

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 REJOINDER MEMORIAL IN RESPONSE TO AMENDED REQUEST BY  
AFILIAS DOMAINS NO. 3 LIMITED FOR INDEPENDENT REVIEW**

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## INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits its Rejoinder to the Reply Memorial in Support of Amended Request by Afilias Domains No. 3 Limited (“Afilias”) for Independent Review (“Reply”) submitted by Afilias on 4 May 2020.

1. What makes this Independent Review Process (“IRP”) different from all the others is that ICANN has not fully addressed the ultimate, underlying dispute that Afilias raises in this IRP – namely, whether Nu Dot Co (“NDC”), by virtue of the Domain Acquisition Agreement (“DAA”) between NDC and Verisign Inc. (“Verisign”), violated the New gTLD Program (“Program”) Applicant Guidebook (“Guidebook”) or the Auction Rules and, if so, whether NDC’s application should be disqualified or its winning bid for .WEB rejected. This is because .WEB has been mired in legal proceedings from before the .WEB auction was even held, including repeated invocations of ICANN’s Accountability Mechanisms and a year-long United States Department of Justice (“DOJ”) investigation.

2. Since the inception of the Program, ICANN has followed a practice of placing applications and contention sets “on hold” when related Accountability Mechanisms are initiated. Once on hold, ICANN generally refrains from taking any action with respect to the application or contention set that could interfere with, or otherwise preempt, a pending Accountability Mechanism. ICANN follows this practice, in part, because ICANN considers its Accountability Mechanisms to be fundamental safeguards in ensuring its bottom-up, multistakeholder model remains effective and that ICANN remains accountable to its community.

3. The ICANN Board followed its processes and its obligations under the Articles of Incorporation (“Articles”) and Bylaws by specifically choosing in November 2016 not to address the issues surrounding .WEB while an Accountability Mechanism regarding .WEB was pending

(which might also be the subject of other soon-to-be filed Accountability Mechanisms). That decision made perfect sense given the expectation that the results of those proceedings could have an impact on whether ICANN might need to make any decision. And because that Board's decision arises "out of the Board's exercise of its fiduciary duties," and the decision was "within the realm of reasonable business judgment," ICANN's Bylaws state that this decision must be viewed by the Panel with deference.<sup>1</sup>

4. Other than certain claims raised for the first time in Afilias' Reply, the Reply is mostly a retread of Afilias' Amended Request for IRP, which itself repackages the misplaced arguments Afilias has been making since 2016. In its Reply, Afilias continues to argue that ICANN's Articles and Bylaws required ICANN to automatically disqualify NDC in 2016 after ICANN received a copy of the DAA. But Afilias overlooks the fact that the violations of the Guidebook and Auction Rules that it alleges do not require the automatic disqualification of NDC's application or rejection of its winning bid for .WEB. Instead, the Guidebook and Auction Rules, together with ICANN's Bylaws, provide ICANN with substantial discretion to determine whether NDC committed a breach of the Guidebook or Auction Rules and, if so, the appropriate remedy or penalty, if any. Afilias' argument also overlooks the fact that, even prior to the Board's determination in 2016 not to make any decision regarding .WEB while an Accountability Mechanism was pending, ICANN would not have disqualified NDC's application upon its receipt of the DAA in August 2016 because the .WEB contention set was on hold at that time due to a pending Accountability Mechanism filed by the parent of another .WEB applicant. Consistent with its well-known practices, ICANN did not take action on .WEB while that Accountability Mechanism was pending.

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<sup>1</sup> Bylaws, Art. 4, § 4.3(i)(iii), Claimant's Ex. C-23 ("C-23").

5. Likewise, Afilias continues to argue that ICANN was required to do a regulatory-like review of Verisign's possible operation of .WEB and block it on the ground that, in Afilias' view, this would diminish competition. Put another way, Afilias claims that ICANN should have rejected NDC's winning bid for .WEB in 2016 and declared Afilias the winner because, in Afilias' opinion, the operation of .WEB by Afilias rather than Verisign is more likely to enhance competition. Not only has this presumption never been established – nor could it with any economic certainty – but there is literally nothing in the Guidebook's detailed procedures for selecting qualified generic top-level domain (“gTLD”) applicants that requires ICANN to perform this type of competition analysis. Indeed, ICANN's Bylaws specifically prohibit ICANN from exercising regulatory authority or acting like a regulator. Likewise, ICANN's Core Value regarding competition does not require it to award gTLDs based on a determination of which applicant will most effectively promote competition, as two current ICANN Board members attest in their witness statements.

6. Rather, ICANN complies with its Core Value regarding competition by coordinating and implementing policies that facilitate market-driven competition – which is precisely what ICANN did by introducing over 1,200 new gTLDs into the market under the Program. ICANN also complies with its Core Value regarding competition by deferring to competition regulators' evaluation of potential competition concerns associated with the Internet's domain name system (“DNS”) – which is precisely what ICANN did when it cooperated with, and deferred to, the DOJ's investigation of competition issues associated with Verisign's possible operation of .WEB. The DOJ's decision not to take action to block Verisign's potential operation of .WEB is dispositive, in the same way it would have been had the DOJ determined to take regulatory action to prevent that from happening. Before this IRP, Afilias recognized ICANN's proper role with respect to competition issues by noting that

“[n]either ICANN nor [ICANN’s Generic Names Supporting Organization] have the authority or expertise to act as anti-trust regulators.”<sup>2</sup> Nothing has changed since Afilias first endorsed this view, other than Afilias assembling arguments for this IRP, of course.

7. In addition, two of the world’s most prominent economists, Dr. Dennis Carlton and Dr. Kevin Murphy, have each submitted expert reports in this IRP – Dr. Carlton on behalf of ICANN and Dr. Murphy on behalf of Verisign – concluding that there is no economic evidence that Verisign’s operation of .WEB (rather than Afilias’) would result in anticompetitive effects. Moreover, ICANN’s Bylaws preclude it from singling out any particular party, including Verisign, for disparate treatment except where justified by substantial and reasonable cause. Afilias has made no showing that Verisign’s operation of .WEB would inhibit competition, much less a substantial showing.

8. Afilias’ contention that ICANN violated its Articles, Bylaws and internal procedures due to the manner in which ICANN investigated Afilias’ allegations against NDC and Verisign is similarly meritless. Afilias’ Amended Request for IRP made no such claim, and Afilias cannot properly assert this new claim in its Reply. Further, the record clearly shows that, after receiving complaints from certain .WEB applicants, including Afilias’ letter dated 8 August 2016, ICANN promptly gathered the information relevant to the issues raised by the applicants. Indeed, Afilias asserts that, by the end of August 2016, ICANN had acquired all of the facts and information necessary to address Afilias’ allegations, which is an admission that is fundamentally inconsistent with Afilias’ argument that ICANN’s investigation was inadequate.

9. In addition, many of Afilias’ claims are time-barred. Specifically, Afilias’ assertions that the ICANN Board and ICANN staff violated the Articles and Bylaws in 2016 are

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<sup>2</sup> 2006 Registry Operators Submission, at 8, R-21.

barred by Rule 4 of the Interim Supplementary Procedures, which states that a dispute may not be filed more than twelve months from the date of the action or inaction sought to be challenged. Afilias' reliance on the doctrine of equitable estoppel in an attempt to evade that clear bar is without merit.

10. Afilias is also seeking relief that is not available in these proceedings. While this Panel is certainly empowered to declare whether ICANN complied with its Articles and Bylaws – with the appropriate deference to the Board's reasonable business judgment – the Panel is not empowered to provide the affirmative relief Afilias seeks. Nothing in ICANN's Articles, Bylaws or the relevant IRP procedures permits the Panel to require ICANN to “disqualify NDC's application and bid and [] offer Afilias the rights to .WEB.”<sup>3</sup> Afilias' claims to the contrary are an irresponsible attempt to push the Panel beyond the marked boundaries of its authority. As Afilias well knows, a decision in excess of the Panel's authority would be invalid.

11. Finally, with respect to Afilias' claim regarding Rule 7 of the Interim Supplementary Procedures, Afilias relies on its prior submissions.<sup>4</sup> ICANN does the same.<sup>5</sup> There is simply no support for the claim that ICANN was either duped by, or conspired with, Verisign to create IRP procedures benefitting Verisign.

## **I. BACKGROUND.**

12. ICANN provided a summary of relevant facts at pages 4 through 16 of its Response to Afilias' Amended Request for IRP (“IRP Response”), dated 31 May 2019. This section provides additional facts that are relevant to the arguments made by Afilias in its Reply.<sup>6</sup>

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<sup>3</sup> Afilias' Reply Memorial ¶ 155.

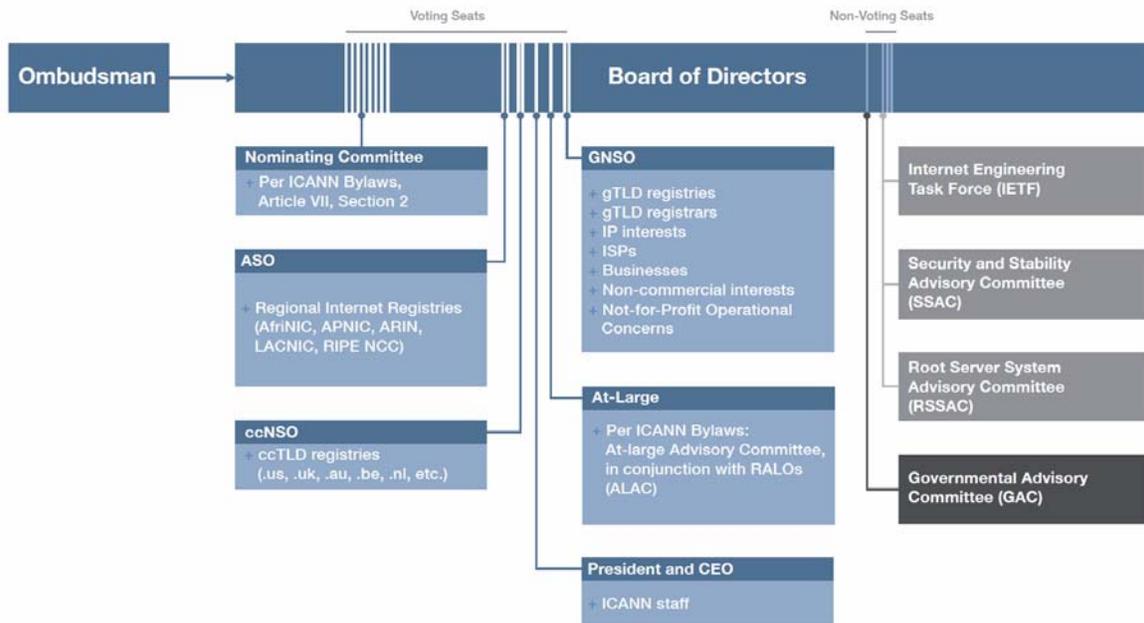
<sup>4</sup> *Id.*, ¶ 11.

<sup>5</sup> See ICANN's Response to Amended Request for IRP ¶¶ 77-82.

<sup>6</sup> Pursuant to Paragraph 201 of the Panel's Decision on Phase I dated 12 February 2020, ICANN submits herewith the witness statements of *Amici* NDC and Verisign in order to help ensure that the factual record in this IRP is complete. ICANN does so without endorsing those statements or agreeing with them in full.

## A. ICANN And Its Board.

13. ICANN is a complex organization with the critical Mission of ensuring “the stable and secure operation of the Internet’s unique identifier systems[.]”<sup>7</sup> ICANN accomplishes its Mission through a multistakeholder model in which individuals, non-commercial stakeholder groups, industry, and governments play important roles in its community-based, consensus-driven, policy-making approach. In fact, ICANN in many ways operates more as a community of participants than a traditional corporation, as shown by the following organization chart:



14. In addition to its international Board of Directors and nearly 400 staff members, the ICANN community includes three Supporting Organizations that develop and recommend policies, within their distinct areas of expertise, concerning the Internet’s technical management. They are the Address Supporting Organization,<sup>8</sup> the Country Code Names Supporting

<sup>7</sup> Bylaws, Art. 1, § 1.1(a), C-23.

<sup>8</sup> *Id.*, Art. 9.

Organization<sup>9</sup> and the Generic Names Supporting Organization (“GNSO”).<sup>10</sup>

15. The community also includes four Advisory Committees that serve as formal advisory bodies to the ICANN Board. They are made up of representatives from the Internet community to advise on particular issues or policy areas and include the Governmental Advisory Committee,<sup>11</sup> the Security and Stability Advisory Committee,<sup>12</sup> the Root Server System Advisory Committee<sup>13</sup> and the At-Large Advisory Committee.<sup>14</sup>

16. In addition, there is an ICANN Nominating Committee (“NomCom”). The NomCom is a committee made up of ICANN community members tasked with selecting, among other positions, some of ICANN’s Board members, as well as leaders of certain Supporting Organizations and Advisory Committees.<sup>15</sup>

17. The Ombudsman is another important part of the ICANN community.<sup>16</sup> “The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the ICANN community who believe that the ICANN staff, Board or an ICANN constituent body has treated them unfairly.”<sup>17</sup>

18. The final component of the ICANN community is the large, globally diverse group of Internet stakeholders – national governments, international organizations, the business sector, civil society, the technical community, and individual Internet users. These entities and individuals participate in ICANN processes by, among other things, attending ICANN’s public meetings, responding to calls for public comment, and initiating ICANN’s Accountability

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<sup>9</sup> Bylaws, Art. 10, C-23.

<sup>10</sup> *Id.*, Art. 11.

<sup>11</sup> *Id.*, Art. 12, § 12.2(a).

<sup>12</sup> *Id.*, Art. 12, § 12.2(b).

<sup>13</sup> *Id.*, Art. 12, § 12.2(c).

<sup>14</sup> *Id.*, Art. 12, § 12.2(d).

<sup>15</sup> *Id.*, Art. 8.

<sup>16</sup> *Id.*, Art. 5, § 5.1.

<sup>17</sup> *Id.*, Art. 5, § 5.2.

Mechanisms.

19. While the international community broadly participates in ICANN’s policy making process, ICANN’s Board of Directors has the sole responsibility and discretion for overseeing and enacting ICANN policies consistent with ICANN’s Mission, Articles and Bylaws.<sup>18</sup> The Board is composed of sixteen voting Directors and four non-voting Liaisons.<sup>19</sup> The ICANN Board is internationally represented, as required by ICANN’s Bylaws, which specify that at least one Director represent each of ICANN’s designated five geographic regions, and no region have more than five Directors on the Board.<sup>20</sup> Over time, the ICANN Board has included, among others, engineers, business executives, researchers, NGO leaders, consultants, directors of non-profit organizations, regulatory experts, technology experts, academics, and attorneys.<sup>21</sup> The Board thus has a wide array of expertise that allows it to consider, assess and balance the diverse interests and perspectives of the global Internet community on the many issues that come before it.

20. ICANN’s Board members have a unique understanding of ICANN’s Mission “and the potential impact of ICANN decisions on the global Internet community.”<sup>22</sup> They also have “personal familiarity” with the operation of gTLD registries and registrars, with Internet technical standards and protocols, with policy-development procedures, and with the broad range of business, individual, academic, and non-commercial users of the Internet.<sup>23</sup> And, significantly, Board members “have the duty to act in what they reasonably believe are the best interests of ICANN”<sup>24</sup> through its “bottom-up, consensus-driven, multistakeholder model.”

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<sup>18</sup> Bylaws, Art. 2, § 2.1, C-23.

<sup>19</sup> *Id.*, Art. 7, § 7.1.

<sup>20</sup> *Id.*, Art. 7, § 7.2(b), (c), § 7.5.

<sup>21</sup> See ICANN Board of Directors, R-23.

<sup>22</sup> Bylaws, Art. 7, § 7.3(b), C-23.

<sup>23</sup> *Id.*, Art. 7, § 7.3(d).

<sup>24</sup> *Id.*, Art. 7, § 7.7.

ICANN defines its unique model as follows:

- ***Bottom-up.*** Rather than the ICANN Board solely declaring what topics ICANN will address, members of sub-groups in ICANN can raise issues at the grassroots level. If the issue is worth addressing and falls within ICANN’s remit, it rises through various Advisory Committees and Supporting Organizations until eventually policy recommendations are passed to the Board for resolution.<sup>25</sup>
- ***Consensus-driven.*** Through its Bylaws, processes, and international meetings, ICANN provides the arena where all advocates and interested parties can discuss Internet policy issues. Almost anyone can join most of ICANN’s volunteer working groups, assuring broad representation with a diverse array of perspectives. Hearing all points of view, searching for mutual interests, and working toward consensus takes time, but the process resists capture by any single interest – an important consideration when administering a resource vital to the global Internet.<sup>26</sup>
- ***Multistakeholder model.*** ICANN’s inclusive approach treats the public sector, the private sector, and technical experts as peers.<sup>27</sup> The ICANN community includes registry operators, registrars, Internet service providers, intellectual property advocates, commercial and business interests, non-commercial and non-profit interests, representation from almost 180 governments,<sup>28</sup> and individual Internet users from around the world. All points of view receive consideration on their own merits. ICANN’s fundamental philosophy is that all users of the Internet deserve a say in how it is run.<sup>29</sup>

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<sup>25</sup> Welcome to ICANN!, R-24.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Governmental Advisory Committee, R-25.

<sup>29</sup> R-24.

## **B. The New gTLD Program.**

21. Nowhere was the ICANN Board's unique expertise and decision-making process more on display than in the creation of the Program. In 2005, ICANN's GNSO began a policy development process to consider the introduction of new gTLDs, based on the results of trial rounds conducted in 2000 and 2003. The GNSO's two-year long policy development process included detailed and lengthy consultations with the many constituencies of ICANN's global Internet community, including governments, civil society, business and intellectual property holders, and resulted in 19 specific policy recommendations for the Program.<sup>30</sup> In June 2008, the ICANN Board adopted the GNSO's policy recommendations for introducing more gTLDs and directed ICANN staff to develop an implementation plan for the Program, with significant input from community members, to be provided to the Board for evaluation and approval.<sup>31</sup>

22. Accordingly, after approval of the GNSO policy recommendations, ICANN undertook an open, inclusive, and transparent implementation process to address a variety of stakeholder issues, including things such as the protection of intellectual property and community interests, consumer protection, and DNS stability. This work involved numerous public consultations, review, and input to and public comment on draft versions of the Guidebook, with the first draft being published in October 2008.<sup>32</sup> This process continued and resulted in multiple versions of the Guidebook, until the ICANN Board adopted the operative, 338-page Guidebook four years later, in June 2012.<sup>33</sup>

23. The Guidebook provides a step-by-step procedure for new gTLD applicants.

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<sup>30</sup> GNSO Final Report on Introduction of New Generic Top-Level Domains (8 August 2007), C-20.

<sup>31</sup> ICANN Adopted Board Resolutions (26 June 2008), C-21.

<sup>32</sup> Guidebook (24 October 2008), *available at* <https://archive.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf>.

<sup>33</sup> Guidebook, Preamble, C-3; Witness Statement of Christine Willett (31 May 2019) (“Willett Stmt.”) ¶ 4.

Applicants that pass initial evaluations and successfully resolve any objections and/or contention set proceedings are presumed to proceed to contracting with ICANN, assuming no Accountability Mechanisms regarding the gTLD are pending.<sup>34</sup> The Guidebook, however, explicitly vests ICANN with significant discretion over the Program. For instance, because the Board has the “ultimate responsibility” for the Program, the Guidebook reserves to the Board “the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community.”<sup>35</sup> Likewise, the Guidebook states that ICANN’s “decision to review, consider and approve an application to establish one or more gTLDs and to delegate new gTLDs after such approval is entirely at ICANN’s discretion.”<sup>36</sup> The Guidebook also makes clear that material misrepresentations by applicants “may cause” ICANN to disqualify an application.<sup>37</sup> And other materials related to the Guidebook, such as the Auction Rules and New gTLD Auction Bidders Agreement (“Bidders Agreement”), state that ICANN’s interpretation of the rules “shall be final and binding”<sup>38</sup> and that ICANN has the discretion to select an appropriate remedy, if any, for violation of the rules.<sup>39</sup>

24. In 2012, ICANN received 1,930 new gTLD applications.<sup>40</sup> To date, approximately 1,235 new gTLDs have been introduced into the Internet.<sup>41</sup> While many applications sailed through the process with little or no dispute, hundreds of applications were the subject of objection proceedings and over 200 contention sets were created, in which multiple, qualified applicants sought the same or similar gTLDs.<sup>42</sup> In addition, more than 20

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<sup>34</sup> Guidebook, § 5.1, C-3; New Generic Top-Level Domains – Contracting & The Registry Agreement, R-26.

<sup>35</sup> Guidebook, § 5.1, C-3.

<sup>36</sup> *Id.*, § 6, Terms and Conditions 3.

<sup>37</sup> *Id.*, § 6, Terms and Conditions 1, *see also id.* § 1.2.7.

<sup>38</sup> Auction Rules for New gTLDs ¶ 72, C-4.

<sup>39</sup> ICANN gTLD Bidders Agreement § 2.10, C-5.

<sup>40</sup> ICANN New Generic Top-Level Domains – Program Statistics, C-212.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

new gTLDs have been the subject of an IRP and some have been the subject of litigation in federal and state courts.<sup>43</sup>

25. Not surprisingly, with so many disputes among applicants, ICANN has been bombarded with fierce lobbying from applicants and others throughout the life of the Program.<sup>44</sup> These efforts – many times requesting that an application be approved or denied, or claiming that certain applications are deficient – have included public comments, informal letters and emails sent to the ICANN Board and Staff, and ICANN Board members and Staff being cornered by interested parties at ICANN meetings.<sup>45</sup> Given the number and frequent stridency of these types of requests – as well as the Guidebook provisions that call for disputes and complaints to be resolved through ICANN’s Accountability Mechanisms – requests for ICANN to take action or not take action in response to a complaint regarding a particular application must be made through ICANN’s Accountability Mechanisms, rather than through private lobbying or letter-writing campaigns.<sup>46</sup>

26. In addition, from the outset of the Program, ICANN has followed a practice of placing applications and contention sets on hold when Accountability Mechanisms regarding them have been filed, although with respect to IRPs, claimants typically are required to submit a request for interim measures in order for the hold to be instituted.<sup>47</sup> Once on hold, ICANN generally refrains from taking any material action with respect to the application or contention

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<sup>43</sup> Independent Review Process Documents, R-27.

<sup>44</sup> Disspain Stmt. ¶ 7.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* ¶¶ 6-7; Guidebook §§ 5.1, 6.6, C-3.

<sup>47</sup> Disspain Stmt. ¶ 11; Determination of the Board Governance Committee (BGC) on Reconsideration Request 14-11 (29 April 2014), at p. 8, R-22 (ICANN staff’s decision to place an application on hold in light of the pending CEP and Reconsideration Requests was “in accordance [with] ICANN transparency and with stated procedures for application status updates and of placing applications on hold pending the final outcome of accountability mechanisms.”).

set while the Accountability Mechanism is pending.<sup>48</sup> ICANN does this, in part, because ICANN considers its Accountability Mechanisms – which include Reconsideration Requests, Ombudsman complaints, the 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), and the IRP – to be fundamental safeguards in ensuring its bottom-up, multistakeholder model remains effective.<sup>49</sup>

**C. Disputes Over .WEB And ICANN’s Responses.**

27. As detailed in ICANN’s IRP Response, and discussed further herein, .WEB was one of the new gTLDs that has been engulfed in fierce battles amongst its applicants, resulting in litigation, Accountability Mechanisms, and even a DOJ investigation,<sup>50</sup> and ICANN has complied with its Articles and Bylaws in dealing with these disputes.<sup>51</sup>

28. There have been sustained disputes over .WEB – both before and after the .WEB auction – which have caused the .WEB applications to be “on hold” for long periods of time. In 2013, one of the .WEB applicants filed a “string confusion” objection against a .WEBS application arguing that .WEB and .WEBS were confusingly similar (and thus should be placed into the same contention set). This caused ICANN to place the .WEB applications on hold for the first time. The objection was ultimately upheld by an independent ICDR panelist, resulting in the .WEBS and .WEB applications being placed in the same contention set, which thereby became the “.WEB Contention Set.”<sup>52</sup>

29. Shortly thereafter, in June 2014, a .WEBS applicant filed an IRP against ICANN

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<sup>48</sup> Disspain Stmt. ¶ 11.

<sup>49</sup> *Id.* With respect to certain IRPs, however, claimants have been required to submit a request for interim measures in order for the hold to be instituted formally.

<sup>50</sup> ICANN’s Response to Amended Request for IRP ¶¶ 34-54.

<sup>51</sup> *Id.* ¶¶ 56-72.

<sup>52</sup> *Id.* ¶ 31.

challenging ICANN’s acceptance of the ICDR’s determination on the string confusion objection. This led to the .WEB Contention Set being placed back on hold. In October 2015, ICANN prevailed in that IRP, and the ICANN Board resolved that ICANN staff should “move forward with the processing of the [.WEB Contention Set].”<sup>53</sup>

30. ICANN staff followed the Board’s directive by removing the hold on the .WEB Contention Set and scheduling the .WEB auction for 27 July 2016.<sup>54</sup> Pursuant to the Guidebook, an ICANN auction is a “mechanism of last resort” that takes place only if all members of the contention set do not agree to a private resolution, such as through a private auction in which the losing applicants would often split the proceeds from the auction.<sup>55</sup> As far as ICANN is aware, the members of the .WEB Contention Set discussed a possible private resolution, but NDC ultimately would not agree to private resolution,<sup>56</sup> meaning an ICANN auction was required by the Guidebook.<sup>57</sup> It now appears that during the “Blackout Period,” which is a seven-day period during which applicants are forbidden from communicating with one another immediately prior to an ICANN auction,<sup>58</sup> Afiliat again contacted NDC to pressure NDC into agreeing to a private resolution of the .WEB Contention Set.<sup>59</sup> But NDC did not respond and continued to insist on an ICANN auction.

31. Then, as detailed in ICANN’s IRP Response, shortly before the auction was set to commence, another .WEB applicant, Ruby Glen, LLC (“Ruby Glen”), took a number of actions in an attempt to halt the auction, including litigation in federal court in which it sought a

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<sup>53</sup> ICANN’s Response to Amended Request for IRP ¶ 32.

<sup>54</sup> Willett Stmt. ¶ 13.

<sup>55</sup> Guidebook, § 4.3, C-3.

<sup>56</sup> Witness Statement of Jose Ignacio Rasco III (“Rasco Stmt.”) ¶¶ 63-66.

<sup>57</sup> Guidebook, § 4.3, C-3.

<sup>58</sup> C-4, § 68; C-5, § 2.6; Supplement to New gTLD Auctions Bidder Agreement, § 2, C-6.

<sup>59</sup> Letter from R. Johnston to E. Enson (23 Aug. 2016), Attachment E, R-18; Rasco Stmt. ¶¶ 67-74.

temporary restraining order to block the auction.<sup>60</sup> Ruby Glen’s claims were rejected by the court, and the auction went forward.

32. NDC prevailed at the auction, which was held on 27-28 July 2016.<sup>61</sup> On 1 August 2016, Verisign announced that it had “entered into an agreement with [NDC] wherein [Verisign] provided funds for [NDC’s] bid” and that, if NDC entered into a Registry Agreement with ICANN to operate .WEB, NDC “will then seek to assign[] the Registry Agreement to VeriSign upon consent from ICANN.”<sup>62</sup> Despite Afiliás’ insinuations to the contrary, this was the first time that ICANN learned that Verisign had an agreement with NDC regarding .WEB.<sup>63</sup>

33. A day later, on 2 August 2016, Ruby Glen’s parent organization, Donuts, Inc. (“Donuts”), invoked ICANN’s CEP regarding the .WEB auction and Verisign’s announcement.<sup>64</sup> Donuts’ invocation of the CEP caused ICANN staff to again place the .WEB Contention Set on hold.

34. On 8 August 2016, Afiliás’ General Counsel wrote ICANN a letter demanding that ICANN “deny NDC’s application” based on three specific claims.<sup>65</sup> First, Afiliás stated that the NDC/Verisign agreement constituted a transfer of NDC’s rights and obligations in connection with its application in violation of the Guidebook. Second, Afiliás stated that NDC violated various disclosure requirements of the Guidebook by failing to inform ICANN of the

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<sup>60</sup> 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. Ruby Glen made the same complaints to the ICANN Ombudsman. Both ICANN and the Ombudsman investigated and concluded that there had been no change in ownership or control that had to be reported to ICANN. Nonetheless, shortly before the auction, Ruby Glen filed a Reconsideration Request seeking to halt the auction. It also filed a complaint in federal court and an application for a temporary restraining order (TRO). The federal court denied the TRO, its decision was upheld on appeal, and the action was subsequently dismissed. ICANN’s Response to Amended Request for IRP ¶¶ 35-39.

<sup>61</sup> ICANN New gTLD Contention Set Resolution Auction: Final Results for WEB / WEBS, RE-10.

<sup>62</sup> Verisign Statement Regarding .Web Auction Results (1 August 2016), C-46.

<sup>63</sup> Disspain Stmt. ¶ 8; ICANN-WEB\_000844, R-19; Witness Statement of Paul Livesay (“Livesay Stmt.”) ¶ 38.

<sup>64</sup> Cooperative Engagement and Independent Review Processes Status Update – 26 September 2016, R-42.

<sup>65</sup> Letter from S. Hemphill (General Counsel, Afiliás) to A. Atallah (President, ICANN’s Global Domains Division) (8 August 2016), at p. 2, C-49.

agreement. Third, Afilias contended that the agreement “likely constitutes a change of control of the applicant.”<sup>66</sup> Nevertheless, Afilias did not initiate a Reconsideration Request, a CEP or an IRP at that time. Rather, Afilias waited more than two years to assert these same alleged Guidebook violations in this IRP, initiated in November 2018. And it was not because Afilias was unaware of the Accountability Mechanisms available. To the contrary, Afilias’ August 2016 letter stated that it planned on “filing a complaint with the ICANN Ombudsman with regard to this matter,”<sup>67</sup> demonstrating that Afilias was certainly aware of the redress it could seek through ICANN’s Accountability Mechanisms.<sup>68</sup> Indeed, Afilias’ parent organization, Afilias Limited, filed a Reconsideration Request in 2014<sup>69</sup> and initiated CEP and IRP proceedings in 2015 regarding one of its affiliates’ application for .RADIO.<sup>70</sup>

35. After the filing of Donuts’ CEP and ICANN’s receipt of Afilias’ August 2016 letter, ICANN, through its counsel, contacted Verisign to request a copy of the DAA and other information relevant to the issues surrounding .WEB.<sup>71</sup> In response, Verisign sent ICANN a letter on 23 August 2016 responding to the allegations and asserting that Afilias should be disqualified from the .WEB Contention Set for violating the auction Blackout Period.<sup>72</sup> As attachments to its letter, Verisign provided a copy of the DAA, a related 26 July 2016 letter agreement between Verisign and NDC, documents supporting its contention that Afilias violated the auction Blackout Period, and documents relating to a private .WEB auction proposed by one

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> ICANN is uncertain of when Afilias initiated this Ombudsman complaint, but, on 19 September 2016, the Ombudsman informed Afilias that he declined to initiate an investigation because ICANN Accountability Mechanisms over the same topics had already been filed. C-101.

<sup>69</sup> <https://www.icann.org/en/system/files/files/request-afili-as-et-al-25sep14-en.pdf>.

<sup>70</sup> Afilias Limited, BRS Media, Inc. & Tin Dale, LLC v. ICANN (.RADIO), R-28.

<sup>71</sup> Transcript of 11 May 2020 Hearing at 20:9-15, R-29.

<sup>72</sup> R-18.

of the .WEB applicants.<sup>73</sup>

36. Still refusing to initiate its own CEP or IRP, Afilias sent ICANN another letter, dated 9 September 2016, again stating that “ICANN must disqualify NDC’s application for .WEB and proceed to contract for .WEB with Afilias” for the same reasons it raised in Afilias’ August 2016 letter.<sup>74</sup> In the September 2016 letter, on which Afilias’ outside counsel was copied, Afilias also “reserve[d] all of its rights to pursue any and all rights or remedies available to it in any forum against ICANN, NDC or VeriSign in connection with the delegation of the .WEB gTLD.”<sup>75</sup>

37. On 16 September 2016, ICANN issued a set of questions to Afilias, Ruby Glen, NDC, and Verisign, seeking input regarding the .WEB auction, the NDC/Verisign agreement, and the alleged violations of the Guidebook.<sup>76</sup> This questionnaire was designed to assist ICANN in evaluating what action, if any, should be taken in response to the claims asserted regarding .WEB.

38. On 30 September 2016, ICANN’s President of the Global Domains Division, Akram Atallah, responded to Afilias’ letters. Mr. Atallah explained that the .WEB Contention Set was placed on hold “to reflect a pending ICANN Accountability Mechanism initiated by another member in the contention set.”<sup>77</sup> Mr. Atallah thereby informed Afilias that its letters – the first of which had preceded Donuts’ CEP – did *not* have the effect of causing the .WEB Contention Set to be placed on hold. Mr. Atallah also informed Afilias that it would be notified if changes were made to the status of the .WEB Contention Set.<sup>78</sup>

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<sup>73</sup> R-18.

<sup>74</sup> Letter from S. Hemphill (General Counsel, Afilias) to A. Atallah (President, ICANN’s Global Domains Division) (9 September 2016), C-103.

<sup>75</sup> *Id.*

<sup>76</sup> Letter from C. Willett (Vice President, ICANN’s gTLD Operations) to J. Kane (Vice President, Afilias’ Corporate Services) (16 September 2016), C-50.

<sup>77</sup> Letter from A. Atallah to S. Hemphill (30 September 2016), C-61.

<sup>78</sup> *Id.*

39. Afilias responded to ICANN’s questionnaire on 7 October 2016, reiterating its core objections to the purported NDC/Verisign agreement and 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.”<sup>79</sup> These are, again, the same claims Afilias is now belatedly pressing in this IRP. Importantly, Afilias’ response to the questionnaire also noted Mr. Atallah’s statement in his letter to Afilias that .WEB was placed on hold because of Donuts’ CEP.<sup>80</sup> Afilias thus recognized that its letters did not have the effect of causing a hold on the .WEB Contention Set.

40. In a November 2016 Board workshop session, ICANN Board members and ICANN’s in-house counsel discussed the issue of .WEB. Prior to this discussion, non-conflicted Board members received Board briefing materials directly from ICANN’s counsel that set forth relevant information about complaints received and formal disputes regarding .WEB, the legal and factual contentions asserted by those complaining, and a set of options the Board could consider. This session was attended by, among others, ICANN’s General Counsel (John Jeffrey) and Deputy General Counsel (Amy Stathos), who provided additional advice and answered questions posed by the Board.<sup>81</sup>

41. At this Board session, the Board chose to not take any action at that time regarding .WEB because an Accountability Mechanism was pending regarding .WEB.<sup>82</sup> Given Donuts’ pending CEP (along with knowledge of the pending Ruby Glen lawsuit), the Board chose to see if the results of such proceedings might require the Board to take any action related

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<sup>79</sup> Letter from J. Kane (Vice President, Afilias’ Corporate Services) to C. Willett (Vice President, ICANN’s gTLD Operations) (7 October 2016), C-51. NDC and Verisign also responded to ICANN’s questions in confidential responses.

<sup>80</sup> *Id.*

<sup>81</sup> Disspain Stmt. ¶ 10.

<sup>82</sup> *Id.* ¶ 11.

to the .WEB Contention Set.<sup>83</sup> ICANN’s Accountability Mechanisms are fundamental safeguards in ensuring that ICANN’s model remains effective, and it did not seem prudent for the Board to interfere with or preempt the issues that were the subject of an Accountability Mechanism regarding .WEB that was pending at that time (which might also be the subject of other soon-to-be filed Accountability Mechanisms).<sup>84</sup>

42. Then, in January 2017, while the Donuts CEP was still pending, the Antitrust Division of the United States Department of Justice (“DOJ”) issued a civil investigative demand (“CID”) to ICANN and Verisign (and likely others involved in the .WEB auction), 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.”<sup>85</sup> The DOJ requested that ICANN take no action on .WEB during the pendency of the investigation, which ICANN agreed was appropriate given DOJ’s expertise in evaluating potential competition issues implicated by Verisign’s possible operation of .WEB.<sup>86</sup> Between February and June 2017, ICANN made document productions and provided information to the DOJ in connection with its investigation, and ICANN is informed and believes that Verisign produced documents to, and met with representatives of, the DOJ.<sup>87</sup>

43. A year later, in January 2018, the DOJ formally closed its investigation without taking any action to block Verisign’s pursuit of .WEB.<sup>88</sup>

44. On 30 January 2018, the Donuts CEP ended with no resolution, and ICANN gave Donuts an extension of time to file an IRP. After Donuts failed to pursue an IRP within the

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Response to Afilias’ DIDP Request (24 March 2018), at p. 11, R-30.

<sup>86</sup> Disspain Stmt. ¶ 11.

<sup>87</sup> R-30, at p. 11.

<sup>88</sup> Excerpts from Verisign 10-K (for the fiscal year ended 31 December 2017), RE-13.

allotted time, NDC's Jose Rasco contacted ICANN demanding that ICANN send NDC a Registry Agreement for .WEB because the DOJ investigation had closed and no Accountability Mechanisms were pending at that time.<sup>89</sup>

45. Despite NDC's demands, the .WEB Contention Set and NDC's application remained on hold. Afilias had submitted a request for documents regarding the .WEB Contention Set to ICANN under ICANN's Documentary Information Disclosure Policy ("DIDP"), and the expectation was that Afilias would file a Reconsideration Request after ICANN responded to the DIDP request.<sup>90</sup>

46. While Afilias' DIDP request was pending, NDC's counsel wrote ICANN on 28 February 2018, complaining that its prevailing application for .WEB remained on hold due to the "pendency of baseless proceedings initiated by third parties."<sup>91</sup> NDC's counsel also demanded that ICANN deliver a Registry Agreement to NDC by 7 March 2018 and reserved "[a]ll rights and remedies."<sup>92</sup>

47. On 16 April 2018, Afilias sent ICANN's Board a letter warning that Afilias "intends to initiate a CEP and a subsequent IRP against ICANN" if ICANN takes the .WEB Contention Set off hold or otherwise "proceeds toward delegation of .WEB to NDC."<sup>93</sup>

48. Consistent with its long-standing procedure, ICANN continued its work by responding to properly invoked Accountability Mechanisms, rather than the threats and demands in informal letters. Then, on 23 April 2018, after ICANN had responded to Afilias' DIDP request, Afilias filed a Reconsideration Request regarding ICANN's DIDP response, as

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<sup>89</sup> Letter from S. Marenberg to ICANN (28 February 2018), R-20.

<sup>90</sup> Letter from A. Ali to ICANN (23 February 2018), C-78.

<sup>91</sup> R-20, at 1.

<sup>92</sup> *Id.* at 1, 2.

<sup>93</sup> Letter from A. Ali to ICANN (16 April 2018), at 5, C-113. Afilias' intentions were no secret. On April 24, 2018, the online magazine Domain Name Wire ran a story entitled "Afilias plans to file IRP to halt .Web." C-124.

expected.<sup>94</sup> On the same day, Afilias filed another DIDP request with ICANN.<sup>95</sup> Consistent with the DIDP and ICANN’s Bylaws, respectively, ICANN responded to Afilias’ second DIDP request and the Board considered and evaluated Afilias’ Request for Reconsideration.<sup>96</sup> On 5 June 2018, the Board denied Afilias’ Reconsideration Request.<sup>97</sup>

49. With the Afilias’ Reconsideration Request resolved, and no other Accountability Mechanisms pending, ICANN staff followed the procedures called for in the Guidebook and took the .WEB Contention Set off hold.<sup>98</sup> At the same time, consistent with ICANN established practice and Mr. Atallah’s letter to Afilias, ICANN staff provided all of the members of the .WEB Contention Set, including Afilias, notice of the change of status.<sup>99</sup> ICANN took these steps with the understanding that Afilias was likely to make good on its threats to “initiate a CEP and a subsequent IRP against ICANN.”<sup>100</sup> On 13 June 2018, ICANN staff sent NDC a form Registry Agreement, in accordance with the Guidebook.<sup>101</sup>

50. As expected, on 18 June 2018, Afilias initiated a CEP as it had threatened to do, asserting the very same claims it had raised in its 2016 letters to ICANN.<sup>102</sup> As a result of Afilias’ CEP, ICANN staff once again placed the .WEB Contention Set on hold.

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<sup>94</sup> Afilias’ Reconsideration Request (23 April 2018), R-31.

<sup>95</sup> Letter from A. Ali to ICANN (23 April 2018), C-79.

<sup>96</sup> Determination of the BAMC – Reconsideration Request 18-7 (5 June 2018), R-32.

<sup>97</sup> *Id.*

<sup>98</sup> Disspain Stmt. ¶ 13.; Guidebook, § 4.1.4 (“An applicant that prevails in a contention resolution procedure, either community priority evaluation or auction, may proceed to the next stage.”); *see also id.* at §§ 1.1.2.10, 4.4, 5.1, C-3; New Generic Top-Level Domains – Update on Application Status and Contention Sets, R-33 (once on-hold status is cleared, application can proceed to contracting).

<sup>99</sup> C-61; Disspain Stmt. ¶ 13; R-22, at p. 7 (“Application status updates are part of the New gTLD Program process ‘to provide a more complete picture of the current status of applications...[a]s applications complete evaluation and proceed to the next phases of the New gTLD Program.’”). This notice also is posted on ICANN’s new gTLD Program web page, which is available to the general public.

<sup>100</sup> C-113 at 5.

<sup>101</sup> Guidebook, § 1.1.2.11 (“Applicants successfully completing all the relevant stages outlined in this subsection 1.1.2 are required to carry out a series of concluding steps” that “include execution of the registry agreement with ICANN.”), § 4.4 (“An applicant that has been declared the winner of a contention resolution process will proceed by entering into the contract execution step.”); *see also* §§ 1.1.2.10, 4.1.4, 5.1, C-3.

<sup>102</sup> R-42.

**D. ICANN's Arms-Length Relationship With Verisign And Afilias.**

51. In its Reply, Afilias claims that ICANN is somehow beholden to Verisign and, thus, was colluding with Verisign to ensure that Verisign obtains the rights to operate .WEB. In reality, however, as the administrator of the DNS, ICANN has an arms-length relationship with Verisign that is no different from ICANN's relationship with other registry operators, including Afilias.

52. In fact, ICANN and Verisign have, at times, been at odds with, and formally adverse to, one another. For example, in the late-1990s, Verisign (as its corporate predecessor, Network Solutions, Inc.) was the exclusive provider of domain name registration services and ICANN's very creation led to an erosion of its market power.<sup>103</sup> In 2002, ICANN implemented the government requirement that Verisign relinquish control of .ORG.<sup>104</sup> In 2004, Verisign sued ICANN alleging that ICANN had overstepped its contractual authority in blocking Verisign from offering certain registry services.<sup>105</sup> Eventually, ICANN countersued Verisign and the litigation persisted for years.<sup>106</sup> In 2013, Verisign and ICANN had a dispute over ICANN's right to audit Verisign's operations of the .NET gTLD.<sup>107</sup>

53. While Verisign is certainly an important registry operator, all registry operators are important to ICANN, including Afilias. For example, in a separate IRP that is currently pending, ICANN is defending the process that led to the awarding of .HOTEL to an Afilias-related company.<sup>108</sup> ICANN's position in that IRP is the same as in this one – ICANN does not have an agenda by which it attempts to determine which gTLD applicants should win or lose.

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<sup>103</sup> Witness Statement of J. Beckwith Burr ("Burr Stmt."), at Ex. A.

<sup>104</sup> ICANN Board Selects New .org Registry Operator, R-34.

<sup>105</sup> *Verisign, Inc. v. ICANN*, Complaint, R-35.

<sup>106</sup> *Verisign, Inc. v. ICANN*, Cross-Complaint, R-36.

<sup>107</sup> Letter from P. Kane to ICANN (8 January 2013), R-37.

<sup>108</sup> See generally, *Fegistry, LLC, et al. v. ICANN*, ICDR Case No. 01-19-0004-0808, ICANN's Response to Request for Independent Review Process, R-38.

Instead, ICANN follows the policies and procedures set forth in the Guidebook and its Articles and Bylaws in administering the application process and awarding the rights to operate new gTLDs as required by that process.

## II. THE CORRECT STANDARD OF REVIEW

54. The standard of review governing this IRP should not be controversial. It is set forth expressly in Article 4, section 4.3(i) of the Bylaws and Rule 11 of the Interim Supplementary Procedures, which are substantially identical. Section 4.3(i) states:

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

- (i) 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 the Articles of Incorporation or Bylaws.
- (ii) All Disputes shall be decided in compliance with the Articles of Incorporation and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.
- (iii) 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>109</sup>

55. Article 4, section 4.3(i) and Rule 11 establish a general *de novo* standard of review and require the Panel to make findings of fact to determine whether any Covered Action violated the Articles or Bylaws. Article 4, section 4.3(i)(iii) also creates a carve-out from that general standard for a particular subset of Covered Actions. “Covered Actions’ are defined as any actions or failure to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute.”<sup>110</sup> Article 4, section 4.3(i)(iii) states that

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<sup>109</sup> Subsections (iv) and (v) of Section 4.3(i) concern IRP’s involving claims that ICANN has not enforced its contractual rights with respect to the IANA Naming Function Contract, and therefore are not relevant here.

<sup>110</sup> Bylaws, Art. 4, § 4.3(b)(ii), C-23.

for claims arising from the Board’s exercise of its fiduciary duties, the IRP Panel reviews the Board’s conduct only to determine whether it was “within the realm of reasonable business judgment.”<sup>111</sup> Thus, the Panel applies a *de novo* standard in making findings of fact and reviewing the actions or inactions of individual Directors, Officers or Staff members. However, the Panel reviews actions or inactions of the Board only to determine whether they were within the realm of reasonable business judgment.

56. Afilias seeks to discount or ignore the deference to the Board’s business judgment mandated by Article 4, section 4.3(i)(iii) on two grounds. First, Afilias asserts that prior IRP decisions have rejected any such deference.<sup>112</sup> Afilias relies primarily on the IRP Panel’s decision in *ICM v. ICANN* dated 19 February 2010, which declined to apply the business judgment rule after finding that the “Articles and Bylaws . . . do not specify or imply that the International Review Process [*sic*] provided for shall (or shall not) accord deference to the decisions of the ICANN Board.”<sup>113</sup> That finding has absolutely no relevance here because it was made under a previous version of ICANN’s Bylaws, which have been amended more than a dozen times in the interim. The version of ICANN’s Bylaws that was operative at the time of the *ICM* decision did not have any provision analogous to the current Article 4.3(i)(iii), which expressly mandates that the Panel defer to the Board’s reasonable business judgment.

57. Afilias also relies on the decision in *Dot Sport Ltd. v. ICANN*<sup>114</sup> and *Booking.com v. ICANN*.<sup>115</sup> Neither decision assists Afilias. Both decisions quote the *ICM* Panel’s finding under the earlier, superseded Bylaws; and neither case purports to examine whether that finding

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<sup>111</sup> Bylaws, Art. 4, § 4.3(i)(iii).

<sup>112</sup> Afilias’ Reply Memorial ¶ 6 & n.16.

<sup>113</sup> *ICM Registry, LLC v. ICANN*, ICDR Case No. 50-177-T 000224 08, Final Declaration (19 February 2010) ¶ 136, CA-001.

<sup>114</sup> *Dot Sport Ltd. v. ICANN*, ICDR Case No. 01-15-0002-9483, Final Declaration (31 January 2017), CA-018.

<sup>115</sup> *Booking.com B.V. v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration (3 March 2015), CA-011.

remains valid under the current Bylaws (as both were decided before the more recent amendments). Moreover, the *Booking.com* Panel went on to state that “we also agree with ICANN to the extent that, in determining the consistency of Board action with the Articles, Bylaws and Guidebook, an ‘IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.’ In other words, it is not for the Panel to opine on whether the Board could have acted differently than it did; rather, our role is to assess whether the Board’s action was consistent with applicable rules found in the Articles, Bylaws and Guidebook.”<sup>116</sup> Similarly, the *Dot Sport* Panel ultimately recognized that it was required to apply a deferential standard of review to the Board’s actions or inactions: “The IRP Panel must apply a defined standard of review to the IRP request, focusing on: a. did the Board act without conflict of interest in taking its decision? b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the community?”<sup>117</sup>

58. Afilias’ second argument for discounting the deference owed to the Board’s business judgment is that, according to Afilias, its claim does not involve the Board’s exercise of its fiduciary duties.<sup>118</sup> Afilias is wrong. As explained in ICANN’s IRP Response and set forth in more detail in the witness statement of Board member Chris Disspain, the ICANN Board was aware of Afilias’ complaints and decided not to make any decision regarding .WEB until analyzing whether the issues and results of the then-pending Accountability Mechanism about .WEB required the Board to do so.<sup>119</sup> It cannot reasonably be disputed that the Board’s decision

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<sup>116</sup> *Booking.com*, Final Declaration ¶ 115, CA-011.

<sup>117</sup> *Dot Sport Ltd.*, Final Declaration ¶ 7.17, CA-018.

<sup>118</sup> Afilias’ Reply Memorial ¶ 16.

<sup>119</sup> See, e.g., ICANN’s Response to Amended IRP Request ¶ 66 (“It was entirely reasonable for the ICANN Board to wait to analyze the issues surrounding .WEB until the DOJ investigation concluded and each of the related Accountability mechanisms was resolved, including this IRP, and then to undertake that analysis on the basis of the results of those proceedings.”).

not to address Afiliias' complaints asserted through letters was an exercise of its fiduciary duties. The Board has a fiduciary duty with respect to all actions that it takes as a Board on behalf of ICANN. "It is without dispute that in California, corporate directors owe a fiduciary duty to the corporation and its shareholders and now as set out by statute, must serve 'in good faith, in a manner such director believes to be in the interests of the corporation and its shareholders.'" *Berg & Berg Enters., LLC v. Boyle*, 178 Cal. App. 4th 1020, 1037 (2009) (citation omitted).<sup>120</sup>

59. Although the Bylaws and Interim Supplementary Procedures do not define "reasonable business judgment," that term has a well-established legal meaning. Every United States jurisdiction, including California, recognizes the "business judgment rule," which provides a "judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions." *Lee v. Interinsurance Exch.*, 50 Cal. App. 4th 694, 711 (1996) (quoting *Barnes v. State Farm Mut. Auto. Ins. Co.*, 16 Cal. App. 4th 365, 378 (1993)).<sup>121</sup> Article 4.3(i)(iii) is expressed in terms strikingly similar to those used by the California Supreme Court to describe the business judgment rule.<sup>122</sup>

60. The drafting history of the Bylaws confirms that they were intended to enshrine the common law business judgment rule. After the *ICM* Panel determined that the business judgment rule did not apply because the Bylaws did not specify a policy of deference to the Board, ICANN's Bylaws were amended to address this exact issue.<sup>123</sup> On 11 April 2013,

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<sup>120</sup> RLA-5, *See also e.g.*, Cal. Corp. Code § 5231 ("A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner that director believes to be in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances."), RLA-22.

<sup>121</sup> RLA-15, The California Supreme Court has noted "that rule of judicial deference to corporate decision making 'exists in one form or another in every American jurisdiction.'" *Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n*, 21 Cal. 4th 249, 257 (1999) (quoting *Frances T. v. Vill. Green Owners Ass'n*, 42 Cal. 3d 490, 507 n.14 (1986)), RLA-13.

<sup>122</sup> *Compare* Bylaws, Art. 4, § 4.3(i)(iii), C-23 (stating that the Panel "shall not replace the Board's reasonable judgment with its own") *with, e.g., Lamden*, 21 Cal. 4th at 257 ("a court will not substitute its judgment for that of the corporation's board of directors."), RLA-13.

<sup>123</sup> *ICM Registry, LLC*, Final Declaration, ¶ 136, CA-001.

ICANN adopted new Bylaws, following community input and a public comment phase, to mandate a limited standard of review of Board decisions:

The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. did the Board act without conflict of interest in taking its decision?
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them; and
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?<sup>124</sup>

61. The standard of review set out in the April 2013 Bylaws is an unmistakable restatement of the common law business judgment rule. *See, e.g. Everest Inv'rs & v. McNeil Partners*, 114 Cal. App. 4th 411, 430 (2003) (quoting *Lee*, 50 Cal. App. 4th at 715) (stating that deference to a Board's business judgment does not apply "in circumstances which inherently raise an inference of conflict of interest."<sup>125</sup> The business judgment rule does not shield actions taken without reasonable inquiry, with improper motives, or as a result of a conflict of interest."). The standard of review added in the April 2013 amendment persisted through several subsequent amendments to the Bylaws until it was abbreviated in the current iteration by simply using the term of art—"reasonable business judgment"—rather than setting forth the legal meaning of that term.

62. In sum, the Panel must apply the standard of review set out in Article 4, section 4.3(i) of the Bylaws and Rule 11 of the Interim Supplementary Procedures. Under those provisions, the Panel applies a *de novo* standard in making findings of fact and determining

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<sup>124</sup> See ICANN's Bylaws (as amended 11 April 2013), Art. 4, § 3(4), R-39.

<sup>125</sup> RLA-9.

whether actions or inactions by ICANN’s officers or staff violated the Bylaws or Articles. The Panel must, however, apply a more limited review to actions or inactions of ICANN’s Board, which can be disturbed only if they are outside the realm of reasonable business judgment.

## ARGUMENT

### I. AFILIAS’ CLAIMS REGARDING ACTION OR INACTION IN LATE 2016 ARE TIME-BARRED.

63. In its Reply, Afilias asserts claims that ICANN’s staff violated the Bylaws and Articles in the course of its investigation of Afilias’ allegations *in August through October of 2016*, and that ICANN’s Board violated the Bylaws by failing to disqualify NDC *in August 2016* and instead opting in November 2016 to await the conclusion of Accountability Mechanisms before making a determination, if any was needed, on the merits of Afilias’ allegations.<sup>126</sup> Further, in its Amended IRP Request, Afilias asserts that ICANN violated its Bylaws by not investigating pre-auction rumors that were purportedly circulating *in July 2016* about Verisign’s relationship with NDC, although it is unclear whether Afilias continues to pursue this claim because it is not referenced anywhere in Afilias’ Reply.

64. Rule 4 of the Interim Supplementary Procedures states:

*The INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of DISPUTE. A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.*<sup>127</sup>

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<sup>126</sup> Afilias’ Reply Memorial ¶ 82 (“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.”); *id.* ¶ 86 (“ICANN violated its Articles and Bylaws when it failed to disqualify NDC’s bid and application upon receiving the DAA in August 2016.”); *id.* ¶¶ 102-118 (asserting complaints regarding ICANN’s investigation in August and September 2016).

<sup>127</sup> Interim Supplementary Procedures, Rule 4. The Bylaws that were in effect until October 2016 allowed IRPs challenging only actions of the Board—not ICANN’s staff, officers or individual directors—and provided that an

65. Afilias does not dispute that its IRP filing came more than two years after it sent letters complaining about the auction and NDC's relationship with Verisign. Instead, Afilias asserts that the time-bar does not expire until 120 days after Afilias became aware of the material effect of the action or inaction giving rise to the dispute. As shown below, Afilias unquestionably was aware of the actions and inactions in 2016 that it now seeks to challenge, along with the material effect of those actions. In any event, Afilias ignores the final clause of Rule 4, which states that a dispute may not be filed more than 12 months from the date of the challenged action or inaction, regardless of when the Claimant became aware of the material effect of that action or inaction. Afilias filed this IRP in November 2018, more than 24 months after the actions or inactions that it contends violated the Bylaws in July through November of 2016.

66. Even if it mattered (and it does not), Afilias undoubtedly was aware of the actions or inactions in 2016 that it now seeks to challenge and the material effect of those actions or inactions. Indeed, Afilias wrote letters to ICANN in August and September 2016 stating claims substantially identical to claims it asserts in this proceeding.<sup>128</sup> For example, in its 9 September 2016 letter, Afilias argued that ICANN was required to disqualify NDC immediately and execute a Registry Agreement with Afilias, and that ICANN would be in violation of its Bylaws by not doing so:

ICANN's Board and officers are obligated under the Articles of Incorporation, Bylaws and the Guidebook (as well as international law and California law) to disqualify

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IRP must be filed within 30 days of the posting of the Board minutes relating to the challenged ICANN decision or action. Under those earlier provisions, Afilias' claims against the staff would be disallowed and its claims against the Board would be time-barred. Afilias knew from the publicly posted Board minutes and many other sources that ICANN did not disqualify NDC in late 2016.

<sup>128</sup> C-49; Letter from S. Hemphill (Afilias) to A. Atallah (ICANN) (9 September 2016), C-103.

NDC's bid immediately and proceed with the contracting of a registry agreement with Afilius.<sup>129</sup>

67. Afilius' 9 September 2016 letter went on to set out the rationale for its claim that ICANN must disqualify NDC, employing the same rationale that Afilius relies on here. In September 2016, Afilius asserted that "NDC violated Paragraph 10 of the Terms and Conditions in Module 6 of the New gTLD Guidebook (the "Guidebook"), which expressly prohibits any applicant for a gTLD to 'resell, assign or transfer any of applicant's rights or obligations in connection with the application.'"<sup>130</sup> Afilius makes this same argument in Section III.A.1 of its Reply.

68. Afilius also asserted in its September 2016 letter that NDC violated the Guidebook provisions that require it to notify ICANN of material changes to its application or financial position: "NDC violated Section 1.2.7 of the Guidebook, which requires applicants to promptly notify ICANN via submission of the appropriate forms if at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, including changes in financial position and changes in ownership or control of the applicant."<sup>131</sup> Afilius makes this same argument in Section III.A.2 of its Reply.

69. Lastly, Afilius asserted in its September 2016 letter that:

NDC violated the Auction Rules for New gTLDs ('Auction Rules'). Rule 12 provides that 'participation in an Auction is limited to Bidders,[?]' which is defined by the Auction Rules as a 'Qualified Applicant' or a 'party designated by a Qualified Applicant to bid on its behalf.' This rule prohibits bids placed on behalf of a third party that is not a 'Qualified Applicant,' defined by the Auction Rules as 'an entity that has submitted an Application for a new gTLD, has received all necessary approvals

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<sup>129</sup> *Id.*, at p. 4.

<sup>130</sup> *Id.*, at p. 2.

<sup>131</sup> *Id.* (internal quotation marks omitted).

from ICANN, and which is included within a Contention Set to be resolved by an Auction.’<sup>132</sup>

This argument re-appears in Section III.A.3 of Afilias’ Reply.

70. In its Reply, Afilias makes much of the fact that it did not obtain a copy of the DAA until December 2018 (one month after it initiated this IRP). But Afilias did not have a copy of the DAA when it filed this IRP. Thus, it cannot credibly argue that it was unable to reasonably pursue an IRP until it obtained the DAA. Moreover, Afilias stated in September 2016 that its arguments were *not* dependent on knowing the precise terms of the DAA:

Although the specific terms of the agreement between VeriSign and NDC had not been disclosed, it is clear from Verisign’s own press release and its disclosure in its Form 10-Q filed with the US Securities and Exchange Commission for the quarter ended June 30, 2016, that both companies entered into an arrangement well in advance of the Auction to transfer NDC’s rights and obligations regarding its .WEB application to VeriSign.<sup>133</sup>

71. Afilias also argues that the limitations period was tolled from 18 June 2018 to 13 November 2018, while its CEP was pending.<sup>134</sup> But the statute of limitations expired no later than August/September 2017 for Afilias’ claims arising from actions or inactions in August/September 2016. Any tolling incident to Afilias’ CEP is therefore irrelevant because the limitations period had already expired.

72. Finally, Afilias seeks to avoid the time-bar by asserting an equitable estoppel theory. Afilias bases this theory on two statements by ICANN. First, Afilias cites Ms. Willett’s statement in her 16 September 2016 letter that receiving Afilias’ response to ICANN’s questionnaire would “help facilitate informed resolution of these questions[.]”<sup>135</sup> Second, Afilias

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<sup>132</sup> C-103, at p.2.

<sup>133</sup> *Id.*

<sup>134</sup> Afilias’ Reply Memorial ¶¶ 143-44.

<sup>135</sup> *Id.* ¶ 147 (citing Ex. C-50).

cites Mr. Atallah’s statement in his 30 September 2016 letter that ICANN “will continue to take Afiliás’s comments, and other inputs that we have sought, into consideration as we consider this matter.”<sup>136</sup> Neither statement supports an equitable estoppel claim.

73. A party seeking to invoke equitable estoppel must establish four elements: “(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.” *Krolikowski v. San Diego City Employees' Ret. Sys.*, 24 Cal. App. 5th 537, 564-65 (2018), *review denied* (Sept. 19, 2018).<sup>137</sup>

74. Afiliás fails to satisfy these elements. Ms. Willett’s and Mr. Atallah’s letters did not discuss or refer to any potential IRP by Afiliás. There is nothing in those letters to suggest that they were intended to encourage Afiliás to delay in filing an IRP, nor is there any evidence that Ms. Willett or Mr. Atallah understood or intended them to have such effect. Moreover, Afiliás has not alleged—or submitted any evidence to prove—that it construed Ms. Willett’s or Mr. Atallah’s letters in such a manner or that it actually relied on those letters in deciding not to file an IRP. Yet “reliance is an essential element of equitable estoppel.” *Atkins, Kroll (Guam), Limited v. Cabrera*, 295 F.2d 21, 23 (9th Cir. 1961);<sup>138</sup> *Elmore v. Cone Mills Corp.*, 187 F.3d 442, 446 (1999) (“The Supreme Court has held that [‘a]n essential element of any estoppel is detrimental reliance on the adverse party’s misrepresentations.”) (Citation omitted).<sup>139</sup> Where, as here, a party submits no evidence of actual reliance, any claim of equitable estoppel must be

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<sup>136</sup> *Id.* ¶ 147 (citing Ex. C-61).

<sup>137</sup> RLA-12.

<sup>138</sup> RLA-4.

<sup>139</sup> RLA-7.

rejected.<sup>140</sup>

75. Afilias' equitable estoppel argument also suffers from two additional defects. First, Afilias' argument is based primarily on Ms. Willett's statement in her 16 September 2016 letter that the parties' responses to ICANN's questionnaire would assist it in reaching an informed determination. However, Afilias also relies on Ms. Willett's letter to support its substantive claim that ICANN's investigation was inadequate and biased.<sup>141</sup> Under California law, a party cannot predicate an equitable estoppel argument on the same conduct on which it bases its cause of action. *Lukovsky v. City and Cty. of San Francisco*, 535 F.3d 1044, 1052 (9th Cir. 2008) ("The primary problem with plaintiffs' argument is that their alleged basis for equitable estoppel is the same as their cause of action. As we have previously explained, the plaintiff must point to some fraudulent concealment, some active conduct by the defendant 'above and beyond the wrongdoing upon which the plaintiff's claim is filed, to prevent the plaintiff from suing in time.'") (Citation omitted).<sup>142</sup>

76. Second, Afilias was represented by experienced counsel throughout the entire period at issue. Its letters were signed by its General Counsel, Mr. Hemphill, and its 9 September 2016 letter copies Afilias' outside counsel, Mr. Arif Ali (who has been counsel for

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<sup>140</sup> *In re Katz Interactive Call Processing Patent Litig.*, Nos. 07-NL-1816, 01-2196, RGK (FFMx) 2009 WL 1351043, at \*15 (C.D. Cal. May 1, 2009) ("Essentially, FedEx is attempting to argue that reliance can be inferred from evidence of misleading conduct. That analysis impermissibly eliminates an essential element of estoppel."), RLA-10; *Sood v. Grief*, No. H033875, 2010 WL 2595128, at \*4-5 (Cal. Ct. App. June 29, 2010) (unpublished) (rejecting equitable estoppel where the evidentiary record was "devoid of any indication that [counsel's] conduct actually and reasonably induced [plaintiff] to forbear suing" within the statutory period) (citation omitted), RLA-19; *Yeager v. Bowlin*, No. CIV. 2:08-102 WBS JM, 2010 WL 95242, at \*16 (E.D. Cal. Jan. 6, 2010) ("Plaintiffs have presented no evidence that indicates they reasonably relied on any representations by defendants that induced them to delay from filing this action until the statute of limitations had run . . . Accordingly, equitable tolling and estoppel are inappropriate."), RLA-20; *Estate of Amaro v. City of Oakland*, No. C09-01019 WHA, 2010 WL 669240, at \*10 (N.D. Cal. Feb. 23, 2010) (finding that plaintiff "ignores equitable estoppel's requirement of reasonable reliance, since there is no evidence in the record that plaintiffs relied, or could have relied, on any actions taken by Poulson."), RLA-8.

<sup>141</sup> Afilias' Reply Memorial ¶¶ 111-118.

<sup>142</sup> RLA-16.

other claimants in previous IRPs, including the *ICM* IRP).<sup>143</sup> Under California law, “[w]here one has been represented by an attorney in connection with a claim the necessary elements of estoppel are not established as a matter of law.” *Romero v. Cty. of Santa Clara*, 3 Cal. App. 3d 700, 705 (1970); *Republic Ins. Co. v. Great Pac. Ins. Co.*, 261 Cal. Rptr. 863, 867 (Cal. Ct. App. Aug. 31, 1989) (unpublished);<sup>144</sup> *Lara v. Willows Joint Venture*, No. B145113, 2002 WL 705962, at \*5 (Cal. Ct. App. Apr. 24, 2002) (unpublished).<sup>145</sup>

77. Afilias knew how to utilize ICANN’s Accountability Mechanisms. It did so in August 2016 when it filed a complaint with ICANN’s Ombudsman regarding the matters that it raised in its August and September 2016 letters, and which it now raises in this IRP.<sup>146</sup> Moreover, Afilias’ parent company had experience initiating a Reconsideration Request, in 2014,<sup>147</sup> and a CEP and IRP, in 2015, regarding another gTLD application.<sup>148</sup> Further, Afilias’ counsel—Mr. Ali—has represented numerous claimants in prior IRP proceedings. Indeed, any time after 1 October 2016, when ICANN’s Bylaws were significantly amended to allow for CEPs and IRPs regarding ICANN staff actions and inactions, Afilias could have formally challenged the staff actions it is challenging in this IRP, but it was required to do so in a timely manner. Afilias chose not to. And if Afilias wished to toll the limitations period, it was required to seek an express agreement to that effect. As a matter of law, and particularly having been

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<sup>143</sup> Dechert LLP – Arif H. Ali, R-40.

<sup>144</sup> RLA-18.

<sup>145</sup> RLA-14, California Rules of Court, rule 8.1105 states that opinions of the Courts of Appeal will be published only if certain criteria are met, such as that the opinion establishes a new rule of law, applies an existing rule to facts significantly different than prior published opinions, or advances a new interpretation, clarification, criticism or construction of the law, RLA-23. Unpublished opinions may not be cited in California state court. *See* Cal. Rules of Court, rule 8.1115, RLA-24. However, they may be cited in federal courts or fora other than California state court. *See, e.g., Inland Concrete Enters., Inc. v. Kraft*, 318 F.R.D. 383, 405-406 (C.D. Cal. 2016), RLA-11. Here, *Romero* (which is published) establishes the applicable rule of law. *Republic Ins. Co.* and *Lara* show that that rule has been consistently applied by the Courts of Appeal, RLA-17.

<sup>146</sup> C-49 (stating “[i]n addition to this letter, we are filing a complaint with the ICANN Ombudsman”).

<sup>147</sup> Afilias Limited, BRS Media Inc. and Tin Dale LLC, Reconsideration Request 14-41, R-43.

<sup>148</sup> Afilias Limited, BRS Media, Inc. & Tin Dale, LLC v. ICANN (.RADIO), R-28.

represented by experienced counsel, Afilias cannot now be heard to claim that it thought that the limitations period would not be enforced.

78. In sum, Afilias' equitable estoppel claim must be rejected. Afilias' claims are time-barred to the extent they are based on actions or inactions that occurred in 2016 or at any other time more than 12 months before Afilias filed its CEP in June 2018.

**II. ICANN'S ARTICLES AND BYLAWS DID NOT REQUIRE ICANN TO AUTOMATICALLY DISQUALIFY NDC; ICANN ACTED CONSISTENTLY WITH ITS ARTICLES AND BYLAWS BY NOT MAKING ANY MATERIAL DECISIONS UNTIL ACCOUNTABILITY MECHANISMS WERE RESOLVED.**

79. Afilias argues in its Reply 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."<sup>149</sup> Afilias is wrong. None of NDC's alleged breaches of the Guidebook or the Auction Rules, even if true, requires automatic disqualification. Instead, the Guidebook and Auction Rules provide ICANN with significant discretion to determine what the penalty or remedy should be, if any, for a potential breach of their terms. Moreover, ICANN reasonably chose to not take any action in 2016 regarding .WEB because an Accountability Mechanism was pending regarding .WEB. ICANN's Accountability Mechanisms are fundamental safeguards in ensuring that ICANN's model remains effective, and it did not seem prudent for the Board or staff to interfere with or preempt the issues that were the subject of an Accountability Mechanism regarding .WEB that was pending at that time.

**A. The Guidebook And Auction Rules Violations Alleged by Afilias Do Not Require the Automatic Disqualification of NDC.**

80. As it has since 2016, Afilias continues to argue that NDC violated the Guidebook

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<sup>149</sup> Afilias' Reply Memorial ¶ 20.

by failing to amend its application to reflect its new plans for .WEB and by allegedly transferring rights and obligations in connection with its .WEB application to Verisign.<sup>150</sup> Afilias also continues to argue that NDC violated the Auction Rules by submitting bids on Verisign’s behalf, rather than its own.<sup>151</sup> Finally, Afilias continues to claim that ICANN violated its Articles and Bylaws by failing to automatically disqualify NDC in 2016 for these alleged breaches.<sup>152</sup> Afilias is incorrect on several levels.

81. As an initial matter, ICANN has taken no position on whether NDC violated the Guidebook, but even if ICANN agreed with Afilias’ interpretation of the Guidebook and the effect of the DAA, ICANN still would not be under an obligation to automatically disqualify NDC. Instead, the Guidebook provides ICANN with substantial discretion in addressing and remedying breaches of its terms. For example, Section 1.2.7 of the Guidebook, which Afilias claims was violated by NDC failing to disclose its arrangement with Verisign, explicitly states that “[f]ailure to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading *may result* in denial of the application.”<sup>153</sup> The Guidebook provides elsewhere 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>154</sup> The Terms and Conditions of the Guidebook, which Afilias claims were violated by an alleged transfer of NDC’s rights and obligations, state that ICANN’s “decision to review, consider and approve an application to establish one or more gTLDs and to delegate new gTLDs

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<sup>150</sup> *Id.* ¶ 28.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* ¶ 20.

<sup>153</sup> Guidebook, § 1.2.7, C-3 (emphasis added).

<sup>154</sup> *Id.*, § 6, Terms and Conditions 1 (emphasis added).

after such approval is entirely *at ICANN's discretion*.”<sup>155</sup>

82. In what appears to be a concession that the Guidebook vests ICANN with this type of discretion, Afilias argues that ICANN's discretion can only be exercised consistent with ICANN's Articles and Bylaws by disqualifying NDC's application. This is not the case for a number of reasons. First, determining that NDC violated the Guidebook is not a simple analysis that is answered on the face of the Guidebook. There is no Guidebook provision that squarely addresses an arrangement like the DAA. A true determination of whether there was a breach of the Guidebook requires an in-depth analysis and interpretation of the Guidebook provisions at issue, their drafting history to the extent it exists, how ICANN has handled similar situations, and the terms of the DAA. This analysis must be done by those with the requisite knowledge, expertise, and experience, namely ICANN.

83. Likewise, ICANN has to approach any such analysis with an eye towards the potential impact a decision of these issues will have on the global Internet community.<sup>156</sup> And, as set forth in ICANN's IRP Response,<sup>157</sup> as well as the witness statements of Paul Livesay and Jose Rasco, there have been a number of arrangements that appear to be similar to the DAA in the secondary market for new gTLDs, including transactions involving Afilias, Donuts and other registry operators.<sup>158</sup> Indeed, the Auction Rules seem to foresee the possibility of such transactions. Rule 68(a) of the Auction Rules explicitly precludes discussion during the Blackout Period “of any post-Auction ownership transfer arrangements, with respect to any Contention Strings in the Auction.”<sup>159</sup> And Rule 68(b) confirms that the “prohibition against

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<sup>155</sup> *Id.*, § 6, Terms and Conditions 3 (emphasis added).

<sup>156</sup> Bylaws, Art. 7, § 7.3(b), C-23.

<sup>157</sup> ICANN's Response to Afilias' Amended Request for IRP, at ¶¶ 25-29.

<sup>158</sup> *Id.* ¶¶ 25-29; Livesay Stmt. ¶¶ 8-10, 26; Rasco Stmt. ¶¶ 42-45.

<sup>159</sup> C-4, at Rule 68(a).

these activities applies only with respect to Contention Strings that are within Blackout Periods . . .”<sup>160</sup> Thus, the Auction Rules appear to contemplate the possibility of a “post-Auction ownership transfer arrangement” being in place prior to an auction. This only reinforces why the outcome here is not preordained, as Afilias tries to portray it.

84. Afilias’ additional argument that “nothing in the [Auction Rules] suggests that ICANN has any discretion in enforcing” the Auction Rules<sup>161</sup> is simply incorrect. The Auction Rules grant ICANN significant discretion to interpret and enforce the rules and to determine the appropriate remedy for violation of the rules. Specifically, the Auction Rules make clear that “[i]f any dispute or disagreement arises in connection with these Auction Rules, including the interpretation or application of these Auction Rules, or the form, content, validity or time of receipt of any Bid, *ICANN’s decision shall be final and binding.*”<sup>162</sup> And the New gTLD Auction Bidders Agreement (“Bidders Agreement”) expressly states that an applicant “acknowledges that it *may be subject to a penalty* of up to the full amount of the Deposit and forfeiture of its Applications or termination of its registry agreements for a serious violation of the Auction Rules or Bidder Agreement.”<sup>163</sup> Thus, there is no question that ICANN has the discretion of determining whether a “serious violation” has taken place and, if so, what the appropriate penalty or remedy should be, if any.

85. Moreover, the Auction Rules violations alleged by Afilias appear to be based on a strained interpretation of the text of the rules. For example, the propriety of an agreement like the DAA is not precisely addressed by the Auction Rules because the Auction Rules are concerned only with the mechanics of the Auction and each applicant’s participation in the

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<sup>160</sup> *Id.*, at Rule 68(b).

<sup>161</sup> Afilias’ Reply Memorial ¶ 101.

<sup>162</sup> C-4, ¶ 72.

<sup>163</sup> C-5 § 2.10.

Auction, such as deposits that must be paid, notices that ICANN must release, the process for submitting bids, and the currency that must be used.<sup>164</sup> The Auction Rules do not appear to be designed to address the extent to which a non-applicant—including a financier, affiliated entity, or contractual counter-party—may be permitted to have an interest in a gTLD. The provisions of those rules that Afilias cites cannot bear the weight Afilias puts on them. For example, Afilias repeatedly cites the statement in Section 12 of the Auction Rules that a “Qualified Applicant may designate a party to bid on its behalf (‘Designated Bidder’).”<sup>165</sup> Afilias construes this section as barring an applicant from bidding on its own application where a third party has some type of interest in the gTLD. But Section 12 does not seem concerned with that issue and does not address it.

86. Likewise, Afilias’ argument that NDC’s bids were invalid because NDC did not fit within the Auction Rules’ definition of a “Bidder” or a “Qualified Applicant” are unpersuasive.<sup>166</sup> ICANN could certainly determine that, despite Afilias’ technical reading of the definitions in the Auction Rules, NDC was, in fact, bidding on *its* application, was submitting bids on *its* behalf, and was submitting bids *it* was willing and able to pay, despite the DAA.<sup>167</sup> And as set forth above, the Auction Rules, as well as the Bidders Agreement, both seem to suggest the possibility of a “post-Auction ownership transfer arrangement” being in place prior to an auction.<sup>168</sup>

87. Finally, because it has the “ultimate responsibility” for the Program, the ICANN

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<sup>164</sup> C-4, ¶ 23 (“All Deposits to the Auction Bank Account must be made by bank wire.”); *id.*, ¶ 8 (“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.”) *id.*, ¶ 16 (“Bidding will take place online at the Auction Site.”); *id.*, ¶ 5 (“All prices in the Auction are expressed in whole numbers of United States dollars (\$US).”).

<sup>165</sup> Afilias’ Reply Memorial ¶¶ 49, 92-95.

<sup>166</sup> *Id.* ¶¶ 87-96.

<sup>167</sup> *Id.* ¶ 94; C-5.

<sup>168</sup> C-4 ¶ 68(a), (b); C-5 § 2.6.

Board has reserved the right to “individually consider” any application to “*determine whether* approval would be in the best interest of the Internet community.”<sup>169</sup> In other words, even if ICANN were to conclude that NDC violated the Guidebook or the Auction Rules, ICANN’s Board would still have the discretion to decide whether approval of NDC’s (or any other applicant’s) application is appropriate or not.

88. Thus, ICANN was never under an obligation to automatically disqualify NDC, as Afilias claims. If ICANN were to determine that NDC violated the Guidebook or the Auction Rules, it is for ICANN to decide whether any such violation warrants disqualification. There are a range of remedies or penalties – not involving an award of .WEB to Afilias – that ICANN could employ if it were to find that NDC did violate the Guidebook or the Auction Rules. As just one example, ICANN could order an unwinding of the .WEB auction and either bar NDC from participating, bar NDC from participating in accordance with the DAA, or permit NDC to participate in accordance with the DAA. It is not, as Afilias suggests, simply a choice between disqualification of NDC or condoning the DAA. Selecting the appropriate remedy involves the balancing of competing interests and policies as well as ICANN’s Core Values. Under the Bylaws, that balancing must be done by ICANN’s Board in the exercise of its reasonable business judgment.

**B. The ICANN Board Appropriately Chose Not To Make Any Material Decisions Regarding .WEB in November 2016.**

89. Since the inception of the Program, ICANN has followed a practice of placing applications and contention sets on hold when Accountability Mechanisms are pending, whether it be a Reconsideration Request, an Ombudsman complaint, a CEP or an IRP.<sup>170</sup> Once on hold,

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<sup>169</sup> Guidebook, § 5.1, C-3.

<sup>170</sup> Disspain Stmt. ¶ 11. With respect to IRPs, however, claimants typically are required to submit a request for interim measures in order for the hold to be instituted.

ICANN generally refrains from taking action with respect to the application or contention set that could interfere with, or otherwise preempt, the pending Accountability Mechanism.<sup>171</sup> ICANN follows this practice, in part, because ICANN considers its Accountability Mechanisms to be fundamental safeguards in ensuring its bottom-up, multistakeholder model remains effective and in ensuring that ICANN remains accountable to its community.<sup>172</sup> Indeed, accountability is built into every level of ICANN’s organization and Mission, as well as its Articles and Bylaws.<sup>173</sup> Moreover, ICANN has a policy of referring potential competition issues to relevant government regulators, as set forth in detail below.

90. Thus, when the Board was faced with Donuts’ 2016 CEP (and subsequently the DOJ’s antitrust investigation) that raised issues about .WEB, the Board appropriately, and fully consistent with ICANN’s Articles and Bylaws, chose not to address any concerns about .WEB while these proceedings were pending as the results might have an impact on the Board’s need to make any such decisions.

91. Moreover, because the Board’s determination not to make any decisions regarding .WEB in November 2016 arises “out of the Board’s exercise of its fiduciary duties,” and the decision was “within the realm of reasonable business judgment,” the Panel must defer to the Board’s reasonable business judgment and cannot replace it with the Panel’s own judgment.<sup>174</sup> It was eminently reasonable for the Board to make this choice because the results of the Accountability Mechanism, and the subsequent DOJ investigation, could have had an impact on any eventual analysis ICANN might be called on to make. For example, the DOJ investigation alone, although not expected when the Board made its choice, had the potential to

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> ICANN Articles of Incorporation, § 2(iii), C-2; Bylaws, Art. 4, §§ 4.2, 4.3, C-23.

<sup>174</sup> Bylaws, Art. 4, § 4.3(i)(iii), C-23.

moot or fundamentally alter the issues raised regarding the DAA. The Board made its reasonable business judgment after receiving materials setting forth the relevant information about the disputes over .WEB, the parties' legal and factual contentions, and a set of options the Board could consider. The Board also made this decision after a robust discussion among Board members and receiving information and advice from counsel.

92. Nor is there any plausible argument that the Board's decision violated ICANN's Bylaws. Afilias draws the conclusion that the Board violated its commitment to "apply[] documented policies consistently, neutrally, objectively, and fairly without singling out any particular party for discriminatory treatment."<sup>175</sup> But Afilias does not attempt to explain how the Board's determination not to make a decision regarding .WEB during the pendency of an Accountability Mechanism or other legal proceedings on the same issues could represent an inconsistent application of "documented policies"; indeed, Afilias does not even identify the documented policies purportedly at issue. Afilias also has not explained how that decision was biased, non-objective or unfair, or how it singled anyone out for discriminatory treatment. It clearly was not and did not.

93. In short, the Board has acted reasonably and prudently. Although this has involved some delay in the final resolution of .WEB, the delay results, in part, from Afilias' decision to sit on its claims for more than two years, rather than promptly initiating another Accountability Mechanism when its complaint to the Ombudsman was denied or even earlier when it first developed and began asserting its claims in August 2016. In any event, under the governing standard of review, the Panel cannot overturn or supplant the Board's reasonable business judgment to decide not to act during the pendency of Accountability Mechanisms that

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<sup>175</sup> Afilias' Reply Memorial ¶¶ 16, 23, 86.

might impact whether it even needs act with regard to .WEB and, if so, the nature of the issues that it must address.

### **III. ICANN HAS COMPLIED WITH ITS CORE VALUE REGARDING COMPETITION.**

94. In its Reply, Afilias continues to claim that ICANN has a “competition promotion mandate,”<sup>176</sup> that this mandate is broader than the DOJ’s regulatory powers and review,<sup>177</sup> and that “ICANN’s decision to exercise its discretion to benefit Verisign is a complete perversion of ICANN’s Bylaws.”<sup>178</sup> Afilias is wrong on all fronts and is now taking a litigation-driven position inconsistent with its previous view that “[n]either ICANN nor the GNSO have the authority or expertise to act as anti-trust regulators.”<sup>179</sup>

95. As an initial matter, ICANN has not exercised its discretion to benefit Verisign. As set forth above, ICANN has not fully evaluated the DAA and NDC’s related conduct because the .WEB Contention Set has been on hold due to the invocation of ICANN’s Accountability Mechanisms and the DOJ investigation. And ICANN certainly has not evaluated whether a transfer of .WEB from NDC to Verisign is appropriate because NDC has not requested such a transfer (and could not unless and until ICANN signs a .WEB registry agreement with NDC). Accordingly, Afilias’ assertion that ICANN has violated its so-called “competition promotion mandate” is not even ripe for consideration.

96. In any event, ICANN does not “decide which companies obtain the exclusive gTLD registry rights” in the way that Afilias asserts.<sup>180</sup> ICANN does not evaluate, for each new gTLD application, whether competition might be enhanced if ICANN selects one registry

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<sup>176</sup> *Id.*, ¶¶ 122-124.

<sup>177</sup> *Id.*, ¶¶ 131-136.

<sup>178</sup> *Id.*, ¶¶ 130.

<sup>179</sup> R-21, at 8 (emphasis added).

<sup>180</sup> Afilias’ Reply Memorial ¶ 3.

operator as opposed to another. Rather, ICANN administers the objective, non-discriminatory processes set forth in the Guidebook under which gTLDs are awarded to qualified entities. ICANN is not required or equipped to make judgments about which applicant for a particular gTLD would most effectively promote competition, or to award gTLDs on that basis. As Afilias notes, the Guidebook sets out comprehensive procedures for the gTLD application and review process.<sup>181</sup> Nowhere in the Guidebook does it state that ICANN will choose among otherwise qualified applicants based on ICANN’s view of which applicant would most effectively contribute to competition.

97. Afilias also incorrectly asserts that “specifically restraining the market power of .COM” was the primary motivating policy underlying the New gTLD Program.<sup>182</sup> While the community-driven policy underlying the Program was aimed at increasing competition, diversity and consumer choice in the DNS, the Program was not specifically designed to take market share from .COM, as Board members J. Beckwith Burr and Christopher Disspain confirm in their witness statements.<sup>183</sup> Had the ICANN community wished to prevent Verisign from being the registry operator for any particular new gTLD, the community (through the GNSO) could have included that prohibition as part of the policy recommendations, or the community could have mandated that such a prohibition be included in the Guidebook to which the community provided extensive input on multiple versions over a multi-year period. The community could even have requested that Verisign not be permitted to operate any gTLD registry other than the ones that it was already operating at the start of the Program. But the community did not take such action, nor was such action ever proposed.<sup>184</sup> Afilias’ claim that the Program specifically targeted

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<sup>181</sup> Afilias’ Reply Memorial ¶ 25.

<sup>182</sup> *Id.*, ¶ 128.

<sup>183</sup> Burr Stmt. ¶ 27; Disspain Stmt. ¶ 14.

<sup>184</sup> Disspain Stmt. ¶ 14.

Verisign is a fabrication, which Afilias then uses to misrepresent ICANN’s Core Values.

98. Ms. Burr and Mr. Disspain provide a clear explanation of how ICANN complies with its Core Values and Bylaws as to competition. One of ICANN’s Core Values, as set forth in ICANN’s Bylaws, requires ICANN to promote 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>185</sup> The Bylaws further require ICANN, “[w]here feasible and appropriate,” to “depend[] on market mechanisms to promote and sustain a competitive environment in the DNS market.”<sup>186</sup> As Ms. Burr explains, taken together, “these provisions obligate ICANN to coordinate the community’s development of, and implement, policy that facilitates market-driven competition.”<sup>187</sup> This is precisely what ICANN did in implementing the Program on behalf of the Internet community.

99. As Ms. Burr and Mr. Disspain further explain, ICANN is not a regulator responsible for taking affirmative actions to block potentially anticompetitive transactions or conduct the way a government regulator would.<sup>188</sup> In fact, ICANN’s Bylaws make clear that ICANN is prohibited from acting like a government regulator. Article 1, section 1.1(c) of the Bylaws states that “[f]or the avoidance of doubt, ICANN does not hold any governmentally authorized regulatory authority.”<sup>189</sup> Moreover, ICANN does not have the resources or expertise necessary to serve as a competition regulator for the DNS.<sup>190</sup> Rather, as Ms. Burr and Mr. Disspain confirm in their witness statements, ICANN complies with the Core Value and Bylaws provisions regarding competition by deferring to an appropriate government regulator – such as

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<sup>185</sup> Bylaws, Art. 1, § 1.2(b)(iv), C-23.

<sup>186</sup> *Id.*, Art. 1, § 1.2(b)(iii).

<sup>187</sup> Burr Stmt. ¶ 19.

<sup>188</sup> Burr Stmt. ¶¶ 28-30; Disspain Stmt. ¶ 14.

<sup>189</sup> Bylaws, Art. 1, § 1.1(c), C-23.

<sup>190</sup> Burr Stmt. ¶ 30.

DOJ – for investigation of potential competition issues. Indeed, the Guidebook specifically states that “ICANN retains the right to refer an application to a competition authority prior to entry into the registry agreement” if ICANN determines that an application or applicant raises potential competition issues.<sup>191</sup> ICANN’s deference to competition authorities in such cases is no different than its deference to the DOJ’s decision here, after a year-long investigation, not to take action to block Verisign’s possible operation of .WEB. If anything, denying NDC’s application on competition grounds in these circumstances would directly violate the Board’s commitment to “apply[] documented policies consistently, neutrally, objectively and fairly without singling out any particular party for discriminatory treatment.”<sup>192</sup>

100. Thus, Afilias’ assertion that ICANN has a competition mandate that is broader than the DOJ’s regulatory powers and review, and which requires ICANN to award .WEB to Afilias, rather than NDC, because that action would most effectively promote competition, is simply wrong. ICANN is not a regulator and has no regulatory authority, and it lacks the institutional capability to make the competition determination that Afilias so blithely and self-servingly demands. ICANN has complied with its Core Value regarding competition by introducing more than a *thousand* new gTLDs into the market and allowing the ultimate competition regulator in the United States – the DOJ – to evaluate the competition issues associated with Verisign’s operation of .WEB.

101. The position that Afilias is espousing in this IRP is a lawyer-generated argument that is inconsistent with ICANN’s Mission, Articles, Bylaws, resources, and expertise. And it is directly contrary to Afilias’ view in 2006 (which, it should be noted, is the same view expressed by Ms. Burr and Mr. Disspain in this IRP), when Afilias commented on ICANN’s appropriate

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<sup>191</sup> Guidebook, § 5.1.4, C-3.

<sup>192</sup> Bylaws, Art. 1, § 1.2(a)(v), C-23.

role as an administrator of the DNS:

“While ICANN’s mission includes the promotion of competition, this role is best fulfilled through the measured expansion of the name space and the facilitation of innovative approaches to the delivery of domain name registry services. *Neither ICANN nor the GNSO have the authority or expertise to act as anti-trust regulators.* Fortunately, many governments around the world do have this expertise and authority, and do not hesitate to exercise it in appropriate circumstances.<sup>193</sup>

102. Also unsupported is Afiliat’s argument that no inference should be drawn from DOJ’s refusal to take action to block Verisign from operating .WEB. To the contrary, Dr. Dennis Carlton, who was the DOJ’s Deputy Assistant Attorney General for Economics, has concluded that, based on his experience, the closure of such an investigation suggests that Verisign’s operation of .WEB is not likely to harm competition.<sup>194</sup>

103. Finally, Dr. Carlton and Dr. Kevin Murphy have concluded in their expert reports that there is no evidence that .WEB will be a unique competitive check on .COM. In other words, there is no economic evidence that .WEB will be a successful rival to .COM such that Verisign’s operation of .WEB is likely to restrain competition. Rather, the expert economists do not believe that .WEB will be more successful in taking market share from .COM than other new gTLDs, which is likely what the DOJ concluded as well. Thus, Afiliat’s competition claim is unsupported as an economic matter.

#### **IV. ICANN COMPLIED WITH ITS ARTICLES, BYLAWS AND INTERNAL PROCEDURES IN INVESTIGATING ISSUES REGARDING THE .WEB AUCTION AND AFILIAT’S CLAIMS.**

104. Afiliat’s contention in its Reply that the manner in which ICANN investigated Afiliat’s allegations against NDC and Verisign violated the Articles and Bylaws is procedurally

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<sup>193</sup> R-21, 8 (emphasis added).

<sup>194</sup> Expert Report of Dennis W. Carlton ¶¶ 58-61.

improper, internally contradictory, and meritless.<sup>195</sup>

105. First, Afiliás' Amended IRP Request asserted no such claim. The Amended IRP Request asserts that ICANN did not adequately investigate *pre-auction* rumors that NDC had reached an agreement with Verisign, but makes no contention regarding the adequacy of ICANN's *post-auction* investigation of Afiliás' specific allegations in its August and September 2016 letters.<sup>196</sup> Rule 6 of the Interim Supplementary Procedures states that "[a] CLAIMANT'S written statement of a DISPUTE shall include all claims that give rise to a particular DISPUTE."<sup>197</sup> Afiliás' current claim that ICANN violated its Bylaws in its post-auction investigation of Afiliás' complaints differs fundamentally from the claim in its Amended IRP Request that ICANN did not sufficiently investigate pre-auction rumors: it concerns a different investigation of different complaints that occurred at a different time in response to different information received by ICANN. Afiliás cannot assert a new claim for the first time in its Reply.

106. Second, Afiliás' contention that ICANN did not adequately investigate its allegations contradicts Afiliás' assertion that "[b]y August 2016, ICANN had all the information it needed to determine that NDC's application and bid had to be disqualified."<sup>198</sup> Afiliás cannot have it both ways: it cannot plausibly contend that ICANN did not gather sufficient facts to make a determination on the propriety of the DAA, while simultaneously arguing that ICANN had all the facts that it needed to make that determination.

107. Third, ICANN's investigation was prompt, thorough and fully consistent with its

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<sup>195</sup> See Afiliás' Reply Memorial ¶¶ 8, 102-118.

<sup>196</sup> Afiliás Amended IRP Request ¶ 78, sub-bullet 4 ("ICANN failed to apply these policies 'neutrally, objectively, and fairly' here: . . . ICANN failed to fully investigate rumors that NDC had reached an agreement with VeriSign prior to the .WEB Auction. Although ICANN specifically asked NDC to confirm that 'there have not been changes to your application . . . that need to be reported to ICANN,' NDC declined to do so and ICANN failed to pursue a response.").

<sup>197</sup> Interim Supp. Proc., Rule 6.

<sup>198</sup> Afiliás' Reply Memorial ¶ 16.

Bylaws and Articles. Donuts initiated its CEP on 2 August 2016, and Afilias first raised its allegations with ICANN in a letter dated 8 August 2016.<sup>199</sup> Through its counsel, ICANN promptly reached out to Verisign to request a copy of the DAA and other information relevant to .WEB.<sup>200</sup> In response, Verisign sent ICANN counsel a letter on 23 August 2016 responding to Donuts' and Afilias' allegations and providing a copy of the DAA, the 26 July 2016 letter agreement between Verisign and NDC, and documents supporting Verisign's contention that Afilias violated the auction Blackout Period.<sup>201</sup> Three weeks later, and based on all of the concerns that had been expressed at that time, ICANN wrote to Afilias, Ruby Glen, NDC and Verisign inviting them each to answer questions designed to probe more deeply into their respective allegations and responses and to give them each an opportunity to fully set out their positions.<sup>202</sup> Afilias, NDC and Verisign each accepted ICANN's invitation (Ruby Glen did not), providing a total of 59 single-spaced pages of analysis.<sup>203</sup> Although Afilias asserts that ICANN's investigation was "biased and inadequate,"<sup>204</sup> it does not identify any additional information that ICANN purportedly should have gathered.

108. Afilias complains that ICANN did not act in accordance with its commitment to transparency because it did not keep Afilias informed on the status of its investigation and the Board's deliberations. However, ICANN's commitment to transparency does not require ICANN to conduct its inner workings or Board discussions publicly, or to give access to that information to a particular applicant upon request. ICANN acted in accordance with its policies and the Bylaws by providing all contention set members, including Afilias, prompt notice when

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<sup>199</sup> Ex. C-49.

<sup>200</sup> R-29, at 20:9-15.

<sup>201</sup> R-18.

<sup>202</sup> C-50.

<sup>203</sup> C-51 (Afilias response); C-109 (Verisign response); C-110 (NDC response).

<sup>204</sup> Afilias' Reply Memorial ¶ 8.

the status of the contention set changed.

109. Afilias baldly asserts that ICANN's investigation was not neutral, objective, fair, non-discriminatory or in good faith. But Afilias never explains how *any* part of ICANN's investigation was non-objective, unfair, discriminatory or in bad faith.<sup>205</sup> Afilias quibbles with the phrasing of some of the questions in ICANN's September 2016 questionnaire.<sup>206</sup> But Afilias cannot seriously dispute that these questions were premised on the very allegations Afilias and Donuts were asserting and successfully accomplished their purpose of providing the parties an opportunity to state their positions in detail on the issues in dispute between them.

110. Afilias also contends that, when ICANN sent the September 2016 questionnaire, ICANN should have disclosed to Afilias that ICANN had received a copy of the DAA from Verisign.<sup>207</sup> Afilias argues that ICANN's failure to do so meant that "the deck was stacked" because Verisign and NDC purportedly knew "the substantive motivations behind the questions" and Afilias did not.<sup>208</sup> Afilias further contends that this somehow amounted to "an attempted cover-up by ICANN of its own failings and of Verisign's and NDC's subterfuge."<sup>209</sup>

111. These contentions make no sense and Afilias does not (and cannot) explain them. Afilias does not identify the purported "substantive motivations" to which it refers or cite any evidence of any such motivations. Afilias does not explain how NDC or Verisign would have known Ms. Willett's alleged "substantive motivations." Afilias does not explain why the fact that ICANN did not inform Afilias that it had obtained the DAA "stacked" the deck. And Afilias does not explain how sending the questions amounted to a "cover-up." Afilias' contentions are

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<sup>205</sup> *Id.*, ¶ 102.

<sup>206</sup> *Id.*, ¶¶ 115-116.

<sup>207</sup> *Id.*, ¶ 113.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*, ¶¶ 16, 102, 118.

simply a series of catch-phrases devoid of any meaning.

112. Moreover, Afilias fails to grapple with the fact that Verisign provided the DAA on the express proviso that it was confidential business information that could *not* be disclosed by ICANN.<sup>210</sup> When information is provided to ICANN on a confidential basis, ICANN respects and maintains the information's confidentiality.<sup>211</sup> Any other approach would discourage individuals and companies from communicating freely and openly with ICANN.

113. Finally, Afilias' complaints about the adequacy of ICANN staff's investigation of Afilias' allegations against Verisign and NDC are ultimately irrelevant because Afilias requests no relief in relation to that conduct. Afilias does not contend that any further investigation is necessary or should be conducted. On the contrary, as noted, Afilias contends that ICANN has all the information necessary to resolve Afilias' complaints and that ICANN has had that information since August 2016.

## **V. AFILIAS REQUESTS RELIEF THAT IS BEYOND THE PANEL'S JURISDICTION.**

114. Article 4, section 4.3(o) of the Bylaws expressly establishes and circumscribes the authority of an IRP Panel. It is remarkable that, although it devotes more than four pages of its Reply to addressing the Panel's authority,<sup>212</sup> Afilias never once cites or references Article 4, section 4.3(o). Afilias' studied avoidance of this definitive provision is tantamount to an admission that it seeks to lead the Panel into error by asking it to grant remedies in excess of the Panel's authority.

115. Article 4, section 4.3(o) states:

Subject to the requirements of this Section 4.3, each IRP Panel shall have the authority to:

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<sup>210</sup> C-102 (“**CONFIDENTIAL BUSINESS INFORMATION: DO NOT DISCLOSE**”).

<sup>211</sup> ICANN Documentary Information Disclosure Policy, R-41.

<sup>212</sup> Afilias' Reply Memorial pp. 57-60.

- (i) Summarily dismiss Disputes that are brought without standing, lack substance, or are frivolous or vexatious;
- (ii) Request additional written submissions from the Claimant or from other parties;
- (iii) Declare whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws, declare whether ICANN failed to enforce ICANN's contractual rights with respect to the IANA Naming Function Contract or resolve PTI service complaints by direct customers of the IANA naming functions, as applicable;
- (iv) Recommend that ICANN stay any action or decision, or take necessary interim action, until such time as the opinion of the IRP Panel is considered;
- (v) Consolidate Disputes if the facts and circumstances are sufficiently similar, and take such other actions as are necessary for the efficient resolution of Disputes; and
- (vi) Determine the shifting of IRP costs and expenses consistent with Section 4.3(r).<sup>213</sup>

116. The only provision of Article 4, section 4.3(o) relevant to this IRP is subsection (iii), which gives the Panel authority to declare whether a Covered Action constituted an action or inaction that violated the Articles or Bylaws.

117. Afilias seeks two types of relief.<sup>214</sup> First, it asks the Panel to declare that ICANN violated its Articles and Bylaws by: (a) failing to disqualify NDC's Application in August 2016; (b) failing to offer the rights to .WEB to Afilias after disqualifying NDC; and (c) proceeding to contract with NDC for a Registry Agreement.<sup>215</sup> While ICANN acknowledges that declarations finding that ICANN violated the Articles or Bylaws would be within the Panel's authority, each declaration requested by Afilias should be denied on the merits. As shown above, requests (a) and (b) are time-barred (*supra* Argument, Sec. I). And even if they were not time-barred,

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<sup>213</sup> Bylaws, Art. 4, § 4.3(o).

<sup>214</sup> Afilias' Reply Memorial ¶ 155.

<sup>215</sup> *Id.*

ICANN and the Board acted within the realm of reasonable business judgment in deciding not to address the merits of claims made by Afilias and others while an Accountability Mechanism was pending (*supra* Argument Sec. II(b)); and, even if Afilias’ allegations against NDC were found by ICANN to have merit, nothing mandates automatic disqualification of NDC’s application or rejection of its auction bids (*supra* Argument Sec. II(a)). With respect to the request (c), ICANN did not violate its Articles or Bylaws by merely sending a draft Registry Agreement to NDC in furtherance of the processes set out in the Guidebook when no Accountability Mechanisms were pending challenging the .WEB application that prevailed in the Auction.

118. The second form of relief sought by Afilias is beyond the authority of the Panel to grant. Specifically, Afilias requests that the Panel “**require** ICANN to disqualify NDC’s application and bid and [] offer Afilias the rights to .WEB[.]”<sup>216</sup> Afilias euphemistically refers to this as a request for “affirmative declaratory relief,”<sup>217</sup> but it is a request for mandatory injunctive relief in substance and effect. Whether styled as a declaration that ICANN must “affirmatively” take certain actions or (more straightforwardly) as a mandatory injunction to take such actions, the relief that Afilias requests clearly exceeds the powers granted to the Panel by Article 4, section 4.3(o).

119. Article 4, section 4.3(o)(iii) allows the Panel to “[d]eclare whether a Covered Action **constituted** an action or inaction that violated the Articles of Incorporation or Bylaws[.]”<sup>218</sup> It is thus explicitly concerned only with past actions or inactions. The retrospective nature of this authority is also implicit in that it applies only to a “Covered Action,” which is defined as “actions or failures to act by or within ICANN **committed** by the Board,

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<sup>216</sup> *Id.* ¶ 155.

<sup>217</sup> *Id.*

<sup>218</sup> Bylaws, Art. 4, § 4.3(o)(iii) (emphasis added), C-23.

individual Directors, Officers, or Staff members that give rise to a Dispute.”<sup>219</sup> Similarly, “Disputes” are defined as “Claims that Covered Actions *constituted* an action or inaction that *violated* the Articles of Incorporation or Bylaws[.]”<sup>220</sup> The Panel has authority to issue a binding declaration regarding only whether past actions or inactions violated ICANN’s Articles or Bylaws. It does not have authority to “declare” that ICANN must take some specific action in the future.

120. Afilias misrepresents ICANN’s case—and then attacks a strawman—by asserting that ICANN’s position is that the Panel’s final declaration is “merely advisory.”<sup>221</sup> That is not ICANN’s position. A proper declaration from this Panel as to whether ICANN violated its Articles or Bylaws is a final decision that is binding on ICANN as well as Afilias.<sup>222</sup> The Panel, however, can properly decide matters and exercise its authority only insofar as they are within its jurisdiction as defined by the Bylaws. The Panel may declare whether a Covered Action constituted an action or inaction that violated ICANN’s Articles and Bylaws, and ICANN will be bound by that declaration. The Panel does not have authority to order or “declare” that ICANN must engage in particular future actions or inactions.

121. Afilias cites Article 4, section 4.3(a) of the Bylaws, which sets out the general purposes of an IRP, including to ensure that ICANN complies with its Bylaws and Articles, to empower the global Internet community to enforce compliance and to reduce disputes by creating precedent.<sup>223</sup> Afilias also cites Article 4, section 4.3(x), which states that an IRP is “intended as a final, binding arbitration process.” However, Afilias does not explain how these provisions can plausibly be construed to expand the Panel’s authority beyond the limits set by

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<sup>219</sup> *Id.*, Art. 4, § 4.3(b)(ii) (emphasis added).

<sup>220</sup> *Id.*, Art. 4, § 4.3(b)(iii) (emphasis added).

<sup>221</sup> Afilias’ Reply Memorial ¶¶ 1, 5, 153.

<sup>222</sup> Bylaws, Art. 4, § 4.3(x)(i) & (iii), C-23.

<sup>223</sup> Afilias’ Reply Memorial ¶ 151.

Article 4, section 4.3(o) and to authorize the Panel to issue a mandatory injunction.

122. There is no conflict between the purposes of IRPs set out in Article 4, sections 4.3(a) and (x) and the limits on the Panel’s authority imposed by Article 4, section 4.3(o). But if any conflict existed, the specific limits imposed by Article 4, section 4.3(o) would prevail over the general purposes set out in sections 4.3(a) and (x). *See, e.g., CAZA Drilling (California), Inc. v. TEG Oil & Gas U.S.A., Inc.*, 142 Cal. App. 4th 453, 466 (2006) (“when general and specific provisions are inconsistent, the latter control”);<sup>224</sup> Cal. Civ. Proc. Code § 1859 (“when a general and particular provision are inconsistent, the latter is paramount to the former.”).<sup>225</sup>

123. Afiliás is also wrong in asserting that prior IRP Panels have found that they have power to issue injunctive relief (or, as Afiliás characterizes it, “affirmative declaratory relief”). The cases that Afiliás cites make no such findings. *DotConnectAfrica Trust* stated that “the Panel is of the view that it does have the power *to recommend* a course of action for the Board to follow as a consequence of any declaration that the Board acted or failed to act in a manner inconsistent with ICANN’s Articles of Incorporation, Bylaws or the Applicant Guidebook.”<sup>226</sup> Similarly, *GCC* found that “the Panel may and should *recommend* affirmative steps to be taken by the Board[.]”<sup>227</sup>

124. Thus, neither the Bylaws nor any dictum in *DotConnectAfrica Trust* or *GCC* supports Afiliás’ contention that the Panel has authority to “*require* ICANN to disqualify NDC’s application and bid and to offer Afiliás the rights to .WEB,” which is what Afiliás seeks.<sup>228</sup> Such

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<sup>224</sup> RLA-6

<sup>225</sup> RLA-21

<sup>226</sup> *DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50 2013 001083, Final Declaration (9 July 2015) ¶ 126 (emphasis added), CA-0015.

<sup>227</sup> *Gulf Cooperation Council (GCC) v. ICANN*, ICDR Case No. 01-14-0002-1065, Partial Final Declaration (19 October 2016) ¶ 147 (emphasis added), CA-0017.

<sup>228</sup> Afiliás’ Reply Memorial ¶ 155 (bold added).

an order would exceed the Panel's authority as defined by the Bylaws and render the Panel's declaration invalid and subject to challenge under Article V(1)(c) of the New York Convention, which states that recognition and enforcement of an arbitral award may be refused where it "contains decisions on matters beyond the scope of the submission to arbitration."<sup>229</sup> The Panel should decline Afilias' invitation to commit that clear error.

### CONCLUSION

125. Afilias' claims lack merit and should be rejected. Afilias' contentions that ICANN violated its Articles and Bylaws in connection with its investigation in August and September 2016, and by not disqualifying NDC in late-2016, are time-barred and meritless. ICANN's investigation promptly and effectively gathered the information relevant to Donuts' and Afilias' claims regarding .WEB, and the Board exercised its reasonable business judgment in not making any decision while an Accountability Mechanism was pending regarding .WEB (which could have been the subject of other soon-to-be filed mechanisms) that could have had an impact on ICANN's need to make any such decision. Moreover, neither the Guidebook nor the Auction Rules mandate disqualification even if ICANN does ultimately determine that NDC violated either or both; each instead leaves the remedy to the discretion of ICANN to determine in the exercise of its business judgment. Furthermore, ICANN is not equipped or required to award .WEB or any other gTLD based on an evaluation of which applicant might most effectively contribute to competition. No party has sought ICANN's approval to assign .WEB to Verisign and, therefore, ICANN has made no decision with respect to such a request.

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<sup>229</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), R-17.

Respectfully submitted,  
JONES DAY

Dated: June 1, 2020

By: /s/ Jeffrey A. LeVee  
Jeffrey A. LeVee

Counsel for Respondent ICANN

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