

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Afilias Domains No. 3 Ltd.,) ICDR CASE NO. 01-18-0004-2702
)
Claimant,)
)
and)
)
INTERNET CORPORATION FOR ASSIGNED)
NAMES AND NUMBERS,)
)
Respondent.)
_____)

**ICANN'S OPPOSITION TO
AFILIAS DOMAINS NO. 3 LTD.'S REQUEST FOR EMERGENCY PANELIST AND
INTERIM MEASURES OF PROTECTION**

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INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby responds to and opposes the Request for Emergency Panelist and Interim Measures of Protection (“Emergency Request”) submitted by Afilias Domains No. 3 Limited (“Afilias”).

1. This Independent Review Process (“IRP”) proceeding relates to the .WEB generic top-level domain (“gTLD”). .WEB is one of the new gTLDs that applicants applied for as part of ICANN’s New gTLD Program (the “Program”), under which entities submitted 1,930 applications to ICANN to offer new gTLDs to Internet users. The Program was designed to enhance diversity, creativity, and consumer choice, and to provide the benefits of innovation to consumers via the introduction of new gTLDs. The success of the Program is demonstrated by the fact that it has resulted in the introduction of over 1,200 new gTLDs.

2. Because there were multiple, qualified applicants for .WEB, each of which passed the applicable evaluations, the .WEB applications were placed in a “contention set,” and ICANN ultimately implemented an applicant auction to resolve the contention set, as expressly required in the detailed Applicant Guidebook (“Guidebook”) that ICANN created to administer the Program. The auction occurred in July 2016, and Nu Dotco, LLC (“NDC”) was the prevailing bidder. NDC’s bid was financially supported by Verisign, Inc. (“Verisign”), the current registry operator of .COM and .NET. In exchange for this financial support, NDC agreed that, after executing an agreement with ICANN to operate .WEB, NDC would seek ICANN’s permission to transfer that agreement to Verisign so it would become the registry operator of .WEB.

3. After NDC prevailed in a public auction for .WEB, Afilias and other .WEB applicants cried foul, alleging that Verisign’s agreement with NDC violated the Guidebook and raised competition concerns. ICANN has evaluated these complaints, some of which also have been addressed in other fora, including federal court litigation, a Department of Justice Antitrust

Division investigation of Verisign, and multiple invocations of ICANN's own accountability mechanisms. The federal court litigation was resolved in ICANN's favor, and the Department of Justice investigation concluded without any action being taken by the federal government. The time has therefore come for the auction results to be finalized and for .WEB to be delegated so that it can be made available to consumers.

4. To be clear, ICANN's interest in this matter is not in the picking of winners and losers, but in completing the rollout of .WEB in order to make this new gTLD available to Internet users just like all the other TLDs that have been processed through the Program. The rollout already has been delayed for years based on the very same challenges raised in this IRP and other ICANN accountability mechanisms.

5. In its Emergency Request, Afilias argues that it will suffer irreparable harm if ICANN decides to contract with NDC during these IRP proceedings because an "IRP Panel would be unable to reverse that decision" and the value of .WEB could be destroyed if Verisign is permitted to launch the gTLD. Both contentions are incorrect.

6. As an initial matter, ICANN does in fact have the ability to change gTLD registry operators once the .WEB Registry Agreement has been executed. If the IRP Panel determines that ICANN violated its Bylaws or Articles of Incorporation, and the ICANN Board then determines (based upon the Board's review of the IRP Panel's conclusions and recommendations) that NDC should be disqualified and/or that .WEB should be awarded to Afilias, ICANN will have the power to cancel the registry agreement with NDC and enter into a registry agreement with Afilias. Third Party Designated Confidential Information Redacted

Emergency relief is therefore unnecessary because any harm to Afilias can be adequately remedied.

7. Likewise, Afilias' allegation that Verisign may sabotage .WEB if it is permitted to launch the gTLD is entirely speculative, lacks evidentiary support, and is contrary to public statements that Verisign has made regarding its plans for .WEB if ICANN approves the transfer from NDC to Verisign. Verisign has successfully operated .COM and .NET for twenty years, and there is no reason to believe that Verisign would not do the same with .WEB.

8. The absence of any true need for interim relief is underscored by Afilias' own delay in filing this IRP. Afilias alleges that it has known since June 2016 that Verisign was backing NDC's .WEB bid. Afilias could have initiated an IRP at any time, including prior to the auction, but it chose to wait nearly two years. If Afilias felt truly threatened with irreparable harm, it should have moved to prevent NDC from participating in the auction or, at the very least, sought emergency relief promptly thereafter. That Afilias chose to sit on its hands for two years belies its claim of urgency.

9. Further, Afilias' Emergency Request does not raise the type of "serious questions" that mandate interim relief. Afilias' claims about alleged Guidebook violations are either time-barred or complain of the type of transaction in which Afilias itself has previously engaged. Affiliates of Afilias have been involved in multiple agreements to transfer gTLDs, which Afilias fails to mention, and which Afilias makes no effort to distinguish from the NDC/Verisign agreement. Also, Afilias' claim that allowing Verisign to operate .WEB violates ICANN's goals of enhancing competition fails to recognize that ICANN is an administrator, not a regulator, and that the ultimate competition regulator – the Department of Justice Antitrust Division – did investigate the NDC/Verisign agreement and closed the investigation without

taking any action.

10. Finally, while Afilias notes that it must establish that the balance of hardships tips decidedly in its favor, Afilias fails even to place on the scale the harm that interim relief will cause to ICANN, Internet consumers, NDC, and Verisign. The fact is that interim relief would frustrate ICANN's goals and mission, deprive consumers of a gTLD that appears to be highly valued based on the prevailing bid price, and directly injure the interests of NDC and Verisign.

Third Party Designated Confidential Information Redacted

.¹ Absent the posting of an adequate bond, which Afilias will no doubt refuse to do – indeed, it objects to NDC and Verisign even participating in this emergency proceeding as *amici* – the financial harm to NDC and Verisign is not compensable and is thus irreparable.

11. ICANN urges the Emergency Panelist to deny the request.

SUMMARY OF RELEVANT FACTS

I. ICANN AND ITS ACCOUNTABILITY MECHANISMS.

12. ICANN is a California not-for-profit public benefit corporation formed in 1998. ICANN oversees the technical coordination of the Internet's domain name system ("DNS") on behalf of the Internet community. The essential function of the DNS is to convert easily remembered Internet domain names, such as "ebay.com" and "icann.org" into numeric IP addresses understood by computers. ICANN's core mission is to ensure the stability, security, and interoperability of the DNS.² To that end, ICANN contracts with entities that operate

¹ Declaration of Todd Strubbe ("Strubbe Decl.") ¶ 8.

² Declaration of Christine Willett ("Willett Decl.") ¶ 2.

generic top-level domains (“gTLDs”), which represent the portion of a domain name to the right of the final dot, such as “.COM” or “.GOV.”

13. To ensure that ICANN is serving and remains accountable to the global Internet community, ICANN has established accountability mechanisms for review of ICANN actions and decisions. Any aggrieved party can seek through these accountability mechanisms to hold ICANN accountable for alleged violations of ICANN’s Bylaws, Articles of Incorporation (“Articles”), or certain other internal policies and procedures.³

14. The ICANN Bylaws also provide for a process by which “any person or entity materially affected by an action or inaction” of ICANN may request review or reconsideration of that action or inaction.⁴ The Board Accountability Mechanisms Committee (“BAMC”), a special committee of the ICANN Board, has been empowered to hear and consider requests for reconsideration.⁵

15. The ICANN Bylaws also create the IRP under which a party materially affected by an action or inaction of the ICANN Board or staff may submit its claims to an “independent third-party.”⁶ IRP claims are submitted to the American Arbitration Association’s International Centre for Dispute Resolution (“ICDR”), which is responsible for administering IRP proceedings in accordance with the ICDR’s International Arbitration Rules, as modified by the ICANN Bylaws and IRP Interim Supplementary Procedures (“Supplementary Procedures”).⁷

16. An IRP Panel is not empowered to substitute its judgment for that of the ICANN

³ Bylaws, Art. 4 §§ 4.2, 4.3; Art. 5, § 5.2, Ex. C-1.

⁴ *Id.*, Art. 4, § 4.2.

⁵ *Id.*

⁶ *Id.*, Art. 4, § 4.3.

⁷ Interim Supplementary Procedures (25 Oct. 2018) (“Interim Supp. Procedures”), Ex. C-59.

Board or staff.⁸ 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 Bylaws, Articles or other internal policies and procedures.⁹

17. Under the current Supplementary Procedures,¹⁰ an IRP must be commenced within 120 days after a claimant becomes aware of the material effect of the alleged ICANN action or inaction giving rise to the dispute, provided, however, that an IRP may not be filed more than twelve months from the date of such action or inaction.¹¹ Under the previous rules in effect until October 2016, an IRP had to be filed within thirty days after notice (as defined below) of the alleged action or inaction, meaning that many of Afiliás' claims in this IRP, despite Afiliás' current claims of urgency, were time-barred nearly two years ago, as ICANN discusses below.¹²

II. ICANN'S NEW GTLD PROGRAM.

A. ICANN's Policy Development – 2000-2007.

18. In its early years, ICANN focused on increasing the number of companies (known as Internet registrars) that could sell domain name registrations to entities and individuals within the existing gTLDs. ICANN also focused on expanding, although more slowly, the number of gTLDs in existence. In 2000, ICANN approved seven new gTLDs as a proof of concept test to confirm that the addition of new gTLDs would not adversely affect the stability and security of the Internet or the DNS. In 2004 and 2005, ICANN approved a handful of additional gTLDs.

⁸ *Id.*; see also Final Declaration, *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247 (“Booking.com Final Declaration”) ¶ 115 (3 March 2015), Ex. RE-1.

⁹ Bylaws, Art. 4, § 4.3, Ex. C-1.

¹⁰ The deadlines in the Interim Supplementary Procedures are subject to change because, as the procedures recognize, “[i]n the event that the final Time for Filing procedure allows additional time to file than this interim Supplementary Procedure allows, ICANN committed to the IOT that the final Supplementary Procedures will include transition language that provides potential claimants the benefit of that additional time, so as not to prejudice those potential claimants.” Interim Supp. Procedures § 4, fn.3, Ex. C-59.

¹¹ Interim Supp. Procedures § 4, Ex. C-59.

¹² Bylaws (as amended 11 February 2016) Art. IV, § 3, Ex. C-23.

19. The New gTLD Program has produced ICANN’s most ambitious expansion of the Internet’s naming system. Under the Program, any interested party could apply for the opportunity to operate new gTLDs that were not already in use in the DNS, meaning that there was no cap on the number of new gTLDs that could be added to the Internet.¹³ The Program was designed to enhance diversity, creativity and consumer choice in gTLDs, and to provide the benefits of innovation to consumers.¹⁴ The Program arose from policy recommendations by ICANN’s Generic Names Supporting Organization (“GNSO”), which were based on community input during the period 2005-2007.¹⁵ On 26 June 2008, the ICANN Board adopted the GNSO’s policy recommendations and directed the ICANN organization to develop an implementation plan for the Program, to be provided to the Board for approval.¹⁶

B. ICANN’s Implementation of the Program – 2008-2012.

20. Implementation of the Program was developed with input from the ICANN community over several years. ICANN published a first draft of the Applicant Guidebook in October 2008¹⁷ and distributed it for public comment. Revisions were made based on public comment, and additional comments were sought on the revisions. The process repeated many times, resulting in numerous versions of the Guidebook until, in June 2012, ICANN adopted the operative, 338-page Guidebook.¹⁸

21. The Guidebook provides a step-by-step procedure for new gTLD applicants. It specifies what documents and information are required to apply, the financial and legal

¹³ Willet Decl. ¶ 3.

¹⁴ Guidebook, Preamble, Ex. C-3.

¹⁵ GNSO Final Report on Introduction of New Generic Top-Level Domains (8 Aug. 2007), Ex. C-20.

¹⁶ ICANN Adopted Board Resolutions (26 June 2008), Ex. C-21.

¹⁷ Guidebook (24 October 2008 version), *available at* <https://archive.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf>.

¹⁸ Guidebook, Preamble, Ex. C-3; Willett Decl. ¶ 4.

commitments of operating a new gTLD, what applicants can expect during the application and evaluation periods, and the dispute resolution procedures that people and organizations could invoke to object to new gTLD applications.¹⁹

22. The Guidebook requires applicants, which must be entities and not individuals, to provide the names and positions of their “directors,” “officers and partners” and “shareholders holding at least 15% of shares,” as well as information about applicants’ financial condition so that ICANN could assess the applicants and their technical and financial wherewithal to operate a gTLD.²⁰ The Guidebook also requires applicants to inform ICANN if “information previously submitted by an applicant becomes untrue or inaccurate,” including “applicant specific information such as changes in financial position and changes in ownership or control of the applicant.”²¹ But an applicant’s failure to inform ICANN that previously submitted information has become untrue or inaccurate does not require denial of an application. Instead, the Guidebook gives ICANN the discretion to determine whether the changed circumstances are material and the consequences, if any, that should follow from a failure to disclose them.²²

23. Only one applicant can be awarded a particular gTLD. Where there is more than one qualified applicant for the same gTLD, the Guidebook mandates that the applications be placed in a “contention set” for selection of a single successful applicant.²³ When applicants are placed in a contention set, the Guidebook encourages (but does not require) the applicants to agree among themselves on resolution of the contention set.²⁴ To resolve a contention set privately, all

¹⁹ See generally, Guidebook, Ex. C-3.

²⁰ Willett Decl. ¶ 12.

²¹ Guidebook § 1.2.7, Ex. C-3.

²² *Id.*

²³ *Id.* § 4.1.1.

²⁴ Guidebook § 4.1.3, Ex. C-3.

applicants within the contention set must agree to a private resolution.²⁵ Private resolutions frequently are achieved through a private auction in which the proceeds paid by the prevailing bidder are divided among the losing bidders. If the contention set cannot be resolved through private resolution, the Guidebook requires ICANN to schedule a public auction for those contention set members wishing to proceed with their applications.²⁶ The proceeds of a public auction are provided to ICANN and are to be used to support its Mission and Core Values.²⁷

24. Once a successful gTLD applicant passes initial evaluation and resolves any objections and/or a contention set, it moves to contracting, where it enters a Registry Agreement with ICANN to become a new gTLD registry operator. A Registry Agreement is the formal, written agreement between a gTLD registry operator and ICANN that sets forth the rights, duties and liabilities of the registry operator. ICANN offers a model Registry Agreement for most gTLDs, but each Registry Agreement can be negotiated and modified.²⁸ After a Registry Agreement is fully executed, ICANN takes the technical steps necessary to delegate the new gTLD into the DNS. Only after a gTLD has been fully delegated by ICANN does it become operable and accessible on the Internet.²⁹

C. Results of the Program – 2012-Present.

25. In 2012, ICANN received 1,930 applications for new gTLDs. Since then, approximately 1,200 new gTLDs have been delegated and are operational.³⁰ These new gTLDs have greatly increased diversity, consumer choice and competition in the DNS.

²⁵ *See id.*

²⁶ *Id.* § 4.3.

²⁷ *Id.* § 4.3, n.1.

²⁸ Willet Decl. ¶ 31.

²⁹ *Id.* ¶ 32.

³⁰ <https://newgtlds.icann.org/en/program-status/statistics>.

26. As one would expect with a vastly expanded marketplace, registry operators (entities that have entered into Registry Agreements with ICANN) have chosen to use and monetize gTLDs in different ways. Many registry operators have followed their original business plans of marketing their gTLDs as envisioned in their applications.³¹ Hundreds of others have assigned or transferred their gTLDs to other entities for financial gain or other reasons.³² Other companies have entered the new gTLD marketplace by acquiring new gTLD registry operators. Some have also chosen to use the gTLDs for their own benefit, such as for branding purposes.³³

27. These kinds of assignments and transfers must be approved by ICANN, and ICANN has a procedure in place for evaluating such requests.³⁴ In addition, ICANN has published materials explaining how, as a technical matter, a gTLD can be assigned from one registry operator to another.³⁵ Because ICANN administers, rather than regulates, the DNS,³⁶ ICANN's focus in evaluating a proposed gTLD transfer is whether the transferee organization has the requisite financial and technical ability to operate a gTLD.³⁷

28. Indeed, Afilias is very familiar with the transfer process due to its involvement in multiple gTLD transfers. For instance, Afilias Limited applied for .MEET in 2012, stating that it planned to make it “the most popular, accessible, and innovative destination on the Internet where people seeking online dating and companionship services can learn about dating,

³¹ Willett Decl. ¶ 33.

³² *Id.*; see also <https://www.icann.org/resources/pages/registry-agreement-assignment-direct-changes-of-control-2017-01-27-en>.

³³ Willett Decl. ¶ 33.

³⁴ *Id.* ¶ 34; see also <https://www.icann.org/resources/pages/registry-agreement-assignment-direct-changes-of-control-2017-01-27-en>.

³⁵ <https://www.icann.org/en/system/files/files/gtld-drd-ui-10sep13-en.pdf>.

³⁶ Bylaws, Art. 1, § 1.1(c), Ex. C-1 (“ICANN shall not regulate (i.e., impose rules and restrictions on) services that use the Internet’s unique identifiers or the content that such services carry or provide, outside the express scope of Section 1.1(a). For the avoidance of doubt, ICANN does not hold any governmentally authorized regulatory authority.”).

³⁷ Willet Decl. ¶ 34.

companionship services and registrars that offer .MEET domain names.”³⁸ On 16 January 2014, ICANN and Afilias Limited entered into a .MEET Registry Agreement.³⁹ But before launching .MEET – *i.e.*, before serving a single customer – Afilias Limited sought to transfer the .MEET Registry Agreement to Charleston Road Registry Inc. d/b/a Google Registry (“Google”) in October 2014.⁴⁰ According to the transfer application, Google planned on converting .MEET from a dating platform to a gTLD that provided “web-based business meetings.”⁴¹ Because ICANN determined that Google had the technical and financial ability to operate .MEET, ICANN approved the transfer even though the new objective for the gTLD was radically different than that expressed in the Afilias application.⁴²

29. Likewise, in 2015, the entity that entered into a Registry Agreement with ICANN to operate .PROMO requested that ICANN approve a transfer of .PROMO to Afilias plc prior to delegation of .PROMO. Although Afilias did not originally apply to operate .PROMO, ICANN approved the transfer based on a demonstration that Afilias was qualified to operate the gTLD.⁴³

30. Finally, as described on its own corporate website, “Afilias has an active program for acquiring new Top Level Domains.”⁴⁴ For instance, in 2016, Afilias plc announced its acquisition of StartingDot, which had become the registry operator for .ARCHI, .BIO and .SKI through the Program. In Afilias plc’s words, “[t]he acquisition agreement is part of Afilias’ ongoing program of acquiring new TLDs to add to its portfolio.”⁴⁵ ICANN approved the transfer

³⁸ .MEET Application, 18(b), Ex. RE-2.

³⁹ <https://www.icann.org/resources/agreement/meet-2014-01-16-en>.

⁴⁰ See Application for Assignment – Registry Agreement (Material Subcontracting Arrangement) for .MEET, Ex. RE-3.

⁴¹ *Id.*

⁴² <https://www.icann.org/resources/agreement/meet-2014-01-16-en>; see also Willett Decl. ¶ 35.

⁴³ <https://www.icann.org/resources/agreement/promo-2014-12-18-en>; see also Willett Decl. ¶ 35.

⁴⁴ <https://afilias.info/news/2016/08/08/afilias-acquires-premium-tlds-archi-bio-and-ski>.

⁴⁵ *Id.*

of those TLDs to Afilias plc based on its technical and financial ability to operate them.⁴⁶

III. THE .WEB CONTENTION SET.

31. ICANN received seven applications for .WEB, including applications from Afilias, NDC and Ruby Glen LLC (“Ruby Glen”). ICANN also received two applications for .WEBS from another applicant, which later withdrew one of its applications in April 2016. The seven applications for .WEB passed all applicable evaluations and were placed in a contention set, pursuant to the procedures set forth in the Guidebook.⁴⁷

32. In 2013, one of the .WEB applicants filed string confusion objections against the .WEBS applications with the ICDR, which is the independent, third-party dispute resolution service provider designated to handle string confusion objections. The objection was ultimately successful and .WEBS was added to the .WEB contention set, thereby creating the .WEB/.WEBS contention set (“Contention Set”).⁴⁸

33. Following the Guidebook’s procedures, on 27 April 2016, ICANN scheduled an auction for 27 July 2016 to resolve the .WEB/.WEBS Contention Set if it could not be privately resolved by the applicants before then.⁴⁹ As the date of the auction approached, it became apparent that the members of the .WEB/.WEBS Contention Set that had applied for .WEB had not resolved the contention set privately, and the members (as a whole) did not request a postponement of the auction. Accordingly, ICANN proceeded with plans for the auction.⁵⁰

⁴⁶ <https://www.icann.org/resources/agreement/ski-2015-04-09-en>; <https://www.icann.org/resources/agreement/bio-2014-03-06-en>; <https://www.icann.org/resources/agreement/archi-2014-02-06-en>.

⁴⁷ Willett Decl. ¶ 6.

⁴⁸ *Id.* ¶ 7. In June 2014, the .WEBS applicant (Vistaprint) filed an IRP against ICANN for accepting the ICDR’s determination following the string confusion objection proceedings. In October 2015, ICANN prevailed in the .WEBS IRP. The ICANN Board considered the .WEBS IRP Final Declaration in October 2015, December 2015, and March 2016, and resolved to “move forward with the processing of the .WEB/.WEBS contention set.” *Id.* ¶ 8.

⁴⁹ Willett Decl. ¶ 9.

⁵⁰ Willett Decl. ¶ 10.

34. Just before the auction, another .WEB applicant (Ruby Glen) invoked several of ICANN’s accountability mechanisms, and eventually commenced litigation, in an attempt to prevent the public auction from going forward and instead force a private auction where the proceeds would be divided and paid to the losing bidders.⁵¹ Ruby Glen complained to ICANN that NDC had a change in ownership or control, and that NDC had failed to notify ICANN of this change, as required by the Guidebook.⁵² According to Ruby Glen, this alleged failure constituted a “potentially disqualifying change[] to NDC’s application.”⁵³

35. ICANN thoroughly investigated these claims. ICANN contacted NDC on 27 June 2016, asking it to confirm whether there were any changes to NDC’s organizational structure that required reporting to ICANN.⁵⁴ NDC’s Chief Financial Officer, Jose Ignacio Rasco III, responded the same day to confirm that NDC had not experienced any changes in its organizational structure.⁵⁵ Nonetheless, in an abundance of caution, ICANN contacted NDC eleven days later to inquire further into potential changes to NDC’s organization.⁵⁶ ICANN staff also interviewed Mr. Rasco via telephone.⁵⁷ During the call, Mr. Rasco stated and later confirmed via email on 11 July 2016: “Neither the ownership nor the control of [NDC] has changed since we filed our application.”⁵⁸ Thereafter, ICANN informed all the contention set members, including Ruby Glen, that ICANN had “investigated the matter, and to date [has] found no basis to initiate the application change request process or postpone the auction.”⁵⁹

⁵¹ See generally, *Ruby Glen v. ICANN*, First Amended Complaint, Ex. RE-4.

⁵² *Id.*; Willett Decl. ¶¶ 11, 15-16.

⁵³ *Ruby Glen v. ICANN*, First Amended Complaint ¶ 36, Ex. RE-4.

⁵⁴ Willett Decl. ¶ 17.

⁵⁵ *Id.*

⁵⁶ *Id.* ¶ 22.

⁵⁷ *Id.*

⁵⁸ Willett Decl. ¶ 22, 24, Ex. F.

⁵⁹ *Id.* ¶ 26; see also Ex. C-44.

36. Ruby Glen then brought its allegations to the ICANN Ombudsman, who also investigated the claim.⁶⁰ Like the ICANN staff, the Ombudsman did not find “any evidence which would satisfy [him] that there has been a material change to the application.”⁶¹

37. On 17 July 2016, Ruby Glen submitted an emergency Reconsideration Request to ICANN to enjoin the auction, claiming that ICANN staff had failed to sufficiently investigate Ruby Glen’s claims regarding NDC.⁶² ICANN’s Board Governance Committee (“BGC”), which was then tasked with evaluating Reconsideration Requests, expeditiously reviewed the thoroughness of the investigation into the alleged changes in NDC’s management and control.⁶³ After finishing its review, the BGC denied the Reconsideration Request on 21 July 2016, concluding that ICANN staff had sufficiently investigated Ruby Glen’s claims.⁶⁴

38. Just days before the .WEB auction was set to begin, Ruby Glen escalated its actions by filing a complaint in Federal District Court against ICANN and an *ex parte* application for a temporary restraining order (“TRO”) to block the auction.⁶⁵ ICANN opposed the TRO application, arguing that Ruby Glen was not likely to succeed on the merits of its claims because ICANN’s Board and staff appropriately investigated Ruby Glen’s claims and detected no changes to NDC’s ownership or control, a finding corroborated by sworn declarations from NDC’s Chief Operating Officer and Chief Financial Officer.⁶⁶

39. The District Court denied Ruby Glen’s request for a TRO based, in part, on the

⁶⁰ *Id.* ¶¶ 20-21.

⁶¹ Willett Decl. ¶ 25, Ex. G.

⁶² Reconsideration Request by Ruby Glen, LLC and Fadix FZC (17 July 2016), Ex. RE-5.

⁶³ Determination of the Board Governance Committee (BGC), Reconsideration Request 16-9 (21 July 2016), Ex. RE-6.

⁶⁴ *Id.*

⁶⁵ *Ruby Glen v. ICANN*, Docket, Ex. RE-7.

⁶⁶ *Ruby Glen v. ICANN*, Opp’n to *Ex Parte* Appl. for TRO, Ex. RE-8.

“strength of ICANN’s evidence.”⁶⁷ Specifically, the District Court held:

ICANN has provided evidence that it has conducted investigations into Plaintiff’s allegations concerning potential changes in NDC’s management and ownership structure at each level of Plaintiff’s appeals to ICANN for an investigation and postponement of the auction. During those investigations, NDC provided evidence to ICANN that it had made no material changes to its management and ownership structure. Additionally, ICANN’s Opposition is supported by the Declarations of Nicolai Bezsonoff and Jose Ignacio Rasco, who declare under penalty of perjury that there have been no changes to NDC’s management, membership, or ownership since NDC first filed its application with ICANN.⁶⁸

40. The District Court also found that “because the results of the auction could be unwound, [Ruby Glen] has not met its burden to establish that it will suffer irreparable harm in the absence of the preliminary injunctive relief it seeks. Significantly, the Court further concluded that the public interest did not favor the postponement of the auction.”⁶⁹

IV. THE .WEB AUCTION AND ENSUING LITIGATION, ACCOUNTABILITY MECHANISMS AND GOVERNMENT INVESTIGATION.

41. After denial of the TRO application, the .WEB/.WEBS auction proceeded as scheduled. NDC prevailed at the auction for .WEB at a bid price of \$135 million on 28 July 2016.⁷⁰ Days later, Verisign, the entity that operates the .COM and .NET gTLDs, among others, publicly stated that it “provided funds for [NDC’s] bid” in exchange for an agreement that, if NDC entered into a Registry Agreement with ICANN to operate .WEB, NDC would then seek to “assign[] the Registry Agreement to VeriSign upon consent from ICANN.”⁷¹

42. On 8 August 2016, Afilias wrote ICANN demanding disqualification of NDC’s .WEB application based on two claims. First, Afilias stated that NDC violated the disclosure requirements of the Guidebook by failing to inform ICANN of its agreement with

⁶⁷ *Ruby Glen v. ICANN*, Order on *Ex Parte* Appl. for TRO, Ex. RE-9.

⁶⁸ *Id.* at 4.

⁶⁹ *Id.*

⁷⁰ ICANN New gTLD Contention Set Resolution Auction: Final Results for WEB / WEBS, Ex. RE-10.

⁷¹ Verisign Statement Regarding .Web Auction Results (1 August 2016), Ex. C-46.

Verisign. Second, Afilias stated that NDC had assigned its application to Verisign in violation of the Guidebook.⁷² These are precisely the same claims that Afilias is now pursuing in this IRP.

43. That same day, Ruby Glen filed its First Amended Complaint against ICANN in Federal District Court, making claims that NDC violated the Guidebook and should have been disqualified on the same grounds asserted in Afilias' letter to ICANN.⁷³

44. On 2 August 2016, Ruby Glen's parent organization, Donuts, Inc. ("Donuts"), invoked ICANN's Cooperative Engagement Process ("CEP"), a pre-IRP proceeding that allows the parties to attempt to resolve or narrow the issues to be brought in an IRP proceeding.⁷⁴ Donuts' claims in the CEP were identical to those asserted in Ruby Glen's First Amended Complaint and Afilias' 8 August 2016 letter.

45. Afilias sent ICANN a subsequent letter, dated 9 September 2016, again asking ICANN to disqualify NDC for the same alleged Guidebook violations. Afilias' 9 September 2016 letter also included claims regarding competition concerns, which are again the same as those alleged in this IRP.⁷⁵

46. As part of ICANN's due diligence into the issues raised by Afilias and Ruby Glen in 2016, ICANN issued a set of questions to Afilias, Ruby Glen, NDC and Verisign, seeking input regarding the .WEB auction, the purported NDC/Verisign agreement, and the alleged violations of the Guidebook.⁷⁶ These questions were designed to assist ICANN in evaluating what action, if any, should be taken in response to the claims asserted by Afilias and Ruby Glen.

⁷² Letter from S. Hemphill (General Counsel, Afilias) to A. Atallah (President, ICANN's Global Domains Division) (8 August 2016), Ex. C-49.

⁷³ *Ruby Glen v. ICANN*, First Amended Complaint, Ex. RE-4.

⁷⁴ Cooperative Engagement and Independent Review Processes Status Update – 20 June 2018, Ex. RE-11.

⁷⁵ Letter from S. Hemphill (General Counsel, Afilias) to A. Atallah (President, ICANN's Global Domains Division) (9 September 2016), Ex. RE-12.

⁷⁶ Letter from C. Willett (Vice President, ICANN's gTLD Operations) to J. Kane (Vice President, Afilias' Corporate Services) (16 September 2016), Ex. C-50.

47. On 7 October 2016, Afilias responded to ICANN’s questions reiterating its core objections to the purported NDC/Verisign agreement, describing it as a “failure to disclose material information relating to [NDC’s] bid for the .WEB rights” and as “clearly designed to preserve Verisign’s existing monopoly in gTLD services that results from its control of .COM and .NET,” which are the claims Afilias is now pressing in this IRP, over two years later.⁷⁷

48. Thereafter, on 28 November 2016, the Federal District Court dismissed with prejudice Ruby Glen’s First Amended Complaint regarding the .WEB auction based on the covenant not to sue in Module 6 of the Guidebook, which requires applicants to use ICANN’s accountability mechanisms instead of filing lawsuits against ICANN.⁷⁸ Ruby Glen appealed.

49. On 1 February 2017, the Antitrust Division of the United States Department of Justice (“DOJ Antitrust Division”) issued a civil investigative demand (“CID”) to ICANN, Verisign and presumably others that participated in the auction for .WEB, seeking documents and information “in connection with DOJ’s investigation of Verisign’s proposed acquisition of NDC’s contractual rights to operate the .WEB gTLD.”⁷⁹ Between February and June 2017, ICANN made several productions of documents and provided information to the DOJ Antitrust Division in connection with its investigation.⁸⁰

50. In January 2018, the DOJ Antitrust Division closed its investigation, presumably meaning the government did not find a threat to competition that warranted further action.⁸¹ Despite the fact that Afilias’ IRP claims focus on the alleged anticompetitive effects of having

⁷⁷ Letter from J. Kane (Vice President, Afilias’ Corporate Services) to C. Willett (Vice President, ICANN’s gTLD Operations) (7 October 2016), Ex. C-51.

⁷⁸ <https://www.icann.org/en/system/files/files/litigation-ruby-glen-court-order-motion-dismiss-first-amended-complaint-28nov16-en.pdf>.

⁷⁹ <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-response-24mar18-en.pdf>.

⁸⁰ *Id.*

⁸¹ Excerpts from Verisign 10-K (for the fiscal year ended 31 December 2017), Ex. RE-13.

Verisign operate .WEB, Afilias does not even mention the Antitrust Division’s investigation – much less the Antitrust Division’s decision to close its investigation – in any of its papers.

51. On 18 June 2018, almost two years after the .WEB auction took place, Afilias initiated its own CEP to assert the exact same claims it had raised in 2016.⁸²

52. Thereafter, on 15 October 2018, the Ninth Circuit Court of Appeals issued an order affirming the dismissal of Ruby Glen’s First Amended Complaint against ICANN.⁸³

53. With the DOJ Antitrust Division investigation closed, the Ruby Glen litigation over, and little progress in the Afilias CEP, ICANN closed the Afilias CEP proceedings but assured Afilias that ICANN would not take further action on .WEB until there was a resolution to Afilias’ Emergency Request in this IRP.⁸⁴ On 14 November 2018, Afilias filed its IRP. On 27 November 2018, Afilias filed its Emergency Request.

STANDARD OF REVIEW

54. ICANN’s Bylaws and Supplementary Procedures allow for interim relief in the form of a stay to maintain the *status quo*.⁸⁵ A claimant must establish the following:

“(i) A harm for which there will be no adequate remedy in the absence of such relief;

(ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and

(iii) A balance of hardships tipping decidedly toward the party seeking relief.”⁸⁶

ARGUMENT

I. AFILIAS WILL NOT SUFFER IMMEDIATE, IRREPARABLE HARM IN THE ABSENCE OF INTERIM RELIEF.

⁸² Cooperative Engagement and Independent Review Processes Status Update – 20 June 2018, Ex. RE-11.

⁸³ *Ruby Glen v. ICANN*, Memorandum, Ex. RE-14.

⁸⁴ Letter from J. LeVee to K. Reisenfeld (3 December 2018), Ex. RE-15.

⁸⁵ Bylaws Art. 4, § 4.3(p), Ex. C-1; Interim Supp. Procedures § 10, Ex. C-59.

⁸⁶ Bylaws Art. 4, § 4.3(p), Ex. C-1; Interim Supp. Procedures § 10, Ex. C-59.

55. A critical aspect of an application for interim relief is the applicant’s demonstration that it will suffer immediate, irreparable harm absent a stay.⁸⁷ Afilias argues that it will suffer irreparable harm if ICANN negotiates a Registry Agreement with NDC because an “IRP Panel would be unable to reverse that decision,” and the value of .WEB could be destroyed if Verisign launches the gTLD. Afilias provides no evidence to support either of these claims.

56. Afilias’ first assertion of irreparable injury – that ICANN is unable to transfer a .WEB Registry Agreement after the conclusion of this IRP – is simply wrong. There is no technological, legal, or other barrier preventing the transfer of a Registry Agreement from one registry operator to another after a Registry Agreement is in place or even after a gTLD has been delegated.

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57. Federal and California state courts have found that, where, as here, ICANN can transfer the Registry Agreement, the type of harm alleged by Afilias is not irreparable and does not warrant interim relief. In denying Ruby Glen’s TRO application seeking to halt the .WEB auction, the District Court ruled that “because the results of the auction could be unwound, Plaintiff has not met its burden to establish that it will suffer irreparable harm in the absence of the preliminary injunctive relief it seeks.”⁸⁹ Likewise, in *DotConnectAfrica Trust v. ICANN*, an applicant for .AFRICA (DCA) filed a motion for preliminary injunction to block ICANN from

⁸⁷ See Interim Supp. Procedures § 10, Ex. C-59.

⁸⁸ Strubbe Decl. ¶ 11; Declaration of Jose Ignacio Rasco III, ¶ 3.

⁸⁹ <https://www.icann.org/en/system/files/files/litigation-ruby-glen-court-order-denying-plaintiff-ex-parte-application-tro-26jul16-en.pdf>.

entering into a .AFRICA Registry Agreement with a competing applicant. The California Superior Court denied the motion because “there is no potential for irreparable harm to DCA” because the “.Africa gTLD can be [transferred] to DCA in the event DCA prevails in this litigation.” The court further noted that “the evidence reflects that [transfer] is not uncommon and has occurred many times. Indeed, ICANN has an established procedure for re-[transferring] a gTLD, which is set forth in a public manual.”⁹⁰

58. The same is true here. If the IRP Panel ultimately determines that ICANN acted inconsistently with its Bylaws or Articles, and the ICANN Board determines (based upon the Board’s review of the IRP Panel’s conclusions and recommendations, if any) that NDC should be disqualified and/or that .WEB should be awarded to Afilias, ICANN has the power to effect a transfer of .WEB to Afilias.

59. Afilias’ second assertion of irreparable injury – that Verisign will destroy .WEB, either intentionally or through mismanagement – is entirely speculative. Claims of irreparable injury must be buttressed with evidence,⁹¹ yet Afilias offers literally no evidence that Verisign will intentionally or otherwise harm the value of .WEB.

60. Contrary to Afilias’ speculation, Verisign has publicly represented to its shareholders that, if ICANN were to approve a transfer of .WEB from NDC to Verisign, Verisign plans to market .WEB aggressively.⁹² Moreover, in light of Verisign’s successful

⁹⁰ <https://www.icann.org/en/system/files/files/litigation-dca-icann-order-denying-plaintiff-motion-prelim-injunction-03feb17-en.pdf>.

⁹¹ *Caribbean Marine Services Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (“Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction. A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief.”) (emphasis in original) (internal citation omitted), Ex. RELA-3; *iFreedom Direct Corp. v. McCormick*, 662 F. App’x. 550, 551 (9th Cir. 2016) (upholding district court decision denying motion for preliminary injunction in part because plaintiff’s evidence of a likelihood of irreparable harm “was too speculative”), Ex. RELA-5.

⁹² Strubbe Decl. ¶ 7.

stewardship over .COM and .NET for almost two decades, Verisign is clearly qualified to operate a gTLD, making Afilias' claims that Verisign will irretrievably blunder a .WEB launch implausible at best. In the .AFRICA case, the Superior Court rejected similar claims that an entity would botch the launch of .AFRICA, finding that "[t]his harm is highly speculative and fails to account for the possibility of re-delegation."⁹³

II. INTERIM RELIEF IS NOT WARRANTED BECAUSE AFILIAS UNREASONABLY DELAYED SEEKING SUCH RELIEF.

61. A hallmark of a proper request for interim relief is diligence in seeking that relief. A long delay in seeking interim relief implies that there is no urgency, nor any irreparable harm, and a request for interim relief can be denied on this basis alone.⁹⁴

62. Afilias did not initiate its CEP until June 2018, almost two years after the .WEB auction and Verisign's announcement on 1 August 2016 that it had entered into an agreement with NDC regarding .WEB. Afilias concedes that, by August 2016, it was aware of the essential facts and arguments it is now raising in its Emergency Request. Indeed, the Emergency Request includes all of the allegations Afilias made in its August and September 2016 letters to ICANN.

63. Further, in a letter dated 7 October 2016 from Afilias' Vice President for Corporate Services, responding to a letter from Mr. Akram Atallah of ICANN, Afilias stated:

Mr. Atallah states that, while the .WEB/.WEBS contention set was placed on hold by ICANN on 19 August 2016, such action was taken because of the initiation of an ICANN Accountability Mechanism by another applicant. **We are concerned that this statement appears to imply that ICANN is not placing the**

⁹³ <https://www.icann.org/en/system/files/files/litigation-dca-icann-order-denying-plaintiff-motion-prelim-injunction-03feb17-en.pdf>.

⁹⁴ See *Oakland Tribune, Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm."), Ex. RELA-6; *iFreedom Direct Corp.*, 662 F. App'x. at 550 (upholding district court decision denying motion for preliminary injunction in part because the plaintiff's "ten-month delay in seeking a preliminary injunction undermined its claim of irreparable harm"), Ex. RELA-5.

contention set on hold in order to address the issues raised by Afilius.⁹⁵

Plainly, Afilius knew more than two years ago that ICANN was not placing the contention set on hold in response to Afilius' allegations and arguments, yet it did nothing.

III. AFILIUS' REQUEST FOR IRP DOES NOT RAISE "SUFFICIENTLY SERIOUS QUESTIONS" THAT JUSTIFY INTERIM RELIEF.

64. Afilius must also show either a likelihood of success on the merits or that it has raised "sufficiently serious questions related to the merits" of its IRP. Afilius bases its request on the lesser showing – that its request raises serious questions going to the merits of its claims. But Afilius has not raised the type of serious questions that justify interim relief.

65. For instance, much of the claims Afilius raises in its Emergency Request relate to ICANN's investigation of NDC and the ICANN Board's decision to proceed with the .WEB auction.⁹⁶ But ICANN's investigation of NDC took place in June 2016, and the ICANN Board decided to proceed with the .WEB auction on 21 July 2016.⁹⁷ According to the Bylaws in place at that time, an IRP had to be filed within 30 days of the posting of the minutes of the meeting when the decision was made. Those minutes were posted on 12 September 2016, making an IRP filing on these issues due no later than 12 October 2016.⁹⁸

66. Similarly, Afilius' claim that allowing Verisign to operate .WEB will violate ICANN's "Core Value to introduce and promote competition," is without merit. While ICANN's Bylaws and Core Values call for ICANN to enact policies that promote competition in the DNS, they do not instruct ICANN to act as a government regulator. In fact, ICANN's

⁹⁵ Letter from J. Kane to C. Willett (7 October 2016), Ex. C-51 (emphasis added).

⁹⁶ Emergency Request at 15, Question 1-5.

⁹⁷ <https://www.icann.org/en/system/files/files/reconsideration-16-9-ruby-glen-radix-bgc-determination-21jul16-en.pdf>.

⁹⁸ Bylaws (as amended 11 February 2016), Art. IV, § 3.3, Ex. C-23.

Bylaws make clear that “ICANN does not hold any governmentally authorized regulatory authority.”⁹⁹ Instead, the regulator authorized to promote and regulate competition, the U.S. Department of Justice Antitrust Division, already evaluated the potential competitive effects of the NDC/Verisign agreement and concluded that government intervention was not warranted.

67. Afiliás claims to be “the world’s second largest Internet domain name registry, with more than 20 million names under management.”¹⁰⁰ Given its size and technical abilities, Afiliás is more than capable of competing with Verisign, whether in .WEB or elsewhere.

68. Finally, ICANN has never been under a duty to disqualify NDC based on its agreement with Verisign. Rather, the Guidebook gives ICANN discretion to determine whether information not disclosed to ICANN either (a) was required to be disclosed in the first instance and/or (b) whether any such non-disclosure is material enough to warrant disqualification.¹⁰¹

IV. THE BALANCE OF HARDSHIPS DOES NOT TIP IN AFILIÁS’ FAVOR.

69. The final requirement for interim relief is that the claimant demonstrate a “balance of the hardships tipping decidedly towards the party seeking the relief.”¹⁰² Where, as here, the party requesting interim relief declines to show a likelihood of success on the merits, the burden to demonstrate that the balance of hardships tips in its favor is higher. The party must

⁹⁹ Bylaws, Art. 1, § 1.1(c), Ex. C-1.

¹⁰⁰ Afiliás, About US, RE-16.

¹⁰¹ Guidebook § 1.2.7, Ex. C-3.

¹⁰² Bylaws Art. 4 § 4.3(p), Ex. C-1; Interim Supp. Procedures § 10, Ex. C-59. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (courts “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.”) (citation and internal quotation marks omitted), Ex. RELA-8; *Burlington Resources Inc. v. Republic of Ecuador & Empresa Estatal Petroleos del Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente’s Request for Provisional Measures (29 June 2009) ¶ 81 (quoting *City Oriente Ltd. v. Republic of Ecuador*, ICSID Case No. ARB/06/21, Decision on revocation of provisional measures of 13 May 2008, ¶ 72), Ex. RELA-2; see also UNCITRAL’s Model Law on Commercial Arbitration Art. 17(A)(1)(a) (requiring that a party requesting relief demonstrate that “[h]arm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted”), Ex. RE-17; *Paushok v. Mongolia*, Order on Interim Measures (2 September 2008) ¶¶ 68-69, Ex. RELA-7.

establish that the balance of hardships “tips sharply” in its favor under the “sliding scale” approach to preliminary injunctions that federal courts employ.¹⁰³ Afilias has not established that the balance of hardships tips in its favor, let alone “sharply tips” in its favor.

70. Separately, Afilias wrongly suggests that the balance of hardships inquiry requires only an analysis of the hardships to Afilias and ICANN, but the standard is not so limited.¹⁰⁴ The Emergency Panelist must not only balance the hardships on the parties, but on all other interested parties, including consumers.

71. As discussed above, Afilias will not “suffer severe and irreparable harm” if its Emergency Request is denied. The harm Afilias claims is fully capable of being remedied in due course through transfer of the .WEB gTLD.

72. On the other hand, significant hardships will be imposed on ICANN, the .WEB auction winner, and consumers if interim relief is granted. There is real harm to ICANN, its processes, and its mission by yet another dispute delaying .WEB, particularly one that could have been resolved by now. In fulfilling ICANN’s mission of ensuring the “stable and secure operation” of the Internet’s DNS, ICANN is committed to respecting the “creativity, innovation, and flow of information made possible by the Internet”; making “decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment”; and “depending on market mechanisms to promote and sustain a competitive environment in the DNS market.”¹⁰⁵ Additional delay in bringing .WEB to fruition would frustrate these ICANN core values and commitments.

73. Likewise, would-be users of .WEB would be harmed by further delays in its

¹⁰³ See *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131, 1135 (9th Cir. 2011), Ex. RELA-1; see also *Disney Enterprises, Inc. v. VidAngel, Inc.*, 869 F. 3d 848, 856 (9th Cir. 2017), Ex. RELA-4.

¹⁰⁴ See Interim Supp. Procedures § 10, Ex. C-59.

¹⁰⁵ Bylaws Art. 1, §§ 1.1, 1.2, Ex. C-1.

launch. If .WEB is truly one of the “crown jewels” of the new gTLDs, as Afilias claims, consumers are harmed every day its launch is delayed. Afilias’ Emergency Request places Afilias’ commercial interests ahead of the consumer benefits the New gTLD Program affords.

74. Further, NDC and Verisign would be harmed by additional delays, which is compounded by the delay-related harm they have already suffered. More than two years ago, NDC and Verisign paid \$135 million for .WEB, but have yet to enjoy any of the benefits of that large investment. Third Party Designated Confidential Information Redacted

¹⁰⁷ Realistically, that substantial injury cannot be compensated, unless Afilias were to allow NDC and Verisign to participate in this emergency proceeding and post a bond at Verisign’s request.¹⁰⁸

75. Given the harm to ICANN, consumers, NDC, and Verisign, there is no conceivable way that the balance of the hardships tips decidedly in Afilias’ favor.

CONCLUSION

76. ICANN respectfully requests that Afilias’ Emergency Request be denied.

Respectfully submitted,

JONES DAY

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Dated: December 17, 2018

¹⁰⁶ Strubbe Decl. ¶ 8.

¹⁰⁷ *Id.*

¹⁰⁸ *See id.* at ¶ 9.