.**") (emphasis added); *Gulf Cooperation Council (GCC) v. ICANN*, ICDR Case No. 01-14-0002-1065, Partial Final Declaration of the Independent Review Process Panel (19 Oct. 2016) ("**GCC v. ICANN, Final Partial Declaration**"), [Ex. CA-17], ¶ 146 ("**[W]e do not accept ICANN's position that we lack authority to include affirmative declaratory relief.**") (emphasis added).
- 16 *ICM v. ICANN*, Declaration, [Ex. CA-1], ¶ 136 (some emphasis in original; some emphasis added); *accord Dot Sport Ltd. v. ICANN*, ICDR Case No. 01-15-0002-9483, Final Declaration (31 Jan. 2017), [Ex. CA-18], ¶ 7.19; *Booking.com v. ICANN*, Final Declaration, [Ex. CA-11], ¶ 112.
- 17 CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), [Ex. C-91], ¶ 2 (at p. 5) (emphasis added).
- 18 Bylaws, [Ex. C-1], Sec. 4.3(i).
- 19 *Id.* Sec. 4.3(a)(viii).
- 20 *Id.* Sec. 4.3(b)(ii) (emphasis added).

## ENDNOTES

- 21 ICANN's Response to Amended IRP Request, ¶ 66.
- 22 As used herein, the term "New gTLD Program Rules" shall refer to the gTLD Applicant Guidebook ("**AGB**") [Ex. C-3], the Auction Rules for New gTLDs: Indirect Contention Edition ("**Auction Rules**") [Ex. C-4], and other rules related to the New gTLD Program. See Amended Request by Afilias for Independent Review Process (21 Mar. 2019) ("**Afilias' Amended IRP Request**"), p. i ("Glossary of Defined Terms").
- 23 *Corn Lake v. ICANN*, Final Declaration (17 Oct. 2016), [Ex. CA-16], ¶ 8.17 (quoting *Booking.com v. ICANN*, Final Declaration, [Ex. CA-11], ¶ 111).
- 24 Domain Acquisition Agreement between Verisign and NDC (25 Aug. 2015) ("**DAA**"), [Ex. C-69].
- 25 Because ICANN designated the DAA as "Highly Confidential," no one at Afilias other than its General Counsel knows of its terms.
- 26 As used herein, the term "DIDP" shall refer to ICANN's Documentary Information Disclosure Policy. See Afilias' Amended IRP Request, p. i ("Glossary of Defined Terms"). Pursuant to this policy, a member of the Internet community can request that ICANN disclose documents in its "possession, custody, or control [that concern its operational activities] ... unless there is a compelling reason for transparency." This request is referred to as a "DIDP Request." ICANN Documentary Information Disclosure Policy (25 Feb. 2012), available at <https://www.icann.org/resources/pages/didp-2012-02-25-en> (last accessed 4 May 2020), [Ex. C-92].
- 27 In its Response, in arguing the Verisign and NDC should be allowed to participate in this IRP as *Amici* because they deny Afilias' claims about their violations of the New gTLD Program Rules, ICANN also asserts that "[f]or their part, NDC and Verisign claim that Afilias violated the .WEB Auction rules and should itself be disqualified by ICANN." ICANN's Response to Amended IRP Request, ¶ 63. This is not a claim that ICANN itself has actually made in this case (or anywhere else). Nor would it be proper for ICANN to do so. An IRP is an ICANN accountability mechanism to assess whether ICANN has complied with its Articles and Bylaws—not a mechanism for ICANN to assert claims against a claimant (which, again, ICANN's Response does not even purport to do). Moreover, Verisign and NDC first raised the "claim" in 2016. ICANN has never done anything about it. If ICANN seeks to press this claim in its next submission, or the *Amici* raise the matter in theirs, Afilias reserves the right to address it in our response to the *Amici*'s submission or in a supplemental response.
- 28 ICANN's Response to Amended IRP Request, ¶ 55 (citations omitted).
- 29 As used herein, the term "Interim Procedures" shall refer to the Interim Supplementary Procedures for ICANN IRP. See Afilias' Amended IRP Request, p. i ("Glossary of Defined Terms").
- 30 Interim Supplementary Procedures for IRP (25 Oct. 2018), [Ex. C-59], Rule 11(a)-(c) (emphasis added). Subsections (d) and (e) of Rule 11 address the standard of review for claims that ICANN has not enforced its contractual rights with respect to the IANA Naming Function Contract and are therefore irrelevant to this IRP.
- 31 Bylaws, [Ex. C-1], Sec. 4.3(b)(ii).
- 32 See Afilias' Amended IRP Request, ¶¶ 75-78; Bylaws, [Ex. C-1], Sec. 1.2(a)(v).
- 33 Interim Supplementary Procedures for IRP (25 Oct. 2018), [Ex. C-59], Rule 13(c) (emphasis added).
- 34 Bylaws, [Ex. C-1], Sec. 4.3(a)(viii).
- 35 As in Afilias' Amended Request, the New gTLD Program Rules refer to the gTLD Applicant Guidebook ("**AGB**") [Ex. C-3], the Auction Rules for New gTLDs: Indirect Contention Edition ("**Auction Rules**") [Ex. C-4], and other rules related to the New gTLD Program. See Afilias' Amended IRP Request, p. i ("Glossary of Defined Terms").
- 36 Afilias' Amended IRP Request, ¶¶ 53-74.
- 37 ICANN's Response to Amended IRP Request, ¶ 6.
- 38 *Id.* ¶ 66.
- 39 *Id.* ¶ 66.
- 40 *Id.* ¶ 56.
- 41 Bylaws, [Ex. C-1], Sec. 1.2(a)(v).
- 42 ICANN's Response to Amended IRP Request, Section B.

## ENDNOTES

- 43 *Id.* ¶ 56 (emphasis added).
- 44 Bylaws, [Ex. C-1], Secs. 1.1(a)(i), 1.1(d)(ii) and 1.2.
- 45 See *Booking.com v. ICANN*, Final Declaration, [Ex. CA-11], ¶ 16 (quoting ICANN's Response, ¶ 14).
- 46 Bylaws, [Ex. C-1], Sec. 1.2. ICANN's "Mission" is broadly described in Section 1.1(a) of the Bylaws. ICANN's Mission includes, *inter alia*, "coordinat[ing] the development and implementation of policies." *Id.* Sec. 1.1(a)(i).
- 47 *Id.* Sec. 1.2(a)(v) (emphasis added).
- 48 *Id.* Sec. 2.3 (emphasis added). Section 2.3 is also applicable in this IRP to ICANN's failure to follow its Competition Mandate, as discussed in **Section IV**.
- 49 *Id.* Sec. 3.1 (emphasis added).
- 50 *Booking.com v. ICANN*, Final Declaration, [Ex. CA-11], ¶ 11 (quoting AGB, *Preamble*).
- 51 *Id.* ¶ 14 (quoting AGB, *Preamble* (emphasis added)).
- 52 *Id.* ¶ 54 (quoting with approval Claimant's Request, ¶ 13 (emphasis added)).
- 53 *GCC v. ICANN*, Partial Final Declaration, [Ex. CA-17], ¶ 12 (emphasis added).
- 54 Bylaws, [Ex. C-1], Sec. 1.2.
- 55 Articles, [Ex. C-2], Art. III.
- 56 As discussed further in **Section IV**, ICANN cannot overlook material misstatements, misrepresentations, or omissions where to do so would violate its Core Principles and Commitments.
- 57 See AGB, [Ex. C-3], p. 6-6. Under both California and international law, the term "may not" is prohibitive, not permissible. "May not" is the equivalent of "shall not." See, e.g., *De Haviland v. Warner Bros. Pictures*, 67 Cal. App. 2d 225, 232 (1944), [Ex. CA-19] ("**[t]he words 'may not' as used are mandatory**") (emphasis added); *Woolls v. Superior Court*, 127 Cal. App. 4th 197, 208-09 (2005), [Ex. CA-20] (the term "**'may not' is prohibitory, as opposed to permissive.**") (internal citation omitted) (emphasis added); *Sustainability, Parks, Recycling & Wildlife Def. Fund v. Dep't of Res. Recycling & Recovery*, 34 Cal. App. 5th 676, 684 (Ct. App. 2019), as modified (Apr. 22, 2019), [Ex. CA-21] ("A 2011 amendment substituted 'shall not' for 'may not.' ... This did not change the meaning; 'may' can be mandatory where permissive use would render a statute's criteria illusory."). Similarly, in the context of international law, the term "may not" can be found, for example, in Article 27 Vienna Convention on the Law of Treaties: "A party may not invoke the provisions of its internal law as justification to perform a treaty." Vienna Convention on the Law of Treaties (1969), 1155 U.N.T.S. 18232, [Ex. CA-22], Art. 27. According to the *travaux*, this article was introduced "to add to the principle of *pact sunt servanda* the additional principle that no party to treaty might invoke the provisions of its constitution or its law as an excuse for its failure to perform the international obligation undertaken." U.N. Conference on the Law of Treaties, 13th Plenary Meeting, U.N. Doc. A/CONF.39/SR.13 (6 May 1969), [Ex. CA-23]. The International Court of Justice has consistently held that the term "may not" as used in Article 27 is obligatory, not permissive. See, e.g., *Fisheries Case (United Kingdom v. Norway)*, Judgment, 1951 ICJ Rep. 116, [Ex. CA-24], p. 132; *Nottebohm Case (Liechtenstein v. Guatemala) (Preliminary Objections)*, Judgment, 1953 I.C.J. Rep. 111, [Ex. CA-25], p. 123; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, 1988 I.C.J. Rep. 12, [Ex. CA-26], ¶ 57.
- 58 ICANN Board Rationales, [Ex. C-9].
- 59 *GCC v. ICANN*, Partial Final Declaration, [Ex. CA-17], ¶ 12 (emphasis added).
- 60 AGB, [Ex. C-3], pp. 1-5 to 1-7 (emphasis added).
- 61 ICANN, New gTLD Application Submitted to ICANN by NU DOTCO LLC, Application ID: 1-1296-36138 (13 June 2012) ("**NDC Application**"), [Ex. C-24].
- 62 NDC Application, [Ex. C-24], pp. 1, 3.
- 63 *Id.* p. 4.
- 64 *Id.*

## ENDNOTES

- 65 See, e.g., ICANN's Response to Amended IRP Request, ¶ 26; see also Verisign's Supplemental Brief in Support of Its Request to Participate as *Amicus Curiae* in Independent Review Process (27 Sep. 2019); NDC's Supplemental Brief in Support of Its Request to Participate as *Amicus Curiae* (27 Sep. 2019).
- 66 AGB, [Ex. C-3], Attachment to Module 2: Evaluation Questions and Criteria.
- 67 *Id.* p. A-1 (emphasis added).
- 68 *Id.* pp. A-1, A-2 (some emphasis in original; some emphasis added).
- 69 For instance, NDC's application represented that Neustar would serve as its "backend provider." NDC Application, [Ex. C-24], p. 5. This is no longer the case.
- 70 *Id.* p. 6 (emphasis added).
- 71 *Id.* (emphasis added).
- 72 An "increasingly popular alternative to .COM" must of course be taken in context. There are an estimated 145.4 million .COM registrations, compared with an estimated 2,370,371 .CO registrations. See Verisign, "The Verisign Domain Report," 17(1) *Domain Name Industry Brief* (Mar. 2020), [Ex. C-93], p. 2; Domain Name Stat, Domain name registrations in Country TLDs, available at <https://domainnamestat.com/statistics/tldtype/country> (last accessed 1 May 2020), [Ex. C-94].
- 73 NDC Application, [Ex. C-24], p. 7 (emphasis added).
- 74 *Id.* (emphasis added).
- 75 ICANN, New gTLD, Comments & Feedback, available at <https://newgtlds.icann.org/en/program-status/comments>.
- 76 Prior to producing documents in this IRP, ICANN requested that Afilias enter a Stipulated Protective Order. Documents marked "Highly Confidential" may only be shown to outside counsel and others (such as experts). Documents marked as "Confidential" may be shown to personnel of the Parties, but only to the extent they are assisting counsel in the proceedings. ICANN marked the DAA as "Highly Confidential" (although it agreed that Afilias' outside counsel could show the DAA to Afilias' General Counsel, Scott Hemphill). But because of the "Highly Confidential" designation, the public is entirely unaware of the terms of the DAA—and the extent to which NDC was acting as a shill for Verisign. Afilias reserves the right to challenge ICANN's designations as this IRP proceeds.
- 77 See Afilias' Amended IRP Request, ¶ 37 (quoting VeriSign, Inc., *Form 10-Q (Quarterly Report)* (28 July 2016), [Ex. C-45], n. 11 (at p. 13)).
- 78 See, e.g., ICANN's Response to Amended IRP Request, ¶¶ 26-28.
- 79 ICANN states in its Response: "Assignments and transfers to operate gTLDs must be approved by ICANN, and ICANN follows a known procedure in evaluating such requests. ICANN also has published materials explaining how a Registry Agreement can be assigned from one registry to another." Afilias' Amended IRP Request, ¶ 26 (endnotes omitted). But these rules and procedures are not, or at least should not be, before this Panel. To the extent that ICANN has effectively approved the transfer and assignment of NDC's .WEB registry agreement—when NDC has not yet entered such an agreement and has not yet requested transfer and assignment—ICANN has breached its Articles and Bylaws by, *inter alia*, failing to apply these documented policies consistently, neutrally, objectively, and fairly, and without singling out any party for disparate treatment.
- 80 AGB, [Ex. C-3], p. 6-6.
- 81 *Id.* p. 1-3 (emphasis in original).
- 82 *Id.* p. 1-38 (emphasis added).
- 83 *Id.* p. 1-3 (emphasis added). The AGB further provided that applications would not be considered if the applicant failed to pay the application fee of USD 185,000 before the deadline. *Id.* p. 1-42.
- 84 *Id.* p. 6-2 (emphasis added).
- 85 *Id.* (emphasis added).
- 86 *Id.* (emphasis added). An action is "false" if it is untrue, not factual or factually incorrect. It is "misleading" if it is deceptive, or tending to mislead or create a false impression. "False" means "not true; not conformable to truth; expressing what is contrary to fact or truth; incorrect; wrong; mistaken; as a false report." Merriam-Webster Dictionary (on-line version), [Ex. C-95]. "Misleading" means "leading or tending to lead into error; causing to err; deceiving." *Id.*

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- 87 AGB, **[Ex. C-3]**, p. 6-4 (emphasis added). The AGB provided an exception to this requirement “to the extent that this Applicant Guidebook expressly states that such information will be kept confidential, except as required by law or judicial process.” *Id.* p. 6-5.
- 88 *Id.* p. 4-6 (emphasis added).
- 89 See Afiliias’ Amended IRP Request, ¶ 21; AGB, **[Ex. C-3]**, p. 4-6.
- 90 See Afiliias’ Amended IRP Request, ¶ 21. See also ICANN, New gTLD, Auction Results, available at <https://gtldresult.icann.org/applicationstatus/auctionresults> (last accessed 1 May 2020).
- 91 AGB, **[Ex. C-3]**, p. 4-22.
- 92 Auction Rules, **[Ex. C-4]**, Rule 40(b) (emphasis added).
- 93 *Id.* Rule 32.
- 94 *Id.* p. 16.
- 95 *Id.* p. 19.
- 96 *Id.* p. 17.
- 97 *Id.* p. 20.
- 98 AGB, **[Ex. C-3]**, pp. 4-25, 4-26 & 4-27.
- 99 DAA, **[Ex. C-69]**, p. 1.
- 100 *Id.* p. 19.
- 101 *Id.* p. 20.
- 102 AGB, **[Ex. C-3]**, p. 6-2.
- 103 DAA, **[Ex. C-69]**, p. 7.
- 104 *Id.* pp. 16, 19.
- 105 AGB, **[Ex. C-3]**, p. 6-2.
- 106 *Id.* (emphasis added).
- 107 DAA, **[Ex. C-69]**, p. 2 (emphasis added).
- 108 *Id.* p. 7 (emphasis added).
- 109 *Id.* (emphasis added).
- 110 *Id.*
- 111 *Id.* p. 16 (emphasis added).
- 112 *Id.* p. 20.
- 113 *Id.* p. 4.
- 114 *Id.* p. 17 (emphasis added).
- 115 *Id.* (emphasis added).
- 116 *Id.* (emphasis added).
- 117 *Id.* p. 18 (emphasis added).
- 118 *Id.* p. 16. Redacted - Third Party Designated Confidential Information
- 119 See *id.* p. 18. Redacted - Third Party Designated Confidential Information

## ENDNOTES

- 120 *Id.* p. 21.
- 121 *Id.* p. 19.
- 122 *Id.* p. 10.
- 123 AGB, [Ex. C-3], pp. 6-2 and 6-6.
- 124 *Id.* p. 6-2 (emphasis added). See also *id.* Sec. 1.2.7 (p. 1-30) (“If at **any time** during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, the applicant must **promptly notify ICANN** via submission of the appropriate forms.”) (emphasis added).
- 125 *Id.* p. A-1 (emphasis in original).
- 126 *Id.* p. A-2.
- 127 *Id.* pp. 1-5 to 1-7.
- 128 NDC Application, [Ex. C-24], p. 6.
- 129 *Id.* p. 7.
- 130 *Id.*
- 131 *Id.*
- 132 *Id.*
- 133 AGB, [Ex. C-3], p. 6-2.
- 134 DAA, [Ex. C-69], p. 7.
- 135 As set forth in Afiliias’ Amended Request, and also discussed below, NDC also made oral statements to ICANN concerning the Application in July 2016, when another applicant raised a complaint prior to the ICANN Auction that NDC had undergone a change in control. See Afiliias’ Amended IRP Request, ¶¶ 53-74.
- 136 AGB, [Ex. C-3], p. 6-2.
- 137 *Id.* p. 6-2.
- 138 DAA, [Ex. C-69], p. 17.
- 139 Email communications between J. Nevett (Donuts, Inc.) and J. I. Rasco (NDC) (6 & 7 June 2016), [Ex. C-35].
- 140 *Id.* (emphasis added). Similarly, as set forth in Afiliias’ Amended Request, Mr. Rasco told Afiliias’ John Kane on or around 1 June 2016 that his “board [had] instructed [him] to skip [the private auction] and proceed to [the] ICANN auction.” Afiliias’ Amended IRP Request, ¶ 30. See also Email from J. Kane (Vice President, Afiliias’ Corporate Services) to H. Lubsen (CEO, Afiliias) (7 July 2016), [Ex. C-34].
- 141 Emails from J. Erwin (ICANN) to J. Rasco (NDC) (27 June 2016), [Ex. C-96].
- 142 *Id.*
- 143 Email communications between C. LaHatte (ICANN Ombudsman) and J. Rasco (NDC) (7 July 2016), [CAW (May 20 WS), Ex. E].
- 144 *Id.* (emphasis added).
- 145 Witness Statement of Christine Willett (20 May 2019), ¶ 26.
- 146 Email communications from C. LaHatte (ICANN Ombudsman) to C. Willett (ICANN) (July 2016), [CAW (May 20 WS), Ex. D], p. 2.
- 147 *Id.* (emphasis added).
- 148 Letter from P. Livesay (Verisign) to J. Rasco (NDC) (26 July 2016), [Ex. C-97], pp. 1-2.
- 149 *Id.* p. 1 (emphasis added).

## ENDNOTES

- 150 Redacted - Third Party Designated Confidential Information
- 151 Letter from P. Livesay (Verisign) to J. Rasco (NDC) (26 July 2016), [Ex. C-97], p. 2.
- 152 *Id.* p. 2.
- 153 Redacted - Third Party Designated Confidential Information
- 154 AGB, [Ex. C-3], p. 6-2.
- 155 *Id.*
- 156 *Id.* (emphasis added).
- 157 AGB, [Ex. C-3], p. 1-5.
- 158 *See, e.g., Booking.com v. ICANN*, Final Declaration, [Ex. CA-11], ¶¶ 11, 14 (quoting AGB, [Ex. C-3], Preamble).
- 159 *See, e.g., id.*, ¶ 14 (quoting AGB, [Ex. C-3], Preamble).
- 160 AGB, [Ex. C-3], p. 4-22 (emphasis added).
- 161 Auction Rules, [Ex. C-4], ¶ 8 (at pp. 1-2) (emphasis added).
- 162 DAA, [Ex. C-69], p. 7 Redacted - Third Party Designated Confidential Information
- 163 Auction Rules, [Ex. C-4], ¶ 12 (at p. 2) (emphasis added).
- 164 *Id.* p. 16) (emphasis added).
- 165 *Id.* p. 19 (emphasis added).
- 166 *Id.* p. 17 (emphasis added).
- 167 *Id.* ¶ 40(b) (at p. 7) (emphasis added).
- 168 *Id.* ¶¶ 12, 32 (emphasis added).
- 169 Auctions Bidder Agreement, [Ex. C-5], p. 1 (emphasis added).
- 170 DAA, [Ex. C-69], p. 17 (emphasis added).
- 171 *Id.*
- 172 AGB, [Ex. C-3], p. 4-22 (“[o]nly bids that comply with all aspects of the rules will be considered valid”).
- 173 *Id.* p. 4-23.
- 174 Auction Rules, [Ex. C-4], ¶¶ 58-59 (emphasis added).
- 175 *Id.* ¶ 62 (emphasis added).
- 176 *See id.* Rule 47 (at pp. 9-10).
- 177 VeriSign, Inc., *Form 10-Q (Quarterly Report)* (28 July 2016), [Ex. C-45], n. 11 (at p. 13).
- 178 A. Allemann, “It looks like Verisign bought .Web domain for \$135 million (SEC Filing),” *Domain Name Wire* (28 July 2016), [Ex. C-77].
- 179 K. Murphy, “Verisign likely \$135 million winner of .web gTLD,” *Domain Incite* (1 Aug. 2016), [Ex. C-30].
- 180 K. McCarthy, “Someone (cough, cough VeriSign) just gave ICANN \$135m for the rights to .web,” *The Register* (28 July 2016), [Ex. C-43]. We know from ICANN’s recent document production that these headlines were sent via Google alert to the emails of the ICANN Ombudsman and Ms. Christine Willett. *See, e.g.,* Email from Domain Name Wire to ICANN Ombudsman (28 July 2016), [Ex. C-98] and Email from Google Alerts to C. Willett (ICANN) (28 July 2016), [Ex. C-99].

## ENDNOTES

- 181 K. McCarthy, “Someone (cough, cough VeriSign) just gave ICANN \$135m for the rights to .web,” *The Register* (28 July 2016), [Ex. C-43], pp. 2-3.
- 182 Email communications from C. LaHatte (ICANN Ombudsman) to C. Willett (ICANN) (July 2016), [CAW (May 20 WS), Ex. D], p. 2.
- 183 Emails from J. Rasco (NDC) to C. Willett (ICANN) (*various dates*), [Ex. C-100], pp. 1-2.
- 184 *Id.* p. 1.
- 185 ICANN’s privilege log shows that from 29 July 2016 (the day after Verisign’s 10Q “disclosure”) and through the month of August, Mr. Atallah was the recipient (either as the addressee or on copy) of 17 communications, all of which ICANN claims to be privileged.
- 186 Verisign Statement Regarding .Web Auction Results (1 Aug. 2016), [Ex. C-46].
- 187 Letter from S. Hemphill (Afilias) to A. Atallah (ICANN) (8 Aug. 2016), [Ex. C-49], p. 1. Given that Mr. Hemphill did not request confidential treatment for his 8 August 2016 letter, ICANN posted it on its website.
- 188 *Id.* p. 2.
- 189 *Id.* p. 2.
- 190 Email from H. Waye (ICANN Ombudsman) to S. Hemphill (Afilias) (19 Sep. 2016), [Ex. C-101]. For reasons that remain unclear to us, ICANN’s Ombudsman ultimately declined to investigate the matters that Mr. Hemphill had raised.
- 191 Letter from R. Johnston (Arnold & Porter) to E. Enson (Jones Day) (23 Aug. 2016), [Ex. C-102]. The letter, on Arnold & Porter letterhead, said that it was submitted jointly by Mr. Johnston and Brian Leventhal, who, at the time, was apparently acting for NDC. See *id.* pp. 1 & 8.
- 192 *Id.* p. 1 (emphasis added). In contrast to Mr. Hemphill’s 8 August 2016 letter, Mr. Johnston’s 23 August 2016 letter asserted that the letter and all of its attachments contained “**CONFIDENTIAL BUSINESS INFORMATION**” that was not to be disclosed.
- 193 In Afilias’ Redfern Schedule, Afilias requested communications before 23 August 2016 between ICANN and Verisign and/or NDC concerning Verisign’s interest or involvement in acquitting rights in the .WEB gTLD, including, without limitation, ICANN’s “request for information” referred to on page 1 of the letter dated 23 August from Mr. Ronald L. Johnston of Arnold & Porter to Mr. Eric Enson of Jones Day.” ICANN stated that it would “conduct a reasonable search and produce non-privileged documents” in response to this request—and the Panel specifically “noted” ICANN’s response. See Afilias’ Redfern Schedule, Request No. 2, pp. 14-17. Yet ICANN has produced no such documents.
- 194 Letter from R. Johnston (Arnold & Porter) to E. Enson (Jones Day) (23 Aug. 2016), [Ex. C-102], p. 1.
- 195 *Id.* pp. 1-2.
- 196 DAA, [Ex. C-69], p. 7.
- 197 Letter from S. Hemphill (Afilias) to A. Atallah (ICANN) (9 Sep. 2016), [Ex. C-103].
- 198 See Letter from C. Willett (ICANN) to J. Kane (Afilias) (16 Sep. 2016), [Ex. C-50], p. 1. On 2 July 2016, Ruby Glen had commenced a lawsuit alleging that ICANN “used its authority and oversight to unfairly benefit an application who is in admitted violation of a number of provisions of the Applicant Guidebook.” *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Cal.), Complaint (22 July 2016), [Ex. C-104], ¶ 2. Ruby Glen amended its complaint on 8 August 2016 to further allege that ICANN failed to fairly and properly administer the New gTLD Program, including by allowing Verisign to acquire NDC’s application rights. *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Cal.), Amended Complaint (8 Aug. 2016), [Ex. C-105], ¶¶ 1-4, 56-62. The court dismissed Ruby Glen’s lawsuit because of the litigation waiver contained in the AGB. *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Cal.), Civil Minutes Supporting Judgment on Motion to Dismiss (28 Nov. 2016), [Ex. C-106], pp. 4-8; *and Ruby Glen, LLC v. ICANN*, Case No. 16-56890 (9th Cir. 2018), Memorandum Order, [Ex. C-107], pp. 2-4. On 2 August 2016, Ruby Glen provided notice to ICANN of its intent to initiate the CEP process, though Ruby Glen did not file an IRP against ICANN. ICANN, Cooperative Engagement and Independent Review Processes, Status Update (8 Aug. 2016), [Ex. C-108]. Afilias had no involvement in any of Ruby Glen’s proceedings.
- 199 As noted above, given the “Highly Confidential” designation that ICANN has placed on the DAA, only Afilias’ outside counsel and its General Counsel, have been able to review the DAA since receiving it in December 2018.

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- 200 Rather than serve legitimate “investigative purposes,” the questions appear more like “contention interrogatories”—the term used in U.S. litigation for written questions that a litigant serves on its opposing party, typically in an effort to frame the opposing party’s contentions in a manner favorable to the litigant that is serving them.
- 201 Letter from C. Willett (ICANN) to J. Kane (Afilias) (16 Sep. 2016), [Ex. C-50], Questions 1-4.
- 202 *Id.* Questions 5, 12, 17-18. See also Letter from R. Johnston (Arnold & Porter) to E. Enson (Jones Day) (23 Aug. 2016), [Ex. C-102].
- 203 Letter from J. Kane (Afilias) to C. Willett (ICANN) (7 Oct. 2016), [Ex. C-51].
- 204 Verisign’s 7 October 2016 Response, [Ex. C-109]; NDC’s 10 October 2016 Response, [Ex. C-110].
- 205 To the extent that ICANN has relied on those arguments in its Response, we have tried to address them here. However, to the extent ICANN relies on these arguments further in its Rejoinder, and to the extent the *Amici* reply on them in their submissions, Afilias reserves the right to address those arguments in its Response to the *Amici* submissions.
- 206 See, e.g., Procedural Order No. 2 (27 Mar. 2020), Attachment A, p. 35 (ICANN Response or Objection to Afilias’ Document Request No. 11 (seeking, as reformulated by the Panel, the documents evidencing, constituting or referring to the “informed resolution” of these questions)).
- 207 Letter from A. Ali (Counsel for Afilias) to ICANN Board (23 Feb. 2018), [Ex. C-78]; Letter from A. Ali (Counsel for Afilias) to ICANN Board (23 Apr. 2018), [Ex. C-79]; Letter from A. Ali (Counsel for Afilias) to ICANN Board (21 Dec. 2018), [Ex. C-111]; Letter from A. Ali (Counsel for Afilias) to ICANN (1 Apr. 2019), [Ex. C-112]; Letter from A. Ali (Counsel for Afilias) to ICANN Board (16 Apr. 2018), [Ex. C-113]; Letter from A. Ali (Counsel for Afilias) to J. LeVee (Counsel for ICANN) (1 May 2018), [Ex. C-114].
- 208 See Email J. Hooper (Verisign) to K. Hakansson (ICANN) (17 Jan. 2018), [Ex. C-115].
- 209 Letter from J. LeVee (Counsel for ICANN) to A. Ali (Counsel for Afilias) (28 Apr. 2018), [Ex. C-80], p. 1 (emphasis added).
- 210 Letter from A. Ali (Counsel for Afilias) to J. LeVee (Counsel for ICANN) (1 May 2018), [Ex. C-114], p. 1 (emphasis added).
- 211 Email from ICANN Global Support to J. Kane (Afilias) (7 June 2018), [Ex. C-62].
- 212 NDC’s Supplemental Brief in Support of Its Request to Participate as *Amicus Curiae* (27 Sep. 2019), ¶ 18.
- 213 ICANN’s Response to Amended IRP Request, ¶ 21.
- 214 Bylaws, [Ex. C-1], Sec. 1.2(a) (emphasis added).
- 215 *Id.* Sec. 1.2(b).
- 216 *Id.* Sec. 1.2.(b)(iv).
- 217 Statement of Kurtz Pritz (ICANN Senior Vice President for Shareholder Relations) in S. Hrg. 112-394, ICANN’s Expansion of Top Level Domains, Hearing before the Committee on Commerce, Science, and Transportation, U.S. Senate, 112<sup>th</sup> Congress, First Session, December 8, 2011 (“December 2011 Senate Hearing”), [Ex. JZ-2], p. 21. The origin of ICANN’s competition mandate is discussed at length in the report submitted by Dr. Zittrain. Expert Report of Jonathan Zittrain (26 Sep. 2018), pp. 27-31.
- 218 ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (20 June 2011) (“ICANN Board Rationales”), [Ex. C-9], p. 62 (emphasis added).
- 219 ICANN’s Response to Amended IRP Request, ¶ 70.
- 220 Statement of Kurtz Pritz (ICANN Senior Vice President for Shareholder Relations), in December 2011 Senate Hearing), [Ex. JZ-2], pp. 8, 11 (emphasis added).
- 221 ICANN Board Rationales, [Ex. C-9], p. 4.
- 222 *Id.*
- 223 *Id.* p. 7.
- 224 *Id.* p. 9.
- 225 *Id.* p. 20.

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- 226 *Id.* p. 4.
- 227 Dennis Carlton (Compass Lexecon), Report regarding ICANN's Proposed Mechanism for Introducing New gTLDs (5 June 2009) ("**Carlton Report**"), [Ex. JZ-47], ¶¶ 6, 23, 29 (emphasis added).
- 228 The DOJ had objected to ICANN's proposed New gTLD Program on the grounds that it would do more harm than good to competition in the DNS.
- 229 Carlton Report, [Ex. JZ-47], ¶ 25 (emphasis added)
- 230 We note that ICANN's Board recently resolved to deny an application to transfer .ORG to a new registry provider. In part, the ICANN Board based its decision on .ORG's unique history and role in the broader ferment of the DNS.
- 231 Bylaws, [Ex. C-1], Sec. 2.3.
- 232 ICANN's Response to Amended IRP Request, ¶¶ 6, 50, 70.
- 233 Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions* (1988), [Ex. C-116], pp. 3, 9.
- 234 As explained by the current head of the DOJ's Antitrust Division, Makan Delrahim: "**antitrust is law enforcement, it's not regulation.** At its best, it supports reducing regulation, by encouraging competitive markets that, as a result, require less government intervention." U.S. Department of Justice, Assistant Attorney General Makan Delrahim Delivers Keynote Address at American Bar Association's Antitrust Law Section Fall Forum (Washington, DC, 16 Nov. 2017), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-american-bar> (last accessed 28 Apr. 2020) ("**Delrahim 2017 Keynote Address**"), [Ex. C-117], p. 1.
- 235 Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions* (1988), [Ex. C-116], p. 2 (emphasis in original).
- 236 15 U.S.C. § 18 (1996) (emphasis added).
- 237 *Steves & Sons, Inc. v. JELD-WEN, Inc.*, No. 19-1397 (4th Cir. 2019), Brief for the United States of America as *Amicus Curiae* in Support of Appellee Steves and Sons, Inc. (23 Aug. 2019) ("**DOJ Amicus Brief**"), [Ex. C-118], p. 1. See also *Steves & Sons, Inc. v. JELD-WEN, Inc.*, Case 3:16-cv-00545-REP (E.D. VA.), Statement of Interest of the United States of America Regarding Equitable Relief (6 June 2018) ("**DOJ Statement of Interest**"), [Ex. C-119], n. 1 ("[T]he Antitrust Division confirms that it investigated this transaction, and did not take any enforcement action. As the Division has explained, however, no inference should be drawn in this private action based upon the Antitrust Division's decision not to take enforcement action.").
- 238 ICANN's Response to Amended IRP Request, ¶ 70. Afilias notes that ICANN, in fact, did not solicit the DOJ's opinion on whether Verisign's proposed acquisition of .WEB would violate U.S. antitrust law. The correct procedure, if that was truly ICANN's intent, would have been to submit a business review letter pursuant to 28 C.F.R. Section 50.6. By doing so, ICANN would have formally solicited the DOJ to issue a statement of its current enforcement intentions with respect to proposed acquisition pursuant to the Department's Business Review Procedure.
- 239 Carlton Report, [Ex. JZ-47], ¶ 19.
- 240 ICANN's Response to Amended IRP Request, ¶ 7.
- 241 *Id.* ¶ 7.
- 242 Decision on Phase I (12 Feb. 2020), ¶ 137.
- 243 Interim Supplementary Procedures for IRP (25 Oct. 2018), [Ex. C-59], Rule 4 (emphasis added).
- 244 Decision on Phase I (12 Feb. 2020), ¶ 132 ("To the extent that Afilias' Rule 7 claim impugns the actions of ICANN's Staff and asserts that these actions violated the Articles of Incorporation or Bylaws, it falls within both the definition of Covered Actions and the jurisdiction of the Panel in this IRP.").
- 245 *Id.* ¶¶ 114-17.
- 246 Bylaws, [Ex. C-1], Sec. 4.3(a)(i).
- 247 *Id.* Sec. 4.3(b)(iii)(A).
- 248 *Id.* Sec. 4.3(b)(ii) (emphasis added).
- 249 Verisign Statement Regarding .Web Auction Results (1 Aug. 2016), [Ex. C-46], p. 1.

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- 250 *Id.* p. 2.
- 251 Letter from J. LeVee (Counsel for ICANN) to A. Ali (Counsel for Afiliias) (18 Dec. 2018), [Ex. C-120], p. 1 (producing documents “as required by the Emergency Panelist’s Decision On Afiliias’ Request For Production Of Documents In Support Of Its Request For Interim Measures,” including the DAA).
- 252 Letter from S. Hemphill (Afiliias) to A. Atallah (ICANN) (9 Sep. 2016), [Ex. RE-12].
- 253 Letter from C. Willett (ICANN) to J. Kane (Afiliias) (16 Sep. 2016), [Ex. C-50], p. 1.
- 254 Letter from A. Atallah (ICANN) to S. Hemphill (Afiliias) (30 Sep. 2016), [Ex. C-61], p. 1.
- 255 Letter from J. Kane (Afiliias) to C. Willett (ICANN) (7 Oct. 2016), [Ex. C-51].
- 256 ICANN’s Response to Amended IRP Request, ¶ 137. The DOJ apparently issued its first Civil Investigative Demands in the investigation on 1 February 2017. *See id.*
- 257 ICANN’s Response to Amended IRP Request, ¶ 137.
- 258 Letter from A. Ali (Counsel for Afiliias) to ICANN Board (23 Feb. 2018), [Ex. C-78], p. 1 (requesting “an update on ICANN’s investigation of the .WEB contention set”); Letter from A. Ali (Counsel for Afiliias) to ICANN Board (16 Apr. 2018), [Ex. C-113], p. 4 (writing directly to the ICANN Board in order to “request[] information on the current status of ICANN’s investigation of the .WEB contention set” because “Afiliias has received no information from ICANN regarding the investigation”); Letter from A. Ali (Counsel for Afiliias) to J. LeVee (Counsel for ICANN) (1 May 2018), [Ex. C-114], pp. 1, 3 (seeking an update because “[t]o date, ICANN has provided no information about the investigation”).
- 259 *See* ICANN’s Response to Amended IRP Request, ¶ 41.
- 260 Letter from S. Hemphill (Afiliias) to A. Atallah (ICANN) (8 Aug. 2016), [Ex. C-49], pp. 1-2.
- 261 Letter from C. Willett (ICANN) to J. Kane (Afiliias) (16 Sep. 2016), [Ex. C-50], p. 1; Letter from A. Atallah (ICANN) to S. Hemphill (Afiliias) (30 Sep. 2016), [Ex. C-61], p. 1. Moreover, a comparison of the concerns raised in Mr. Hemphill’s 8 August 2016 letter with the asserted in this IRP demonstrates that they are not the same. Although Mr. Hemphill correctly predicted that NDC violated the provisions of the New gTLD Program Rules that prohibited an applicant from re-selling, assigning, or transferring rights and obligations in its application, and that allow ICANN to disqualify an applicant for material misstatements, misrepresentations, or omissions, Mr. Hemphill simply did not know the details of the DAA at that point. Again, ICANN received the DAA shortly after Mr. Hemphill sent his 8 August 2016 letter, but never disclosed that fact (let alone the terms of the DAA) until this IRP.
- 262 Bylaws, [Ex. C-1], Sec. 4.3(e)(i) (emphasis added). Indeed, Bylaws expressly provides that “the IRP Panel shall award to ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees,” if the claimant does not participate “in good faith in the CEP” and ICANN prevails in the IRP. *Id.* Sec. 4.3(e)(ii).
- 263 ICANN, Cooperative Engagement Process - Request for Independent Review (11 Apr. 2013), [Ex. C-121], pp. 1-2 (emphasis added). *See also* *GCC v. ICANN*, Partial Final Declaration, [Ex. CA-17], ¶ 69 (“**The IRP Deadline is tolled if the parties are engaged in a Cooperative Engagement Process.**”) (emphasis added).
- 264 Email from ICANN Independent Review to A. Ali and R. Wong (Counsel for Afiliias) (13 Nov. 2018), [Ex. C-54].
- 265 *Id.*
- 266 Letter from C. Willett (ICANN) to J. Kane (Afiliias) (16 Sep. 2016), [Ex. C-50], p. 1; Letter from A. Atallah (ICANN) to S. Hemphill (Afiliias) (30 Sep. 2016), [Ex. C-61], p. 1.
- 267 *GCC v. ICANN*, Partial Final Declaration, [Ex. CA-17], ¶ 81.
- 268 ICANN’s Response to Amended IRP Request, ¶ 83.
- 269 *Id.* ¶ 10 (emphasis added).
- 270 CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), [Ex. C-91], ¶ 177 (p. 34); CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Annex 07 – Recommendation #7: Strengthening ICANN’s Independent Review Process (23 Feb. 2016), [Ex. C-122], ¶¶ 2, 16 (pp. 1, 6).
- 271 Bylaws, [Ex. C-1], Sec. 4.3(a)(i)-(iii) & (vi)-(ix) (emphasis added).

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<sup>272</sup> *Id.* Sec. 4.3(a) (emphasis added).

<sup>273</sup> *Id.* Sec. 4.3(x) (emphasis added).

<sup>274</sup> *Id.* Sec. 4.3(x)(i)-(iii) (emphasis added).

<sup>275</sup> *Id.* Secs. 4.3(m)(i), 4.3(n)(i) (emphasis added).

<sup>276</sup> See, e.g., *DotConnectAfrica v. ICANN*, Final Declaration, [Ex. CA-15], ¶¶ 118-33; *GCC v. ICANN*, Partial Final Declaration, [Ex. CA-17], p. 44.

<sup>277</sup> *DotConnectAfrica v. ICANN*, Final Declaration, [Ex. CA-15], ¶ 23 (quoting its earlier Declaration on the IRP Procedure, ¶ 105).

<sup>278</sup> *Id.* ¶ 23 (quoting its prior Declaration on the IRP Procedure, ¶ 111).

<sup>279</sup> *GCC v. ICANN*, Partial Final Declaration, [Ex. CA-17], ¶ 146 (emphasis added).