INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
ICDR CASE NO. 01-18-0004-2702

Altanovo Domains Limited
(Claimant)

v.

INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS
(Respondent)

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R-1

RESPONDENT'S EXHIBIT

Adopted Board Resolutions | Paris

26 Jun 2008

- Approval of Minutes
- GNSO Recommendations on New gTLDs
- IDNC / IDN Fast-track
- GNSO Recommendation on Domain Tasting
- Approval of Operating Plan and Budget for Fiscal Year 2008-2009
- Update on Draft Amendments to the Registrar Accreditation Agreement
- Approval of PIR Request to Implement DNSSEC in .ORG
- ICANN Board of Directors' Code of Conduct
- Ratification of Selection of Consultant to Conduct Independent Review of the Board
- Appointment of Independent Review Working Groups
- Update on Independent Reviews of ICANN Structures
- Board Committee Assignment Revisions
- Approval of BGC Recommendations on GNSO Improvements
- Receipt of Report of President's Strategy Committee Consultation
- Selection of Mexico City for March 2009 ICANN Meeting
- Review of Paris Meeting Structure
- Board Response to Discussions Arising from Paris Meeting

Approval of Minutes

Resolved (2008.06.26.01), the minutes of the Board Meeting of 29 May 2008 are approved. <http://www.icann.org/minutes/prelim-report-29may08.htm>

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GNSO Recommendations on New gTLDs

Whereas, the GNSO initiated a policy development process on the introduction of New gTLDs in December 2005. <http://gnso.icann.org/issues/new-gtlds/>

Whereas, the GNSO Committee on the Introduction of New gTLDs addressed a range of difficult technical, operational, legal, economic, and policy questions, and facilitated widespread participation and public comment throughout the process.

Whereas, the GNSO successfully completed its policy development process on the Introduction of New gTLDs and on 7 September 2007, and achieved a Supermajority vote on its 19 policy recommendations. <http://gnso.icann.org/meetings/minutes-gnso-06sep07.shtml>

Whereas, the Board instructed staff to review the GNSO recommendations and determine whether they were capable of implementation.

Whereas, staff has engaged international technical, operational and legal expertise to provide counsel on details to support the implementation of the Policy recommendations and as a result, ICANN cross-functional teams have developed implementation details in support of the GNSO's policy recommendations, and have concluded that the recommendations are capable of implementation.

Whereas, staff has provided regular updates to the community and the Board on the implementation plan. <http://icann.org/topics/new-gtld-program.htm>

Whereas, consultation with the DNS technical community has led to the

conclusion that there is not currently any evidence to support establishing a limit to how many TLDs can be inserted in the root based on technical stability concerns. <http://www.icann.org/topics/dns-stability-draft-paper-06feb08.pdf>

Whereas, the Board recognizes that the process will need to be resilient to unforeseen circumstances.

Whereas, the Board has listened to the concerns about the recommendations that have been raised by the community, and will continue to take into account the advice of ICANN's supporting organizations and advisory committees in the implementation plan.

Resolved (2008.06.26.02), based on both the support of the community for New gTLDs and the advice of staff that the introduction of new gTLDs is capable of implementation, the Board adopts the GNSO policy recommendations for the introduction of new gTLDs <http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>.

Resolved (2008.06.26.03), the Board directs staff to continue to further develop and complete its detailed implementation plan, continue communication with the community on such work, and provide the Board with a final version of the implementation proposals for the board and community to approve before the new gTLD introduction process is launched.

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IDNC / IDN Fast-track

Whereas, the ICANN Board recognizes that the "IDNC Working Group" developed, after extensive community comment, a final report on feasible methods for timely (fast-track) introduction of a limited number of IDN ccTLDs associated with ISO 3166-1 two-letter codes while an overall, long-term IDN ccTLD policy is under development by the ccNSO.

Whereas, the IDNC Working Group has concluded its work and has submitted recommendations for the selection and delegation of "fast-track" IDN ccTLDs and, pursuant to its charter, has taken into account and was guided by consideration of the requirements to:

- Preserve the security and stability of the DNS;
- Comply with the IDNA protocols;
- Take input and advice from the technical community with respect to the implementation of IDNs; and

- Build on and maintain the current practices for the delegation of ccTLDs, which include the current IANA practices.

Whereas, the IDNC Working Group's high-level recommendations require implementation planning.

Whereas, ICANN is looking closely at interaction with the final IDN ccTLD PDP process and potential risks, and intends to implement IDN ccTLDs using a procedure that will be resilient to unforeseen circumstances.

Whereas, staff will consider the full range of implementation issues related to the introduction of IDN ccTLDs associated with the ISO 3166-1 list, including means of promoting adherence to technical standards and mechanisms to cover the costs associated with IDN ccTLDs.

Whereas, the Board intends that the timing of the process for the introduction of IDN ccTLDs should be aligned with the process for the introduction of New gTLDs.

Resolved (2008.06.26.04), the Board thanks the members of the IDNC WG for completing their chartered tasks in a timely manner.

Resolved (2008.06.26.05), the Board directs staff to: (1) post the IDNC WG final report for public comments; (2) commence work on implementation issues in consultation with relevant stakeholders; and (3) submit a detailed implementation report including a list of any outstanding issues to the Board in advance of the ICANN Cairo meeting in November 2008.

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GNSO Recommendation on Domain Tasting

Whereas, ICANN community stakeholders are increasingly concerned about domain tasting, which is the practice of using the add grace period (AGP) to register domain names in bulk in order to test their profitability.

Whereas, on 17 April 2008, the GNSO Council approved, by a Supermajority vote, a motion to prohibit any gTLD operator that has implemented an AGP from offering a refund for any domain name deleted during the AGP that exceeds 10% of its net new registrations in that month, or fifty domain names, whichever is greater. <http://gnso.icann.org/meetings/minutes-gnso-17apr08.shtml>

Whereas, on 25 April 2008, the GNSO Council forwarded its formal "Report to the ICANN Board - Recommendation for Domain Tasting"

<http://gnso.icann.org/issues/domain-tasting/domain-tasting-board-report-gnso-council-25apr08.pdf>, which outlines the full text of the motion and the full context and procedural history of this proceeding.

Whereas, the Board is also considering the Proposed FY 09 Operating Plan and Budget <http://www.icann.org/financials/fiscal-30jun09.htm>, which includes (at the encouragement of the GNSO Council) a proposal similar to the GNSO policy recommendation to expand the applicability of the ICANN transaction fee in order to limit domain tasting.

Resolved (2008.06.26.06), the Board adopts the GNSO policy recommendation on domain tasting, and directs staff to implement the policy following appropriate comment and notice periods on the implementation documents.

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Approval of Operating Plan and Budget for Fiscal Year 2008-2009

Whereas, ICANN approved an update to the Strategic Plan in December 2007. <http://www.icann.org/strategic-plan/>

Whereas, the Initial Operating Plan and Budget Framework for fiscal year 2009 was presented at the New Delhi ICANN meeting and was posted in February 2008 for community consultation. <http://www.icann.org/announcements/announcement-2-04feb08.htm>

Whereas, community consultations were held to discuss and obtain feedback on the Initial Framework.

Whereas, the draft FY09 Operating Plan and Budget was posted for public comment in accordance with the Bylaws on 17 May 2008 based upon the Initial Framework, community consultation, and consultations with the Board Finance Committee. A slightly revised version was posted on 23 May 2008. <http://www.icann.org/financials/fiscal-30jun09.htm>

Whereas, ICANN has actively solicited community feedback and consultation with ICANN's constituencies. <http://forum.icann.org/lists/op-budget-fy2009/>

Whereas, the ICANN Board Finance Committee has discussed, and guided staff on, the FY09 Operating Plan and Budget at each of its regularly scheduled monthly meetings.

Whereas, the final FY09 Operating Plan and Budget was posted on 26 June 2008.

<http://www.icann.org/en/financials/proposed-opplan-budget-v3-fy09-25jun08-en.pdf>

Whereas, the ICANN Board Finance Committee met in Paris on 22 June 2008 to discuss the FY09 Operating Plan and Budget, and recommended that the Board adopt the FY09 Operating Plan and Budget.

Whereas, the President has advised that the FY09 Operating Plan and Budget reflects the work of staff and community to identify the plan of activities, the expected revenue, and resources necessary to be spent in fiscal year ending 30 June 2009.

Whereas, continuing consultation on the budget has been conducted at ICANN's meeting in Paris, at constituency meetings, and during the public forum.

Resolved (2008.06.26.07), the Board adopts the Fiscal Year 2008-2009 Operating Plan and Budget. <http://www.icann.org/en/financials/proposed-opplan-budget-v3-fy09-25jun08-en.pdf>

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Update on Draft Amendments to the Registrar Accreditation Agreement

(For discussion only.)

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Approval of PIR Request to Implement DNSSEC in .ORG

Whereas, Public Interest Registry has submitted a proposal to implement DNS Security Extensions (DNSSEC) in .ORG. <http://icann.org/registries/rsep/pir-request-03apr08.pdf>

Whereas, staff has evaluated the .ORG DNSSEC proposal as a new registry service via the Registry Services Evaluation Policy <http://icann.org/registries/rsep/>, and the proposal included a requested amendment to Section 3.1(c)(i) of the .ORG Registry Agreement <http://icann.org/tlds/agreements/org/proposed-org-amendment-23apr08.pdf> which was posted for public comment along with the PIR proposal.

Whereas, the evaluation under the threshold test of the Registry Services Evaluation Policy <http://icann.org/registries/rsep/rsep.html> found a likelihood of security and stability issues associated with the proposed implementation. The

RSTEP Review Team considered the proposal and found that there was a risk of a meaningful adverse effect on security and stability, which could be effectively mitigated by policies, decisions and actions to which PIR has expressly committed in its proposal or could be reasonably required to commit. <http://icann.org/registries/rsep/rstep-report-pir-dnssec-04jun08.pdf>

Whereas, the Chair of the SSAC has advised that RSTEP's thorough investigation of every issue that has been raised concerning the security and stability effects of DNSSEC deployment concludes that effective measures to deal with all of them can be taken by PIR, and that this conclusion after exhaustive review greatly increases the confidence with which DNSSEC deployment in .ORG can be undertaken.

Whereas, PIR intends to implement DNSSEC only after extended testing and consultation.

Resolved (2008.06.26.08), that PIR's proposal to implement DNSSEC in .ORG is approved, with the understanding that PIR will continue to cooperate and consult with ICANN on details of the implementation. The President and the General Counsel are authorized to enter the associated amendment to the .ORG Registry Agreement, and to take other actions as appropriate to enable the deployment of DNSSEC in .ORG.

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ICANN Board of Directors' Code of Conduct

Whereas, the members of ICANN's Board of Directors are committed to maintaining a high standard of ethical conduct.

Whereas, the Board Governance Committee has developed a Code of Conduct to provide the Board with guiding principles for conducting themselves in an ethical manner.

Resolved (2008.06.26.09), the Board directs staff to post the newly proposed ICANN Board of Directors' Code of Conduct for public comment, for consideration by the Board as soon as feasible. [Reference to PDF will be inserted when posted.]

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Ratification of Selection of Consultant to Conduct Independent Review of the Board

Whereas, the Board Governance Committee has recommended that Boston Consulting Group be selected as the consultant to perform the independent review of the ICANN Board.

Whereas, the BGC's recommendation to retain BCG was approved by the Executive Committee during its meeting on 12 June 2008.

Resolved (2008.06.26.10), the Board ratifies the Executive Committee's approval of the Board Governance Committee's recommendation to select Boston Consulting Group as the consultant to perform the independent review of the ICANN Board.

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Appointment of Independent Review Working Groups

Whereas, the Board Governance Committee has recommended that several working groups should be formed to coordinate pending independent reviews of ICANN structures.

Resolved (2008.06.26.11), the Board establishes the following independent review working groups:

- ICANN Board Independent Review Working Group: Amadeu Abril i Abril, Roberto Gaetano (Chair), Steve Goldstein, Thomas Narten, Rajasekhar Ramaraj, Rita Rodin, and Jean Jacques Subrenat.
- DNS Root Server System Advisory Committee (RSSAC) Independent Review Working Group: Harald Alvestrand (Chair), Steve Crocker and Bruce Tonkin.
- Security and Stability Advisory Committee (SSAC) Independent Review Working Group: Robert Blokzijl, Dennis Jennings (Chair), Reinhard Scholl and Suzanne Woolf.

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Update on Independent Reviews of ICANN Structures

(For discussion only.)

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Board Committee Assignment Revisions

Whereas, the Board Governance Committee has recommended that the membership of several Board should be revised, and that all other committees should remain unchanged until the 2008 Annual Meeting.

Resolved (2008.06.26.12), the membership of the Audit, Finance, and Reconsideration committees are revised as follows:

- Audit Committee: Raimundo Beca, Demi Getschko, Dennis Jennings, Njeri Rionge and Rita Rodin (Chair).
- Finance Committee: Raimundo Beca, Peter Dengate Thrush, Steve Goldstein, Dennis Jennings, Rajasekhar Ramaraj (Chair), and Bruce Tonkin (as observer).
- Reconsideration Committee: Susan Crawford (Chair), Demi Getschko, Dennis Jennings, Rita Rodin, and Jean-Jacques Subrenat.

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Approval of BGC Recommendations on GNSO Improvements

Whereas, Article IV, Section 4 of ICANN's Bylaws calls for periodic reviews of the performance and operation of ICANN's structures by an entity or entities independent of the organization under review.

Whereas, the Board created the "Board Governance Committee GNSO Review Working Group" (Working Group) to consider the independent review of the GNSO and other relevant input, and recommend to the Board Governance Committee a comprehensive proposal to improve the effectiveness of the GNSO, including its policy activities, structure, operations and communications.

Whereas, the Working Group engaged in extensive public consultation and discussions, considered all input, and developed a final report <http://www.icann.org/topics/gnso-improvements/gnso-improvements-report-03feb08.pdf> containing a comprehensive and exhaustive list of proposed recommendations on GNSO improvements.

Whereas, the Board Governance Committee determined that the GNSO Improvements working group had fulfilled its charter and forwarded the final report to the Board for consideration.

Whereas, a public comment forum was held open for 60 days to receive, consider and summarize <http://forum.icann.org/lists/gnso-improvements-report-2008/msg00033.html> public comments on the final report.

Whereas, the GNSO Council and Staff have worked diligently over the past few months to develop a top-level plan for approaching the implementation of the improvement recommendations, as requested by the Board at its New Delhi meeting.

Whereas, ICANN has a continuing need for a strong structure for developing policies that reflect to the extent possible a consensus of all stakeholders in the community including ICANN's contracted parties.

Resolved (2008.06.26.13), the Board endorses the recommendations of the Board Governance Committee's GNSO Review Working Group, other than on GNSO Council restructuring, and requests that the GNSO convene a small working group on Council restructuring including one representative from the current NomCom appointees, one member from each constituency and one member from each liaison-appointing advisory committee (if that advisory committee so desires), and that this group should reach consensus and submit a consensus recommendation on Council restructuring by no later than 25 July 2008 for consideration by the ICANN Board as soon as possible, but no later than the Board's meeting in August 2008.

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Receipt of Report of President's Strategy Committee Consultation

Whereas, the Chairman of the Board requested that the President's Strategy Committee undertake a process on how to strengthen and complete the ICANN multi-stakeholder model.

Whereas, the PSC has developed three papers that outline key areas and possible responses to address them: "Transition Action Plan," "Improving Institutional Confidence in ICANN," and "FAQ." <http://icann.org/en/announcements/announcement-16jun08-en.htm >

Whereas, these documents and the proposals contained in them have been discussed at ICANN's meeting in Paris.

Whereas, a dedicated webpage has been launched to provide the community with information, including regular updates <http://icann.org/jpa/iic/>.

Resolved (2008.06.26.14), the Board thanks the President's Strategy Committee for its work to date, and instructs ICANN staff to undertake the public consultation recommended in the action plan, and strongly encourages the entire ICANN community to participate in the continuing consultations on the future of ICANN by

reviewing and submitting comments to the PSC by 31 July 2008.

Selection of Mexico City for March 2009 ICANN Meeting

Whereas, ICANN intends to hold its first meeting for calendar year 2009 in the Latin America region;

Whereas, the Mexican Internet Association (AMIPCI) has agreed to host the meeting;

Resolved (2008.06.26.15), the Board accepts the AMIPCI proposal to host ICANN's 34th global meeting in Mexico City, in March 2009.

Review of Paris Meeting Structure

(For discussion only.)

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Board Response to Discussions Arising from Paris Meeting

(For discussion only.)

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ICANN At-Large Summit Proposal

Whereas, at the ICANN meeting in New Delhi in February 2008, the Board resolved to direct staff to work with the ALAC to finalise a proposal to fund an ICANN At-Large Summit, for consideration as part of the 2008-2009 operating plan and budget process. <http://www.icann.org/minutes/resolutions-15feb08.htm>

Whereas, potential funding for such a summit has been identified in the FY09 budget. <http://www.icann.org/financials/fiscal-30jun09.htm>

Whereas, a proposal for the Summit was completed and submitted shortly before the ICANN Meeting in Paris.

Resolved (2008.06.26.16), the Board approves the proposal to hold an ICANN At-Large Summit as a one-time special event, and requests that the ALAC work with ICANN Staff to implement the Summit in a manner that achieves efficiency, including considering the Mexico meeting as the venue.

Resolved (2008.06.26.17), with the maturation of At-Large and the proposal for the At-Large Summit's objectives set out, the Board expects the ALAC to look to more self-funding for At-Large travel in the fiscal year 2010 plan, consistent with the travel policies of other constituencies.

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Other Business

(TBD)

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Thanks to Steve Conte

Whereas, Steve Conte has served as an employee of ICANN for over five years.

Whereas, Steve has served ICANN in a number of roles, currently as ICANN's Chief Security Officer, but also as a vital support to the Board and its work at meetings.

Whereas, Steve has given notice to ICANN that he has accepted a new position with the Internet Society (ISOC), and that his employment with ICANN will conclude at the end of this meeting.

Whereas, Steve is of gentle nature, possessed of endless patience and fierce integrity, a love of music, and great dedication to the Internet and those who nurture it.

Whereas, the ICANN Board wishes to recognize Steve for his service to ICANN and the global Internet community. In particular, Steve has tirelessly and with good nature supported the past 19 ICANN meetings and his extraordinary efforts have been most appreciated.

Resolved (2008.06.26.18), the ICANN Board formally thanks Steve Conte for his service to ICANN, and expresses its good wishes to Steve for his work with ISOC and all his future endeavors.

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Thanks to Sponsors

The Board extends its thanks to all sponsors of this meeting:

L'Association Française pour le Nommage Internet en Coopération (AFNIC), France Télécom, Groupe Jutheau Husson, Stichting Internet Domeinregistratie Nederland (SIDN), Association Marocaine des Professionnels des Telecommunications (MATI), Afilias Limited, Deutsches Network Information Center (DENIC), The European Registry of Domain Names (EURid), European Domain Name Registration (EuroDNS), INDOM, Toit de la Grande Arche Parvis de la Défense, Musee de L'informatique, NeuStar, Inc., Public Interest Registry, VeriSign, Inc., AusRegistry, Fundació puntCAT, Council of European National Top Level Domain Registries (CENTR), China Internet Network Information Center (CNNIC), Institut National de Recherche en Informatique et en Automatique (INRIA), InterNetX, Key-Systems GmbH, Directi Internet Solutions Pvt. Ltd. d/b/a PublicDomainRegistry.com, Nask, Nominet UK, The Internet Infrastructure Foundation (.SE), Registry ASP, Amen, DotAsia Organisation Ltd., Domaine FR, Golog, Iron Mountain Intellectual Property Management, Inc., Nameaction, Inc., NIC.AT Internet Verwaltungs und Betriebsgesellschaft m.b.H, UNINETT Norid A/S, IIT – CNR (Registro del ccTLD.it), Renater, Domaine.info, and ICANNWiki.

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Thanks to Local Hosts, Staff, Scribes, Interpreters, Event Teams, and Others

The Board wishes to extend its thanks to the local host organizers, AGIFEM, its President Daniel Dardailler, Vice-President Pierre Bonis and CEO Sebastien Bachollet, as well as Board Members from Afnic, Amen, Domaine.fr, Eurodns, Indom, Internet Society France, Internet fr, Namebay, Renater, and W3C.

The Board would also like to thank Eric Besson, the Minister for Forward Planning, Assessment of Public Policies and Development of the Digital Economy for his participation in the Welcome Ceremony and the Welcome Cocktail.

The Board thanks the Au Toit de la Grande Arche , its president, Francis Bouvier, and Directeur, Philippe Nieuwbourg, and Bertrand Delanoë, Maire de Paris, and Jean-Louis Missika, adjoint au Maire de Paris for their hospitality at the social events at the ICANN Paris meeting.

The Board expresses its appreciation to the scribes Laura Brewer, Teri Darrenougue, Jennifer Schuck, and Charles Motter and to the entire ICANN staff for their efforts in facilitating the smooth operation of the meeting. ICANN would particularly like to acknowledge the many efforts of Michael Evans for his assistance in organizing the past eighteen public board meetings and many other smaller events for the ICANN community.

The Board also wishes to express its appreciation to VeriLan Events Services, Inc.

for technical support, Auvitec and Prosn for audio/visual support, Calliope Interpreters France for interpretation, and France Telecom for bandwith. Additional thanks are given to the Le Meridien Montparnasse for this fine facility, and to the event facilities and support.

The Board also wishes to thank all those who worked to introduce a Business Access Agenda for the first time at this meeting, Ayesha Hassan of the International Chamber of Commerce, Marilyn Cade, and ICANN Staff.

The members of the Board wish to especially thank their fellow Board Member Jean-Jacques Subrenat for his assistance in making the arrangements for this meeting in Paris, France.

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R-2

RESPONDENT'S EXHIBIT

CONTRACTING & THE REGISTRY AGREEMENT

News & Views

Announcement: 04 August 2017 – 2017 Base New gTLD Registry Agreement Now Effective

Contracting Overview

Contracting is a process by which eligible applicants enter into a Registry Agreement ("RA") with ICANN to operate the applied-for TLD. This process commences once the applicant successfully meets all of the following New gTLD Program requirements:

- Pass application evaluation
- Resolve contention
- Completes objection dispute resolution
- Clear GAC advice
- Completes change requests

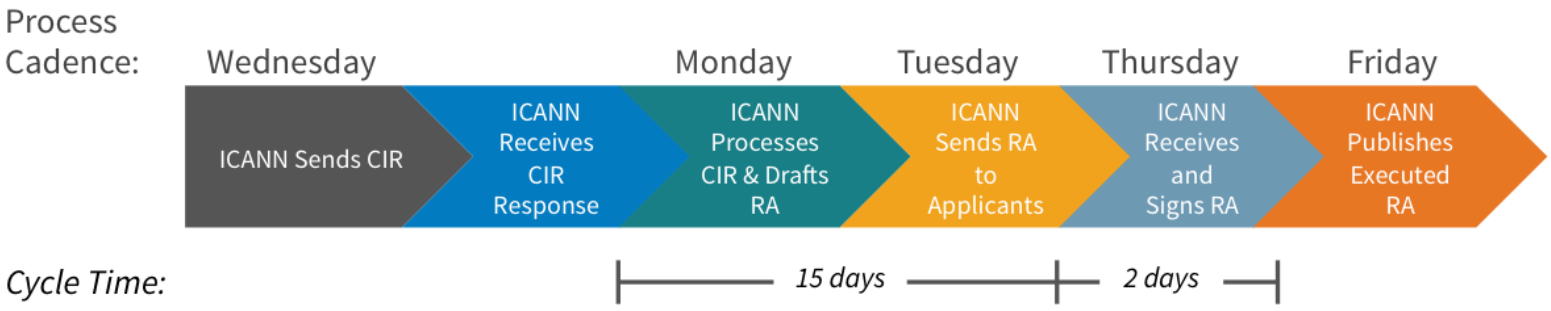
Once an applicant is eligible to commence the contracting process, ICANN will notify the applicant's primary contact via the Naming Services portal. Notifications are sent by prioritization number. Included with the notification is a CIR Form that requests for certain information needed for drafting of the RA. It is important that applicants complete and submit the CIR Form promptly upon notification to avoid missing the 9-month deadline to execute a Registry Agreement. As per Section 5.1 of the Applicant Guidebook, "Eligible applicants are expected to have executed the registry agreement within nine (9) months of the notification date. Failure to do so may result in loss of eligibility, at ICANN's discretion." The Applicant Guidebook also provides for applicants to request an extension to the 9-month window to execute the Registry Agreement if the applicant "can demonstrate, to ICANNs reasonable satisfaction, that it is working diligently and in good faith toward successfully completing the steps necessary for

entry into the registry agreement." To request for an extension, the contracting point of contact should complete and submits the Request for Extension to Execute Registry Agreement Form [DOCX, 565 KB].

To help applicants prepare for completion and submission of the CIR Form, ICANN has provided the following information:

- Contracting Information Request User Guide (updated 15 July 2014) [PDF, 2.02 MB]
- *Sample* Irrevocable Standby Letter of Credit [DOCX, 169 KB]
- *Template* for Requesting Changes to the base Registry Agreement [DOCX, 24 KB]
- *Sample Affirmation Letter to Designate a New Signatory* [DOCX, 31 KB]

Contracting will be completed once the RA is executed and the applicant will proceed to the next phase of Transition to Delegation known as Pre-Delegation Testing. Below is an overview of the contracting process. The graphic depicts a best-case scenario where there are no issues with the application. The cycle time is subject to change if volume of CIR response exceeds 40 per week. Please note that the below cycle time does not apply to applications that have been granted an extension to execute the Registry Agreement. For those applications that have been granted an extension to execute the Registry Agreement, ICANN will abide by the timelines provided in the extension notifications.



Contracting Deadlines and Extensions

On 3 September 2014, ICANN published a "Requests for Extension to Execute New gTLD Registry Agreements" announcement. This announcement re-emphasizes that eligible applicants are expected to execute the Registry Agreement within nine (9) months of the notification date. Applicants must submit extension requests at least 45 days prior to the original deadline date to be eligible for an extension. If an extension request is not submitted by the deadline, the applicant will not be granted an extension and will be expected to execute the Registry Agreement by the original deadline.

Scenario 1: No responses to the CIR received 3 weeks prior to the Registry Agreement execution deadline, and no extensions have been granted.

If no extensions have been granted and the applicant does not submit a response to the CIR 3 weeks prior to the Registry Agreement execution deadline, it must execute the Registry Agreement by the Registry Agreement execution deadline. To provide applicants under this scenario the ability to execute the Registry Agreement by the deadline date, ICANN will send eligible applicants the base Registry Agreement 2 weeks prior to the deadline date to execute the Registry Agreement.

Scenario 2: The applicant requests an extension to execute the Registry Agreement.

Applicants should demonstrate, to ICANN's reasonable satisfaction, that it is working diligently and in good faith toward successfully completing the steps necessary for entry into the registry agreement. Applicants provided with any extension shall meet interim milestone deadlines based on the activities that need to be completed. All applicants who have been granted an extension must execute the Registry Agreement by the extended deadline, or risk losing eligibility to execute the Registry Agreement with ICANN. In addition, applicants that fail to meet interim milestone deadlines will be at risk of losing eligibility to execute the Registry Agreement with ICANN. If an applicant loses eligibility to execute the Registry Agreement with ICANN, the status of its application will be changed to "Will Not Proceed."

- Download the Extension Request Form [DOC, 565 KB]
- View the Contracting Deadlines and Extensions FAQs [PDF, 340 KB]

Registry Agreement

The Registry Agreement is the formal written and binding agreement between the applicant and ICANN that sets forth the rights, duties, liabilities and obligations of the applicant as a Registry Operator. Applicants may elect to negotiate the terms of the RA by exception, but this course of action will take substantially longer to complete the Contracting process.

- View the Base Registry Agreement [PDF, 925 KB] (Updated 31 July 2017)
- View Reline of Base New gTLD Registry Agreement [924 KB] (Updated 31 July 2017)
- 2017 Global Amendment to the Base New gTLD Registry Agreement
- *Template for Requesting Changes to the base Registry Agreement*

Specification 13

On 26 March 2014, by the New gTLD Program Committee ("NGPC") of the ICANN Board passed a resolution approving a Registry Agreement Specification 13 for Brand category of applicants. One provision of Specification 13 gives a .BRAND registry operator the ability to designate up to three ICANN accredited registrars to serve as the exclusive registrars for their TLD. When the NGPC approved Specification 13 on 26 March 2014, implementation of this provision was delayed for 45 days in respect of the GNSO policy Recommendation 19 on the Introduction of New Generic Top-Level Domains. After considering the matter, the GNSO Council informed ICANN in correspondence dated 9 May 2014 [PDF, 366 KB] that although it found that the proposed provision was inconsistent with Recommendation 19, given the unique and specific circumstances, the GNSO Council accepted the variation from the original policy, did not object to the adoption of Specification 13 in its entirety, and so indicated in the form of a motion vote on and passed at the GNSO Council meeting of 8 May 2014. Specification 13 was not finalized until May 9, 2014. Subsequently, as a result of the 2017 Global Amendment, the current form of Specification 13 is effective 31 July 2017.

Specification 13 provides certain modifications to the RA for those applicants that qualify as a .Brand TLD. These requirements include:

- The TLD string is identical to the textual elements protectable under applicable law, of a registered trademark valid under applicable law;
- Only Registry Operator, its Affiliates or Trademark Licensees are registrants of domain names in the TLD and control the DNS records associated with domain names at any level in the TLD;
- The TLD is not a Generic String TLD (as defined in Specification 11);
- Registry Operator has provided ICANN with an accurate and complete copy of such trademark registration.

Registry operators that want to qualify as a .Brand TLD and receive a Specification 13 to the RA may submit an application for Specification 13 to ICANN. ICANN posts all applications for Specification 13 for comment for 30 days. All input received will be taken into consideration. If a Specification 13 is granted, it will include an exemption to the Registry Operator Code of Conduct.

- View Specification 13 [PDF, 292 KB] (Updated 31 July 2017)
- View Specification 13 Process and Application Form [PDF, 472 KB]
- View Applications to Qualify for Specification 13
- Submit Comments on Applications for Specification 13
- View Comments Submitted on Applications for Specification 13
- Read the Specification 13 FAQs (Updated 15 July 2014) [PDF, 428 KB]

Registry Operator Code of Conduct

The Registry Operator Code of Conduct is a set of guidelines for registry operators relating to certain and limited operations of the registry. All registry operators are subjected to the Code of Conduct unless an exemption is granted to the registry operator by ICANN. In order to qualify for an exemption to the Code of Conduct, the TLD must not be a "generic string" (as defined in Section 3(d) of Specification 11) and the following criteria must be satisfied:

- All domain name registrations in the TLD are registered to, and maintained by, Registry Operator for the exclusive use of Registry Operator or its affiliates;
- Registry Operator does not sell, distribute or transfer control or use of any registrations in the TLD to any third party that is not an affiliate of Registry Operator; and
- Application of the Code of Conduct to the TLD is not necessary to protect the public interest.

Registry operators that want to be exempted from the Code of Conduct may submit a request for exemption to the Code of Conduct to ICANN. ICANN posts all requests for exemption to the Code of Conduct for comment for 30 days. All input received will be taken into consideration.

A clause providing an exemption to the Code of Conduct is included in the provisions of Specification. Thus, any registry operator applying for a Specification 13 to the RA need not separately apply for an exemption to the Code of Conduct.

- Review the COC Exemption Process & Forms [PDF, 146 KB]
- View Requests for Exemption to the Code of Conduct
- Submit Comments on Requests for Exemption to the Code of Conduct
- View Comments Submitted on Requests for Exemption to the Code of Conduct
- Read the Code of Conduct Exemption FAQ (Updated 18 July 2014) [PDF, 500 KB]

Application Eligibility Reinstatement

Application Eligibility Reinstatement is a process that allows applicants with applications in a "Will Not Proceed" status because a contracting related deadline was missed to request reinstatement of the application's eligibility status. If eligibility reinstatement is granted, the applicant may proceed to signing the Registry Agreement with ICANN provided the application meets all Program requirements.

ICANN will notify applicants that are qualified to request reinstatement of eligibility status of their applications via the Naming Services portal (referenced as Application Eligibility Notification). Generally, ICANN will notify the applicant within one week of the application status being changed to "Will Not Proceed." Upon notification, applicants may request reinstatement of their applications' eligibility by submitting the Application Eligibility Reinstatement Request form. Requests must be submitted by the deadline communicated to the applicant in the Application Eligibility Notification to be considered.

To ensure applicants are committed to signing the Registry Agreement and to delegate the TLD within 12 months of the Effective Date of the Registry Agreement, applicants will be required to provide:

- All pending information required for the execution of the Registry Agreement. This could include:
  - Compliant Continuing Operations Instrument
  - Complete Contracting Information Request form or updated information for the Contracting Information Request
  - Application change request
  - Complete Specification 13 application
  - Complete Request to Registry Operator Code of Conduct Exemption
- All required information for Post-Contracting activities:
  - Pre-Delegation Testing information
  - A fully executed Data Escrow agreement
  - Registry contact and Registry public contact information
  - Registry Onboarding Information Request information
  - Notification of intent for Registry assignment or material sub-contractor changes

Deadline and Timeline

In addition to the above required information, applicants will need to commit to signing the Registry Agreement and completing post-contracting activities by certain deadline dates:

- **Registry Agreement signing** – If applicant has a Registry Agreement signing deadline date that is in the future, applicant will be required to sign the Registry Agreement by that date. If applicant has an Registry Agreement signing deadline date that has passed, applicant will be required to sign the Registry Agreement 30 days from the date ICANN notifies applicant of the new Registry Agreement signing deadline date.
- **Onboarding** – Applicant will be required to complete Onboarding 45 days from the Effective Date of the Registry Agreement. Applicant will receive a notification after Registry Agreement execution to enter the provided information into the Naming Services portal.
- **Pre-Delegation Testing** – Applicant will be required to start Pre-Delegation Testing 45 days from the Effective Date of the Registry Agreement. Applicant will receive a notification after Registry Agreement execution to schedule Pre-Delegation Testing appointment.
  All required information and documents must be submitted with the request so that ICANN may review the request in its entirety to make a

determination. ICANN will review requests based on the unique circumstances of each application and notify applicants of its determination via the Naming Services portal.

- View Application Eligibility Reinstatement Process and Request Form [DOCX, 536 KB]

Contracting Statistics

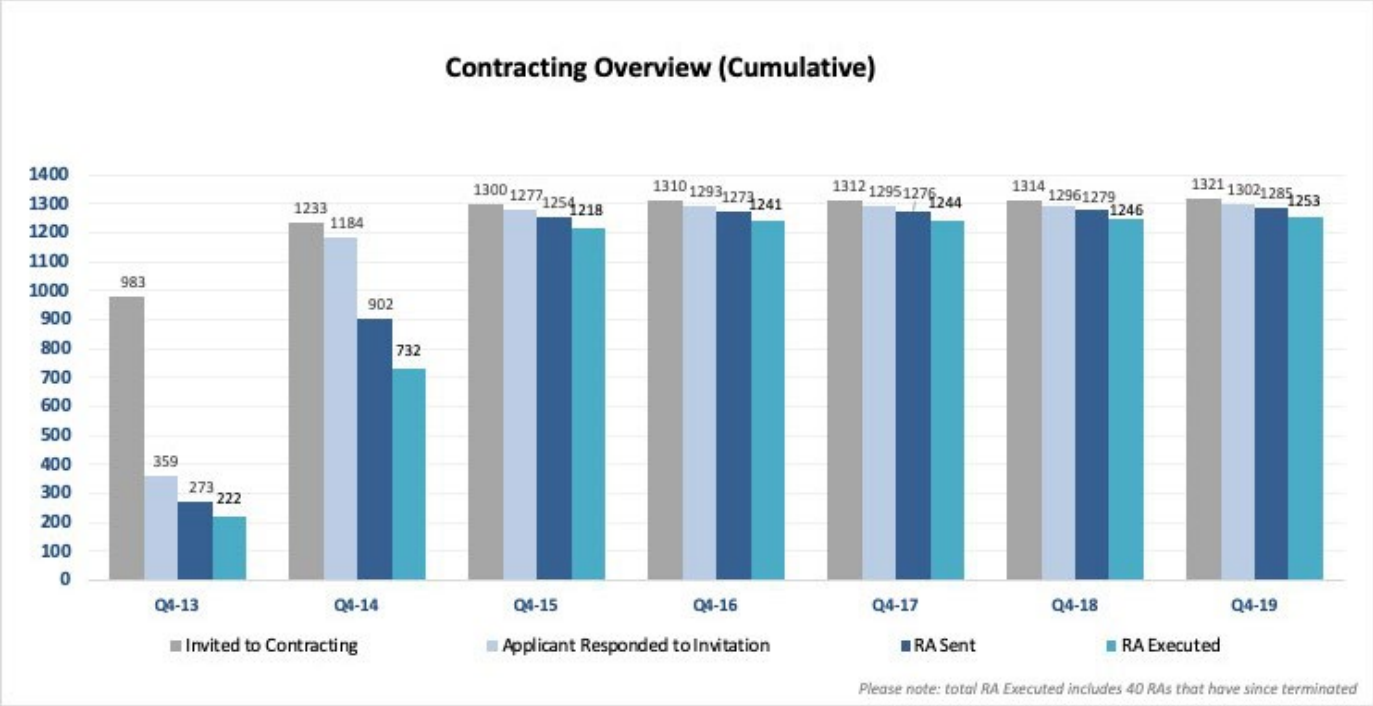
The following contracting statistics are updated on a quarterly basis:

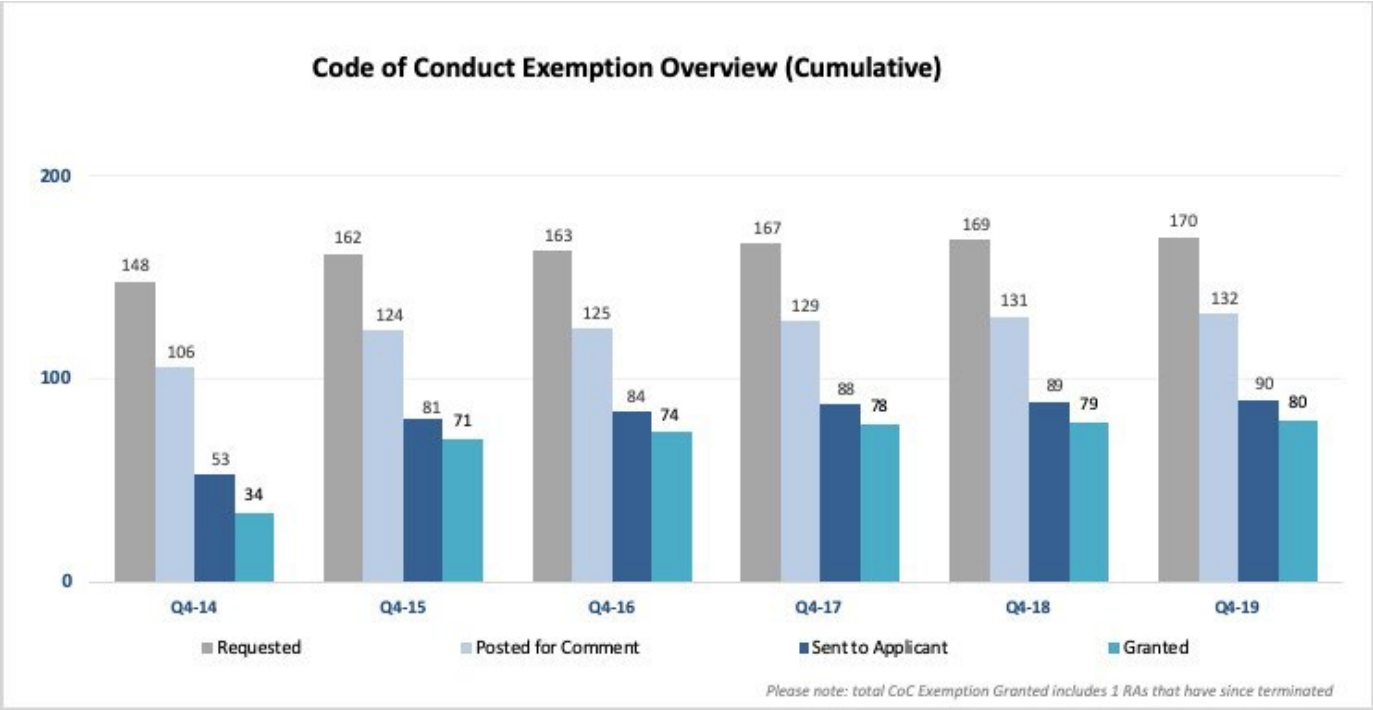
For the Quarter Ending: 31 December 2019

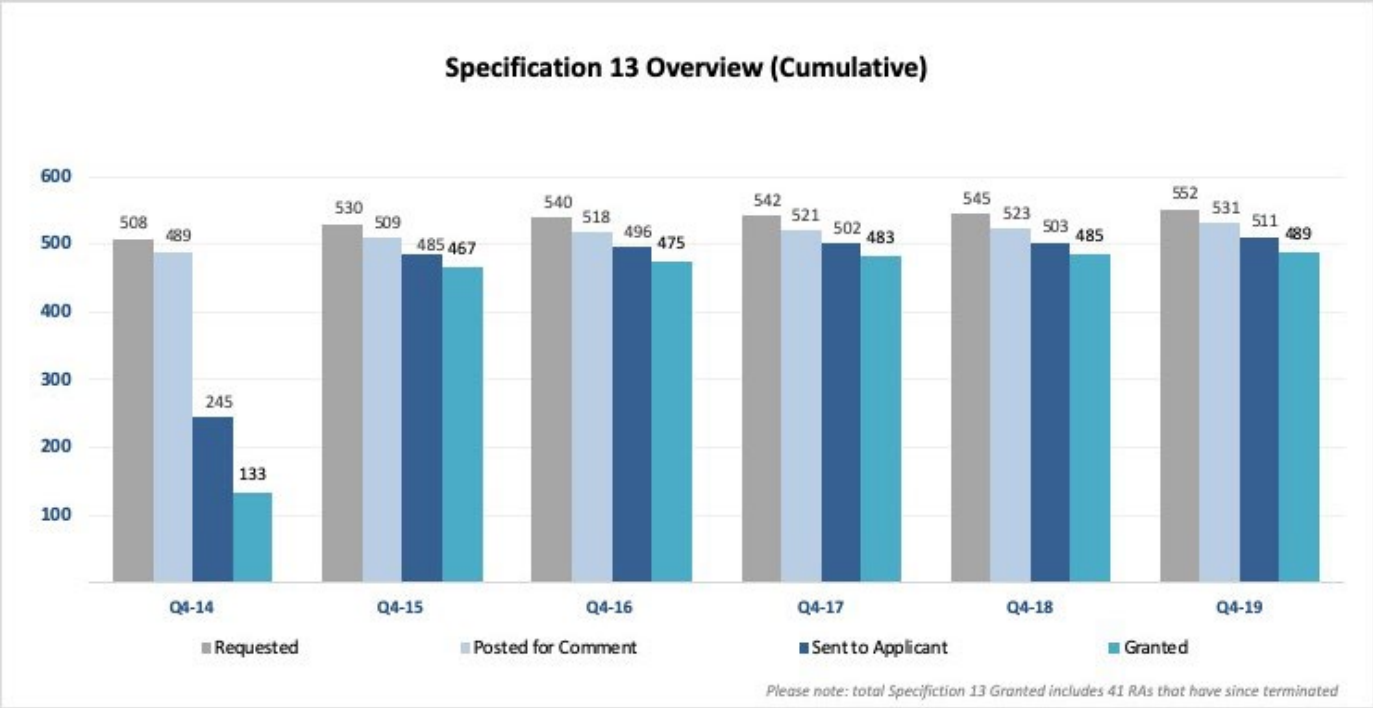
Number of Applications Invited to Contracting: 3
Number of Responses to Contracting Invite Received: 3
Number of Registry Agreements Sent to Applicants: 3
Number of Registry Agreements Executed: 3

Number of Requests for Exemption to the Code of Conduct Posted for 30-day Comment: 0
Number of Code of Conduct Exemptions Granted: 0

Number of Applications for Specification 13 Posted for 30-day Comment: 0
Number of Specification 13 Granted: 3







Contracting Resources

Documents

- Base Registry Agreement [PDF, 925 KB] (Updated 31 July 2017)
- Specification 13 [PDF, 292 KB] (Updated 31 July 2017)
- Contracting Information Request Guidance (Updated 15 July 2014) [PDF, 2.02 MB]
- Naming Services portal User's Guide [PDF, 730 KB]

Sample Irrevocable Standby Letter of Credit [DOCX, 169 KB]
- *Template for Requesting Changes to the base Registry Agreement* [DOCX, 24 KB]
- *Sample Affirmation Letter to Designate a New Signatory* [DOCX, 31 KB]
- Specification 13 Process and Application Form [PDF, 472 KB]
- COC Exemption Process & Form [PDF, 146 KB]
- Request for Extension to Execute Registry Agreement Form [DOCX, 565 KB]

Comments

- View Applications to Qualify for Specification 13
- Submit Comments on Applications for Specification 13
- View Comments Submitted on Applications for Specification 13
- View Requests for Exemption to the Code of Conduct
- Submit Comments on Requests for Exemption to the Code of Conduct
- View Comments Submitted on Requests for Exemption to the Code of Conduct

Frequently Asked Questions

- Specification 13 FAQs [PDF, 427 KB]
- Code of Conduct Exemption FAQ [PDF, 500 KB]
- Contracting Deadlines and Extensions FAQs [PDF, 340 KB]

Questions?

- **Applicants:** Submit an inquiry via the Naming Services portal
- **Non-Applicants:** Email us at newgtld@icann.org

News Archive

Below find archival materials documenting milestones in the development of the Contracting process, listed in reverse chronological order.

29 July 2014 – CORRECTION: ICANN Updates Specification 13 Process and Application Form

15 July 2014 – ICANN Updates Specification 13 Process and Application Form

14 April 2014 – ICANN Publishes Process to Qualify for Specification 13 to the New gTLD Registry Agreement

18 March 2014 – ICANN Seeks Comments on Requests for Exemption to the Registry Operator Code of Conduct

9 May 2014 – GNSO Provided Input on Specification 13 at New gTLD Program Committee's ("NGPC") Request

On 26 March, the NGPC approved Specification 13 to the New gTLD Registry, along with an additional clause that would allow .Brand registry operators to designate up to three ICANN accredited registrars to serve as the exclusive registrars for their TLD. The NGPC asked the GNSO to comment on whether this clause is in line with GNSO policy recommendations. On 9 May, the GNSO provided its comment in a letter to Cherine Chalaby, the Chair of the NGPC:

- Letter from Jonathan Robinson to Cherine Chalaby [PDF, 367 KB]

15 July 2013 – Contracting Session at ICANN 47 Durban

Krista Papac, ICANN's gTLD Registry Services Director, leads a session focused on helping New gTLD applicants understand and prepare for the Contracting process.

- Web Conference Recording

- Audio Recording [MP3, 36.7 MB]
- Presentation [PDF, 726 KB]
- Additional Questions & Answers [PDF, 274 KB]

15 July 2013 – First Registry Agreements

On the opening day of ICANN 47 Durban, ICANN signs the first four Registry Agreements with new gTLD applicants.

- First Registry Agreements Executed – Internet Users Will Soon Be Able to Navigate the Web in Their Native Language
- Akram Atallah's Blog Post: 2013 RAA and RyA Signings Kick-off ICANN 47 in Durban

14 July 2013 – Supplement to the Registry Agreement

Required of applicants facing outstanding items, such as Governmental Advisory Committee (GAC) Advice, Rights Protection Mechanisms requirements, and Post-Delegation Dispute Resolution Proceedings, that wish to sign the Registry Agreement ahead of resolving those issues.

- Supplement to the Registry Agreement [PDF, 49 KB]

21 June 2013 – Contracting Information Request Guidance

ICANN publishes materials to help applicants to prepare for contracting.

- Contracting Information Request Guidance [PDF, 304 KB]

13 June 2013 – New gTLD Contracting Webinar

ICANN hosts a webinar to help new gTLD applicants understand the Contracting process and learn what information they must provide prior to executing a Registry Agreement.

- Web Conference Recording
- Teleconference Recording [MP3, 15.8 MB]
- Presentation [PDF, 1.29 MB]
- Additional Questions & Answers [PDF, 532 KB]
- Announcement

29 April 2013 – Registry Agreement is Now Available for Public Comment

ICANN is seeking public comment on the Proposed Final Registry Agreement published on 29 April 2013.

- Read the Announcement
- Comment now

1 April 2013 – Revised Registry Agreement Posted for Review

ICANN provides the latest version of the "Revised new gTLD Registry Agreement" for the community's information and review.

- ICANN Blog Post

26 March 2013 – New gTLD Update Webinar

ICANN staff hosts a webinar session providing information about the Contracting process, among other program updates.

- Conference Call Audio [MP3, 21.8 MB]
- Presentation [PDF, 2.08 MB]

5 February 2013 – New gTLD Applicant Webinar

ICANN staff hosts a webinar session providing details about the Public Interest Commitments (PIC) Specification, among other program updates.

- Web Meeting Recording
- Conference Call Recording
- Presentation [PDF, 1.04 MB]

5 February 2013 – Public Comment: Revised New gTLD Registry Agreement & PIC Spec

ICANN solicits feedback on a revised version of the New gTLD Registry Agreement that includes information on the Public Interest Commitments (PIC) Specification.

- Revised New gTLD Registry Agreement Including Additional Public Interest Commitments Specification
- Frequently Asked Questions | Specification 11 of the Revised New gTLD Registry Agreement: Public Interest Commitments

5 September 2013 – Customer Portal User Guide

ICANN publishes a User Guide to help applicants complete Transition to Delegation processes. Applicants must conduct Contracting through the Customer Portal.

- Announcement: Customer Portal User Guide Created to Help Applicants Transition to Delegation
- Customer Portal User Guide [PDF, 2.18 MB]

27 August 2013 – Potential Name Space Collision Report

ICANN explains how the Name Space Collision Report will affect the Contracting process. New gTLD applications are to be handled according to the potential for risk.

Potential Name Space Collision Report's Impact on Contracting

Contracting Process Statistics

CUMULATIVE TOTALS —>		1930	1147	606	544	468
Week Ending (2014)	Sent Through Priority Number	Contracting Eligibility Notifications Sent	CIR Invitations Sent	CIR Responses Received	Contracts Sent Out For Signature	Registry Agreements Executed
11 Jul	–	–	1	3	10	4
4 Jul	–	–	1	1	6	9
27 Jun	–	–	0	8	8	15
20 Jun	–	–	4	6	2	6
13 Jun	–	–	5	9	9	5
6 Jun	–	–	6	10	16	3
30 May	–	–	8	7	10	6
23 May	–	–	2	5	5	6
16 May	–	–	3	7	6	4

9 May	–	–	4	10	7	9
2 May	–	–	10	2	7	7
25 Apr	–	–	1	5	10	8
18 Apr	–	–	2	10	5	4
11 Apr	–	–	0	9	7	4
04 Apr	–	–	4	4	6	10
28 Mar	–	–	5	10	5	10
21 Mar	–	–	2	4	11	27
14 Mar	–	–	0	4	19	4
7 Mar	–	–	1	15	60	37
28 Feb	–	–	7	7	4	3
21 Feb	–	–	1	63	5	4
14 Feb	–	–	95	3	8	3
07 Feb	–	–	0	18	13	9
31 Jan	–	–	1	7	0	7
24 Jan	–	–	0	4	7	14
17 Jan	–	–	6	9	15	9
10 Jan	–	–	1	10	10	19
03 Jan	–	–	0	3	0	0

Week Ending (2013)	Sent Through Priority Number	Contracting Eligibility Notifications Sent	CIR Invitations Sent	CIR Responses Received	Contracts Sent Out For Signature	Registry Agreements Executed
27 Dec	–	–	0	16	0	0
20 Dec	–	–	5	8	23	21
13 Dec	–	–	5	23	25	11
06 Dec	–	–	3	13	37	31
29 Nov	–	–	1	11	0	0
22 Nov	–	–	9	14	16	15
15 Nov	–	–	2	40	30	29
08 Nov	1930	430	198	22	48	35
01 Nov	1500	100	46	16	4	5
25 Oct	1400	100	52	14	16	8

18 Oct	1300	100	49	26	7	9
11 Oct	1200	100	49	7	6	2
04 Oct	1100	100	57	15	9	8
27 Sep	1000	100	47	14	3	4
20 Sep	900	100	39	13	14	10
13 Sep	800	100	53	21	15	17
06 Sep	700	100	53	10	2	0
30 Aug	600	100	49	19	17	13
23 Aug	500	100	49	20	0	0
16 Aug	400	100	53	24	0	0
09 Aug	300	100	49	9	0	0
02 Aug	200	92	53	0	0	0
26 Jul	108	58	31	1	0	0
19 Jul	50	0	0	0	4	4
12 Jul	50	0	0	4	0	0
05 Jul	50	50	31	0	0	0

Continuing Operations Instrument (Letter of Credit) Outreach

Week Ending (2013)	Priority Numbers Addressed
11 Oct	1701 – 1930 (Completed)
04 Oct	1501 – 1700
27 Sep	1401 – 1500
20 Sep	1251 – 1400
13 Sep	1101 – 1250
06 Sep	951 – 1100
30 Aug	801 – 950
23 Aug	701 – 800
16 Aug	501 – 700
09 Aug	201 – 500
02 Aug	109 – 200
26 Jul	51 – 108
19 Jul	Not applicable

12 Jul	Not applicable
05 Jul	1 – 50

Applicants' Corner

Applicant Guidebook

Applicant Support Program

Auctions

Community Priority Evaluation (CPE)

Contracting & the Registry Agreement

- Applications to Qualify for Specification 13 to the Registry Agreement
- Registry Operator Code of Conduct Exemption Requests

Global Support

Pre-Delegation Testing

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RESPONDENT'S EXHIBIT

R-3

Assignment of a Registry Agreement

This page is available in:
English |
العربية (https://www.icann.org/resources/pages/assignments-2022-12-06-ar) |
Español (https://www.icann.org/resources/pages/assignments-2022-12-06-es) |
Français (https://www.icann.org/resources/pages/assignments-2022-12-06-fr) |
日本語 (https://www.icann.org/resources/pages/assignments-2022-12-06-ja) |
Português (https://www.icann.org/resources/pages/assignments-2022-12-06-pt) |
Русский (https://www.icann.org/resources/pages/assignments-2022-12-06-ru) |
中文 (https://www.icann.org/resources/pages/assignments-2022-12-06-zh)

Please note that the English language version of all translated content and documents are the official versions and that translations in other languages are for informational purposes only.

An assignment of a Registry Agreement occurs when the registry operator transfers any of its rights and/or obligations under the Registry Agreement from the current registry operator to another entity. These transactions may be classified as:

- Assignment to Affiliated Assignee
- Assignment to Existing Registry Operator
- Assignment to New Registry Operator

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ICANN (Internet Corporation for Assigned Names and Numbers) org conducts due diligence to understand and evaluate the entity that is expected to operate the top-level domain ("TLD (Top Level Domain)") and to have reasonable assurances that this entity will continue to enable the secure, stable, and resilient operation of the TLD (Top Level Domain) (e.g., ICANN (Internet Corporation for Assigned Names and Numbers) org may assess financial resources, operational and technical capabilities, and/or transaction structure, and will perform background screenings). Assignments are also subject to the Registry Transition Process, see Registry Transition Process webpage (/resources/pages/transition-processes-2013-04-22-en) for additional information.

View completed Assignments (/resources/pages/registry-agreement-assignment-direct-changes-of-control-2017-01-27-en)

Assignment Process

Below are general instructions for submitting assignment requests organized by the assignment types. The steps below highlight key considerations and preparations that registry operators should make prior to submitting a service request case in the Naming Services portal (NSp).

Before You Submit: Considerations and Preparation

Prior to submission, ICANN (Internet Corporation for Assigned Names and Numbers) org encourages registry operators to:

- Review the relevant sections of the Registry Agreement.
- Review the types of assignments below along with the Assignments Required Information (/en/system/files/files/assignments-required-information-21oct22-en.pdf).

- Consider the type that will apply to your proposed assignment.
- Organize a consultation call with your account manager to review the proposed transaction, timing, and to discuss any questions. To schedule a consultation call, open a General Inquiry case in the Naming Services portal (https://portal.icann.org/) (NSp) or contact your account manager directly.*
- Prepare the information and documentation for submission. Please review the Naming Service portal User Guide for Registries (/en/system/files/files/nsp-registries-user-guide-10feb22-en.pdf) for detailed instructions on submitting a service request case.

**Note that any such inquiries shall not be considered notice of an assignment as required by the Registry Agreement. Registry operators are not to construe any consultations with ICANN (Internet Corporation for Assigned Names and Numbers) org as legal, business or tax advice. Each registry operator should consult its own attorney, accountant or other professional advisors concerning legal, business, tax, or other matters concerning the proposed assignment.*

Assignment to Affiliated Assignee

Occurs when the proposed assignee is an Affiliated Assignee (as defined in Section 7.5(f) of the Registry Agreement) and the Affiliated Assignee has expressly assumed in writing the terms and conditions of the Registry Agreement.

1. **Request Submission** - The assignor must select "Assignment to Affiliate" to initiate a case in NSp. The assignor must provide ICANN (Internet Corporation for Assigned Names and Numbers) org with the required information and documentation for review. Please see the

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Assignments Required Information (/en/system/files/files/assignments-required-information-21oct22-en.pdf) for more details.

2. **ICANN (Internet Corporation for Assigned Names and Numbers) Review** - ICANN (Internet Corporation for Assigned Names and Numbers) org will review the information, responses, and supporting documents submitted.

3. **Determination** - After the registry operator satisfies the requirements, ICANN (Internet Corporation for Assigned Names and Numbers) org will acknowledge the assignment via an Acknowledgement of Assignment letter. ICANN (Internet Corporation for Assigned Names and Numbers) will reflect the assignment on its webpages, including by publishing the applicable assignment and assumption agreement.

Assignment to Existing Registry Operator

Occurs when the proposed assignee is an existing registry operator of at least one gTLD (generic Top Level Domain) (and only if the existing registry operator is in compliance with the terms of its registry agreement(s) governing the gTLD (generic Top Level Domain)(s) it operates) and is not an Affiliated Assignee.

1. **Request Submission** – The assignor must select "Assignment to Existing Registry Operator" to initiate a case in NSp. The assignor must provide ICANN (Internet Corporation for Assigned Names and Numbers) org with the required information and documentation for review. ICANN (Internet Corporation for Assigned Names and Numbers) org will open a separate case for the proposed assignee. The proposed assignee must provide ICANN (Internet Corporation for Assigned Names and Numbers) org with the

required information and documentation for review in NSp **within 2 calendar days** of receiving the case in order for ICANN (Internet Corporation for Assigned Names and Numbers) org to have the necessary time to review the request within the 10 calendar days as noted below in ICANN (Internet Corporation for Assigned Names and Numbers) Review. Please see the Assignments Required Information (/en/system/files/files/assignments-required-information-21oct22-en.pdf) for more details.

2. **ICANN (Internet Corporation for Assigned Names and Numbers) Review** - ICANN (Internet Corporation for Assigned Names and Numbers) org will review the information, responses, and supporting documents submitted and will respond within 10 calendar days of ICANN (Internet Corporation for Assigned Names and Numbers)'s receipt of notice of the proposed assignment.

3. **Determination** - ICANN (Internet Corporation for Assigned Names and Numbers) org will provide one of the following responses to the proposed assignment request:
    - *Conditional Consent* - ICANN (Internet Corporation for Assigned Names and Numbers) org may issue a Conditional Consent to Assignment letter whereby ICANN (Internet Corporation for Assigned Names and Numbers) approves the assignment request, contingent upon the satisfaction of certain conditions. These conditions usually require the assignor and proposed assignee to provide additional documentation, including an assignment and assumption agreement, data escrow agreement and/or continued operations instrument.

      Note, this additional documentation should **not be executed until after ICANN (Internet Corporation for Assigned Names and Numbers)'s conditional**

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consent has been granted. ICANN (Internet Corporation for Assigned Names and Numbers) org will conduct a review of the additional documentation and if sufficient (and if the proposed assignee is in compliance with the terms of its registry agreement(s) governing the gTLD (generic Top Level Domain)(s) it operates at the time of satisfaction of the conditions), ICANN (Internet Corporation for Assigned Names and Numbers) org will grant its final consent and approve the assignment request via a Release of Conditions to Consent letter. ICANN (Internet Corporation for Assigned Names and Numbers) org will then reflect the assignment on its webpages, including by publishing the applicable assignment and assumption agreement.

- *Objection and/or Request for Additional Information* - if the information, responses, or documentation submitted is insufficient to proceed with Conditional Consent or not provided in a timely manner, ICANN (Internet Corporation for Assigned Names and Numbers) org may object to the proposed assignment request. Should ICANN (Internet Corporation for Assigned Names and Numbers) org request additional information to further evaluate the proposed assignment, the assignor must supply the requested information within fifteen (15) calendar days.

Assignment to New Registry Operator

Occurs when the proposed assignee is not an existing registry operator and is not an Affiliated Assignee. See the additional Assignment to New Registry Operator assignee information (/en/system/files/files/assignment-new-registry-operator-assignee-info-06mar23-en.pdf).

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1. **Request Submission** – The assignor must select "Assignment to New Registry Operator" to initiate a case in NSp. The assignor must provide ICANN (Internet Corporation for Assigned Names and Numbers) org with the required information and documentation for review. ICANN (Internet Corporation for Assigned Names and Numbers) org will open a separate case for the proposed assignee. The proposed assignee must provide ICANN (Internet Corporation for Assigned Names and Numbers) org with the required information and documentation for review in NSp **within 5 calendar days** of receiving the case in order for ICANN (Internet Corporation for Assigned Names and Numbers) org and its external providers to have the necessary time to review the request. Please see the Assignments Required Information for more details.

2. **ICANN (Internet Corporation for Assigned Names and Numbers) Review** - Background screening and financial evaluation will be conducted by external providers and the proposed assignee will be responsible for the evaluation fees. ICANN (Internet Corporation for Assigned Names and Numbers) org will review the evaluation results as well as the information, responses, supporting documents submitted and will respond within 30 calendar days of ICANN (Internet Corporation for Assigned Names and Numbers)'s receipt of notice of the proposed assignment.

3. **Determination** - ICANN (Internet Corporation for Assigned Names and Numbers) org will provide one of the following outcomes of the proposed assignment request:
    - *Conditional Consent* - ICANN (Internet Corporation for Assigned Names and Numbers) org may issue a Conditional Consent to Assignment letter whereby ICANN (Internet Corporation for Assigned Names and Numbers) approves the assignment request, contingent upon the satisfaction of certain conditions.

These conditions usually require the assignor and proposed assignee to provide additional documentation, including an assignment and assumption agreement, data escrow agreement and/or continued operations instrument.

Note, this additional documentation should **not be executed until after ICANN (Internet Corporation for Assigned Names and Numbers)'s conditional consent has been granted**. ICANN (Internet Corporation for Assigned Names and Numbers) org will conduct a review of the additional documentation and if sufficient, ICANN (Internet Corporation for Assigned Names and Numbers) org will grant its final consent and approve the assignment request via a Release of Conditions to Consent letter. ICANN (Internet Corporation for Assigned Names and Numbers) org will then reflect the assignment on its webpages, including by publishing the applicable assignment and assumption agreement.

- *Consent Withheld and/or Request for Additional Information* - if the information, responses, or documentation submitted is insufficient to proceed with Conditional Consent or not provided in a timely manner, ICANN (Internet Corporation for Assigned Names and Numbers) org may withhold consent to the proposed assignment request. Should ICANN (Internet Corporation for Assigned Names and Numbers) org request additional information to further evaluate the proposed assignment, the assignor must supply the requested information within fifteen (15) calendar days.

The proposed assignee is responsible for fees incurred for evaluations conducted by external providers. Fees may vary depending on the nature of the transaction but typically will not

exceed US $19,000 for a single TLD (Top Level Domain) assignment to a new registry operator.

Resources

- Assignments Required Information (/en/system/files/files/assignments-required-information-21oct22-en.pdf)
- Assignment and Assumption Agreement Template - Existing or New Registry Operator (/en/system/files/files/assignment-assumption-agreement-template-21oct22-en.pdf)
- Assignment and Assumption Agreement Template - Affiliated Assignee (/en/system/files/files/assignment-assumption-agreement-template-14feb23-en.pdf)
- Additional Assignment to New Registry Operator Assignee Information (/en/system/files/files/assignment-new-registry-operator-assignee-info-06mar23-en.pdf)
- Contact Information Document (/en/system/files/files/contact-info-assignment-change-control-11oct17-en.pdf)
- Registry Transition Processes (/resources/pages/transition-processes-2013-04-22-en)
- Completed Assignments (/resources/pages/registry-agreement-assignment-direct-changes-of-control-2017-01-27-en)
- Material Subcontracting Arrangement (MSA (Material Subcontracting Agreement)) change (/resources/material-subcontracting-arrangement)

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R-3

R-3

R-3

R-4

RESPONDENT'S EXHIBIT

ICANN New gTLD Contention Set Resolution Auction

Final Results for WEB / WEBS

Winners:

String Won	Applicant	Application ID	Winning Price	Date of Auction
WEB	NU DOT CO LLC	1-1296-36138	$135,000,000	27-July-2016
WEBS	Vistaprint Limited	1-1033-73917	$1	27-July-2016

Applicants:

Applicant	Application ID	Position	Submitted Deposit (Participated in Auction)
Afilias Domains No. 3 Limited	1-1013-6638	A	Yes
Charleston Road Registry Inc.	1-1681-58699	A	Yes
DotWeb Inc.	1-956-26846	A	Yes
NU DOT CO LLC	1-1296-36138	A	Yes
Ruby Glen, LLC	1-1527-54849	A	Yes
Schlund Technologies GmbH	1-1013-77165	A	Yes
Vistaprint Limited	1-1033-73917	C	Yes
Web.com Group, Inc.	1-1009-97005	B	Yes

Round Information:

Round #	Start of Round Price	End of Round Price	Number of Eligible Bidders	Aggregate Demand	Enduring Applications
1	$1	$1,000,000	8	6	7
2	$1,000,000	$2,000,000	7	6	7
3	$2,000,000	$3,000,000	7	6	7
4	$3,000,000	$4,000,000	7	6	7
5	$4,000,000	$5,400,000	7	6	7
6	$5,400,000	$7,200,000	7	6	7
7	$7,200,000	$9,600,000	7	6	7
8	$9,600,000	$12,000,000	7	5	6
9	$12,000,000	$15,000,000	6	5	6
10	$15,000,000	$18,800,000	6	4	4
11	$18,800,000	$23,500,000	4	4	4
12	$23,500,000	$29,400,000	4	4	4
13	$29,400,000	$36,800,000	4	4	4
14	$36,800,000	$46,000,000	4	4	4
15	$46,000,000	$57,500,000	4	4	4

16	$57,500,000	$71,900,000	4	2	2
17	$71,900,000	$82,000,000	2	2	2
18	$82,000,000	$92,000,000	2	2	2
19	$92,000,000	$102,000,000	2	2	2
20	$102,000,000	$112,000,000	2	2	2
21	$112,000,000	$122,000,000	2	2	2
22	$122,000,000	$132,000,000	2	2	2
23	$132,000,000	$142,000,000	2	*	*

Notes:

- This was an Indirect Contention.
- Aggregate Demand: The number of Bids placed at the End of Round Price. The Aggregate Demand is available for all Rounds except the final Round.
- Enduring Application: An Application for which a Continue Bid has been submitted or which satisfies the condition of clause 34(c) of the Auction Rules (Version 2015-02-24), but which has not been deemed to be a Winning Application pursuant to clause 35(b). The number of Enduring Applications is available for all Rounds except the final Round.
- All prices are displayed in United States Dollars (USD) with a comma denoting the thousands separator.
- The results shown reflect the outcome of the Auction commenced on 27 July 2016 and do not necessarily reflect the final resolution of the Contention Set. Being declared the ultimate winner of the Contention String is contingent upon timely payment of the Winning Price per the Auction Rules and eligibility to sign a Registry Agreement as determined by ICANN.
- The Application in the “B” position was eliminated after Round 10, causing the Contention Set to divide and causing the Application of Vistaprint Limited to be deemed a Winning Application.
- The outcome of the Auction does not guarantee that Registry Agreements will be signed or that the TLDs will be delegated. These results do not constitute a waiver or amendment of any provision of the Applicant Guidebook, the Registry Agreement, the Bidder Agreement or the Auction Rules.

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RESPONDENT'S EXHIBIT

August 1, 2016

Verisign Statement Regarding .Web Auction Results

RESTON, Va.--(BUSINESS WIRE)-- VeriSign, Inc. (NASDAQ:VRSN), a global leader in domain names and internet security, today announced the following information pertaining to the .web top-level domain (TLD):

The Company entered into an agreement with Nu Dot Co LLC wherein the Company provided funds for Nu Dot Co's bid for the .web TLD. We are pleased that the Nu Dot Co bid was successful.

We anticipate that Nu Dot Co will execute the .web Registry Agreement with the Internet Corporation for Assigned Names and Numbers (ICANN) and will then seek to assign the Registry Agreement to Verisign upon consent from ICANN.

As the most experienced and reliable registry operator, Verisign is well-positioned to widely distribute .web. Our expertise, infrastructure, and partner relationships will enable us to quickly grow .web and establish it as an additional option for registrants worldwide in the growing TLD marketplace. Our track record of over 19 years of uninterrupted availability means that businesses and individuals using .web as their online identity can be confident of being reliably found online. And these users, along with our global distribution partners, will benefit from the many new domain name choices that .web will offer.

About Verisign
Verisign, a global leader in domain names and internet security, enables internet navigation for many of the world's most recognized domain names and provides protection for websites and enterprises around the world. Verisign ensures the security, stability and resiliency of key internet infrastructure and services, including the .com and .net domains and two of the internet's root servers, as well as performs the root zone maintainer functions for the core of the internet's Domain Name System (DNS). Verisign's Security Services include intelligence-driven Distributed Denial of Service Protection, iDefense Security Intelligence and Managed DNS. To learn more about what it means to be Powered by Verisign, please visit Verisign.com.

VRSNF

View source version on businesswire.com: http://www.businesswire.com/news/home/20160801005586/en/

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RESPONDENT'S EXHIBIT

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Attorneys for Plaintiff
RUBY GLEN, LLC

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RUBY GLEN, LLC

Plaintiff,

vs.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS AND DOES 1-10

Defendant.

Case No.: 2:16-cv-05505-PA-AS

PLAINTIFF'S AMENDED COMPLAINT FOR:

1) **BREACH OF CONTRACT**
2) **BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING**
3) **NEGLIGENCE**
4) **UNFAIR COMPETITION (VIOLATION OF CALIFORNIA BUSINESS & PROFESSIONS CODE § 17200)**
5) **DECLARATORY RELIEF**

Plaintiff RUBY GLEN, LLC (hereinafter, "Plaintiff") alleges as follows:

INTRODUCTION

1. Plaintiff was formed for the purpose of applying to the Internet Corporation for Assigned Names and Numbers ("ICANN") for the right to operate the .WEB generic top-level domain ("gTLD"). In reliance on ICANN's agreement to administer the bid process in accordance with the rules and guidelines contained in its gTLD Applicant Guidebook ("Applicant Guidebook"), Plaintiff paid ICANN a mandatory $185,000 application fee for the opportunity to secure the rights to the .WEB gTLD.

2. Throughout every stage of the four years it has taken to bring the .WEB gTLD to market, Plaintiff worked diligently to follow the rules and procedures promulgated by ICANN. In the past month, ICANN has done just the opposite. Instead of functioning as a disinterested regulator of a fair and transparent gTLD bid process, ICANN used its authority and oversight to unfairly benefit an applicant who is in admitted violation of a number of provisions of the Applicant Guidebook. ICANN's conduct, tainted by an inherent conflict of interest, ensured that it would be the sole beneficiary of the $135 million proceeds from the .WEB auction—a result that ICANN's own guidelines identify as a "last resort" outcome. Even more problematic, ICANN allowed a third party to make an eleventh-hour end run around the application process to the detriment of Plaintiff, the other legitimate applicants for the .WEB gTLD and the Internet community at large.

3. ICANN's failure to administer the gTLD application process in a fair, proper, and transparent manner is not unique to the .WEB gTLD applicants. To the contrary, in the days following the filing of this action, ICANN was publicly rebuked by an independent review panel for its "cavalier" and seemingly routine dismissal of concerns raised by gTLD applicants without "mak[ing] any reasonable investigation" into the facts underlying those concerns as required by ICANN's Bylaws, Articles of

Incorporation and the Applicant Guidebook. The independent review panel also highlighted what it deemed to be improper influence by ICANN staff on purportedly independent ICANN accountability mechanisms established to handle concerns raised by gTLD applicants.

4. As set forth more fully herein, ICANN deprived Plaintiff and the other applicants for the .WEB gTLD of the right to compete for the .WEB gTLD in accordance with established ICANN policy and guidelines. Court intervention is necessary to ensure ICANN's compliance with its own accountability and transparency mechanisms in the ongoing .WEB bid process and to prevent the assignment of the .WEB gTLD to an entity that is in admitted violation of ICANN's own policies.

PARTIES

5. Plaintiff Ruby Glen, LLC is a limited liability company, duly organized and existing under the laws of the State of Delaware and operated by Donuts Inc., an affiliate located in Bellevue, Washington. The sole member of Ruby Glen, LLC is Covered TLD, LLC ("Covered TLD"). Covered TLD is a limited liability company, duly organized and existing under the laws of the State of Delaware. Covered TLD has a sole member, Donuts Inc. ("Donuts"). Donuts is a for-profit corporation, duly organized and existing under the laws of the State of Delaware, with its principal place of business in Bellevue, Washington.

6. Defendant Internet Corporation for Assigned Names and Numbers ("ICANN") is a nonprofit corporation, organized and existing under the laws of the State of California, with its principal place of business in Los Angeles, California.

7. Defendants Does 1-10 are persons who instigated, encouraged, facilitated, acted in concert or conspiracy with, aided and abetted, and/or are otherwise responsible in some manner or degree for the breaches and wrongful conduct averred herein. Plaintiff is presently ignorant of the true names and capacities, whether individual, corporate, associate, or otherwise, of DOES 1 through 10, and will amend this

Complaint to allege their true names and capacities when the same have been ascertained.

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over this action under 28 U.S.C. § 1332(a) as the parties are completely diverse in citizenship and the amount in controversy exceeds $75,000.

9. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b) and (c), in that Defendant ICANN resides and transacts business in this judicial district. Moreover, a substantial part of the events, omissions, and acts that are the subject matter of this action occurred within the Central District of California.

FACTS COMMON TO ALL CAUSES OF ACTION

A. ICANN'S FORMATION AND PURPOSE

10. ICANN is a non-profit corporation originally established to assist in the transition of the Internet domain name system from one of a single domain name operator to one with multiple companies competing to provide domain name registration services to Internet users "in a manner that w[ould] permit market mechanisms to support competition and consumer choice in the technical management of the [domain name system]."

11. ICANN's ongoing role is to provide technical coordination of the Internet's domain name system by introducing and promoting competition in the registration of domain names, while ensuring the security and stability of the domain name system. In that role, and as relevant here, ICANN was delegated the task of administering generic top level domains ("gTLDs") such as .COM, .ORG, or, in this case, .WEB.

12. Article 4 of ICANN's Articles of Incorporation requires ICANN to "operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international

conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets." A true and correct copy of ICANN's Articles of Incorporation is attached hereto as Exhibit A and incorporated herein by reference.

13. ICANN is accountable to the Internet community for operating in a manner consistent with its Bylaws and Articles of Incorporation as a whole. ICANN's Bylaws require ICANN, its Board of Directors and its staff to act in an open, transparent and fair manner with integrity. A true and correct copy of ICANN's Bylaws are attached hereto as Exhibit B and incorporated herein by reference. Specifically, the ICANN Bylaws require ICANN, its Board of Directors, and staff to:

a. "Mak[e] decisions by applying documented policies neutrally and objectively, with integrity and fairness."

b. "[Act] with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected."

c. "Remain[] accountable to the Internet community through mechanisms that enhance ICANN's effectiveness."

d. Ensure that it does "not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition."

e. "[O]perate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness."

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B. THE NEW gTLD PROGRAM AND APPLICANT GUIDEBOOK

14. ICANN is the sole organization worldwide with the power and ability to administer the bid processes for, and assign rights to, gTLDS. As of 2011, there were only 22 gTLDs in existence; the most common of which are .COM, .NET, and .ORG.

15. In or about 2011, ICANN approved the expansion of a number of the gTLDs available to eligible applicants as part of its 2012 Generic Top Level Domains Internet Expansion Program (the "New gTLD Program").

16. In January 2012, as part of the New gTLD Program, ICANN invited eligible parties to submit applications to obtain the rights to operate various new gTLDs, including, the .WEB and .WEBS gTLDs (collectively referred to herein as ".WEB" or the ".WEB gTLD"). In return, ICANN agreed to (a) conduct the bid process in a transparent manner and (b) abide by its own bylaws and the rules and guidelines set forth in ICANN's gTLD Applicant Guidebook ("Applicant Guidebook"). A true and correct copy of the Applicant Guidebook is attached hereto as Exhibit C and incorporated herein by reference.

17. The Applicant Guidebook obligates ICANN to, among other things, conduct a thorough investigation into each of the applicants' backgrounds. This investigation is necessary to ensure the integrity of the application process, including a potential auction of last resort, and the existence of a level playing field among those competing to secure the rights to a particular new gTLD. It also ensures that each applicant is capable of administering any new gTLD, whether secured at the auction of last resort or privately beforehand, thereby benefiting the public at large.

18. ICANN has broad authority to investigate all applicants who apply to participate in the New gTLD Program. This investigative authority, willingly provided by each applicant as part of the terms and conditions in the guidelines contained in the Applicant Guidebook, is set forth in relevant part in Section 6 as follows:

///

> 8. … In addition, Applicant acknowledges that [sic] to allow ICANN to conduct thorough background screening investigations:
>
> …
>
> c. Additional identifying information may be required to resolve questions of identity of individuals within the applicant organization; …
>
> …
>
> 11. Applicant authorizes ICANN to:
>
> a. Contact any person, group, or entity to request, obtain, and discuss any documentation or other information that, in ICANN's sole judgment, may be pertinent to the application;
>
> b. Consult with persons of ICANN's choosing regarding the information in the application or otherwise coming into ICANN's possession…

19. To aid ICANN in fulfilling its investigatory obligations, "applicant[s] (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any and all others acting on [their] behalf)" are required to provide extensive background information in their respective applications. In addition to serving the purposes noted above, this information also allows ICANN to determine whether an entity applicant or individuals associated with an entity applicant have engaged in the automatically disqualifying conduct set forth in Section 1.2.1 of the Applicant Guidebook, including convictions of certain crimes or disciplinary actions by governments or regulatory bodies. Finally, this background information is important to provide transparency to other applicants competing for the same gTLD.

20. Indeed, ICANN deemed transparency into an applicant's background so important when drafting the Applicant Guidebook that applicants submitting a new

gTLD application are required to undertake a continuing obligation to notify ICANN of "any change in circumstances that would render any information provided in the application false or misleading," including "applicant-specific information such as changes in financial position and changes in ownership or control of the applicant."

21. As a further condition of participating in the .WEB auction, ICANN required Plaintiff and other applicants to agree to a broad covenant not to sue in order to apply for the .WEB contention set (the "Purported Release"). The Purported Release applies to all new gTLD applicants and states, in relevant part:

> Applicant hereby releases ICANN . . . from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN . . . in connection with ICANN's . . . review of this application. . . . Applicant agrees not to challenge . . . and irrevocably waives any right to sue or proceed in court.

22. The Purported Release is not subject to negotiation. If a potential applicant does not agree to the release, it cannot be considered for participation in the .WEB auction. The Purported Release is also entirely one-sided in that it allows ICANN to absolve itself of wrongdoing while affording no remedy to applicants. Moreover, the Purported Release does not apply equally as between ICANN and the applicants because it does not prevent ICANN from proceeding with litigation against an applicant.

23. In lieu of the rights ICANN claims are waived by the Purported Release, ICANN purports to provide applicants with an independent review process, as a means to challenge ICANN's actions with respect to a gTLD application. The IRP is effectively an arbitration, operated by the International Centre for Dispute Resolution of the American Arbitration Association, comprised of an independent panel of arbitrators. The IRP is officially identified by ICANN as an Accountability Mechanism.

24. In accordance with the IRP, any entity materially affected by a decision or action by the Board that the entity believes is inconsistent with the Articles of

Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.

C. THE AUCTION PROCESS FOR NEW gTLDS

25. A large number of new gTLDs made available by ICANN in 2012 received multiple applications. In accordance with the Applicant Guidebook, where multiple new gTLD applicants apply to obtain the rights to operate the same new gTLD, those applicants are grouped into a "contention set."

26. Pursuant to the Applicant Guidebook, a contention set may be resolved privately among the members of a contention set or facilitated by ICANN as an auction of last resort. Applicants are encouraged to privately resolve a new gTLD contention set (i.e., reach a determination as to which applicant will ultimately be assigned the right to operate the new gTLD at issue). An ICANN auction of last resort will only be conducted when the members of a contention cannot reach agreement privately. By refusing to agree to resolve a contention set privately, one member of a contention set has the ability to force the other members, all of whom may be willing to resolve the contention set privately, to an ICANN auction of last resort.

27. For purposes of this matter, it is important to understand that the manner in which a contention set is resolved—whether by private agreement or ICANN auction—determines which entities will receive the proceeds from the winning bid. When a contention set is resolved privately, ICANN receives no financial benefit; in an ICANN auction, the entirety of the auction proceeds go to ICANN.

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D. PLAINTIFF'S APPLICATION FOR THE .WEB gTLD

28. In May 2012, Plaintiff submitted application 1-1527-54849 for the .WEB contention set. Plaintiff also submitted with its application the sum of $185,000—the mandatory application fee.

29. In consideration of Plaintiff paying the $185,000 application fee, ICANN agreed to conduct the application process for the .WEB gTLD in a manner consistent with its own Bylaws, Articles of Incorporation, and the rules and procedures set forth in both the Applicant Guidebook and the Auction Rules, and in conformity with the laws of fair competition. Plaintiff would not have paid the $185,000 mandatory application fee absent the mutual consideration and promises set forth above.

30. Plaintiff's application passed ICANN's "Initial Evaluation" process on July 19, 2013. It is an approved member of the .WEB contention set and qualified to participate in the ICANN auction process for .WEB.

E. NDC'S APPLICATION FOR THE .WEB gTLD

31. On June 13, 2012, NDC submitted application number 1-1296-36138 for the .WEB contention set.

32. Among other things, the application required NDC to provide "the identification of directors, officers, partners, and major shareholders of that entity." As relevant here, NDC provided the following response to Sections 7 and 11 of the application:

> **Secondary Contact**
>
> **7(a). Name**
>
> Mr. Nicolai Bezsonoff
>
> **7(b). Title**
>
> Manager

Applicant Background

11(a). Name(s) and position(s) of all directors

Jose Ignacio Rasco III	Manager
Juan Diego Calle	Manager
Nicolai Bezsonoff	Manager

11(b). Name(s) and position(s) of all officers and partners

Jose Ignacio Rasco III	CFO
Juan Diego Calle	CEO
Nicolai Bezsonoff	COO

11(c). Name(s) and position(s) of all shareholders holding at least 15% of shares

Domain Marketing Holdings, LLC	Not Applicable
NUCO LP, LLC	Not Applicable

33. By submitting its application for the .WEB gTLD and electing to participate in the .WEB contention set, NDC expressly agreed to the terms and conditions set forth in the Applicant Guidebook as well as Auction Rules, including specifically, and without limitation, Sections 1.2.1, 1.2.7, 6.1 and 6.10 of the Applicant Guidebook.

34. The Applicant Guidebook requires an applicant to notify ICANN of any changes to its application, including the applicant background screening information required under Section 1.2.1; the failure to do so can result in the denial of an application. For example, Section 1.2.7 imposes an ongoing duty to update "applicant-specific information such as changes in financial position and changes in ownership or control of the applicant." Similarly, pursuant to Section 6.1, "[a]pplicant agrees to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading."

35. In addition to a continuing obligation to provide complete, updated, and accurate information related to its application, Section 6.10 of the Applicant Guidebook,

strictly prohibits an applicant from "resell[ing], assign[ing], or transfer[ring] any of applicant's rights or obligations in connection with the application." An applicant that violates this prohibition is subject to disqualification from the contention set.

36. ICANN failed to investigate credible evidence supporting a determination that NDC violated each of these guidelines—evidence that it held for over a month prior to the .WEB auction date. Despite the urging of multiple .WEB applicants and NDC's written admissions of potentially disqualifying changes to NDC's application, ICANN continues to turn a blind eye to the direct detriment of other .WEB applicants and to ICANN's foundational duties to administer the New gTLD Program with fairness and transparency.

F. NDC'S FAILURE TO NOTIFY ICANN OF CHANGES TO ITS APPLICATION

37. On or about June 1, 2016, Plaintiff learned that NDC was the only member of the .WEB contention set unwilling to resolve the contention set in advance and in lieu of the ICANN auction.

38. At the time, Plaintiff found the decision unusual given NDC's historical willingness and enthusiasm to participate in the private resolution process. Overall, NDC has applied for 13 gTLDs in the New gTLD Program; nine of those gTLDs were resolved privately with NDC's agreement. The auction for the .WEB gTLD is the first auction in which NDC has pushed for an ICANN auction of last resort.

39. On June 7, 2016, Plaintiff contacted NDC in writing to inquire as to whether NDC might reconsider its recent decision to forego resolution of the .WEB contention set prior to ICANN's auction of last resort. In response, NDC stated that its position had not changed. NDC also advised, however, that Nicolai Bezsonoff, who is identified on NDC's .WEB application as Secondary Contact, Manager, and COO, is "no longer involved with [NDC's] applications." NDC also made statements indicating a potential change in the ownership of NDC, including an admission that the board of

NDC had changed to add "several others" and that he had to check with the "powers that be," implying that he and his associate on the email were no longer in control. The email communication containing these statements is set forth in pertinent part below:

From: Jose Ignacio Rasco <r@straat.co>
Subject: Re: .web
Date: June 7, 2016 at 11:32:17 AM EDT
To: Jon Nevett <jon@donuts.email>
Cc: Juan Diego Calle <j@straat.co>

Jon,

[Redacted]

Nicolai is at NSR full time and no longer involved with our TLD applications. I'm still running our program and Juan sits on the board with me and several others.

[Redacted]

Best,
Jose

40. Noting that NDC's conduct and statements (a) appeared to directly contradict information in NDC's .WEB application and (b) suggested that NDC had either resold, assigned, or transferred its rights in the application in violation of its duties under the Applicant Guidebook, Plaintiff diligently contacted ICANN staff in writing with the discrepancy on or about June 22, 2016 to understand who it was competing against for .WEB and to improve transparency over the process for ICANN and the other .WEB applicants.

41. After engaging in a series of discussions with ICANN staff, Plaintiff decided to formally raise the issue with the ICANN Ombudsman on or about June 30, 2016; as of the initiation of this lawsuit, Plaintiff's most recent correspondence with the ICANN Ombudsman, dated July 10, 2016, in which it provided further information related to the statements made by NDC, remains unanswered.

42. At every opportunity, Plaintiff raised the need for a postponement of the .WEB auction to allow ICANN time to fulfill its obligations to (a) investigate the

contradictory representations made by NDC in relation to its pending application; (b) address NDC's continued status as an auction participant; and (c) provide all the other .WEB applicants the necessary transparency into who they were competing against. It also discussed the matter with ICANN staff and the Ombudsman at ICANN's most recent meeting in Helsinki, Finland, which took place from June 27-30, 2016.

43. On July 11, 2016, Radix FZC (on behalf of DotWeb Inc.) and Schlund Technologies GmbH, each members of the .WEB contention set, sent correspondence to ICANN stating their own concerns in proceeding with the auction of last resort scheduled for July 27, 2016. The correspondence stated:

> We support a postponement of the auction, to give ICANN and the other applicants time to investigate whether there has been a change of leadership and/or control of another applicant, NU DOT CO LLC. To do otherwise would be unfair, as we do not have transparency into who leads and controls that applicant as the auction approaches.

G. ICANN'S DECISION TO PROCEED WITH THE .WEB AUCTION

44. On July 13, 2016, ICANN issued a statement denying the collective request of multiple members of the .WEB contention set to postpone the July 27, 2016 auction to allow for a full and transparent investigation into apparent discrepancies in the NDC application, as highlighted by NDC's own statements. Without providing any detail, ICANN simply stated as follows:

> Secondly, in regards to potential changes of control of NU DOT CO LLC, we have investigated the matter, and to date we have found no basis to initiate the application change request process or postpone the auction.

45. Contrary to its obligations of accountability and transparency, ICANN's decision did not address the manner or scope of the claimed investigation nor did it address whether a specific inquiry was made into (a) Mr. Bezsonoff's current status, if any, with NDC, (b) the identity of "several other[]" new and unvetted members of

NDC's board, or (c) any change in ownership—the very issues raised by NDC's own statements. The correspondence was also silent as to any investigation into whether NDC had either resold, assigned, or transferred all or some of the rights to its .WEB application.

46. Plaintiff was unable to learn any further information regarding the extent of the investigation undertaken by ICANN, other than it was limited to inquiries only to NDC and no independent corroboration was sought or obtained.

47. Despite the clear credibility issues raised by NDC's own contradictory statements, ICANN conducted no further investigation. Indeed, ICANN informed Plaintiff that it never even contacted Mr. Bezsonoff or interviewed the other individuals identified in Sections 7 and 11 of NDC's application prior to reaching its conclusion.

48. To be clear, the financial benefit to ICANN of resolving the .WEB contention set by way of an ICANN auction is no small matter—as of the filing of this lawsuit, ICANN's stated net proceeds from the 15 ICANN auctions conducted since June 2014 total $101,357,812. The most profitable gTLDs from those auctions commanded winning bids of $41,501,000 (.SHOP), $25,001,000 (.APP), $6,706,000 (.TECH), $5,588,888 (.REALTY), $5,100,175 (.SALON) and $3,359,000 (.MLS). ICANN has not yet determined what it will do with the enormous proceeds from these auctions.

H. PLAINTIFF'S REQUEST FOR RECONSIDERATION

49. ICANN's Bylaws provide an established accountability mechanism by which an entity that believes it was materially affected by an action or inaction by ICANN staff that contravened established policies and procedures may submit a request for reconsideration or review of the conduct at issue. The review is conducted by ICANN's Board Governance Committee.

50. On July 17, 2016, Plaintiff and Radix FZC, an affiliate of another member of the .WEB contention set, jointly submitted a Reconsideration Request to ICANN, in

response to the actions and inactions of ICANN staff in connection with the decision set forth in the ICANN's July 13, 2016 correspondence.

51. The Reconsideration Request sought reconsideration of (a) ICANN's determination that it "found no basis to initiate the application change request process" in response to the contradictory statements of NDC and (b) ICANN's improper denial of the request made by multiple contention set members to postpone the .WEB auction of last resort, which would have provided ICANN the time necessary to conduct a full and transparent investigation into material discrepancies in NDC's application and its eligibility as a contention set member.

52. The Reconsideration Request highlighted the following issues:

a. ICANN's failure to forego a full and transparent investigation into the material representations made by NDC is a clear violation of the principles and procedures set forth in the ICANN Articles of Incorporation, Bylaws and the Applicant Guidebook.

b. ICANN is the party with the power and resources necessary to delay the ICANN auction of last resort while the accuracy of NDC's current application is evaluated utilizing the broad investigatory controls contained in the Applicant Guidebook, to which all applicants, including NDC, agreed.

c. Postponement of the .WEB auction of last resort provides the most efficient manner for resolving the current dispute for all parties by (i) sparing ICANN and the many aggrieved applicants the time and expense of legal action while (ii) avoiding the very real likelihood of a court-mandated unwinding of the ICANN auction of last resort should it proceed.

d. ICANN'S July 13, 2016 decision raises serious concerns as to whether the scope of ICANN's investigation was impacted by the

inherent conflict of interest arising from a perceived financial benefit to ICANN if the Auction goes forward as scheduled.

e. ICANN's New gTLD Program Auctions guidelines state that a contention set would only proceed to auction where all active applications in the contention set have "**no pending ICANN Accountability Mechanisms,**" i.e., no pending Ombudsman complaints, Reconsideration Requests or IRPs.

53. The issues raised by Plaintiff were similar to those raised by applicants for other gTLDs in similar contexts; issues that were deemed well-founded by an independent panel assigned to review ICANN's compliance with its mandatory obligations and bylaws in relation to its administration of the application processes for the New gTLD Program.

54. On July 21, 2016, ICANN denied the Request for Reconsideration. In doing so, ICANN relied solely on statements from NDC that directly contradicted those contained in NDC's earlier correspondence—a clear red flag. Once again, despite the credibility issues raised by NDC's own contradictory statements, ICANN failed and refused to contact Mr. Bezsonoff or interview the other individuals identified in Sections 7 and 11 of NDC's application prior to reaching its conclusion. ICANN also failed to investigate whether NDC had either resold, assigned, or transferred all or some of its rights to its .WEB application.

55. On July 22, 2016, Plaintiff initiated ICANN's Independent Review Process by filing ICANN's Notice of Independent Review. The IRP remains pending.

I. THE .WEB AUCTION RESULTS

56. On July 27, 2016, the .WEB auction proceeded as scheduled. The following day, ICANN reported NDC as the winning bidder of the .WEB gTLD. According to ICANN, NDC's winning bid amount was $135 million, more than *triple*

the previous highest price paid for a new gTLD and a sum greater than all of the prior ICANN auction proceeds combined.

57. On July 28, 2016, non-party VeriSign, Inc. ("VeriSign"), the registry operator for the .COM and .NET gTLDs, filed a Form 10-Q with the Securities and Exchange Commission in which it disclosed that "[s]ubsequent to June 30, 2016, the Company incurred a commitment to pay approximately $130.0 million for the future assignment of contractual rights, which are subject to third-party consent. The payment is expected to occur during the third quarter of 2016."

58. On August 1, 2016, VeriSign confirmed via a press release that the approximately $130 million "commitment" referred to in its Form 10-Q was, in fact, an agreement entered into with NDC "wherein [VeriSign] provided funds for [NDC]'s bid for the .web TLD" in an effort to acquire the rights to the .WEB gTLD. VeriSign stated that its acquisition of the .WEB gTLD would be complete after NDC "execute[s] the .web Registry Agreement with [ICANN]" and then "assign[s] the Registry Agreement to VeriSign upon consent from ICANN."

59. VeriSign did not apply for the .WEB gTLD and was not a disclosed member of the .WEB contention set. At no point prior to the .WEB auction did NDC disclose (a) its relationship with VeriSign; (b) the fact that NDC had effectively become a proxy for VeriSign as a result of VeriSign agreeing to fund NDC's .WEB auction bids; or (c) the fact that NDC had either resold, assigned, or transferred all or some of its rights to its .WEB application to VeriSign.

60. As alleged above, VeriSign is the registry operator for the .COM and .NET gTLDs, which together account for the greatest market share among all gTLDs. Indeed, on July 28, 2016, VeriSign reported combined registrations for the .COM and .NET registries of 143.2 million domains, *more than six times greater* than the combined total registrations of approximately 23 million for all other existing gTLDs.

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61. On information and belief, VeriSign did not apply for, or disclose its interest in, the .WEB gTLD in an effort to avoid heightened scrutiny of its application by ICANN, the other .WEB applicants, the domain name industry at large and, most importantly, the U.S. Department of Justice; specifically, VeriSign's apparent acquisition of NDC's application rights was an attempt to avoid allegations of anti-competitive conduct and antitrust violations in applying to operate the .WEB gTLD, which is widely viewed by industry analysts as the strongest competitor to the .COM and .NET gTLDs.

62. Had VeriSign's apparent acquisition of NDC's application rights been fully disclosed to ICANN by NDC, as required by Sections 1.2.7, 6.1 and 6.10 of the Applicant Guidebook, among other provisions, the relationship would have also triggered heightened scrutiny of VeriSign's Registry Agreements with ICANN for .COM and .NET, as well as its Cooperative Agreement with the Department of Commerce.

FIRST CAUSE OF ACTION

(Breach of Contract against Defendant ICANN)

63. Plaintiff incorporates the allegations set forth in Paragraphs 1 – 62 above as though fully set forth herein.

64. In June 2012, ICANN invited eligible parties to submit applications to obtain the rights to, among others, the .WEB gTLD as part of the New gTLD Program. In doing so, ICANN promised the potential applicants that it would (a) conduct the bid process in a transparent manner, (b) ensure competition, and (c) abide by its own Bylaws and the rules set forth in the Applicant Guidebook.

65. On or about June 13, 2012, Plaintiff submitted an application to ICANN to obtain the rights to the .WEB gTLD. In consideration of ICANN's promise to abide by its own Bylaws, Articles of Incorporation, and the rules and procedures set forth in

the Applicant Guidebook in its administration of the .WEB auction process, Plaintiff paid ICANN a sum of $185,0000—the mandatory application fee.

66. In consideration of Plaintiff paying the sum of $185,000, ICANN promised to conduct the application process for the .WEB gTLD in a manner consistent with its own Bylaws, Articles of Incorporation, and the rules and procedures set forth in both the Applicant Guidebook and the Auction Rules, and in conformity with the laws of fair competition.

67. Plaintiff would not have paid the $185,000 mandatory application fee or spent time and other resources absent the mutual consideration and promises set forth above. Plaintiff performed all conditions, covenants, and promises on its part to be performed in accordance with the agreed upon terms of participating in the New gTLD Program, except those obligations, if any, that it has been prevented or excused from performing as a result of the misconduct set forth in this Complaint.

68. ICANN has materially breached its obligations to Plaintiff, as set forth in ICANN's Bylaws and Articles of Incorporation, and the Applicant Guidebook by (a) failing to thoroughly investigate the issues raised by NDC's own statements and (b) refusing to postpone the .WEB auction of last resort to allow for a full and transparent investigation into the apparent discrepancies in NDC's .WEB application.

69. Specifically, ICANN's acts and omission violated, among other things:

a. Article 1, section 2.8 and Article III, Section 1 of ICANN's Bylaws, which require ICANN to "[m]ak[e] decisions by applying documented policies neutrally and objectively, with integrity and fairness" and "operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness." ICANN obligates each applicant who seeks to participate in the New gTLD auction process to affirm that the statements and representations contained in the application are true

and accurate; applicants also undertake a continuing obligation to update their application when changes in circumstance affect an application's accuracy. By failing to engage in a thorough, open, and transparent investigation of the contradictory statements made by NDC in relation to its application, as well as an apparent change of control with potential antitrust implications, ICANN plainly—and inexplicably—failed to reach its decisions by "applying documented policies neutrally and objectively, with integrity and fairness."

b. Article 1, section 2.9 of ICANN's Bylaws, which requires ICANN to "[act] with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected." In undertaking only a cursory examination of the contradictory statements made by NDC and the apparent change in NDC's rights to its application, ICANN failed to balance ICANN's interest in a swift resolution of the concerns raised by the members of the .WEB contention set with its obligation to obtain sufficient assurances and information from the individuals and entities at the center of the statements made by NDC; at the very least, ICANN should have (a) conducted interviews with Mr. Bezsonoff and all other individuals identified in Section 11 of NDC's application prior to reaching its conclusion and (b) investigated whether NDC had either resold, assigned, or transferred all or some of its rights to its .WEB application.

c. Article 1, section 2.10 of ICANN's Bylaws, which requires ICANN to "[r]emain[] accountable to the Internet community through mechanisms that enhance ICANN's effectiveness." By failing to

make use of the processes established in Sections 6.8 and 6.11 to the Applicant Guidebook in investigating an admitted failure by NDC to abide by its continuing obligation to update its application, ICANN staff disregarded the very accountability mechanisms put in place to serve and protect the .WEB contention set, the Internet community, and the public at large. This error was compounded by the cursory dismissal of the concerns raised by multiple members of the .WEB contention set relating to the accuracy of the representations made in NDC's application. By failing to apprise the members of the contention set as to the manner and scope of the investigation conducted by ICANN staff, ICANN failed to ensure that it would hold itself accountable to any gTLD applicant, let alone the Internet community and the public.

d. Article II, section 3 of ICANN's Bylaws, which states that "ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition." There can be no questioning the fact that the Staff Action resulted in disparate treatment in favor of NDC. On one hand, there are clear statements from NDC that representations made in its application are inaccurate and there is ample evidence that NDC has either resold, assigned, or transferred all or some of its rights to its .WEB application. On the other hand, when pressed by multiple members of the contention set to fully investigate the matter, ICANN provided only a conclusory statement that raises more questions than it resolves. To the extent it had reason to engage in such disparate treatment of the members

of the .WEB contention set, ICANN failed to provide such a reason in reaching the determinations at issue in this Request.

70. ICANN also promised that a contention set would only proceed to auction where all active applications in the contention set have "**no pending ICANN Accountability Mechanisms**." ICANN breached this promise by refusing to postpone the .WEB auction of last resort while Plaintiff's Reconsideration Request remains pending and its Ombudsman complaint remains unresolved. ICANN further breached this promise by moving forward with the .WEB auction of last resort while Plaintiff's IRP, initiated on July 22, 2016, remains pending.

71. On information and belief, Plaintiff alleges that the breaches set forth above resulted from a pre-textual "investigation" into the admissions made by NDC and ICANN's issuance of its subsequent July 13, 2016 decision. Specifically, Plaintiff alleges that ICANN intentionally failed to abide by its contractual obligations to conduct a full and open investigation into NDC's admission because it was in ICANN's interest that the .WEB contention set be resolved by way of an ICANN auction. As such, Plaintiff alleges that ICANN willfully and intentionally committed the wrongful acts described above.

72. As a direct and proximate result of ICANN's breaches, Plaintiff has suffered, and will continue to suffer, without limitation, losses of revenue from third parties, profits, consequential costs and expenses, market share, reputation, and goodwill, in an amount to be determined at trial but not less than twenty-two million, five hundred thousand dollars ($22,500,000) plus interest.

SECOND CAUSE OF ACTION

(Breach of the Covenant of Good Faith and Fair Dealing against Defendant ICANN)

73. Plaintiff incorporates the allegations set forth in Paragraphs 1 – 62 above as though fully set forth herein.

74. An implied covenant of good faith and fair dealing exists between Plaintiff and ICANN as a result of the contractual relationship entered into as part of the .WEB gTLD application process.

75. ICANN breached the covenant of good faith and fair dealing when it acted in a way that deprived Plaintiff of the benefits of the agreement as set forth in the Applicant Guidebook, namely that the administration of the bid process for the .WEB gTLD would be founded on the principles of fairness and transparency.

76. ICANN breached the covenant of good faith and fair dealing when it:

a. Failed to conduct due diligence and an adequate investigation into apparent violations of the Applicant Guidebook raised by NDC's admissions, including but not limited to failing to investigate whether NDC had either resold, assigned, or transferred all or some of its rights to its .WEB application;

b. Failed to conduct interviews with Mr. Bezsonoff and all other individuals identified in Sections 7 and 11 of NDC's application as part of an investigation into apparent violations of the Applicant Guidebook raised by NDC's admissions;

c. Failed to provide a necessary level of transparency into the identity and leadership of a competing applicant;

d. Refused to postpone the ICANN auction of last resort to allow for a full and transparent investigation into the apparent violations of the Applicant Guidebook raised by NDC's admissions; and

e. Failed to conduct a reasonable inquiry into NDC's impermissible resale, transfer, or assignment of its rights in the .WEB application to VeriSign.

77. On information and belief, Plaintiff alleges that the breaches set forth above resulted from a pre-textual "investigation" into the admissions made by NDC and

ICANN's issuance of its subsequent July 13, 2016 decision. Specifically, Plaintiff alleges that ICANN intentionally failed to abide by its obligations to conduct a full and open investigation into NDC's admission because it was in ICANN's interest that the .WEB contention set be resolved by way of an ICANN auction. As such, Plaintiff alleges that ICANN willfully and intentionally committed the wrongful acts described above.

78. As a direct and proximate result of ICANN's breaches as set forth above, Plaintiff has suffered, and will continue to suffer, without limitation, losses of revenue from third parties, profits, consequential costs and expenses, market share, reputation, and good will.

THIRD CAUSE OF ACTION

(Negligence against Defendant ICANN)

79. Plaintiff incorporates the allegations set forth in Paragraphs 1 – 62 above as though fully set forth herein.

80. ICANN owed Plaintiff a duty to act with proper care and diligence in administering the .WEB auction process in accordance with its own Bylaws, Articles of Incorporation, and the rules and procedures as stated in the Applicant Guidebook.

81. ICANN breached the duty owed Plaintiff by, among other things:

a. Failing to conduct due diligence and an adequate investigation into apparent violations of the Applicant Guidebook raised by NDC's admissions, including whether NDC resold, assigned or transferred any of its rights or obligations in connection with the application to VeriSign;

b. Failing to conduct interviews with Mr. Bezsonoff and all other individuals identified in Sections 7 and 11 of NDC's application as part of an investigation into apparent violations of the Applicant Guidebook raised by NDC's admissions;

c. Refusing to postpone the ICANN auction of last resort to allow for a full and transparent investigation into the apparent violations of the Applicant Guidebook raised by NDC's admissions; and

d. Failing to provide a rationale for the decision set forth in the July 13, 2016 correspondence.

82. As a direct and proximate result of ICANN's breaches as set forth above, Plaintiff has suffered, and will continue to suffer, without limitation, losses of revenue from third parties, profits, consequential costs and expenses, market share, reputation, and good will.

FOURTH CAUSE OF ACTION

(Unfair Competition in Violation of Cal. Bus. & Prof. Code §17200 against Defendant ICANN)

83. Plaintiff incorporates the allegations set forth in Paragraphs 1 – 62 above as though fully set forth herein.

84. The California Unfair Competition Law ("UCL") protects both consumers and competitors by prohibiting "unfair competition," which is defined, in the disjunctive, by Business and Professions Code section 17200 as including "any unlawful, unfair or fraudulent business act or practice" as well as "unfair, deceptive, untrue or misleading advertising."

85. Plaintiff has standing to pursue this claim under Business and Professions Code section 17204 because Plaintiff has suffered injury in fact and has lost money or property as a result of ICANN's actions as set forth above. The losses include, but are not limited to, expenses incurred by Plaintiff in exhausting every available formal and informal avenue of recourse with ICANN prior to the filing of the above-captioned action, including legal fees related to the preparation and submission of the Reconsideration Request. Losses also include the $185,000 application fee paid to ICANN to participate as an application in the .WEB contention set.

86. The following acts and omissions of ICANN, among others, were unlawful under the UCL:

a. ICANN's imposition of the unenforceable contract terms contained in the Purported Release, in violation of California Civil Code section 1668, which declares violative of public policy those contracts that "have for their object, directly or indirectly, to exempt anyone from the responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent…."

b. ICANN's imposition of the unenforceable contract terms contained in the Purported Release, in violation of California Civil Code § 1770(a)(19), which defines as unlawful, the "[i]nsert[ion] of an unconscionable provision in [a] contract."

87. The following acts and omissions of ICANN, among others, were unfair under the UCL:

a. Plaintiff hereby incorporates by this reference the allegations of Paragraph 86 and its subparts as stated herein; each act therein alleged is also an unfair act or practice under the UCL;

b. ICANN's decision to conduct a cursory investigation into the apparent violations of the Applicant Guidebook raised by NDC's admissions without regard for rights of the other .WEB contention set members;

c. ICANN's decision to forego a postponement of the ICANN auction of last resort scheduled for July 27, 2016 without conducting an open and transparent investigation into the apparent violations of the Applicant Guidebook raised by NDC's admissions; and

d. ICANN's decision to allow NDC to continue to participate as a

.WEB contention set member despite NDC's own admission of inaccuracies contained in its application, in violation of the guidelines contained in the Applicant Guidebook.

88. The following acts and omissions of ICANN, among others, were fraudulent under the UCL in that they were likely to deceive, and in fact did deceive, members of the public:

a. Plaintiff hereby incorporates by this reference the allegations of Paragraph 86 and its subparts as if restated herein; each is also a fraudulent act or practice under the UCL;

b. ICANN's false representation that it would make all decisions in administering the .WEB auction process "by applying documented policies neutrally and objectively, with integrity and fairness";

c. ICANN's false representation that in administering the .WEB auction process, it would "[act] with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected";

d. ICANN's false representation that in administering the .WEB auction process, it would"[r]emain[] accountable to the Internet community through mechanisms that enhance ICANN's effectiveness";

e. ICANN's false representation that in administering the .WEB auction process, it would "apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment";

f. ICANN's false representation that all applicants would be subject to the same agreement, rules, and procedures;

g. ICANN's false representation that it would require applicants to

update their applications with "any change in circumstances that would render any information provided in the application false or misleading," including "applicant-specific information such as changes in financial position and changes in ownership or control of the applicant";

h. ICANN's false representation that a contention set would only proceed to auction where all active applications in the contention set have "**no pending ICANN Accountability Mechanisms**"; and

i. ICANN's false representation that an applicant would be disqualified from participating in the .WEB contention set for "resell[ing], assign[ing], or transfer[ring] any of [the] applicant's rights or obligations in connection with the application."

89. On information and belief, the conduct identified in Paragraphs 86-88 and their subparts resulted from the intentional conduct of ICANN.

90. With specific reference to the conduct identified in Paragraphs 87-88 and their subparts above, Plaintiff alleges that ICANN's "investigation" into the admissions made by NDC and ICANN's subsequent issuance of its July 13, 2016 decision were pre-textual in nature, the goal of which was to ensure ICANN secured a windfall from the .WEB contention set being resolved by way of an ICANN auction of last resort. Specifically, Plaintiff alleges that ICANN intentionally failed to abide by its contractual obligations to conduct a full and open investigation into NDC's admission because it was in ICANN's interest that the .WEB contention set be resolved by way of an ICANN auction. As such, Plaintiff alleges that it was in ICANN's interest to willfully and intentionally commit the wrongful acts described above. Pursuant to Business and Professions Code section 17203 and the equitable powers of the Court, Plaintiff seeks an order (a) enjoining ICANN from proceeding with the .WEB ICANN auction of last resort until the claims presented by way of the above-captioned action are resolved; (b)

enjoining ICANN from entering into a Registry Agreement with any party for the .WEB gTLD pending a final decision on the merits of this matter; and (c) enjoining ICANN from engaging in the unlawful, unfair and fraudulent business acts and practices described above. Plaintiff also seeks an order requiring ICANN to comply with its own Bylaws, Articles of Incorporation, and the rules and procedures set forth in the Applicant Guidebook, in the continued administration of the .WEB contention set process and to take such corrective actions and adopt such remedial measures as are necessary to prevent the further occurrence of the acts or practices alleged herein.

91. Plaintiff also seeks an order requiring restitution of any and all monies obtained by ICANN from Plaintiff as a result of the intentionally unlawful, unfair, and fraudulent described above. Plaintiff's request includes, but is not limited to, the restitution of any and all fees paid by or monies received from Plaintiff in relation to the .WEB contention set process.

92. Preventing the unlawful business practices engaged in by ICANN will ensure a significant benefit to the other .WEB contention set members as well as the public at large. Moreover, the financial burden of pursuing private enforcement substantially exceeds the financial benefit to Plaintiff. Thus, in the interest of justice, Plaintiff seeks attorneys' fees in bringing this private attorney general claim pursuant to Civil Code section 1021.5 in an amount subject to proof.

FIFTH CAUSE OF ACTION

(Declaratory Relief—Against Defendant ICANN)

93. Plaintiff incorporates the allegations set forth in Paragraphs 1 – 62 above as though fully set forth herein.

94. An actual and justiciable controversy has arisen, and now exists, between Plaintiff, on one hand, and ICANN, on the other, regarding the legality and effect of the Purported Release contained in the Applicant Guidebook.

95. As a condition of participating in the .WEB contention set process, ICANN required Plaintiff and other applicants to sign the Applicant Guidebook, which contained a covenant not to sue in order to apply for the .WEB contention set. The Purported Release applies to all New gTLD applicants and states, in relevant part:

> Applicant hereby releases ICANN . . . from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN . . . in connection with ICANN's . . . review of this application. . . . Applicant agrees not to challenge . . . and irrevocably waives any right to sue or proceed in court.

96. The Purported Release is not subject to negotiation: If a potential applicant does not agree to the release, it cannot be considered for participation in the .WEB contention set process. The Purported Release is also entirely unilateral in that it allows ICANN to absolve itself of wrongdoing while affording no remedy to applicants. Moreover, the Purported Release does not apply equally as between ICANN and the applicants because it does not prevent ICANN from proceeding with litigation against an applicant.

97. Plaintiff seeks a declaration of its rights regarding the enforceability of the Purported Release in light of California Civil Code Section 1668, which prohibits the type of broad exculpatory clauses contained in the Purported Release: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property or another, or violation of law, whether willful or negligent, are against the policy of the law."

98. Plaintiff maintains that, on its face, the Release is "against the policy of the law" because it exempts ICANN from any and all claims arising out of the application process, even those arising from fraudulent or willful conduct.

99. As such, an actual controversy has arisen and now exists between Plaintiff and ICANN as to the enforceability of the Purported Release. Plaintiff desires a judicial

determination and declaration that the Purported Release is unenforceable, unconscionable, and/or void as a matter of public policy. Such a declaration is necessary and appropriate at this time so that Plaintiff may ascertain its rights with respect to the enforceability of the Purported Release.

WHEREFORE, Plaintiff RUBY GLEN, LLC prays for relief as follows:

1. For compensatory damages according to proof at the time trial;
2. For general damages according to proof;
3. For restitutionary damages according to proof;
4. An injunction requiring ICANN to refrain from conducting the auction of last resort for the .WEB gTLD pending a final decision on the merits of this matter;
5. An injunction requiring ICANN to refrain from entering into a Registry Agreement with any party for the .WEB gTLD pending a final decision on the merits of this matter;
6. An injunction requiring ICANN to refrain from assigning the rights to the .WEB gTLD to any party pending a final decision on the merits of this matter;
7. Attorneys' fees and costs to the extent permitted by law; and
8. For such other relief as the Court deems just and proper against all Defendants.

Dated: August 8, 2016

By: *s/ Paula L. Zecchini*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies, under penalty of perjury under the laws of the State of California, that I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Electronic Mail Notice List

•Eric P Enson
epenson@jonesday.com,dfutrowsky@jonesday.com

•Jeffrey A LeVee
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•Charlotte Wasserstein
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SIGNED AND DATED this 8th day of August, 2016 at Seattle, Washington.

COZEN O'CONNOR

By: */s/ Paula Zecchini*
Paula Zecchini

R-7

RESPONDENT'S EXHIBIT

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 16-5505 PA (ASx)	Date	November 28, 2016
Title	Ruby Glen, LLC v. Internet Corp. for Assigned Names & Numbers		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE	
Stephen Montes Kerr	None	N/A
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: IN CHAMBERS COURT ORDER

Before the Court is a Motion to Dismiss filed by defendant Internet Corporation for Assigned Names and Numbers ("ICANN") (Docket No. 30). ICANN challenges the sufficiency of the First Amended Complaint ("FAC") filed by plaintiff Ruby Glen, LLC ("Plaintiff"). Also before the Court is a Motion to Take Third Party Discovery or, in the Alternative, for the Court to Issue a Scheduling Order ("Motion to Begin Discovery") filed by Plaintiff (Docket No. 32). Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that these matters are appropriate for decision without oral argument. The hearing calendared for November 28, 2016, is vacated, and the matters taken off calendar.

I. Factual and Procedural Background

Plaintiff filed its original Complaint on July 22, 2016. In its Complaint, and an accompanying Ex Parte Application for Temporary Restraining Order, Plaintiff sought to temporarily enjoin ICANN from conducting an auction for the rights to operate the registry for the generic top level domain ("gTLD") for .web. According to the original Complaint, Plaintiff applied to ICANN in 2012 to operate the registry for the .web gTLD. Because other entities also applied to operate the .web gTLD, ICANN's procedures required all of the applicants, in what are referred to as "contention sets," to first attempt to resolve their competing claims, but if they could not do so, ICANN would conduct an auction and award the rights to operate the registry to the winning bidder.

According to Plaintiff, one of the competing entities, Nu Dotco, LLC ("NDC") was unwilling to informally resolve the competing claims and instead insisted on proceeding to an auction. Plaintiff alleged in its original Complaint that NDC experienced a change in its management and ownership after it submitted its application to ICANN but that NDC did not provide ICANN with updated information as required by ICANN's application requirements. On June 22, 2016, Plaintiff requested that ICANN conduct an investigation regarding the discrepancies in NDC's application and postpone the auction. At least one other applicant

seeking to operate the .web registry also requested that ICANN postpone the auction and investigate NDC's current management and ownership structure. ICANN denied the requests on July 13, 2016, and stated that "in regards to potential changes of control of Nu DOT CO LLC, we have investigated the matter and to date we have found no basis to initiate the application change request process or postpone the auction." Plaintiff and another of the applicants then submitted a request for reconsideration to ICANN on July 17, 2016. ICANN denied the request for reconsideration on July 21, 2016.

Plaintiff's original Complaint asserted claims for: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) negligence; (4) unfair competition pursuant to California Business and Professions Code section 17200; and (5) declaratory relief. The Court denied Plaintiff's Ex Parte Application for Temporary Restraining Order on July 26, 2016, and the auction went forward. Plaintiff filed its FAC on August 8, 2016.

According to the FAC, NDC submitted the winning bid in the amount of $135 million at the auction. After NDC won the auction, a third-party, VeriSign, Inc. ("VeriSign"), which is the registry operator for the .com and .net gTLDs, announced that it had provided the funds for NDC's bid for the .web gTLD and that it would become the registry operator for the .web gTLD once NDC executes the .web registry agreement with ICANN and, with ICANN's consent, assigns its rights to operate the .web registry to VeriSign.

The FAC asserts the same five claims contained in the original Complaint. Plaintiff's breach of contract, breach of the implied covenant of good faith and fair dealing, and negligence claims are all based on provisions in ICANN's bylaws, Articles of Incorporation, and the ICANN Applicant Guidebook stating, for instance, that ICANN will make "decisions by applying documented policies neutrally and objectively, with integrity and fairness," that ICANN will remain "accountable to the Internet community through mechanisms that enhance ICANN's effectiveness," and that no contention set will proceed to auction unless there is "no pending ICANN accountability mechanism." Plaintiff's unfair competition and declaratory relief claims allege that a covenant not to sue contained in the ICANN Application Guidebook is invalid and unlawful under California law. That release states:

> Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's or an ICANN Affiliated Party's review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of

> this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION, APPLICANT ACKNOWLEDGES AND ACCEPTS THAT APPLICANT'S NONENTITLEMENT TO PURSUE ANY RIGHTS, REMEDIES, OR LEGAL CLAIMS AGAINST ICANN OR THE ICANN AFFILIATED PARTIES IN COURT OR ANY OTHER JUDICIAL FORA WITH RESPECT TO THE APPLICATION SHALL MEAN THAT APPLICANT WILL FOREGO ANY RECOVERY OF ANY APPLICATION FEES, MONIES INVESTED IN BUSINESS INFRASTRUCTURE OR OTHER STARTUP COSTS AND ANY AND ALL PROFITS THAT APPLICANT MAY EXPECT TO REALIZE FROM THE OPERATION OF A REGISTRY FOR THE TLD; PROVIDED, THAT APPLICANT MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN'S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION.

(FAC ¶ 21, Ex. C § 6.6 (capitalization in original).)

In its Motion to Dismiss, ICANN contends that the FAC fails to state any viable claims because Plaintiff has not plausibly alleged any breaches of ICANN's auction rules, Bylaws, and Articles of Incorporation. ICANN additionally asserts that the covenant not to sue bars all of Plaintiff's claims and that the FAC should be dismissed because Plaintiff has failed to join NDC as an indispensable party. Plaintiff's Motion to Begin Discovery seeks permission to propound third-party discovery directed to NDC and VeriSign prior to the parties participating in the Federal Rule of Civil Procedure 26(f) conference.

II. Legal Standard

Generally, plaintiffs in federal court are required to give only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). While the

Federal Rules allow a court to dismiss a cause of action for "failure to state a claim upon which relief can be granted," they also require all pleadings to be "construed so as to do justice." Fed. R. Civ. P. 12(b)(6), 8(e). The purpose of Rule 8(a)(2) is to "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80 (1957)). The Ninth Circuit is particularly hostile to motions to dismiss under Rule 12(b)(6). See, e.g., Gilligan v. Jamco Dev. Corp. , 108 F.3d 246, 248 49 (9th Cir. 1997) ("The Rule 8 standard contains a powerful presumption against rejecting pleadings for failure to state a claim.") (internal quotation omitted).

However, in Twombly, the Supreme Court rejected the notion that "a wholly conclusory statement of a claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery." Twombly, 550 U.S. at 561, 127 S. Ct. at 1968 (internal quotation omitted). Instead, the Court adopted a "plausibility standard," in which the complaint must "raise a reasonable expectation that discovery will reveal evidence of [the alleged infraction]." Id. at 556, 127 S. Ct. at 1965. For a complaint to meet this standard, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." Id. at 555, 127 S. Ct. at 1965 (citing 5 C. Wright & A. Miller, Federal Practice and Procedure §1216, pp. 235 36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action") (alteration in original)); Daniel v. County of Santa Barbara, 288 F.3d 375, 380 (9th Cir. 2002) ("'All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party.'") (quoting Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000)). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555, 127 S. Ct. at 1964 65 (internal quotations omitted). In construing the Twombly standard, the Supreme Court has advised that "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009).

III. Analysis

ICANN seeks dismissal of the FAC based on, among other things, the covenant not to sue contained in the Application Guidebook. Plaintiff, however, claims that the covenant not to sue

is unenforceable because it is void under California law and both procedurally and substantively unconscionable. Specifically, according to Plaintiff, the covenant not to sue violates California Civil Code section 1668, which provides: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law." Cal. Civ. Code § 1668. Section 1668 "[o]rdinarily . . . invalidates contracts that purport to exempt an individual or entity from liability for future intentional wrongs and gross negligence. Furthermore, the statute prohibits contractual releases of future liability for ordinary negligence when 'the 'public interest' is involved or . . . a statute expressly forbids it.'" Frittelli, Inc. V. 350 North Canon Drive, LP, 202 Cal. App. 4th 35, 43, 135 Cal. Rptr. 3d 761, 769 (2011) (quoting Farnham v. Superior Court, 60 Cal. App. 4th 69, 74, 70 Cal. Rptr. 2d 85, 88 (1997)). "Whether an exculpatory clause 'covers a given case turns primarily on contractual interpretation, and it is the intent of the parties as expressed in the agreement that should control. When the parties knowingly bargain for the protection at issue, the protection should be afforded. This requires an inquiry into the circumstances of the damage or injury and the language of the contract; of necessity, each case will turn on its own facts.'" Burnett v. Chimney Sweep, 123 Cal. App. 4th 1057, 1066, 20 Cal. Rptr. 3d 562, 570 (2004) (quoting Rossmoor Sanitation, Inc. v. Pylon, Inc., 13 Cal. 3d 622, 633, 119 Cal. Rptr. 449, 456 (1975)).

The FAC does not seek to impose liability on ICANN for fraud, willful injury, or gross negligence. Nor does Plaintiff allege that ICANN has willfully or negligently violated a law or harmed the public interest through its administration of the gTLD auction process for .web. Nor is the covenant not to sue as broad as Plaintiff argues. Instead, the covenant not to sue applies to:

> [A]ll claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's or an ICANN Affiliated Party's review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application.

(FAC ¶ 21, Ex. C § 6.6.) Because the covenant not to sue only applies to claims related to ICANN's processing and consideration of a gTLD application, it is not at all clear that such a situation would ever create the possibility for ICANN to engage in the type of intentional conduct to which California Civil Code section 1668 applies. See Burnett, 123 Cal. App. 4th at 1066, 20 Cal. Rptr. 3d at 570. Additionally, the covenant not to sue does not leave Plaintiff

without remedies. Plaintiff may still utilize the accountability mechanisms contained in ICANN's Bylaws. (See FAC ¶ 21, Ex. C § 6.6.) According to the FAC, these accountability mechanisms include "an arbitration, operated by the International Centre for Dispute Resolution of the American Arbitration Association, comprised of an independent panel of arbitrators." (FAC ¶ 23.) Therefore, in the circumstances alleged in the FAC, and based on the relationship between ICANN and Plaintiff, section 1668 does not invalidate the covenant not to sue.[1/]

Plaintiff also contends that the covenant not to sue is both procedurally and substantively unconscionable. Under California law, the "party challenging the validity of a contract or a contractual provision bears the burden of proving [both procedural and substantive] unconscionability." Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc., 232 Cal. App. 4th 1332, 1347, 182 Cal. Rptr. 3d 235, 247-48 (2015). "The elements of procedural and substantive unconscionability need not be present to the same degree because they are evaluated on a sliding scale. Consequently, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to conclude the term is unenforceable, and vice versa." Id., 182 Cal. Rptr. 3d at 248.

"The oppression that creates procedural unconscionability arises from an inequality of bargaining power that results in no real negotiation and an absence of meaningful choice." Id. at 1347-48, 182 Cal. Rptr. 3d at 248. For purposes of procedural unconscionability, "California law allows oppression to be established in two ways. First, and most frequently, oppression may be established by showing the contract is one of adhesion. . . . In the absence of an adhesion contract, the oppression aspect of procedural unconscionability can be established by the totality of the circumstances surrounding the negotiation and formation of the contract." Id. at 1348, 182 Cal. Rptr. 3d at 249. Importantly, "showing a contract is one of adhesion does not always establish procedural unconscionability." Id. at n.9. In the absence of an adhesion contract, the "circumstances relevant to establishing oppression include, but are not limited to (1) the amount of time the party is given to consider the proposed contract; (2) the amount and type of pressure exerted on the party to sign the proposed contract; (3) the length of the proposed contract and the length and complexity of the challenged provision; (4) the education and experience of the party; and (5) whether the party's review of the proposed contract was aided by an attorney." Id., 182 Cal. Rptr. 3d at 248-49.

[1/] The Court does not find persuasive the preliminary analysis concerning the enforceability of the covenant not to sue conducted by the court in DotConnectAfrica Trust v. ICANN, Case No. 2:16-cv-862 RGK (JCx) (C.D. Cal. Apr. 12, 2016).

Here, even if the covenant not to sue contained in the Application Guidebook is a contract of adhesion, the nature of the relationship between ICANN and Plaintiff, the sophistication of Plaintiff, the stakes involved in the gTLD application process, and the fact that the Application Guidebook "is the implementation of [ICANN] Board-approved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period," militates against a conclusion that the covenant not to sue is procedurally unconscionable. (FAC ¶ 21, Ex. C, p. 1-2 ("Introduction to the gTLD Application Process").) ICANN is a non-profit entity that, according to the FAC, "is accountable to the Internet community for operating in a manner consistent with its Bylaws and Articles of Incorporation . . . ." (FAC ¶¶ 10 & 13.) Plaintiff, for its part, is a sophisticated entity that paid a $185,000 application fee to participate in the application process for the .web gTLD. (FAC ¶ 1.) Under the totality of these circumstances, the Court concludes that the covenant not to sue is, at most, only minimally procedurally unconscionable.

"Substantive unconscionability is not susceptible of precise definition. It appears the various descriptions unduly oppressive, overly harsh, so one-sided as to shock the conscience, and unreasonably favorable to the more powerful party all reflect the same standard." Grand Prospect Partners, 232 Cal. App. 4th at 1349, 182 Cal. Rptr. 3d at 249 (citations omitted). "'[U]nconscionability turns not only on a 'one sided' result, but also on an absence of 'justification' for it.'" Walnut Producers of Cal. v. Diamond Foods, Inc., 187 Cal. App. 4th 634, 647, 114 Cal. Rptr. 3d 449, 459 (2010) (quoting A & M Produce Co. v. FMC Corp., 135 Cal. App. 3d 473, 487, 186 Cal. Rptr. 114, 122 (1982)).

Plaintiff contends that the covenant not to sue is substantively unconscionable because of the one-sided limitation on an applicant's ability to sue ICANN without limiting ICANN's ability to sue an applicant. Plaintiff additionally asserts that the issue of the substantive unconscionability of the covenant not to sue is not susceptible to resolution at this stage of the proceedings because the FAC does not allege any facts providing a justification for ICANN's inclusion of the covenant not to sue in the Application Guidebook. The Court disagrees. The nature of the relationship between applicants such as Plaintiff and ICANN, and the justification for the inclusion of the covenant not to sue, is apparent from the facts alleged in the FAC and the FAC's incorporation by reference of the Application Guidebook. Without the covenant not to sue, any frustrated applicant could, through the filing of a lawsuit, derail the entire system developed by ICANN to process applications for gTLDs. ICANN and frustrated applicants do not bear this potential harm equally. This alone establishes the reasonableness of the covenant not to sue. As a result, the Court concludes that the covenant not to sue is not substantively unconscionable.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 16-5505 PA (ASx)	Date	November 28, 2016
Title	Ruby Glen, LLC v. Internet Corp. for Assigned Names & Numbers		

Conclusion

For all of the foregoing reasons, the Court concludes that the covenant not to sue is, at most, only minimally procedurally unconscionable. The Court also concludes that the covenant not to sue is not substantively unconscionable or void pursuant to California Civil Code section 1668. Because the covenant not to sue bars Plaintiff's entire action, the Court dismisses the FAC with prejudice. The Court declines to address the additional arguments contained in ICANN's Motion to Dismiss. Plaintiff's Motion to Begin Discovery is denied as moot. The Court will issue a Judgment consistent with this Order.

IT IS SO ORDERED.

R-8

RESPONDENT'S EXHIBIT

NOT FOR PUBLICATION

FILED

OCT 15 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RUBY GLEN, LLC, Plaintiff-Appellant, v. INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS and DOES, 1-10, Defendants-Appellees.	No. 16-56890 D.C. No. 2:16-cv-05505-PA-AS MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Percy Anderson, District Judge, Presiding

Argued and Submitted October 9, 2018
Pasadena, California

Before: SCHROEDER, M. SMITH, and NGUYEN, Circuit Judges.

Ruby Glen, LLC ("Ruby Glen") appeals the district court's dismissal of its First Amended Complaint ("FAC") against Internet Corporation for Assigned Names and Numbers ("ICANN"). We have jurisdiction under 28 U.S.C. § 1291. "We review de novo dismissals for failure to state a claim under Rule 12(b)(6)."

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

McKesson HBOC, Inc. v. N.Y. State Common Ret. Fund, Inc., 339 F.3d 1087, 1090 (9th Cir. 2003). We affirm.

The district court properly dismissed the FAC on the ground that Ruby Glen's claims are barred by the covenant not to sue contained in the Applicant Guidebook. As the district court found, the covenant not to sue is not void under California Civil Code section 1668. Ruby Glen is not without recourse—it can challenge ICANN's actions through the Independent Review Process, which Ruby Glen concedes "is effectively an arbitration, operated by the International Centre for Dispute Resolution of the American Arbitration Association, comprised of an independent panel of arbitrators." Thus, the covenant not to sue does not exempt ICANN from liability, but instead is akin to an alternative dispute resolution agreement falling outside the scope of section 1668. *See* Cal. Civ. Code. § 1668 ("All contracts which have for their object . . . *to exempt* anyone from responsibility for his own fraud, or willful injury . . . , or violation of law . . . are against the policy of the law." (emphasis added)); *see also Cont'l Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1527 (9th Cir. 1987) (holding that an "exculpatory clause" does not violate California Civil Code section 1668 where the clause bars suit, but "[o]ther sanctions remain in place"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to

arbitrate . . . , a party does not forgo [its] substantive rights . . . ; it only submits to their resolution in an arbitral, rather than a judicial, forum.").

The district court also properly rejected Ruby Glen's argument that the covenant not to sue is unconscionable. Even assuming that the adhesive nature of the Guidebook renders the covenant not to sue procedurally unconscionable, it is not substantively unconscionable. *See Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899, 910 (2015) (explaining that procedural and substantive unconscionability "must *both* be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability" (emphasis in original) (internal quotation marks omitted)); *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, 232 Cal. App. 4th 1332, 1347–48 (2015) (holding that procedural unconscionability "may be established by showing the contract is one of adhesion"). Because Ruby Glen may pursue its claims through the Independent Review Process, the covenant not to sue is not "so one-sided as to shock the conscience." *See Walnut Producers of Cal. v. Diamond Foods, Inc.*, 187 Cal. App. 4th 634, 647–48 (2010) (internal quotation marks omitted).

Finally, the district court did not abuse its discretion in denying Ruby Glen leave to amend because any amendment would have been futile. *See Carrico v. City & Cty. of San Francisco*, 656 F.3d 1002, 1008 (9th Cir. 2011).[1]

AFFIRMED.

[1] Ruby Glen raises several additional arguments that it failed to raise below. We decline to consider those arguments because they were raised for the first time on appeal. *See Dream Palace v. Cty. of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004).

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			**TOTAL:**	$

* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - *Continued* R-8

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk

R-9

RESPONDENT'S EXHIBIT

To: Arif Ali on behalf of Afilias Domains No. 3 Ltd.

Date: 24 March 2018

Re: Request No. 20180223-1

In your letter dated 23 February 2018 that you submitted on behalf of Afilias Domains No. 3 Ltd. (Afilias), among other things, you request: (1) an update on ICANN organization's investigation of the .WEB contention set; and (2) documentary information pursuant to the Internet Corporation for Assigned Names and Numbers' (ICANN's) Documentary Information Disclosure Policy (DIDP). For reference, a copy of your letter is attached to the email transmitting this Response.

As an initial matter, the DIDP is limited to requests for documentary information already in existence within ICANN organization that is not publicly available. It is not a mechanism for one to make information requests or requests for "updates" concerning ICANN organization's internal activities. As such, your request for "an update on ICANN's investigation of the .WEB contention set" is beyond the scope of the DIDP and will not be addressed in this Response. Moreover, ICANN organization is not required to create or compile summaries of any documented information in response to a DIDP Request. (*See* DIDP (https://www.icann.org/resources/pages/didp-2012-02-25-en).)

Items Requested

Your Request seeks the disclosure of documentary information relating to the .WEB applications and the .WEB contention set:

1. All documents received from Ruby Glen, NDC, and Verisign in response to ICANN's 16 September 2016 request for additional information;
2. Ruby Glen's Notice of Independent Review, filed on 22 July 2016;
3. All documents filed in relation to the Independent Review Process between ICANN and Ruby Glen, initiated on 22 July 2016;
4. All applications, and all documents submitted with the applications, for the rights to .WEB;
5. All documents discussing the importance of .WEB to bringing competition to the provision of registry services;
6. All documents concerning any investigation or discussion related to
    a. the .WEB contention set,
    b. NDC's application for the .WEB gTLD,
    c. Verisign's agreement with NDC to assign the rights to .WEB to Verisign, and
    d. Verisign's involvement in the .WEB contention set, including all communications with NDC or Verisign;
7. Documents sufficient to show the current status of NDC's request to assign .WEB to Verisign;

8. Documents sufficient to show the current status of the delegation of .WEB;
9. All documents relating to the Department of Justice, Antitrust Division's ("DOJ") investigation into Verisign becoming the registry operator for .WEB ("DOJ Investigation"), including:
    a. document productions to the DOJ;
    b. communications with the DOJ;
    c. submissions to DOJ, including letters, presentations, interrogatory responses, or other submissions;
    d. communications with Verisign or NDC relating to the investigation; and
    e. internal communications relating to the investigation, including all discussions by ICANN Staff and the ICANN Board; and
10. All joint defense or common interest agreements between ICANN and Verisign and/or NDC relating to the DOJ Investigation.

Response

The New gTLD Program and String Contention

In 2012, ICANN opened the application window for the New Generic Top-Level Domain (gTLD) Program and created the new gTLD microsite (https://newgtlds.icann.org/en/), which provides detailed information about the Program. From the Program Status webpage of the new gTLD microsite (https://newgtlds.icann.org/en/program-status), people can access the public portions of each new gTLD application, including all of the .WEB applications, by clicking on "Current Application Status" and accessing the New gTLD Current Application Status webpage (https://gtldresult.icann.org/application-result/applicationstatus/viewstatus).

ICANN received seven applications for .WEB, which were placed into a contention set (*see* Applicant Guidebook (Guidebook), §1.1.2.10 (String Contention)). Module 4 of the Guidebook (String Contention Procedures) describes situations in which contention for applied-for new gTLDs occurs, and the methods available to applicants for resolving contention absent private resolution: "It is expected that most cases of contention will be resolved by the community priority evaluation, or through voluntary agreement among the involved applicants. Auction is a tie-breaker method for resolving string contention among the applications within a contention set, if the contention has not been resolved by other means." (Guidebook, § 4.3 (Auction: Mechanisms of Last Resort).)

Should private resolution not occur, the contention set will proceed to an auction of last resort governed by the Auction Rules that all applicants agreed to by applying. (Guidebook, § 1.1.2.10 (String Contention)). In furtherance of ICANN's commitment to transparency, ICANN organization established the New gTLD Program Auctions webpage, which provides extensive detailed information about the auction process (https://newgtlds.icann.org/en/applicants/auctions.)

Resolution of .WEB/.WEBS Contention Set

Following the procedures set forth in the Guidebook, ICANN organization scheduled an auction of last resort for 27 July 2016 to resolve the .WEB/.WEBS contention set (Auction). (*See* https://newgtlds.icann.org/en/applicants/auctions/schedule-13mar18-en.pdf.)

On or about 22 June 2016, Ruby Glen LLC (Ruby Glen) asserted that changes had occurred in NU DOT CO LLC's (NDC's) application for .WEB, in particular to NDC's management and ownership, and asserted that the Auction should be postponed pending further investigation. (*See* https://www.icann.org/en/system/files/files/litigation-ruby-glen-icann-memorandum-point-authorities-support-motion-dismiss-first-amended-complaint-26oct16-en.pdf.)

ICANN organization investigated Ruby Glen's assertions regarding NDC's application. After completing its investigation, ICANN org sent a letter to the members of the contention set stating, among other things, that "in regards to potential changes of control of [NDC], we have investigated the matter, and to date we have found no basis to initiate the application change request process or postpone the auction." (*See* https://www.icann.org/en/system/files/correspondence/willett-to-web-webs-members-13jul16-en.pdf.)

Ruby Glen then invoked one of ICANN's accountability mechanisms by submitting a reconsideration request on an urgent basis (Request 16-9), seeking postponement of the Auction and requesting a more detailed investigation. (*See* https://www.icann.org/en/system/files/files/reconsideration-16-9-ruby-glen-radix-request-redacted-17jul16-en.pdf.) After carefully considering the information related to Request 16-9, on 21 July 2016 ICANN's Board Governance Committee (BGC) denied Request 16-9. (*See* https://www.icann.org/en/system/files/files/reconsideration-16-9-ruby-glen-radix-bgc-determination-21jul16-en.pdf.)

The next day Ruby Glen sued ICANN org. (*See* https://www.icann.org/en/system/files/files/litigation-ruby-glen-complaint-22jul16-en.pdf.) At the same time, Ruby Glen applied for a temporary restraining order (TRO Application), seeking to stop ICANN org from conducting the Auction at the scheduled time. (*See* https://www.icann.org/en/system/files/files/litigation-ruby-glen-ex-parte-application-tro-memo-points-authorities-22jul16-en.pdf.) The Court denied the TRO Application (*see* https://www.icann.org/en/system/files/files/litigation-ruby-glen-court-order-denying-plaintiff-ex-parte-application-tro-26jul16-en.pdf) and the Auction took place on 27 and 28 July 2016. NDC placed the winning bid. (*See* https://gtldresult.icann.org/application-result/applicationstatus/auctionresults.)

On 28 November 2016, the Court dismissed Ruby Glen's complaint and entered judgment in ICANN organization's favor. (*See* https://www.icann.org/en/system/files/files/litigation-ruby-glen-judgment-28nov16-en.pdf.) Ruby Glen appealed that decision, and the appeal is currently pending. (*See* https://www.icann.org/en/system/files/files/litigation-ruby-glen-notice-appeal-regarding-dismissal-20dec16-en.pdf.)

DIDP Process and Responses

The DIDP exemplifies ICANN's Commitments and Core Values supporting transparency and accountability by setting forth a procedure through which documents concerning ICANN organization's operations and within ICANN organization's possession, custody, or control that are not already publicly available are made available unless there is a compelling reason for confidentiality. (*See* https://www.icann.org/resources/pages/didp-2012-02-25-en.)

Consistent with its commitment to operating to the maximum extent feasible in an open and transparent manner, ICANN org has published process guidelines for responding to requests for documents submitted pursuant to the DIDP (DIDP Response Process). (*See* https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf (DIDP Response Process).) The DIDP Response Process provides that, following the collection of potentially responsive documents, "[a] review is conducted as to whether any of the documents identified as responsive to the Request are subject to any of the Defined Conditions for Nondisclosure identified [on ICANN organization's website]." If ICANN organization concludes that a document falls within one of the Defined Conditions for Nondisclosure (Nondisclosure Conditions), "a review is conducted as to whether, under the particular circumstances, the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure."

The DIDP was developed as the result of an independent review of standards of accountability and transparency within ICANN, which included extensive public comment and community input. (*See* https://www.icann.org/news/announcement-4-2007-03-29-en; https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en.) Following the completion of this review, ICANN organization sought public comment on the resulting recommendations, and summarized and posted publicly the community feedback. (*See* https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en.) Based on the community's feedback, ICANN organization proposed changes to its frameworks and principles to "outline, define and expand upon the organisation's accountability and transparency" (*see* https://www.icann.org/en/system/files/files/acct-trans-frameworks-principles-17oct07-en.pdf), and sought additional community input on the proposed changes before implementing them (*see* https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en).

Neither the DIDP nor ICANN's Commitments and Core Values supporting transparency and accountability obligates ICANN organization to make public every document in its possession. As noted above, the DIDP sets forth Nondisclosure Conditions for which other commitments or core values may compete or conflict with the transparency commitment. These Nondisclosure Conditions represent areas, vetted through public comment, that the community has agreed are presumed not to be appropriate for public disclosure. The public interest balancing test in turn allows ICANN organization to determine whether or not, under the specific circumstances, its commitment to transparency outweighs its other commitments and core values. Accordingly, ICANN organization may appropriately exercise its discretion, pursuant to the DIDP, in determining that certain documents are not appropriate for disclosure, without

contravening its commitment to transparency. As the Amazon EU S.à.r.l. Independent Review Process Panel noted, "notwithstanding ICANN's transparency commitment, both ICANN's By-Laws and its Publication Practices recognize that there are situations where non-public information, e.g., internal staff communications relevant to the deliberative processes of ICANN . . . may contain information that is appropriately protected against disclosure." (Amazon EU S.à.r.l. v. ICANN, Procedural Order (7 June 2017) (https://www.icann.org/en/system/files/files/irp-amazon-procedural-order-3-07jun17-en.pdf).)

ICANN's Bylaws address the need to balance competing interests such as transparency and confidentiality, noting that "in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing test must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN's Mission." (ICANN Bylaws, 22 July 2017, Art. 1, Section 1.2(c) (https://www.icann.org/resources/pages/governance/bylaws-en/#article1).)

Afilias' DIDP Request

Item 1

Item 1 seeks "[a]ll documents received from Ruby Glen, NDC, and Verisign, Inc. (Verisign) in response to ICANN's 16 September 2016 request for additional information."

The documentary information received from NDC, Verisign, Afilias, and Ruby Glen in response to ICANN organization's 16 September 2016 request for information are subject to the following Nondisclosure Conditions:

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.

- Confidential business information and/or internal policies and procedures.

Notwithstanding the above, ICANN organization will continue to review potentially responsive materials and consult with relevant third parties, as needed, to determine if additional documentary information is appropriate for disclosure under the DIDP. If it is determined that certain additional documentary information is appropriate for public

disclosure, ICANN organization will supplement this DIDP Response and notify the Requestor of the supplement.

Items 2 and 3

Item 2 seeks Ruby Glen's Notice of Independent Review, filed on 22 July 2016; Item 3 seeks "[a]ll documents filed in relation to the Independent Review Process between ICANN and Ruby Glen, initiated on 22 July 2016."

ICANN organization understands that, on 22 July 2016, Ruby Glen filed certain materials with the International Centre for Dispute Resolution (ICDR) relating to the initiation of an Independent Review Process (IRP) against ICANN. Ruby Glen did not provide ICANN organization with these materials; nor has Ruby Glen, the ICDR, or any other entity ever provided ICANN organization with a Notice of or Request for Independent Review Process that Ruby Glen might have filed against ICANN. As such, ICANN organization does not have any responsive documentary information in response to Items 2 or 3. ICANN understands that Ruby Glen withdrew its request for IRP on 18 August 2016; and that the ICDR later closed the IRP.

Item 4

Item 4 seeks "[a]ll applications, and all documents submitted with the applications, for the rights to .WEB." Materials responsive to Item 4 are publicly available on ICANN's website. Specifically, ICANN organization posts the public portions of each gTLD application and the public portions of any documents submitted with an application on the New gTLD Current Application Status webpage. (*See* https://gtldresult.icann.org/application-result/applicationstatus/viewstatus.) The public portions of the .WEB applications can be accessed as follows:

- NU DOT CO LLC's .WEB Application: https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1053;
- Charleston Road Registry Inc.'s .WEB Application: https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/520;
- Web.com Group, Inc.'s .WEB Application: https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1596;
- DotWeb Inc's .WEB Application: https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1663;
- Ruby Glen, LLC's .WEB Application: https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/692;
- Afilias Domains No. 3 Ltd's .WEB Application: https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/292;
- Schlund Technologies GmbH's .WEB Application: https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/542.

As stated in the Guidebook (Guidebook, Module 2 (Evaluation Questions and Criteria) (https://newgtlds.icann.org/en/applicants/agb)), certain applicant information is not appropriate for public posting and ICANN organization informed applicants that the following types of information would not be publicly posted:

- Personally identifying information (*see* Applicant Questions 6, 7, 11);
- An applicant's Business ID, Tax ID, VAT registration number, or equivalent (*see* Application Question 10);
- Involvement of any individual identified in an application in civil or criminal legal proceedings, (*see* Application Question 11);
- Bank details related to wire transfer payment of the evaluation fee (*see* Application Question 12);
- For geographic names, letters of support or non-objection (*see* Application Question 21(b));
- Descriptions of the applicant's intended technical and operational approach for those registry functions that are internal to the infrastructure and operations of the registry (*see* Application Questions 30(b) – 44);
- Financial information (*see* Application Question 45-50).

The foregoing types of information contained in new gTLD applications and supporting materials are also subject to the following Nondisclosure Conditions:

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

- Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.

- Confidential business information and/or internal policies and procedures.

Item 5

Item 5 seeks "[a]ll documents discussing the importance of .WEB to bringing competition to the provision of registry services." Item 5 is vague, and does not appear

to concern ICANN's operational activities; as written, it is unclear what documents are being requested.

To the extent Item 5 seeks materials concerning ICANN organization's review of how the New gTLD Program has impacted competition, consumer choice and consumer trust, ICANN organization has established a Competition, Consumer Trust & Consumer Choice Review webpage (https://newgtlds.icann.org/en/reviews/cct), which includes documentary information concerning, among other things, the extent to which the introduction of new gTLDs has promoted competition.

To the extent Item 5 seeks materials that overlap with the materials responsive to Item 9(a) ("document productions to the DOJ" in response to the DOJ CID), ICANN organization incorporates and refers Requestor to the response to Item 9(a) below.

Should the Requestor wish to clarify or narrow the scope of Item 5, ICANN organization will consider the revised request. However, as currently written, Item 5 is so overbroad and vague that ICANN organization is not able to provide a further response at this time.

Item 6

Item 6 seeks "[a]ll documents concerning any investigation or discussion related to: (a) the .WEB contention set, (b) NDC's application for the .WEB gTLD, (c) Verisign's agreement with NDC to assign the rights to .WEB to Verisign, and (d) Verisign's involvement in the .WEB contention set, including all communications with NDC or Verisign."

With regard to Items 6(a) and 6(b), these requests are exceedingly overbroad and vague; as written, it is unclear what documents are being requested. NDC (and all the applicants for .WEB) went through an extensive application process that included, among other things: the submission of the application and supporting materials; an administrative completeness check; comment period and a formal objection process; contention procedures and dispute resolution; an initial evaluation (which included string reviews and demonstrations of technical, operational, and financial capability, as well as reviews for DNS security issues); and background screening. As written, Items 6(a) and 6(b) seek "[a]ll documents" concerning every facet of the application process for each of the seven .WEB applications, which is not a reasonable request. As such, it is subject to the following Nondisclosure Condition:

- Information requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; (iii) complying with which is not feasible; or (iv) are made with an abusive or vexatious purpose or by a vexatious or querulous individual.

Should the Requestor wish to clarify or narrow the scope of Items 6(a) and 6(b), ICANN organization will consider the revised request. However, as currently written, Items 6(a) and 6(b) are so overbroad and vague that ICANN organization is not able to provide a

further response at this time. In addition, Items 6(a) and 6(b) potentially seek documents that are subject to the following Nondisclosure Conditions:

- Information subject to the attorney-client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.

- Confidential business information and/or internal policies and procedures.

- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

With regard to Items 6(c) and 6(d), these requests seek "[a]ll documents concerning any investigation or discussion related to: […] (c) Verisign's agreement with NDC to assign the rights to .WEB to Verisign, and (d) Verisign's involvement in the .WEB contention set, including all communications with NDC or Verisign." Certain materials responsive to Items 6(c) and 6(d) are publicly available. Verisign issued a public statement regarding its agreement with NDC and its involvement in the auction. (*See* "Verisign Statement Regarding .Web Auction Results," available at https://investor.verisign.com/releasedetail.cfm?ReleaseID=981994.)

Any further documents responsive to Items 6(c) and 6(d) are subject to the following Nondisclosure Conditions:

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents,

memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.

- Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

- Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.

- Confidential business information and/or internal policies and procedures.

- Information subject to the attorney-client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

To the extent Item 6 seeks materials that overlap with the materials responsive to Item 9(a) ("document productions to the DOJ" in response to the DOJ CID), ICANN organization incorporates and refers Requestor to the response to Item 9(a) below.

Notwithstanding the above, ICANN organization will continue to review potentially responsive materials and consult with relevant third parties, as needed, to determine if additional documentary information is appropriate for disclosure under the DIDP. If it is determined that certain additional documentary information is appropriate for public disclosure, ICANN organization will supplement this DIDP Response and notify the Requestor of the supplement.

Item 7

Item 7 seeks "[d]ocuments sufficient to show the current status of NDC's request to assign .WEB to Verisign." ICANN organization does not have any documentary information responsive to this request. That said, the current application status for each new gTLD application, including NDC's .WEB application, is publicly available on the New gTLD Current Application Status webpage. (*See* https://gtldresult.icann.org/application-result/applicationstatus/viewstatus; *see also* https://gtldresult.icann.org/applicationstatus/applicationdetails/1053.)

Item 8

Item 8 seeks "[d]ocuments sufficient to show the current status of the delegation of .WEB." Materials responsive to Item 8 are publicly available. Specifically, ICANN organization makes publicly available information concerning the current application status for each gTLD application, including NDC's .WEB application, on the New gTLD Current Application Status webpage. (*See* https://gtldresult.icann.org/application-result/applicationstatus/viewstatus; *see also* https://gtldresult.icann.org/applicationstatus/applicationdetails/1053.) As reflected on the foregoing webpages, .WEB is "in contracting."

Item 9

Item 9 seeks "[a]ll documents relating to the Department of Justice, Antitrust Division's ("DOJ") investigation into Verisign becoming the registry operator for .WEB ("DOJ Investigation"), including: (a) document productions to the DOJ; (b) communications with the DOJ; (c) submissions to DOJ, including letters, presentations, interrogatory responses, or other submissions; (d) communications with Verisign or NDC relating to the investigation; and (e) internal communications relating to the investigation, including all discussions by ICANN Staff and the ICANN Board."

On 1 February 2017, DOJ issued a Civil Investigative Demand (CID) to ICANN in connection with DOJ's investigation of Verisign's proposed acquisition of NDC's contractual rights to operate the .WEB gTLD. ICANN provided DOJ with information responsive to the CID.

With regard to Item 9(a), the vast majority of the documents provided to DOJ are publicly available materials. Attachment A provides links to the publicly available documents that ICANN organization provided to DOJ in response to the CID. With respect to the non-public materials provided to DOJ, such materials are categorized as follows and are subject to various Nondisclosure Conditions:

- Confidential data reports, subject to the following Nondisclosure Conditions:
    - Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN's relationship with that party.
    - Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.
    - Confidential business information and/or internal policies and procedures.

- Trade secrets and commercial and financial information not publicly disclosed by ICANN.

- Correspondence from, to, or among ICANN organization relating to .WEB, subject to the following Nondisclosure Conditions:

  - Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN's relationship with that party.

  - Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.

  - Confidential business information and/or internal policies and procedures.

  - Trade secrets and commercial and financial information not publicly disclosed by ICANN.

  Certain of these documents comprise correspondence to or from the Requestor, which are undoubtedly already in the Requestor's possession, custody, or control. If the Requestor considers its correspondence with ICANN organization to be appropriate for public disclosure, ICANN organization can supplement this DIDP Response and make such documents publicly available.

- Auction forms from .WEB applicants, subject to the following Nondisclosure Conditions:

  - Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN's relationship with that party.

  - Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.

  - Confidential business information and/or internal policies and procedures.

  - Trade secrets and commercial and financial information not publicly disclosed by ICANN.

Again, certain of these documents comprise auction forms the Requestor submitted to ICANN organization, which are undoubtedly already in the Requestor's possession, custody, or control. If the Requestor considers its auction forms to be appropriate for public disclosure, ICANN organization can supplement this DIDP Response and make such documents publicly available.

- Self-Resolution notices regarding gTLDs other than .WEB, subject to the following Nondisclosure Conditions:
    - Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN's relationship with that party.
    - Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.
    - Confidential business information and/or internal policies and procedures.
    - Trade secrets and commercial and financial information not publicly disclosed by ICANN.
- Draft Board materials, draft announcements, and other internal documents, subject to the following Nondisclosure Conditions:
    - Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN's relationship with that party.
    - Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.
    - Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications.

- Confidential business information and/or internal policies and procedures.
- Information subject to the attorney–client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.
- Trade secrets and commercial and financial information not publicly disclosed by ICANN.

Item 9(b) seeks "[a]ll documents relating to the Department of Justice, Antitrust Division's ("DOJ") investigation into Verisign becoming the registry operator for .WEB ("DOJ Investigation"), including […] (b) communications with the DOJ." Documents responsive to Item 9(b) are subject to the following Nondisclosure Conditions:

- Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN's relationship with that party.
- Information subject to the attorney-client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

Item 9(c) seeks "[a]ll documents relating to the Department of Justice, Antitrust Division's ("DOJ") investigation into Verisign becoming the registry operator for .WEB ("DOJ Investigation"), including: […] (c) submissions to DOJ, including letters, presentations, interrogatory responses, or other submissions." Documents responsive to Item 9(c) are subject to the following nondisclosure conditions:

- Information provided by or to a government or international organization, or any form of recitation of such information, in the expectation that the information will be kept confidential and/or would or likely would materially prejudice ICANN's relationship with that party.
- Information subject to the attorney-client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.
- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.

- Confidential business information and/or internal policies and procedures.

Item 9(d) seeks "[a]ll documents relating to the Department of Justice, Antitrust Division's ('DOJ') investigation including Verisign becoming the registry operator for .WEB, including […] (d) communications with Verisign or NDC relating to the investigation…." ICANN organization did not engage in written communications with Verisign or NDC concerning the substance of DOJ's investigation and therefore ICANN org does not have any documentary information responsive to this request.

Item 9(e) seeks "[a]ll documents relating to the Department of Justice, Antitrust Division's ('DOJ') investigation including Verisign becoming the registry operator for .WEB, including […] (e) internal communications relating to the investigation, including all discussions by ICANN Staff and the ICANN Board." Documents responsive to Item 9(e) are subject to the following Nondisclosure Conditions:

- Information subject to the attorney-client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation.

- Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.

- Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication.

Item 10

Item 10 seeks "[a]ll joint defense or common interest agreements between ICANN and Verisign and/or NDC relating to the DOJ Investigation." ICANN does not have any documentary information responsive to this request.

Public Interest in Disclosure of Information Subject to Nondisclosure Conditions

Notwithstanding the applicable Nondisclosure Conditions identified in this Response, ICANN organization has considered whether the public interest in disclosure of the information subject to these conditions at this point in time outweighs the harm that may be caused by such disclosure. ICANN org has determined that there are no current circumstances for which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure. ICANN org will continue to review potentially responsive materials and consult with relevant third parties, as needed, to determine if additional documentary information is appropriate for disclosure under the DIDP. If it is determined that certain additional documentary information is

appropriate for public disclosure, ICANN org will supplement this DIDP Response and notify the Requestor of the supplement.

About DIDP

ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. In addition, the DIDP sets forth Defined Conditions of Nondisclosure. To review a copy of the DIDP, please see http://www.icann.org/en/about/transparency/didp. ICANN organization makes every effort to be as responsive as possible to the entirety of your Request. As part of its accountability and transparency commitments, ICANN organization continually strives to provide as much information to the community as is reasonable. ICANN organization encourages you to sign up for an account at ICANN.org, through which you can receive daily updates regarding postings to the portions of ICANN organization's website that are of interest. If you have any further inquiries, please forward them to didp@icann.org.

ATTACHMENT A

DOCUMENT DESCRIPTION	LINK
Applicant Guidebook	https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf
ICANN Auction Rules, Evaluation Processes, Etc.	https://newgtlds.icann.org/en/program-status/evaluation-panels#overview
	https://newgtlds.icann.org/en/program-status/odr
	https://newgtlds.icann.org/en/applicants/auctions
Documents Pertaining to .WEB Applications	https://newgtlds.icann.org/sites/default/files/drsp/03feb14/determination-1-1-1033-22687-en.pdf
	https://gtldresult.icann.org/applicationstatus/stringcontentionstatus:downloadauctionreport/233
Materials re February 27, 2014 Board Governance Committee ("BGC") Meeting	https://www.icann.org/resources/board-material/minutes-bgc-2014-02-27-en
	https://www.icann.org/en/system/files/files/request-annex-vistaprint-06feb14-en.pdf
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Materials re October 22, 2015 Regular Meeting of the ICANN Board	https://www.icann.org/resources/board-material/resolutions-2015-10-22-en
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Materials re December 2, 2015 Special Meeting of the ICANN Board	https://www.icann.org/resources/board-material/resolutions-2015-12-02-en
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	https://www.icann.org/resources/board-material/prelim-report-2015-12-02-en
	https://www.icann.org/en/system/files/bm/briefing-materials-1-redacted-02dec15-en.pdf
	https://www.icann.org/en/system/files/bm/briefing-materials-2-redacted-02dec15-en.pdf
Materials re March 3, 2016 Regular Meeting of the ICANN Board	https://www.icann.org/resources/board-material/prelim-report-2016-03-03-en
	https://www.icann.org/en/system/files/bm/briefing-materials-1-redacted-03mar16-en.pdf
	https://www.icann.org/en/system/files/bm/briefing-materials-2-redacted-03mar16-en.pdf
	https://www.icann.org/resources/board-material/resolutions-2016-03-03-en
	https://www.icann.org/resources/board-material/minutes-2016-03-03-en
Materials re July 21, 2016 BGC Meeting	https://www.icann.org/resources/board-material/minutes-bgc-2016-07-21-en
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Materials re September 15, 2016 Regular Meeting of the ICANN Board	https://www.icann.org/resources/board-material/minutes-2016-09-15-en
	https://www.icann.org/resources/board-material/prelim-report-2016-09-15-en
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	https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadapplication/292?t:ac=292
	https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadapplication/542?t:ac=542
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	https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadapplication/692?t:ac=692
	https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadapplication/520?t:ac=520
	https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadapplication/1663?t:ac=1663
.WEB/.WEBS Contention Set Status	https://gtldresult.icann.org/application-result/applicationstatus/contentionsetdiagram/233
Vistaprint Limited v. ICANN (.WEBS) IRP Materials	https://www.icann.org/resources/pages/vistaprint-v-icann-2014-06-19-en
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Auction Participation Forms (templates)	https://newgtlds.icann.org/en/applicants/auctions/bidder-form-09nov17-en.pdf
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Auction Result Reports	https://gtldresult.icann.org/application-result/applicationstatus/stringcontentionstatus:downloadauctionreport/16
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	https://gtldresult.icann.org/application-result/applicationstatus/stringcontentionstatus:downloadauctionreport/6
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	https://gtldresult.icann.org/applicationstatus/stringcontentionstatus:downloadauctionreport/39
	https://gtldresult.icann.org/applicationstatus/stringcontentionstatus:downloadauctionreport/67
Ruby Glen v. ICANN Litigation Materials	https://www.icann.org/en/system/files/files/litigation-ruby-glen-complaint-22jul16-en.pdf
	https://www.icann.org/en/system/files/files/litigation-ruby-glen-ex-parte-application-tro-memo-points-authorities-22jul16-en.pdf
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	https://www.icann.org/en/system/files/files/litigation-ruby-glen-court-order-denying-plaintiff-ex-parte-application-tro-26jul16-en.pdf
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	CCTRT Work Plan, available at https://community.icann.org/download/attachments/58727379/DRAFT%20workplan%20v2.pdf?version=1&modificationDate=1458753104114&api=v2
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	CCT-RT Metrics Reporting Page, available at https://www.icann.org/resources/reviews/cct/metrics
	Board Resolution - Recommendations for the Collection of Metrics for the New gTLD Program to Support future AoC Review, available at https://www.icann.org/resources/board-material/resolutions-2015-02-12-en#1.e
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	IAG-CCT Wiki, available at https://community.icann.org/display/IAG/IAG
	Board Resolution on the Collection of Benchmarking Metrics for the New gTLD Programto Support future AoC Review, available at https://www.icann.org/resources/board-material/resolutions-2014-03-27-en#2.c
	Board Resolution Evaluating Suggested GNSO and ALAC Metrics for CCT Review, available at https://www.icann.org/resources/board-material/resolutions-2013-07-18-en#2.b
	CCT Metrics Collection Memo, available at https://community.icann.org/download/attachments/56135378/Metrics_Collection_Memo.pdf?version=1&modificationDate=1455838112000&api=v2
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	ICANN Rights Protection Mechanisms Review Report, available at http://newgtlds.icann.org/en/reviews/rpm/rpm-review-11sep15-en.pdf
	Consumer Awareness of New gTLDs - Highlights and Links from existing research, available at https://www.icann.org/en/system/files/files/report-comments-new-gtld-draft-review-29jan16-en.pdf
	Image Online Design, Inc. v. ICANN Overview, available at https://www.icann.org/resources/pages/iod-v-icann-2012-11-02-en
	Image Online Design, Inc. v. ICANN - ICANN's Reply ISO Motion to Dismiss Complaint, available at https://www.icann.org/en/news/litigation/iod-v-icann/icann-reply-memo-support-14jan13-en.pdf
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	List of Registry Agreement assignments.xlsx, available at https://community.icann.org/download/attachments/56135378/List%20of%20Assignments.xlsx?version=1&modificationDate=1477044215000&api=v2
	NTLDStats.com 3 March 2017 - Parking Analysis of Legacy gTLDs.xlsx, available at https://community.icann.org/download/attachments/56135378/ICANN%20Parking%20Check.xlsx?version=1&modificationDate=1488820496000&api=v2
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	DomainWire Global TLD Stat Report, available at link https://www.centr.org/library/library/statistics-report/domainwire-global-tld-report-2016-4.html (referred by Russ Weinstein)
	Competition, Consumer Trust and Consumer Choice Review Website (with overview of other materials), available at: https://newgtlds.icann.org/en/reviews/cct
	Information regarding the Competition, Consumer Trust and Consumer Choice Review Team (CCT-RT) members, available at https://www.icann.org/news/announcement-2-2015-12-23-en

R-10

RESPONDENT'S EXHIBIT

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

FORM 10-K

(Mark One)

☑ **ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

For the fiscal year ended December 31, 2017

OR

☐ **TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934**

For the transition period from _____ to _____

Commission File Number: 000-23593

VERISIGN, INC.

(Exact name of registrant as specified in its charter)

Delaware	**94-3221585**
(State or other jurisdiction of incorporation or organization)	**(I.R.S. Employer Identification No.)**
12061 Bluemont Way, Reston, Virginia	**20190**
(Address of principal executive offices)	**(Zip Code)**

Registrant's telephone number, including area code: (703) 948-3200

Securities registered pursuant to Section 12(b) of the Act:

Title of each class	Name of each exchange on which registered
Common Stock $0.001 Par Value Per Share	NASDAQ Global Select Market

Securities registered pursuant to Section 12(g) of the Act: None

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. YES ☑ NO ☐

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. YES ☐ NO ☑

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. YES ☑ NO ☐

Indicate by check mark whether the registrant has submitted electronically and posted on its corporate Web site, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit and post such files). YES ☑ NO ☐

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of the registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. ☐

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act.

Large accelerated filer	☑	Accelerated filer	☐
Non-accelerated filer	☐	Smaller reporting company	☐
		Emerging growth company	☐

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act. ☐

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act.): YES ☐ NO ☑

The aggregate market value of the voting and non-voting common equity stock held by non-affiliates of the Registrant as of June 30, 2017, was $3.3 billion based upon the last sale price reported for such date on the NASDAQ Global Select Market. For purposes of this disclosure, shares of Common Stock held by persons known to the Registrant (based on information provided by such persons and/or the most recent schedule 13Gs filed by such persons) to beneficially own more than 5% of the Registrant's Common Stock and shares held by officers and directors of the Registrant have been excluded because such persons may be deemed to be affiliates. This determination is not necessarily a conclusive determination for other purposes.

Number of shares of Common Stock, $0.001 par value, outstanding as of the close of business on February 9, 2018: 97,120,531 shares.

DOCUMENTS INCORPORATED BY REFERENCE

Portions of the definitive Proxy Statement to be delivered to stockholders in connection with the 2018 Annual Meeting of Stockholders are incorporated by reference into Part III

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ITEM 2. PROPERTIES

Our corporate headquarters are located in Reston, Virginia. We have administrative, sales, marketing, research and development and operations facilities located in the U.S., Europe, Asia, and Australia. As of December 31, 2017, we owned approximately 454,000 square feet of space, which includes facilities in Reston and Dulles, Virginia and New Castle, Delaware. As of December 31, 2017, we leased approximately 17,000 square feet of space in Europe, Australia and Asia. These facilities are under lease agreements that expire at various dates through 2022.

We believe that our existing facilities are well maintained and in good operating condition, and are sufficient for our needs for the foreseeable future. The following table lists our major locations and primary use as of December 31, 2017:

Major Locations	Approximate Square Footage	Use
United States:		
Reston, Virginia	221,000	Corporate Headquarters
New Castle, Delaware	105,000	Data Center
Dulles, Virginia	60,000	Data Center
Europe:		
Fribourg, Switzerland	10,000	Data Center and Corporate Services

The table above does not include approximately 68,000 square feet of space owned by us and leased to third parties.

ITEM 3. LEGAL PROCEEDINGS

On January 18, 2017, the Company received a Civil Investigative Demand from the Antitrust Division of the United States Department of Justice ("DOJ") requesting certain material related to the Company becoming the registry operator for the *.web* gTLD. On January 9, 2018, the DOJ notified the Company that this investigation was closed.

ITEM 4. MINE SAFETY DISCLOSURES

Not applicable.

R-11

RESPONDENT'S EXHIBIT

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

AFILIAS DOMAINS NO. 3 LIMITED,

Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Respondent

ICDR Case No. 01-18-0004-2702

AFILIAS DOMAINS NO. 3 LIMITED'S RULE 33 APPLICATION FOR AN ADDITIONAL DECISION AND FOR INTERPRETATION

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21 June 2021

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Counsel for Claimant

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I. INTRODUCTION

1. Pursuant to Article 33 of the ICDR Arbitration Rules (the "**ICDR Rules**"), as informed by the standards for the challenge (*i.e.*, set aside) of arbitral awards under the English Arbitration Act ("**EAA**") and the requirements for the Independent Review Process ("**IRP**") set out in ICANN's Bylaws, Claimant Afilias Domains No. 3 Limited n/k/a Altanovo Domains Ltd. ("**Claimant**" or "**Afilias**"[1]) submits this application (the "**Application**") requesting an additional decision[2] and interpretation of the Panel's Final Decision dated 20 May 2021 (the "**Decision**").[3] Article 33 provides in relevant part:

> 1. Within 30 days after the receipt of an award, any party, with notice to the other party, may request the arbitral tribunal to interpret the award or correct any clerical, typographical, or computational errors or make an additional award as to claims, counterclaims, or setoffs presented but omitted from the award.
>
> 2. If the tribunal considers such a request justified after considering the contentions of the parties, it shall comply with such a request within 30 days after receipt of the parties' last submissions respecting the requested information, correction, or additional award. Any interpretation, correction, or additional award made by the tribunal shall contain reasoning and shall form part of the award.[4]

2. By failing to resolve all of the claims and issues Afilias presented to the Panel for decision, the Panel has not only failed to satisfy its mandate; it has also undermined the very

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[1] As the Panel described in its Decision, Claimant's former parent company, Afilias, Inc. merged with Donuts, Inc. ("**Donuts**") in late 2020. *See* Final Decision (20 May 2021) ("**Decision**"), ¶¶ 11, 244-49. However, Claimant and its .WEB application were carved out of the transaction. Claimant remains part of a group of companies that is now separate from Afilias, Inc. and Donuts. *Id.*, ¶ 245. Although Claimant is now known as Altanovo Domains Ltd., for the sake of consistency and ease of reference, we will refer to Claimant as "Afilias" throughout this Application. ICANN has been properly notified of the transaction and the resulting corporate changes.

[2] While the ICDR Rules use the term "award," in the context of an IRP and the Bylaws, the word "award" should be understood to apply to an IRP panel's "decision." Both terms are used interchangeably in this submission.

[3] The Claimant and Respondent are separately filing a joint application under Article 33 to request typographical and similar corrections to the Decision.

[4] ICDR Rules (2014), Art. 33(1) and (2).

Purposes of the IRP (as set out in Section 4.3(a) of the Bylaws)—especially, but not exclusively, by its decision to refer Afilias' claim arising from Nu Dot Co's ("**NDC**") violation of the New gTLD Program Rules back to the ICANN Board and Staff to "pronounce" upon "in the first instance."

3. The purpose of this application is to provide the Panel with an opportunity to address those claims and issues presented to it that the Panel did not decide or resolve, render such additional decisions as may be warranted, and otherwise provide more comprehensive reasoning that would allow the Parties and the global Internet community to understand the logic underlying the Panel's decisions and the consequences thereof for ICANN accountability.

4. This application is organized as follows:

- **Section II** addresses the applicable legal standards (**Section II(A)**), including the purposes of an additional decision and the Panel's mandate in this IRP insofar as it pertains to Claimant's application. It then addresses Claimant's request for an additional decision addressing three of Claimant's claims which the Panel did not decide and resolve in accordance with its clear mandate per the Bylaws. These are:

  (1) Claimant's claim that ICANN breached its Articles and Bylaws by not rejecting NDC's application, and/or not declaring NDC's bids at the ICANN auction invalid, and/or not deeming NDC ineligible to enter into a registry agreement for .WEB because of its violations of the New gTLD Program Rules, and not offering .WEB to Afilias as the next highest bidder (**Section II(B)**);[5]

  (2) Claimant's claim that ICANN breached its Articles and Bylaws by failing to conduct its activities in accordance with relevant principles of international law by failing to enforce the New gTLD Program Rules and proceeding to delegate .WEB to NDC despite NDC breaches of the Rules (**Section II(C)**); and

  (3) Claimant's claim that ICANN breached its Articles and Bylaws by treating Afilias inequitably and disparately when compared to the

[5] Afilias' Revised Statement of Issues (12 Oct. 2020) ("**Afilias' Revised Statement of Issues**"), Breaches 1; Afilias' Amended Request by Afilias for Independent Review Process (21 Mar. 2019) ("**Amended Request for IRP**"), Sec. 4.

manner in which it treated NDC and non-applicant Verisign (**Section II(D)**).

- **Section III** addresses Afilias' request for an interpretation of certain of the Panel's findings and rulings. It first discusses how the term "interpretation" should be understood in light of international arbitral practice and the requirement in the Bylaws that all IRP panel decisions must be "well-reasoned" (**Section III(A)**). It then sets out each of the specific points on which an interpretation is requested (**Sections III(B)-(E)**).

- **Section IV** addresses, with reference to the specific purposes intended to be achieved by the IRP, the implications of the deficiencies in the Panel's Decision and reasoning for Claimant and the global Internet community.

- **Section V** sets out the relief Afilias is requesting pursuant to this application.

II. CLAIMANT'S REQUEST FOR AN ADDITIONAL AWARD

A. The Applicable Legal Standard

1. The Purpose of an Additional Award

5. Article 33 of the ICDR Rules authorizes the Panel to "make an additional award as to claims, counterclaims, or setoffs presented but omitted from the award."[6] The purpose of an additional award is to ensure that an arbitral tribunal (here the Panel) fulfills its mandate and avoids rendering an award that is *infra petita* and thus subject to set-aside.[7] As Professor Gary Born has stated, "[t]he arbitrator's obligations include ***deciding all of the disputes which are presented*** to

[6] ICDR Rules (2014), Art. 33(1). The Panel may make such an additional award at the request of either party or *sua sponte*. *See* ICDR Rules (2014), Arts. 33(1) and 33(3). *See also* Martin F. Gusy and James M. Hosking, *A Guide to the ICDR International Arbitration Rules* (2nd ed., 2019), **[Ex. CA-148]**, ¶ 33.16 (citation omitted) ("As noted by a reviewing court, the key question as to whether a claim, counterclaim, or set-off may be the subject of an additional award is whether or not the claim, counterclaim, or set-off was originally 'presented' during the arbitration such that the tribunal should have addressed it.").

[7] *See* Gary Born, *International Commercial Arbitration* (3rd ed., 2021), **[Ex. CA-149]**, pp. 3406-409 (observing that many leading arbitral regimes and rules—including the ICDR, LCIA, ICSID, and UNCITRAL Rules—provide for the making of additional awards by the tribunal, following the issuance of its "final" award).

him or her."[8] An award is *infra petita* if—as with the Panel's Decision in this case—it fails to resolve all claims presented to it as required by the arbitration agreement.[9]

6. An award that is *infra petita* is subject to annulment under the vast majority of national arbitration laws—including specifically, under the EAA.[10] As Professor Born notes: "[i]f a tribunal fails to, or is unable to, make an additional award addressing a claim that was presented during the arbitral proceedings, then its award will be subject to challenge in an action to annul or subject to non-recognition (on grounds of *infra petita*)."[11] Indeed, the requirement that arbitrators must resolve all claims and issues presented to them—in a manner that fulfills their mandate—is not only a matter of national arbitration laws, including the EAA,[12] it is also a basic principle of arbitrator ethics. The AAA/ABA Code of Ethics for Arbitrators[13] underscores the duty of a tribunal to decide all submitted issues. Canon V(A) provides that "[t]he arbitrator should, after careful deliberation, ***decide all issues submitted for determination***."[14] Because the "arbitrator's

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8 Gary Born, *International Commercial Arbitration* (3rd ed., 2021), **[Ex. CA-149]**, p. 2137 (emphasis added).

9 Gary Born, *International Commercial Arbitration* (3rd ed., 2021), **[Ex. CA-149]**, p. 2137.

10 English law is of course the *lex arbitri* of this case given that the arbitration is seated in London. Section 68(2)(d) of the EAA provides that an award may be set aside where there is a "failure by the tribunal to deal with all the issues that were put to it." English Arbitration Act 1996, **[Ex. AA-50]**, Sec. 68(2)(d).

11 Gary Born, *International Commercial Arbitration* (3rd ed., 2021), **[Ex. CA-149]**, p. 3409.

12 *See, e.g.*, *The Secretary of State for the Home Department v. Raytheon Systems Ltd.* [2014] EWHC 4375 (TCC), **[Ex. CA-150]**, ¶¶ [41]-[61] (the High Court set aside an award under section 68(2)(d) of the EAA because the tribunal had not considered all the issues that were essential to the resolution of the parties' claims).

13 The ICDR is the international division of the AAA. As Born observes, "These codes should be regarded as expressing the reasonable expectations of commercial parties and most arbitrators, and the arbitrator's contractual obligations can therefore also be said to include a duty to comply generally with any applicable rules of ethical responsibility, at least insofar as these are directed towards the protection of the parties and are consistent with the parties' arbitration agreement." Gary Born, *International Commercial Arbitration* (3rd ed., 2021), **[Ex. CA-149]**, pp. 2138-39.

14 American Arbitration Association, The Code of Ethics for Arbitrators in Commercial Disputes (1 Mar. 2004), **[Ex. CA-151]**, Canon V(A). *See also id.*, Canon I(F) ("An arbitrator should conduct the arbitration process so as to advance the fair and efficient resolution of the matters submitted for decision.").

authority is derived from the agreement of the parties," he or she must "neither exceed that authority ***nor do less than is required to exercise that authority completely***."[15]

7. A failure to resolve a claim properly presented to the panel is not only manifestly unjust to the party that has presented the claim—who, as here, was required to give up its right to have that claim resolved by a court, based on the promise that the claim will instead be resolved as required by the arbitration agreement, *i.e.*, the Bylaws. It also violates the arbitrators' obligation to both parties, and, moreover, constitutes an enormous waste of both parties' time and resources. As the late Professor David Caron explained, an additional award "provides the arbitrators a mechanism for completing their mandate, when necessary, by making an award that resolves all remaining claims."[16] In the words of Professor Jan Paulsson, the "corrective mechanism" of an additional award "prevents the neutralisation of a lengthy, costly arbitration…."[17]

8. The relevant authorities on set aside and annulment confirm that any omission to decide a properly submitted claim—whether deliberate, inadvertent, or otherwise—is grounds for an additional award. Under English law, that is true even where, as here, the Panel purported to "resolve" at least some of the claims at issue in a manner that fails to fulfill its mandate. In *Ronly Holdings v. JSC Zestafoni*, the English High Court stated the following principles regarding the arbitrator's mandate:

> i) An award must be final as to all issues decided (save exceptionally and irrelevant here, when the arbitrator is empowered by the parties

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[15] American Arbitration Association, The Code of Ethics for Arbitrators in Commercial Disputes (1 Mar. 2004), **[Ex. CA-151]**, Canon I(E) (emphasis added). Here, as the Panel well appreciates, the "agreement of the parties" is reflected in the Bylaws and the New gTLD Program Rules.

[16] David D. Caron and Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd ed., 2013), **[Ex. CA-152]**, pp. 821-22. *See also* Peter Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* (4th ed., 2019), **[Ex. CA-153]**, pp. 439-40 ("The tribunal may, upon request by a party, make an additional award as to claims presented in the proceedings but omitted from the award. This consequence seems logical in light of the fact that clearly, in the given case, the tribunal acted *infra petita* and did not entirely fulfil its mandate.").

[17] Jan Paulsson and Georgios Petrochilos, *UNCITRAL Arbitration* (2017), **[Ex. CA-154]**, p. 354.

> to grant relief on a provisional basis pursuant to [Section 39 of the EAA].
>
> ii) Subject to (iv) below, ***an award must be complete as to all issues before the tribunal; an award which leaves any such issues undecided, cannot be maintained***.
>
> iii) ***An arbitrator has no power to reserve a decision on issues before him to others to resolve***.
>
> iv) An arbitrator only has power to reserve issues to himself for later decision if he proceeds by way of an "interim" award [under Section 47 of the EAA].[18]

Based on these principles, the High Court concluded that the arbitrator had failed to fulfill his mandate, when he did not resolve all of the claims that were within his mandate to decide under the contract at issue, referring some of those claims back to the parties to resolve by other means.[19]

9. Here, too, the Panel must resolve all of the claims and issues before it in a manner consistent with its mandate—a mandate that is plainly set out in the Bylaws. Otherwise, Afilias, whose claims the Panel failed to resolve in the proper exercise of its mandate, will suffer substantial injustice, and the time and resources of both Parties will have been wasted on an arbitration that failed to resolve claims put to the Panel for final resolution.

2. The Panel's Mandate in this Arbitration

10. Afilias has previously addressed in considerable detail the sources and scope of the Panel's mandate in this IRP—*i.e.*, what this Panel was ***required*** to do, but summarizes below the key principles and provisions to provide the necessary context for this application.[20]

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[18] *Ronly Holdings v. JSC Zestafoni G Nikoladze Ferroalloy Plant* [2004] EWHC 1354 (Comm), **[Ex. CA-155]**, ¶ [23] (emphasis added; citations omitted).

[19] *Ronly Holdings v. JSC Zestafoni G Nikoladze Ferroalloy Plant* [2004] EWHC 1354 (Comm), **[Ex. CA-155]**, ¶ [26].

[20] *See, e.g.*, Afilias' Post-Hearing Brief (12 Oct. 2020) ("**Afilias' PHB**"), ¶¶ 207 (citation omitted) ("It is a well-established principle of international arbitration that a tribunal, or in this case a panel, has an obligation to exercise the full extent of its jurisdiction. This principle has been recognized by no less an authority than L. Yves Fortier in his decision as part of the *Vivendi v. Argentina* annulment proceeding. A tribunal must consider and decide all matters falling within its jurisdiction[.]"), 210 (citation omitted) ("This Panel must not accept ICANN and the

11. The Panel's mandate is clearly set forth in Section 4.3 of ICANN's Bylaws. Section 4.3(g) provides that once an IRP Panel is constituted:

> [The] IRP Panel ***shall be charged*** with hearing ***and resolving*** the Dispute, considering the Claim and ICANN's response ('Response') in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP Panel decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law.[21]

The term "Claim" (with a capital "C") refers to a claimant's "written statement of a Dispute;"[22] that is, the document or documents describing the Covered Actions that the claimant considers has given rise to a Dispute. The Bylaws define "Disputes" as including "Claims that Covered Actions constituted an action ***or inaction*** that violated the Articles of Incorporation or Bylaws[.]"[23] The Bylaws define "Covered Actions" as "any actions or ***failures to act*** by or within ICANN committed ***by the Board***, individual Directors, Officers, ***or Staff members***, that give rise to a Dispute."[24] As the Panel will also recall—a point which bears emphasizing in the context of the Dispute that it was called upon to resolve—the Bylaws were specifically amended to include Staff action and inaction as Covered Actions.[25] Furthermore and as significantly, the Bylaws were

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Amici's invitation to exercise anything less than its full jurisdiction granted under the Bylaws. The IRP was designed to provide full accountability for ICANN in the absence of *any other* external form of accountability."). *See* Afilias' Response to the Amicus Curiae Briefs (24 July 2020) ("**Afilias' Response to the *Amici*'s Briefs**"), Sec. IX; Afilias' PHB, Sec. V. *See also* Merits Hearing, Tr. Day 2 (4 Aug. 2020), 329:1-6 (Burr Cross-Examination).

[21] ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018) ("**Bylaws**"), **[Ex. C-1]**, Sec. 4.3(g) (emphasis added).

[22] Bylaws, **[Ex. C-1]**, Sec. 4.3(d). Accordingly, we use "claims" with a lower case "c" to refer to Afilias' assertions that ICANN violated its Articles and Bylaws through its actions or inactions.

[23] Bylaws, **[Ex. C-1]**, Sec. 4.3(b)(iii)(A) (emphasis added).

[24] Bylaws, **[Ex. C-1]**, Sec. 4.3(b)(ii) (emphasis added).

[25] Bylaws, **[Ex. C-1]**, Sec. 4.2(c); Decision on Phase I (12 Feb. 2020), ¶ 132 ("To the extent that Afilias' Rule 7 claim impugns the actions of ICANN's Staff and asserts that these actions violated the Articles of Incorporation or Bylaws, it falls within both the definition of Covered Actions and the jurisdiction of the Panel in this IRP.").

amended to put in place an "enhanced accountability mechanism" to address the ICANN Board's and Staff's actions and failures to act.[26] As ICANN's own witness, J. Beckwith Burr, testified to this Panel: "[T]he purpose of the IRP is to determine whether or not, in taking some action or inaction or failing to act, ICANN has violated its [B]ylaws, and that would be including in its -- in its application of the rules of the applicant guidebook if it violated the bylaws somehow."[27]

12. Under Section 4.3(i), in discharging its mandate to resolve the Dispute (*i.e.*, Claims regarding Covered Actions as presented by the claimant), "[e]ach IRP Panel shall conduct an objective, *de novo* examination of the Dispute." Section 4.3(i) further provides:

> (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.[28]

13. Section 4.3(v) requires that in deciding the Disputes presented to it, the Panel's decision "shall reflect ***a well-reasoned application of how the Dispute was resolved*** in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP decisions decided

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[26] Afilias' Response to the *Amici*'s Briefs, Sec. IX(B); Afilias' PHB, Sec. V(A). Further, as the Panel is aware, the purpose of the revised IRP system was to satisfy the U.S. government's demand that ICANN improve its accountability mechanisms. *See*, *e.g.*, CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), **[Ex. C-91]**, p. 5.

[27] Merits Hearing, Tr. Day 2 (4 Aug. 2020), 329:1-6 (Burr Cross-Examination).

[28] Bylaws, **[Ex. C-1]**, Sec. 4.3(i)(i) and (ii) (emphasis added). As discussed further below, ICANN asserted as a defense in the later stages of this IRP that it had decided not to decide Afilias' complaints until after the conclusion of this IRP proceeding, and that the Panel should consider that defense under Section 4.3(i)(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."). However, the Panel expressly declined "to rely on the provisions of Section 4.3(i)(iii) of the Bylaws" or to determine "whether or not that decision [not to decide] involved the Board's exercise of its fiduciary duties." Decision, ¶ 328.

under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law."[29]

14. In addition, "[t]he IRP is ***intended as a final, binding arbitration process***."[30] Under the Bylaws, IRP Panel decisions "are intended ***to be enforceable*** in any court with jurisdiction over ICANN without a de novo review of the decision of the IRP Panel … with respect to factual findings or conclusions of law."[31] In other words, the Panel's decisions resolving the Dispute and its declarations in this regard must yield an outcome that is capable of enforcement—in this case, under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Panel's Decision in this IRP has yielded nothing that would be so enforceable.

15. In its Final Decision, the Panel failed to fulfill its mandate, as plainly stated in Article 4.3, with respect to three claims that Claimant squarely put to the Panel to hear ***and resolve***.

16. *First*, the Panel did not resolve Afilias' claim regarding the following specifically pled Covered Actions: that ICANN violated its Articles and Bylaws by (a) not rejecting NDC's application, and/or (b) not declaring NDC's bids at the ICANN auction invalid, and/or (c) not deeming NDC ineligible to enter into a registry agreement for .WEB because of its violations of the New gTLD Program Rules, and (d) not offering .WEB to Afilias as the next highest bidder (the "**Rules Breach Claim**"). In omitting to decide Afilias' claim that ICANN breached its Articles and Bylaws through its inaction—and instead referring the claim back to the ICANN

[29] Bylaws, **[Ex. C-1]**, Sec. 4.3(v) (emphasis added).

[30] Bylaws, **[Ex. C-1]**, Sec. 4.3(x) (emphasis added).

[31] Bylaws, **[Ex. C-1]**, Sec. 4.3(x)(ii) (emphasis added).

Board to "pronounce" on it "in the first instance"—the Panel failed to resolve the claim, as required by Article 4.3(g) of the Bylaws, and thus acted *infra petita*.[32]

17. In addition to its failure to resolve the claim, the Panel also failed to make "findings of fact ***to determine whether the Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws***" as required by Article 4.3(i) of the Bylaws. The Panel's findings of facts cannot be reconciled with its referral of the claim back to the ICANN Board for "pronouncement" "in the first instance." Nor can this referral be reconciled with other rulings the Panel made in the Decision's *Dispositif*. Furthermore, the Panel failed not only to "decide" Afilias' claim; it failed to decide it "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."[33] The Panel must therefore issue an additional decision to satisfy its mandate in this case (**Section II(B)**).

18. *Second*, the Panel failed to resolve—or even to mention in its assessment of the claims—Afilias' claim that ICANN violated its obligation to conduct its activities in accordance with relevant principles of international law, and thereby breached its Articles and Bylaws (the "**International Law Claim**"). There is no indication that the Panel gave any consideration whatsoever to this claim. The Panel's failure to hear and resolve this claim is also *infra petita*, thus requiring the Panel to issue an additional decision (**Section II(C)**).

19. *Third*, the Panel did not resolve Afilias' claim that ICANN violated its Articles and Bylaws through its inequitable and disparate treatment of Afilias as compared to its treatment of

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[32] As discussed further below, the Panel also acted *extra petita* in referring Afilias' Claim for declaratory relief back to the ICANN Board for to "pronounce" upon "in the first instance." Decision, ¶ 410. There is nothing in the Bylaws that allows the Panel to refer a claim for a declaration back to the ICANN Board instead of resolving the claim as plainly required by its mandate. Nor is there anything in ICANN's constitutive documents that use the word "pronounce." The Panel appears to have invented the term "pronounce" in this context and has also left it entirely undefined. *See* **Section III(B)(2)**.

[33] Bylaws, **[Ex. C-1]**, Sec. 4.3(i)(ii).

NDC and Verisign (the "**Disparate Treatment Claim**"). Although making findings of fact establishing the validity of Afilias' Disparate Treatment Claim, the Panel declined to decide the claim, instead stating that "the Panel does not consider it necessary, based on the allegation of disparate treatment, to add to its findings in relation to the Claimant's core claims."[34] The Panel then failed to grant or deny or further address Afilias' Disparate Treatment Claim. Again, the Bylaws require the Panel to hear ***and resolve*** the claim, *i.e.*, to grant or reject it—and ***to make findings of fact to determine whether the Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws***. The Bylaws do not provide the Panel with discretion to determine that it is not "necessary" to decide a claim that has been squarely put before it—or to make findings of fact but then decline "to determine whether the Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws." Here, too, the Panel acted *infra petita* and must issue an additional decision to fulfill its mandate (**Section II(D)**).

20. Accordingly, and for reasons more fully stated below, the Panel must issue an additional decision resolving those claims that were presented to it but which the Panel failed to resolve.

B. The Panel Must Issue an Additional Decision To Resolve Afilias' Rules Breach Claim.

1. The Rules Breach Claim Was Properly Submitted and Fully Arbitrated Before the Panel.

21. Simply stated, the Rules Breach Claim Afilias submitted to the Panel for decision is as follows: ICANN violated its Articles and Bylaws by not enforcing the New gTLD Program Rules to disqualify NDC's application and bids, determine that NDC is ineligible to enter in to a

[34] Decision, ¶ 347.

registry agreement for .WEB, and offer .WEB to Afilias as the second highest bidder.[35] Afilias' complaint was *not* that ICANN failed to "decide" or to "pronounce" on the propriety of the DAA and NDC's and Verisign's other conduct. As the Panel well knows, ICANN did not assert that it had made any "decision not to decide" until long after the IRP was underway. Rather, Afilias alleged that ICANN's ***inaction***—its failure to act as it was required to act—in not enforcing the New gTLD Program Rules is inconsistent with the Articles and Bylaws.[36] ICANN's failure to disqualify NDC's application and bids, determine that NDC is ineligible to enter in to a registry agreement for .WEB, and offer .WEB to Afilias as the second highest bidder is the Covered Action presented to the Panel for assessment and resolution. The Panel must decide whether that inaction violated the Articles and Bylaws. As discussed below, the question of whether the DAA and NDC's other conduct[37] violated the New gTLD Program Rules—regardless of whether ICANN ever "pronounced" on it—was a threshold issue for Afilias' Rules Breach Claim and was also thoroughly arbitrated in this IRP.

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[35] There has never been any question as to whether Afilias' Rules Breach Claims is within the Panel's jurisdiction. As the Panel confirmed in its Decision, "the jurisdiction of the Panel to hear the Claimant's core claims [which include the Rules Breach Claim] against the Respondent in relation to .WEB is not contested." Decision, ¶ 26. As the Panel also recognized, "[t]he Claimant's core claims against the Respondent in this IRP arise from the Respondent's failure to reject NDC's application for .WEB, disqualify its bids at the auction, and deem NDC ineligible to enter a registry agreement with the Respondent in relation to .WEB because of NDC's alleged breaches of the Guidebook and Auction Rules." *Id*., ¶ 251.

[36] *See* Amended Request for IRP, Sec. 4 (ICANN's Failure to Disqualify NDC Breaches ICANN's Obligation to Apply Documented ICANN Policies Neutrally, Objectively, and Fairly); Reply Memorial in Support of Amended Request by Afilias for Independent Review (4 May 2020) (Revised, 6 May 2020) ("**Afilias' Reply Memorial**"), Sec. III (ICANN Violated Its Bylaws and Articles by Not Disqualifying NDC's Application and Bid and in Proceeding to Contract with NDC (and Therefore Verisign) for the .WEB Registry Agreement); Afilias' PHB, Sec. III(A) (ICANN Staff Failed to Make Decisions by Applying Documented Policies Consistently, Neutrally, Objectively, and Fairly). Afilias alleged in its Rules Breach Claim that ICANN violated, *inter alia*, its obligation to "[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling any particular party for discriminatory treatment." Afilias' Reply Memorial, ¶ 16 (quoting Bylaws, **[Ex. C-1]**, Sec. 1.2(a)(v)); Afilias' PHB, ¶ 126.

[37] In its Decision, the Panel often refers to the propriety of the DAA under the New gTLD Program Rules. For the avoidance of doubt, Afilias alleged that NDC's other conduct (including, for example, its misrepresentations and omissions made to ICANN Staff concerning its application) also constituted violations that warranted disqualification. *See, e.g.*, Afilias' Reply Memorial, Sec. III(A)(2); Afilias' Response to the *Amici*'s Briefs, Sec. IV(B).

22. As the Panel recognized in its Decision, Afilias initiated this IRP by alleging that under the Articles, Bylaws, and New gTLD Program Rules, ICANN was required to "disqualify NDC's bid for .WEB, and, in exchange for a bid price to be specified by the Panel, proceed with contracting the registry agreement for .WEB with the Claimant."[38] As described by the Panel:

> In its Amended Request for IRP dated 21 March 2019, the Claimant claims that the Respondent had ***breached*** its Articles and Bylaws as a result of the Board's and Staff's ***failure to enforce the rules for, and underlying policies of, ICANN's New gTLD Program***, including the rules, procedures, and policies set out in the Guidebook and Auction Rules.[39]

23. As set forth in the Decision, Afilias maintained and arbitrated the Rules Breach Claim throughout the IRP, asserting in its Post-Hearing Brief that "the two fundamental questions before the Panel are whether the Respondent ***was required*** to (i) determine that NDC is ineligible to enter into a registry agreement for .WEB for having violated the New gTLD Program Rules and, if so, (ii) offer the .WEB gTLD to the Claimant."[40]

24. Both ICANN and the *Amici* also recognized from the outset of this case that the question posed by Afilias' Rules Breach Claim is whether ICANN's ***failure*** to disqualify NDC and to offer .WEB to Afilias is consistent with the Articles, Bylaws, and New gTLD Program Rules. At the outset of Phase II, the Panel directed the Parties "to develop a joint list of agreed issues ***to be decided in Phase II***[.]"[41] The Parties ultimately submitted separate lists of issues, with the *Amici* flagging the issues that they wished to address in their *Amici* submissions. Given Afilias' Rules Breach Claim, the Parties' lists of issues "***to be decided***" in Phase II included the following:

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[38] Decision, ¶ 4.

[39] Decision, ¶ 124 (emphasis added) (citing Amended Request for IRP, ¶ 2).

[40] Decision, ¶ 201 (emphasis added).

[41] Letter and First Procedural Order (5 Mar. 2020), p. 2 (emphasis added).

AFILIAS' LIST OF PHASE II ISSUES (INCLUDING ISSUES THAT *AMICI* ASKED TO ADDRESS) (13 MARCH 2020)[42]	ICANN'S LIST OF PHASE II ISSUES (INCLUDING ISSUES THAT *AMICI* ASKED TO ADDRESS) (13 MARCH 2020)[43]
1. Whether ICANN violated its Articles of Incorporation and Bylaws and/or the applicable rules and policies governing the .WEB application, auction, and delegation process (as stated *inter alia* in [the New gTLD Program Rules]), including (without limitation) its obligation to apply its policies neutrally, objectively, fairly, transparently, and in accordance with international law…: … (d) by ***failing*** to remove NDC from the .WEB contention set and/or deny NDC's application and/or invalidate NDC's bids for .WEB as a result of NDC's alleged Rules violations; … (f) by ***failing*** to award the .WEB registry agreement to Afilias, who submitted the second-highest bid, at the bid price required by the [New gTLD Program Rules][.]	1. Whether ICANN violated its Articles of Incorporation, Bylaws, the gTLD Applicant Guidebook and/or the Auction Rules for New gTLDs: Indirect Contention Edition by its: a. ***Failure*** 'to 'disqualify' NDC because it [allegedly] 'fail[ed] to provide ICANN with the identifying information necessary to confirm the identity' of the true applicant,' who Afilias contends is Verisign…; b. ***Failure*** 'to 'reject' NDC's application for the [alleged] omission of material information from its application, namely that it was [allegedly] obligated to assign .WEB to VeriSign[']…; c. ***Failure*** 'to 'deny' NDC's application for [allegedly] 'fail[ing] to notify ICANN of any change in circumstances that would render any information provided in its application false or misleading'…; … g. ***Failure*** to disqualify NDC from the .WEB auction on the ground that its auction bids were invalid because NDC allegedly did not bid on its own behalf…; h. ***Failure*** to disqualify NDC for its alleged 'sale, assignment, and/or transfer of rights and obligations in its .WEB application to VeriSign'[.]

25. Thus, Afilias' Rules Breach Claim has always been at the heart of this IRP. Afilias made extensive submissions to the Panel in support of its Rules Breach Claim.[44] Afilias provided

[42] Joint Email and enclosures to the Panel regarding List of Phase II Issues (13 Mar. 2020), Afilias' List of Phase II Issues.

[43] Joint Email and enclosures to the Panel regarding List of Phase II Issues (13 Mar. 2020), ICANN's Proposed Joint Issues List.

[44] Amended Request for IRP, Secs. 3-5; Afilias' Reply Memorial, Sec. III; Afilias' PHB, Secs. III(A) and (C).

detailed argumentation and analysis on the specific provisions of the AGB, Auction Rules, and other New gTLD Program Rules, and extensive evidence and explanation as to why ICANN was required to conclude that NDC's and Verisign's conduct violated the terms of New gTLD Program Rules, therefore requiring disqualification of NDC's application and bids, determining that it is ineligible to enter in to a registry agreement, and offering .WEB to the next highest bidder.[45] Afilias also provided detailed submissions explaining why—based on the text of the New gTLD Program Rules as well as the Articles and Bylaws—ICANN was required to disqualify NDC's bids and offer .WEB to Afilias as the next highest bidder.[46] Afilias' claims on these matters were fully presented to the Panel at the merits hearing through oral submissions and the cross-examination of both ICANN's and the *Amici*'s witnesses on these precise points, including on the documentary evidence submitted by both Parties and the *Amici*. Afilias also presented detailed argumentation and analysis as to why ICANN's ***inaction***—*i.e.*, its ***failure*** to disqualify NDC's application and bids, its ***failure*** to find NDC ineligible to enter into a registry agreement, and its ***failure*** to offer .WEB to Afilias as the next highest bidder, as required under the plain terms of the New gTLD Program—breached its Articles and Bylaws under (*inter alia*) the norms of applicable law and prior relevant IRP decisions. Afilias also addressed the issues extensively, based on the evidence presented at the hearing, in its post-hearing brief.[47]

26. As the Panel observed in its Decision, ICANN asserted in its Rejoinder that "[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,

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[45] Amended Request for IRP, Secs. 3-5; Afilias' Reply Memorial, Sec. III; Afilias' PHB, Secs. III(A) and (C). *See also* Afilias' Reply Memorial, ¶ 99 ("Therefore, the New gTLD Program Rules plainly required ICANN to declare NDC's bids in default and award the .WEB TLD to Afilias as the next highest bidder.").

[46] Amended Request for IRP, Secs. 3-5; Afilias' Reply Memorial, Sec. III; Afilias' PHB, Secs. III(A) and (C).

[47] *See*, *e.g.*, Afilias' PHB, Secs. III(A) and (C) (and sources cited therein).

how ICANN has similar situations, and the terms of the DAA."[48] That is exactly what Afilias provided in this IRP. Afilias more than discharged its burden on the Rules Breach Claim, which was properly before the Panel for resolution. The same cannot be said for ICANN, whose core defense to the Rules Breach Claim (*i.e.*, the alleged decision to defer) was not raised until the late stages of this IRP, and which was, in any event, completely contrary to an express representation made to another panelist in these very same proceedings, as well as to findings made by this Panel in its Decision.

27. Moreover, ICANN had every opportunity to respond to Afilias' Rules Breach Claim "on the merits"—and did so by presenting the arguments and evidence of its choosing.[49] Thus, ICANN also submitted hundreds of pages of legal and factual argument—and presented extensive oral argument, witness testimony, and documentary evidence before and at the merits hearing—in an effort to rebut Afilias' Rules Breach Claim.[50]

28. In addition, ICANN fully supported—and this Panel granted—the *Amici*'s request to participate in these proceedings ***for the specific purpose*** of responding substantively to Afilias' Rules Breach Claim. As ICANN stated in its Response to Afilias' Amended IRP Request:

> ***NDC and Verisign have responses to Afilias' allegations of Guidebook violations***…. Thus, it is important that NDC and

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[48] Decision, ¶ 315 (quoting ICANN's Rejoinder Memorial in Response to Amended Request by Afilias for Independent Review (1 June 2020) ("**ICANN's Rejoinder Memorial**"), ¶ 82).

[49] *See*, *e.g.*, ICANN's Response to Amended Request for Independent Review Process (31 May 2019) ("**ICANN's Response to Amended IRP Request**"), ¶ 64 (emphasis omitted) ("the alleged Guidebook violations identified by Afilias do not call for the automatic disqualification of NDC"); ICANN's Rejoinder Memorial, ¶ 23 (citations omitted) ("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.' … 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' and that ICANN has the discretion to select an appropriate remedy, if any, for violation of the rules."); ICANN's Post-Hearing Brief (12 Oct. 2020) ("**ICANN's PHB**"), Sec. III.

[50] *See*, *e.g.*, ICANN's Response to Amended IRP Request, Argument, Secs. I-II; ICANN's Rejoinder Memorial, Argument, Secs. II-IV; ICANN's PHB, Secs. III-VI; Witness Statement of Christopher Disspain (1 June 2020); Witness Statement of Christine A. Willett (31 May 2019).

> Verisign be permitted to participate in this IRP ***so that the Panel will have the benefit of their evidence and submissions, in addition to the views of Afilias and ICANN, before rendering any final decision***.[51]

ICANN vigorously argued for *Amici* participation through Phase I of this IRP. And, as a result of the Panel's Phase I Decision, the *Amici* participated in Phase II for the purpose of presenting "their evidence and submissions" on Afilias' Rules Breach Claim, so that the Panel could have the benefit of their views, as well as of Afilias and ICANN, to enable the Panel to render a final decision. (Indeed, the *Amici* participated in arbitrating the merits of this Dispute more fulsomely than any other *amici* in any international arbitration of which we are aware.)

29. Thus, the *Amici* also submitted hundreds of pages of legal and factual argument—and presented extensive oral argument, documentary evidence, and the testimony of their own witnesses before and at the merits hearing—in an effort to rebut Afilias' claim that ICANN was required to determine that their conduct violated the New gTLD Program Rules. The *Amici* addressed these issues in 200 pages of combined briefing in Phase II, including post-hearing briefs in which they, too, were able to address all the evidence and make all the arguments of their choosing.[52] It is difficult to understand why the Panel would have permitted the *Amici*'s broad participation in this IRP, and to do so on matters addressing the substance of their conduct insofar as ICANN's obligations are concerned, but for the Panel to then (deliberately or inadvertently) fail to consider the substance of that conduct and its necessary consequences. The Panel's approach in this regard strikes Afilias as flatly contradictory of the Panel's ruling in Phase I of the IRP.

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[51] ICANN's Response to Amended IRP Request, ¶ 10 (emphasis added).

[52] *Amicus Curiae* Brief of Nu Dotco, LLC (26 June 2020); Verisign, Inc.'s Pre-Hearing Brief (Phase II) (26 June 2020); *Amici*'s PHB.

30. Moreover, while ICANN asserted that it was "neutral" on the question of whether the DAA and NDC's other conduct violated the New gTLD Rules (an assertion that was entirely inconsistent with ICANN's conduct since the .WEB auction, as well as with its conduct and arguments throughout the IRP), the Panel plainly stated that it was not an option for ICANN to refuse to comment on the *Amici*'s position, given that Afilias' Rules Breach Claim was before the Panel for final resolution. In Procedural Order No. 5—which the Panel described in its Decision as laying "the foundations to the Panel's approach to the issues in dispute in this IRP"—the Panel ruled:

> [T]he Guidebook and Auction Rules originate from ICANN. That being so, in this Accountability Mechanism in which Respondent's conduct is being impugned, ***the Respondent should be able to say whether or not the position being defended by the Amici in relation to these ICANN instruments is one that ICANN is prepared to endorse and, if not, to state the reasons why***.[53]

31. Indeed, while ICANN certainly relied on and supported the *Amici* in their arguments countering Afilias' assertions that the DAA and NDC's other conduct violated the New gTLD Program Rules, ICANN throughout this IRP repeatedly attacked Afilias' positions on its Rules Breach Claim as having no merit—going so far as to tell the Panel that Afilias was wrongfully trying to use these IRP proceedings "to seize control of .WEB for itself."[54]

32. ICANN asserted to the Panel, for example:[55]

- "As the party that made a significant financial investment in .WEB over two years ago, Verisign is determined to proceed pursuant to its agreement with NDC so that it can operate .WEB. ***Afilias, on the other hand, is determined to***

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[53] Procedural Order No. 5 (14 July 2020), ¶ 22 (emphasis added) (quoted in Decision, ¶ 62).

[54] ICANN's Response to Amended IRP Request, ¶ 10.

[55] Even leaving aside the evidence of ICANN's disparate treatment of Afilias prior to the IRP, given the positions ICANN took in the IRP, including the lengths to which ICANN went to secure the *Amici's* participation, it is simply incomprehensible that the Panel could assume that ICANN's evaluation of NDC's and Verisign's conduct, and the consequences flowing therefrom, will be transparent, objective, fair and impartial.

use this proceeding to seize control of .WEB for itself – at a bid price set by this Panel – even though it did not prevail in the auction."[56]

- "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 bid for .WEB***."[57]

- "[T]he 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."[58]

- "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***."[59]

- "[A]s set forth in ICANN's IRP Response, as well as the witness statements of Paul Livesay and Jose Rasco, there have been a number of arrangements that appear similar to the DAA in the secondary market for new gTLDs, including transactions involving Afilias, Donuts and other registry operators. ***Indeed, the Auction Rules seem to foresee the possibility of such transactions***."[60]

- "***The provisions of [the Auction 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 ….' But Section 12 does not seem concerned with that issue and does not address it."[61]

- "Moreover, the Auction Rules violations alleged by Afilias appear to be based on a strained interpretation of the text of the rules."[62]

- "Likewise, ***Afilias' argument that NDC's bids were invalid*** because NDC did not fit within the Auction Rules' definition of a 'Bidder' or 'Qualified Applicant' ***are unpersuasive***."[63]

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[56] ICANN's Response to Amended IRP Request, ¶ 10 (emphasis added).

[57] ICANN's Rejoinder Memorial, ¶ 4 (emphasis added).

[58] ICANN's Rejoinder Memorial, ¶ 79 (emphasis added).

[59] ICANN's Rejoinder Memorial, ¶ 82 (emphasis added).

[60] ICANN's Rejoinder Memorial, ¶ 83 (citations omitted) (emphasis added).

[61] ICANN's Rejoinder Memorial, ¶ 85 (citations omitted) (emphasis added).

[62] ICANN's Rejoinder Memorial, ¶ 85 (emphasis added).

[63] ICANN's Rejoinder Memorial, ¶ 86 (emphasis added).

- "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."[64]

- "Also left unrebutted by Afilias at the Hearing is the principle that ***the unambiguous provisions*** of the Guidebook and Auction Rules ***vest in ICANN substantial discretion to determine whether an applicant has violated the terms of either and, if so, what action to take***."[65]

- "Afilias alleges that the Guidebook required ICANN to disqualify NDC for failing to provide ICANN with 'identifying information necessary to confirm the identity' of the true applicant – which Afilias contends was Verisign, not NDC – and for failing to notify ICANN of NDC's 'change in circumstances.' But ***the 'applicant' for .WEB was NDC—not Verisign—both before and after the DAA, and no testimony suggested otherwise***."[66]

As discussed further below, the premise on which the Panel has referred Afilias' Rules Breach Claim back to the ICANN Board for "pronouncement"—adopting ICANN's belated (and self-contradictory) assertion that it never considered or addressed Afilias' complaints—cannot be reconciled with the record before the Panel, or with the findings of the Panel that amply support Afilias' claims that ICANN violated its obligation of good faith to Afilias, and subjected Afilias to disparate treatment compared to NDC and Verisign (which claims the Panel also failed to resolve, in violation of its mandate).

33. After the merits hearing, the Panel requested the Parties to "update their respective lists of issues ***to be decided*** by taking into account the pleadings filed subsequently [to their original lists of issues submitted on 13 March 2020] and the evidence elicited at the hearing."[67] In their updated lists, the Parties continued to recognize that Afilias' Rules Breach Claim required a determination by the Panel as to whether ICANN's failure to disqualify NDC's application and

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64 ICANN's Rejoinder Memorial, ¶ 87.

65 ICANN's PHB, ¶ 89 (emphasis added).

66 ICANN's PHB, ¶ 140 (citations omitted) (emphasis added).

67 Email to the Parties from the Panel (15 Sept. 2020), p. 1 (emphasis added).

bids, determine NDC's ineligibility to enter in to a registry agreement and offer .WEB to Afilias breached ICANN's Articles and Bylaws. Thus, Afilias' updated list of issues to be decided by the Panel included the following alleged breaches:

> Whether ICANN violated its Articles of Incorporation and Bylaws, including (without limitation) its obligation to apply its policies consistently, neutrally, objectively, and fairly and in good faith by (a) ***not*** rejecting NDC's application, and/or (b) ***not*** declaring NDC's bids at the ICANN auction invalid, and/or (c) ***not*** deeming NDC's ineligible to enter into a registry agreement for .WEB because of its violations of the New gTLD Program Rules[.]
>
> …
>
> Whether ICANN violated its Articles of Incorporation and Bylaws, including (without limitation) its obligation to apply its policies consistently, neutrally, objectively, and fairly and in good faith by failing to award the .WEB registry agreement to Afilias, the second-highest bidder, at the bid price required by the New gTLD Rules[.][68]

34. Similarly, ICANN's updated list of issues to be decided, under the heading of "Merits Issues," included:

> Whether ICANN violated its Bylaws' provision stating that ICANN should "[m]ake decisions by applying its documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment," by ***not*** immediately disqualifying NDC's application or auction bids when ICANN became aware of NDC's arrangement with Verisign regarding .WEB.[69]

35. Thus, from the commencement of this IRP on 14 November 2018, through the submissions of Post-Hearing Briefs on 12 October 2020, Afilias' Rules Breach Claim was squarely

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[68] Afilias' Revised Statement of Issues, Breaches 1 and 2 (emphasis added).

[69] ICANN's List of Issues (12 Oct. 2020), ¶ 7 (emphasis added) (citing Amended Request for IRP, ¶¶ 68 & 78 (bullets 1-3, 7)). ICANN's use of the word "immediately" is a distortion of Afilias' claim. While Afilias submits that ICANN had sufficient information to require NDC's disqualification when it received the DAA in August 2016, ICANN in fact had nearly two years to consider whether the New gTLD Program Rules required disqualification. ICANN failed to act on the information it had in its possession consistent with the New gTLD Program Rules, and instead decided to proceed toward contracting with NDC in June 2018.

before the Panel for resolution. The Parties and *Amici* extensively briefed and argued the Rules Breach Claim—presenting detailed written and oral submissions and voluminous evidence (both documentary and testimonial) on that claim and the issues underlying it. A significant portion of the hearing testimony—including all or nearly all the testimony provided by ICANN's witnesses Christine Willett and Christopher Disspain, and the *Amici*'s witnesses, Jose Rasco and Paul Livesay—was devoted to the Rules Breach Claim.

36. In sum, the Rules Breach Claim was properly submitted and fully arbitrated before this Panel. As explained in the following section, however, the Panel inexplicably and impermissibly failed to resolve the claim as required by its mandate.

2. The Panel Failed To Resolve the Rules Breach Claim as Required by Its Mandate.

37. Again, the Panel's mandate concerning Afilias' Rules Breach Claim is perfectly clear under the Bylaws. The Panel is "***charged with hearing and resolving the Dispute***."[70] Furthermore, "[a]ll 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."[71] In particular, the "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."[72]

38. The Dispute at issue (as the Panel acknowledged elsewhere in its Decision) is whether the Covered Action identified by Afilias—ICANN's ***failure*** to disqualify NDC's application and bids, determine NDC's ineligibility to enter in to a registry agreement, and offer

[70] Bylaws, **[Ex. C-1]**, Sec. 4.3(g) (emphasis added).

[71] Bylaws, **[Ex. C-1]**, Sec. 4.3(i)(ii) (emphasis added).

[72] Bylaws, **[Ex. C-1]**, Sec. 4.3(i)(i) (emphasis added).

.WEB to Afilias—complied with the Articles, Bylaws, and New gTLD Program Rules. That is Afilias' Rules Breach Claim. As ICANN itself acknowledged in its Rejoinder (citing the decision of the IRP Panel in *Booking.com*), the Panel's "role" (*i.e.*, its mandate) "is to assess whether the Board's action [or inaction] was consistent with applicable rules found in the Articles, Bylaws and Guidebook."[73]

39. Here, however, the Panel did not decide or resolve the question of whether the inaction that Afilias put at issue was consistent with the applicable rules found in the Articles, Bylaws, and New gTLD Program Rules. Instead, the Panel ruled, *inter alia*, that both ICANN Staff and the ICANN Board violated the Articles and Bylaws when they:

> [F]ail[ed] ***to pronounce*** on the question of whether the Domain Acquisition Agreement entered into between [NDC and Verisign] on 25 August 2015, as amended and supplemented by the 'Confirmation of Understanding' executed by these same parties on 26 July 2016…, complied with the New gTLD Program Rules following the Claimant's complaints that it violated the Guidebook and Auction Rules[.][74]

40. The Panel then fashioned a "remedy" that neither Afilias nor ICANN formally requested and that is not within the Panel's authority to make. The Panel recommended that:

> [T]he Respondent stay any and all action or decision that would further the delegation of the .WEB gTLD until such time as the Respondent's Board has considered the opinion of the Panel in this Final Decision, and, in particular, (a) ***considered and pronounced*** upon the question of whether the DAA complied with the New gTLD Program Rules following the Claimant's complaints that it violated the Guidebook and Auction Rules and, as the case may be, (b) determined whether by reason of any violation of the Guidebook and Auction Rules, NDC's application for .WEB should be rejected and its bids at the auction disqualified.[75]

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[73] *Booking.com B.V. v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration (3 Mar. 2015), **[Ex. CA-11]**, ¶ 115.

[74] Decision, ¶ 410(1).

[75] Decision, ¶ 410(5) (emphasis added).

41. The Panel's recommendation on that point was based on its assertion earlier in the Decision that it had come to the "firm view" that:

> [I]t is for the Respondent, that has the requisite knowledge, expertise, and experience, ***to pronounce in the first instance*** on the propriety of the DAA under the New gTLD Program Rules, and on the question of whether NDC's application should be rejected and its bids at the auction disqualified by reason of its alleged violations of the Guidebook and Auction Rules.[76]

42. Earlier in its Decision, the Panel stated that its view that ICANN should pronounce on this issue in the first instance is "necessarily predicated on the assumption that the Respondent will take ownership of these issues when they are raised and, subject to the ultimate independent review of an IRP Panel, will take a position as to whether the conduct complained of complies with the Guidebook and Auction Rules."[77] The Panel even set forth questions for the ICANN Board to consider (which the Panel "merely cite[d] as examples"), including:

- "Whether, in entering into the DAA, NDC violated the Guidebook and, more particularly, the section providing that an 'Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application'."
- "Whether the execution of the DAA by NDC constituted a 'change in circumstances that [rendered] any information provided in the application false and misleading'."
- "Whether by entering into the DAA after the deadline for the submission of applications for new gTLDs, and by agreeing with NDC provisions designed to keep the DAA strictly confidential, Verisign impermissibly circumvented the 'roadmap' provided for applicants under the New gTLD Program Rules, and in particular the public notice, comment and evaluation process contemplated by these Rules."[78]

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[76] Decision, ¶359.

[77] Decision, ¶296.

[78] Decision, ¶317.

43. The problem is that all these questions (and many others that the Panel did not specifically mention) were arbitrated extensively in this IRP and were ***put to the Panel*** for final resolution. These were threshold questions that the Panel was required to answer in order to determine whether the "Covered Action" put at issue by Afilias violated the Articles, Bylaws, and New gTLD Program Rules. The Panel need only review the Parties' updated list of issues, which the Panel specifically asked the Parties to submit, to confirm the foregoing.

44. Instead of resolving the issues that were squarely before it, the Panel seems to have invented a prerequisite for a claimant to assert a claim that ICANN failed to act as required based on a violation of the New gTLD Program Rules—*i.e.*, the ICANN Board must "pronounce in the first instance" on whether there has been such a violation, and if so, what the appropriate remedy is. Having concluded that this newly invented prerequisite had not been met—because ICANN had declined to "pronounce" on these matters "in the first instance"—the Panel then excused itself from addressing the Dispute that Afilias had actually put before it. Thus, the Panel left Afilias' Rules Breach Claim to be resolved by another IRP Panel, after the ICANN Board has "pronounced" on the threshold issues that were fully arbitrated before it and that this Panel was mandated to resolve.

45. The Panel cited no legal or factual basis to support the existence of any such prerequisite—and indeed, there is none.[79] The term "pronounce" does not appear anywhere in the Articles or Bylaws; nor does it appear anywhere in the submissions of the Parties or the *Amici*. Nor does the Panel give any definition of the term.

[79] Thus, the Panel not only failed to "resolve" the Dispute by referring these issues back to the Board for pronouncement; it also failed to "resolve" the dispute "in compliance with the Articles of Incorporation and Bylaws, as understood in light of prior IRP Panel decisions … and norms of applicable law." Bylaws, **[Ex. C-1]**, Sec. 4.3(g).

46. According to Black's Law Dictionary, the term "pronounce" means:

> To utter formally, officially, and solemnly; to declare aloud and in a formal manner. In this sense a court is said to "pronounce" judgment or a sentence.[80]

Non-legal dictionaries of the English language define "pronounce" in much the same way:

> [T]o declare officially or ceremoniously[;] the minister *pronounced* them husband and wife.[81]

The Panel did not identify any legal basis as to why ICANN must "pronounce in the first instance" as to whether it believes that there has been a violation of the New gTLD Program Rules, as a prerequisite for a claimant to allege that ICANN's failure to undertake necessary action on the violation is inconsistent with the Articles, Bylaws, or New gTLD Program Rules. The Panel did not cite any legal authority or other foundation to support such a prerequisite, but simply stated that it is the Panel's "firm view" that such a prerequisite exists.

47. At another point in its Decision (not in the *Dispositif)*, the Panel uses the words "decide" and "determine" instead of "pronounce" (*i.e.*, "the Panel is of the opinion that it is for the Respondent to ***decide***, in the first instance, whether NDC violated the Guidebook and Auction Rules and, assuming the Respondent ***determines*** that it did, what consequences should follow"[82]). "Decide" and "determine" are words that are typically defined differently from "pronounce."[83] But even if the Panel views the terms as interchangeable, the Panel still has failed to provide any

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80 *The Law Dictionary* (on-line version): pronounce, *available at* https://thelawdictionary.org/pronounce, **[Ex. CA-156]**.

81 *Merriam-Webster Dictionary* (on-line version): pronounce, *available at* https://www.merriam-webster.com/dictionary/pronounce?src=search-dict-box, **[Ex. CA-157]**.

82 Decision, ¶ 349.

83 *Merriam-Webster Dictionary* (on-line version): decide, *available at* https://www.merriam-webster.com/dictionary/decide?src=search-dict-box, **[Ex. CA-158]** ("[T]o make a final choice or judgment about"; to select as a course of action"; "to infer on the basis of evidence"); *Merriam-Webster Dictionary* (on-line version): determine, *available at* https://www.merriam-webster.com/dictionary/determine?src=search-dict-box, **[Ex. CA-159]** ("[T]o fix conclusively or authoritatively"; "to decide by judicial sentence"; "to settle or decide by choice of alternatives or possibilities").

basis for its ruling that ICANN must pronounce/decide/determine whether there has been a violation of the New gTLD Guidebook Rules, ***before*** a claimant can assert in an IRP that ICANN has breached its Articles and Bylaws by failing to act as required based on that violation. We refer again to J. Beckwith Burr's hearing testimony quoted above, *i.e.*, that the purpose of an IRP is to determine whether, "in taking some action or inaction or failing to act, ICANN has violated its bylaws," including "in its application of the rules of the applicant guidebook".[84] Nor is there any basis for the Panel's apparent ruling that ICANN must "decide," "determine," or "pronounce" ***on the appropriate remedy*** for a violation before a claimant can assert in an IRP that ICANN has breached its Articles and Bylaws by failure to act on such violation. The Panel also failed to explain what it means by its "assumption that the Respondent will take ownership of these issues when they are raised."[85] It failed to state on what that "assumption" is based, given that the factual record of ICANN's conduct in this matter demonstrates (as discussed below) ICANN's failure to act in good faith and its disparate treatment of Afilias as compared to Verisign/NDC.[86] Nor did the Panel state what, in the Panel's view, the ICANN Board needs to do to take "ownership of these issues."

48. However, by their plain language, all these terms purport to require that the ICANN Board must take some sort of *action* before a claimant can bring an IRP. Thus, the Panel's ruling (or more accurately, its failure to rule) on ICANN's Rules Breach Claim has effectively written the terms "inaction" and "failure to act" out of the Bylaws. In so doing, the Panel has significantly—and impermissibly—rewritten its mandate in this IRP proceeding. It has also excluded the possibility of the direct right of action that was specifically included in the amended

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[84] Merits Hearing, Tr. Day 2 (4 Aug. 2020), 329:1-6 (Burr Cross-Examination).

[85] Decision, ¶ 296.

[86] *See* **Section III(C)**.

Bylaws insofar as Staff action or inaction underlies a claim. Indeed, as the Panel's Decision stands, ICANN will always be able evade accountability for Staff or Board inaction, so long as the Board has not "pronounced" on the basis for the inaction.

49. The Panel's omission to decide and resolve whether the Covered Action before it—*i.e.*, ICANN's failure to disqualify NDC and offer .WEB to Afilias—cannot be reconciled with its mandate and is therefore *infra petita*. In addition, the Panel's referral of the threshold questions back to the ICANN Board—thus allowing the Panel to avoid deciding and resolving the Dispute that has been placed before it—is *extra petita*. There is nothing in any of the documents governing this arbitration (*i.e.*, the Bylaws, the Interim Procedures, or the ICDR Arbitration Rules) that allows this Panel to refer such threshold questions to the ICANN Board to "pronounce [on] in the first instance."[87] Thus, the Panel failed not only to "decide" the Dispute presented to it. The Panel also failed to decide it "in compliance with the Articles … and Bylaws, ***as understood in the context of the norms of applicable law and prior relevant IRP decisions***."[88]

50. As stated above, the ICANN Bylaws not only require IRP Panels to "resolve" the Disputes that have been put before them. They also require a "***well-reasoned***" decision.[89] And they require an IRP Panel to "***make findings of fact to determine whether the Covered Action***

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[87] It is sometimes the case that an arbitral tribunal—instead of resolving the dispute in the manner required by the arbitration agreement (and thus acting *infra petita*)—will instead purport to dispose of the dispute in a manner that is not permitted by the arbitration agreement (thus acting *extra petita*). For example, in *Ronly v. Zestafoni*, the English High Court observed that where the arbitrator failed to resolve all of the claims submitted to him—instead referring some of those claims back to the parties to resolve amongst themselves—his award could be considered both *infra petita* (because it did not fulfill the mandate to resolve all of the claims before him) and *extra petita* (because it made a referral that was not permitted by the mandate. Here, the Panel can issue an additional decision that will address the problem that its decision is both *infra petita* and *extra petita* in its referral of Afilias' Rules Breach Claim back to the ICANN Board to "pronounce [on] in the first instance"—simply by resolving the claim that it was *required* to resolve under its mandate." *Ronly Holdings v. JSC Zestafoni G Nikoladze Ferroalloy Plant* [2004] EWHC 1354 (Comm), **[Ex. CA-155]**. An award that is *extra petita* can be challenged under section 68(2)(b) of the EAA on the grounds of "the tribunal exceeding its powers…." English Arbitration Act 1996, **[Ex. AA-50]**, Sec. 68(2)(b).

[88] Bylaws, **[Ex. C-1]**, Sec. 4.3(i)(ii) (emphasis added).

[89] Bylaws, **[Ex. C-1]**, Sec. 4.3(v) (emphasis added).

constituted an action or inaction that violated the Articles of Incorporation or Bylaws."[90] Most modern arbitration legislation and arbitral rules—including the EAA and the ICDR Rules[91]—require "reasoned awards." As explained by Professor Born: "[A] reasoned decision, explaining how legal rules apply to factual determinations, is the essence of adjudication, distinguishing it from legislative, executive and other forms of decision-making."[92] The Bylaws, in requiring a ***well-reasoned*** decisions and ***findings of fact*** to determine whether the Covered Action constituted an action or inaction that violated the Articles and Bylaws, go significantly beyond the requirement of a reasoned award.

51. As stated above, the Panel has failed to provide any reasoned basis to support its assertion that the ICANN Board must "pronounce upon" or "decide" or "determine" the threshold questions of whether NDC violated the New gTLD Program Rules—and, if so, what the appropriate remedy should be—before Afilias can bring an IRP alleging that ICANN's failure to disqualify NDC and offer .WEB to Afilias violates ICANN's Articles and Bylaws. Indeed, not only does the Panel's ruling lack any legal or factual basis, it also is directly contradicted by the Panel's factual findings and other substantive rulings in the case.

52. Thus, in its *Dispositif*, the Panel concluded that the ICANN Board breached ICANN's Articles and Bylaws by, *inter alia*:

> [F]ailing itself to pronounce on [Claimant's complaints about the propriety of the DAA] while taking the position in this IRP, an accountability mechanism ***in which these complaints were squarely***

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[90] Bylaws, **[Ex. C-1]**, Sec. 4.2(i)(i) (emphasis added).

[91] EAA, Article 52(4); ICDR Rules, Article 30(1).

[92] Gary Born, *International Commercial Arbitration* (3rd ed., 2021), **[Ex. CA-149]**, p. 3293. As explained by Professor Born, a "reasoned award" is "necessary in order to constrain the power of the decision-maker (reducing the risk of arbitrary, corrupt, whimsical, or lazy decisions), to enhance the quality of the decision-making process (by requiring thoughtful, diligent analysis) and to provide the parties with the opportunity not only to be heard, but to hear and see that their submissions have been considered and how they have been disposed of." *Id*., p. 3292.

> ***raised***, that the Panel should not pronounce on them out of respect for, and ***in order to give priority to the Board's expertise and the discretion afforded to it in the management of the New gTLD Program***[.][93]

53. In other words, the Panel ruled that the ICANN Board breached its Articles and Bylaws by taking the positions that (1) the Panel "should not pronounce" on Afilias' complaints that were "squarely raised" in the IRP and (2) the Panel should "give priority to the Board's expertise and the discretion afforded to it in the management of the New gTLD Program." And yet the Panel—while holding that the ICANN Board breached its Articles and Bylaws by taking these positions—adopted these very same positions as its own, ruling that the Panel should not pronounce on Afilias' complaints that were "squarely raised" in the IRP, but should instead defer to the Board's supposed expertise. By essentially ordering "relief"—which ICANN never formally requested—reflecting the very same conduct that the Panel concluded breached the Articles and Bylaws when taken by the ICANN Board, the Panel plainly failed to satisfy its mandate to decide this Dispute "in compliance with" the Articles and Bylaws.[94]

54. In addition, as noted above, at Paragraph 349 of the Decision, the Panel stated its "opinion that it is for the Respondent to decide, in the first instance, whether NDC violated the Guidebook and Auction Rules…."[95] As explained above, there is no legal or factual basis for the Panel to conclude that ICANN must first decide or pronounce that there has been such a violation,

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[93] Decision, ¶ 410 (1) (emphasis added).

[94] Similarly, at paragraph 328 of its Decision, the Panel stated that "it seems to the Panel reasonable for the Board to have decided to await the outcome of these proceedings before considering and determining what action, if any, it should take." That statement is difficult, if not impossible to reconcile with the Panel's ruling in its *Dispositif* that the Board violated the Articles and Bylaws by "failing itself to pronounce on these complaints while taking the position in this IRP, an accountability mechanism in which these complaints were squarely raised, that the Panel should not pronounce on them out of respect for" the Board, "and in order to give priority to the Board's expertise and the discretion afforded to it in the management of the New gTLD Program." Decision, ¶ 410(1).

[95] Decision, ¶ 349.

in order for a claimant to assert that ICANN failed to act on the violation consistent with the Articles, Bylaws, and New gTLD Program Rules. Furthermore, the notion that ICANN has not yet "decided" or "pronounced" on these issues "in the first instance" cannot be reconciled with the Panel's other rulings, or for that matter, the record in this case. Indeed, the Panel itself recognized that ICANN's assertions that it had "taken no position on whether NDC violated the Guidebook" cannot be reconciled with either its earlier representations in the IRP or its other conduct during and before the IRP.[96]

55. Thus, as the Panel found in Paragraph 273 of its Decision, when ICANN proceeded toward delegation of .WEB to NDC in June 2018, "***a necessary implication*** of the Respondent's decision was that [Afilias'] concerns ***did not stand - or no longer stood - in the way of the delegation of .WEB to NDC***."[97]

56. Similarly, as the Panel stated in Paragraph 341 of its Decision:

> A necessary implication of the Respondent's decision to proceed with the delegation of .WEB to NDC in June 2018 was some implicit finding that NDC was not in breach of the New gTLD Program Rules and, by way of consequence, the implicit rejection of the Claimant's allegations of non-compliance with the Guidebook and Auction Rules. ***This is difficult to reconcile with the submission that "ICANN has taken no position on whether NDC violated the Guidebook"***.[98]

57. And according to Paragraph 343 of the Decision:

> The Panel also finds it ***contradictory for the Respondent to assert in pleadings before this Panel that the Respondent has not yet considered the Claimant's complaints***, having represented to the Emergency Panelist earlier in these proceedings that ***ICANN "ha[d] evaluated these complaints" and that the "time ha[d] therefore***

[96] Decision, ¶ 341.

[97] Decision, ¶ 273 (emphasis added).

[98] Decision, ¶ 341 (emphasis added) (quoting ICANN's Rejoinder Memorial, ¶ 81).

> ***come for the auction results to be finalized and for .WEB to be delegated so that it can be made available to consumers"***.[99]

58. The Panel thus recognized that ICANN's assertion that it had taken "no position" on Afilias' complaints was contradicted by ICANN's prior representations to a panelist and pleadings *in this IRP* (all of which ICANN made public), as well as by its conduct both during and prior to this IRP. Yet the Panel nonetheless based its "referral" back to the ICANN Board on the basis of this assertion by ICANN—even as the Panel made findings showing the assertion to be *false* (or, at best, highly dubious). The English courts have set aside arbitral awards (or portions thereof) for failure to resolve all claims where, as here, the award contains a "glaring illogicality."[100]

59. In candor, given the Panel's other findings and rulings, Afilias is not particularly sympathetic to the Panel's complaint that:

> [T]he Panel finds itself in the unenviable position of being presented with allegations of non-compliance with the New gTLD Program Rules in circumstances where the Respondent, the entity with primary responsibility for this Program, has made no first instance determination of these allegations, whether through actions of its Staff or Board, and decline[d] to take a position as to the propriety of the DAA under the Guidebook and Auction Rules in this IRP.[101]

60. *First*, when an arbitral tribunal unquestioningly adopts one party's unsubstantiated assertion as a basis for its ruling—here, that ICANN "has made no first instance determination of these allegations, whether through actions of its Staff or Board"—even though that assertion is

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[99] Decision, ¶ 343 (emphasis added) (quoting ICANN's Opposition to Afilias' Request for Emergency Panelist and Interim Measures of Protection (17 Dec. 2018), ¶ 3).

[100] *See, e.g.*, *Metropolitan Property Realizations Ltd. v. Atmore Investments Ltd.* [2008] EWHC 2925 (Ch), **[Ex. CA-160]**.

[101] Decision, ¶ 345.

contradicted by the Panel's specific factual findings, that tribunal has failed to provide a "reasoned" (let alone a "well-reasoned") award with respect to that ruling.

61. *Second*, the Panel's statement that ICANN has "decline[d] to take a position as to the propriety of the DAA under the Guidebook and Auction Rules in this IRP" (an assertion offered by ICANN after the IRP was well underway, and one that cannot be reconciled with ICANN's prior representations to the Emergency Panelist) is also inconsistent with the Panel's factual findings, as well as with ICANN's own submissions to the Panel (as shown, *inter alia*, by the examples from ICANN's submissions set forth above at Paragraph 32 above).

62. *Third*, as the members of this experienced Panel must surely know, even assuming *arguendo* that ICANN did "decline[] to take a position as to the propriety of the DAA under the [New gTLD Program Rules] in this IRP," ICANN's failure to engage on the issues that Afilias properly raised in support of its Rules Breach Claim in this IRP does not excuse the Panel from its mandate to decide and resolve the claim. ICANN's failure to "take a position as to the propriety of the DAA" certainly cannot justify the Panel's *extra petita* act of referring these issues back to the ICANN Board to "pronounce [on] in the first instance."

63. *Fourth*, the assertion that ICANN "is the entity with primary responsibility for [the New gTLD] Program" is irrelevant to the Panel's mandate in this case. The notion that ICANN or its Board has the "requisite knowledge, expertise, and experience, to pronounce in the first instance"[102] on issues that have been squarely presented to this Panel—so that the Panel should refer these issues back to the ICANN Board if the Board has not yet made any such pronouncements—has no legal or factual basis whatsoever and is entirely inconsistent with this Panel's mandate. Apart from ICANN's unsupported assertion, there is nothing in the record before

[102] Decision, ¶ 359.

this Panel—and certainly nothing in the Panel's Decision—to support the notion that the Board has the "requisite knowledge, expertise, and experience" (but this Panel does not) to decide the Dispute submitted to this Panel, in which the Board is accused of having failed to follow its own Articles, Bylaws, and New gTLD Program Rules. To the contrary, there are numerous findings in the Panel's Decision to support Afilias' claim that ICANN has acted in bad faith and a manner that afforded disparate treatment to Afilias as compared to Verisign and NDC. Those findings seriously compound the Panel's lack of adequate reasoning in "referring" Afilias' Rules Violation Claim back to the Board to "pronounce [on] in the first instance."

64. This IRP is an ICANN ***accountability*** mechanism. It is the only means—per ICANN—by which ICANN's Staff and Board can be held accountable for actions ***or inactions*** relating to the New gTLD Program that breach the Articles or Bylaws. The purposes of this IRP include providing "meaningful, affordable and accessible ***expert*** review of Covered Actions…."[103] This Panel has failed to provide that review. Its deference to the Board's supposed "knowledge, expertise, and experience"—such that the Panel has refused to resolve a Dispute alleging that the Board's failure to act as required by the New gTLD Program Rules violates its Articles and Bylaws, instead referring that Dispute back to the Board to "pronounce" on—eliminates ICANN's accountability. As stated by the IRP Panel in *Vistaprint v. ICANN*:

> [T]he IRP is the only accountability mechanism by which ICANN holds itself accountable through independent third-party review of its actions or inactions. Nothing in the Bylaws specifies that the IRP Panel's review must be founded on a deferential standard…. Such a standard would undermine the Panel's primary goal of ensuring accountability on the part of ICANN and its Board, and would be incompatible with ICANN's commitment to maintain and improve

[103] Bylaws, **[Ex. C-1]**, Sec. 4.3(a)(ii).

> robust mechanisms for accountability, as required by ICANN's Affirmation of Commitments, Bylaws and core values.[104]

65. That is why the Panel's mandate is to "conduct an objective, de novo examination of the Dispute;" to "make findings of fact to determine whether the Covered Action constituted an action or inaction that violated" the Article and Bylaws; and to ensure that "[a]ll Disputes shall be decided in compliance with the Articles … and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions."[105]

66. The Panel has failed to fulfill that mandate. Accordingly, the Panel should issue an additional decision in which it decides and resolves Afilias' Rules Breach Claim as required by the Parties' arbitration agreement.

3. The Issue of Remedy for the Rules Breach Claim Has Also Been Properly Submitted and Fully Arbitrated Before the Panel.

67. Because the Panel did not resolve Afilias' Rules Breach Claim, it also did not reach the issue of the remedies requested by Afilias. The proper remedies for this breach, however, were also properly submitted and fully arbitrated for the Panel. Consistent with the Panel's mandate, the Panel must resolve them—especially if the Panel agrees with Afilias and issues an additional decision resolving the Rules Breach Claim on the merits.

68. Afilias sought both declaratory relief and affirmative declaratory relief (what ICANN more accurately called "injunctive" relief) for its Rules Breach Claim in the IRP. As a preliminary matter, there is no dispute that if a breach is found, the Panel has the authority to make a declaration to that effect. As ICANN stated in its Rejoinder Memorial:

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[104] *Vistaprint Ltd. v. ICANN*, ICDR Case No. 01-14-0000-6505, Final Declaration of the Independent Review Panel (9 Oct. 2015), **[Ex. CA-2]**, ¶ 124. Notably, the *Vistaprint* IRP was decided under the prior Bylaws, *i.e.*, before the amendments in 2016 provided that IRPs must result in a final resolution of claims that can be enforced in a court of law.

[105] Bylaws, **[Ex. C-1]**, Sec. 4.3(i)(i) and (ii).

> Afilias seeks two types of relief [(*i.e.*, declaratory and injunctive) on its Rules Breach Claim]. First, it asks the Panel ***to declare*** that ICANN violated its Articles and Bylaws by (a) failing to disqualify NDC's Application [after receiving the DAA]; (b) failing to offer the rights to .WEB to Afilias after disqualifying NDC; and (c) proceeding to contract with NDC for a registry agreement. ***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***.[106]

69. The Panel indeed ruled that ICANN had breached its Articles and Bylaws by "moving to delegate .WEB to NDC in June 2018"—at least so long as Afilias' complaints "remained unaddressed"—and issued a declaration to that effect.[107] With respect to Afilias' request for a declaration that ICANN breached its Articles and Bylaws with respect to items (a) and (b), ICANN offered three defenses "on the merits."[108] *First*, ICANN argued that the claim was time-barred, which argument the Panel rejected.[109] *Second*, ICANN argued that "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,"[110] an argument that the Panel declined to reach.[111] *Third*, ICANN argued that "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."[112]

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106 ICANN's Rejoinder Memorial, ¶ 117 (emphasis added) (footnotes omitted).

107 Decision, ¶ 410(1).

108 ICANN's Rejoinder Memorial, ¶ 117 (setting forth the three merits defenses to the claim).

109 Decision, ¶¶ 278, 281.

110 ICANN's Rejoinder Memorial, ¶ 118.

111 As discussed above, while the Decision stated that "it seems to the Panel reasonable for the Board to have decided to await the outcome of these proceedings before considering and determining what action, if any, it should take," (Decision, ¶ 328), that assertion is difficult, if not impossible, to reconcile with the Panel's *Dispositif* as set forth in paragraph 410(1)(b)(ii). Moreover, the Panel specifically stated in paragraph 328 that it reached its conclusion "without needing to rely on the provisions of Section 4.3(i)(iii) of the Bylaws, and determining whether or not that decision involved the Board's exercise of its fiduciary duties."

112 ICANN's Rejoinder Memorial, ¶ 117.

70. On this last point, it is unclear as to what the Panel ruled. Although the Panel stated that it accepted ICANN's "submission that it would be improper for the Panel to dictate what should be the consequence of NDC's violation of the New gTLD Program Rules, assuming a violation is found," the Panel also said that it was "mindful of the Claimant's contention that whatever discretion the Respondent may have is necessarily constrained by the Respondent's obligation to enforce the New gTLD Program Rules objectively and fairly."[113] But Afilias specifically put before the Panel the question of whether the New gTLD Program Rules—construed and applied within the parameters of ICANN's Articles and Bylaws—required disqualification of NDC's application and bids, and offering .WEB to Afilias as the next highest bidder, and explained why the question must be answered in the affirmative.[114] Afilias therefore satisfied its burden of demonstrating that it is entitled to a declaration that ICANN breached its Articles and Bylaws by failing to disqualify NDC's application and bids and to offer .WEB to Afilias as the second highest bidder. Afilias also fully briefed and argued the issue of why it was entitled to injunctive relief—*i.e.*, relief from the Panel ordering ICANN to disqualify NDC's application and bids and to offer .WEB to Afilias as the second highest bidder.[115] ICANN fully

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[113] Decision, ¶ 360.

[114] Amended Request for IRP, Secs. 3-5; Afilias' Reply Memorial, Sec. III; Afilias' PHB, Secs. III(A) and (C).

[115] Amended Request for IRP, ¶ 89 ("Afilias respectfully requests the IRP Panel to issue a binding Declaration: … (2) that, in compliance with its Articles and Bylaws, ICANN must disqualify NDC's bid for .WEB for violating the AGB and Auction Rules; (3) ordering ICANN to proceed with contracting the Registry Agreement for .WEB with Afilias in accordance with the New gTLD Program Rules"); Afilias' Reply Memorial, ¶ 155 ("the Panel's mandate necessarily requires the Panel to issue a final decision declaring that ICANN breached its Articles and Bylaws by: (a) failing to disqualify NDC's application and bid upon receiving the DAA in August 2016; (b) failing to offer Afilias the rights to .WEB, as the next highest bidder, as provided for in the New gTLD Program Rules; and (c) following a biased, superficial and self-serving investigation, proceeding to contract with NDC (and hence Verisign) for the .WEB registry agreement, notwithstanding NDC's disqualifying violations."); Afilias' Response to the *Amici*'s Briefs, ¶ 66 ("the Panel's task with respect to Afilias' principal claim is straightforward: by reviewing the terms of the DAA against the New gTLD Program Rules, applied in accordance with ICANN's Articles and Bylaws, the Panel should conclude that ICANN violated its Articles and Bylaws by failing to disqualify NDC's application and bid, and by failing to award .WEB to Afilias as the next highest bidder."); Afilias' PHB, ¶ 240 ("Specifically, as injunctive relief, in addition to granting such other relief as the Panel considers appropriate in the circumstances of this case, the Panel should order and recommend that ICANN: Reject NDC's application for the .WEB gTLD; Disqualify NDC's bids at the ICANN auction for the .WEB gTLD;

briefed and argued its position to the contrary. Accordingly, if the Panel issues an additional decision resolving the merits of Afilias' Rules Breach Claim (as it must to fulfill its mandate)—and rules in Afilias' favor—then the Panel should also finally resolve the Dispute by addressing Afilias' requested relief.

C. The Panel Must Issue an Additional Decision Resolving Afilias' International Law Claim.

1. Afilias Presented a Claim to the Panel that ICANN Violated International Law.

71. Afilias claimed from the very outset of this IRP that ICANN violated its obligation to conduct its activities in conformity with relevant principles of international law by failing to enforce the New gTLD Program Rules and by proceeding to delegate .WEB to NDC. We refer to this claim as the **International Law Claim**. The Panel, however, failed to decide this claim, and there is no substantive assessment whatsoever of Afilias' extensive submissions on ICANN's international law violations in the Decision. Here again, the Panel failed to fulfill its express mandate under the Bylaws.

72. Afilias laid out its position on ICANN's international law obligations clearly and distinctly from the first statement of its claims in the Request for IRP and the Amended Request for IRP.[116] In the latter, Afilias set forth its position that, pursuant to the Articles and Bylaws, "ICANN is required to carry out its activities '***in conformity with relevant principles of international law and international conventions*** and applicable local law[.]'"[117] Afilias further alleged that "ICANN has also breached its obligations under international and California law to

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Deem NDC ineligible to execute a registry agreement for the .WEB gTLD; Offer the registry rights to the .WEB gTLD to Afilias, as the next highest bidder in the ICANN auction").

[116] Afilias' Request for Independent Review Process (14 Nov. 2018) ("**Request for IRP**"), ¶ 9; Amended Request for IRP, ¶ 8.

[117] Amended Request for IRP, ¶ 8 (quoting Bylaws, **[Ex. C-1]**, Sec. 1.2(a)(v)).

act in good faith."[118] Based on this position, Afilias submitted to the Panel its request for a binding declaration that "ICANN has … ***violated international law***[.]"[119] None of the foregoing is controversial.

73. Indeed, in its recitation of the Parties' arguments, the Panel properly acknowledged that Afilias had submitted a claim for ICANN's violation of international law and good faith:

> The Claimant contends that the Respondent has breached its obligation, under its Bylaws, to make decisions by applying its documented policies 'neutrally, objectively, and fairly,' in addition to breaching its obligations under international law and California law to act in good faith.[120]

The Panel further recognized in that recitation that Claimant's request for relief explicitly sought a determination on its claim of an international law violation:

> By way of relief, the Claimant requested the Panel to issue a binding declaration:
>
> > (1) that ICANN has acted inconsistently with its Articles and Bylaws, breached the binding commitments contained in the AGB, ***and violated international law***[.][121]

74. Afilias set out the particulars as to what international law and the principle of good faith required of ICANN. Afilias explained that:

> The guiding substantive and procedural rules in ICANN's Articles and Bylaws—including the rules involving procedural fairness, transparency, and non-discrimination—are so fundamental that they appear in some form in virtually every legal system in the world, and, as discussed below, are given definition by numerous sources of international law. ***They arise from the general principle of good***

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[118] Amended Request for IRP, ¶ 5.

[119] Amended Request for IRP, ¶ 89(1) (emphasis added).

[120] Decision, ¶ 126.

[121] Decision, ¶ 128 (emphasis added).

> ***faith, which is considered to be 'the foundation of all law and all conventions'***.[122]

75. Afilias then elaborated, including with volumes of supporting authority, as to what the four following specific facets of the international law principle of good faith required of ICANN in the circumstances of the present case:[123]

- Procedural fairness and due process: Response, ¶¶ 145-147; Authorities CA-66 through CA-73.
- Impartiality and non-discriminatory treatment: Response, ¶¶ 149-150; Authorities CA-74 through CA-91.
- Openness and transparency: Response, ¶¶ 155-156; Authorities CA-92, CA-85 through CA-89, and CA-93 through CA-98.
- Respect for legitimate expectations: Response, ¶ 160; Authorities CA-66, CA-78, and CA-99 through CA-103.

76. Afilias further explained that, "[a]s determined by the first-ever IRP panel (Schwebel, Paulsson, Trevizian), [international law] includes the obligation of good faith."[124] As the Panel itself recognized in its recitation of arguments, Afilias specified that its international law claim included allegations that ICANN had violated various threads of its international law obligation of good faith.[125] The Bylaws provide that the Panel is required to decide the dispute between ICANN and Afilias "in the context of the norms of applicable law and prior relevant IRP decisions."[126] This, the Panel failed to do.

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[122] Afilias' Response to the *Amicus Curiae* Briefs (24 July 2020) ("**Afilias' Response to the *Amici*'s Briefs**"), ¶ 144 (emphasis added) (quoting B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (2006), **[Ex. CA-3(bis)]**, p. 105).

[123] Afilias' Response to the *Amici*'s Briefs, ¶¶ 141-44.

[124] Amended Request for IRP, ¶ 8.

[125] Decision, ¶ 126.

[126] Bylaws, **[Ex. C-1]**, Sec. 4.3(i)(ii); *see also id.*, Sec. 4.3(v).

77. Nevertheless, the Panel never denied that obligations under international law apply to ICANN. To the contrary, the Panel directly quoted from Article 2, paragraph III of the Articles, which states that ICANN "shall operate in a manner consistent with these Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions…."[127] It also directly quoted from Section 1.2(a) of the Bylaws, which restates that ICANN shall carry "out its activities in conformity with relevant principles of international law and international conventions and applicable local law".[128] Nonetheless, the Panel did not expressly address and decide Afilias' International Law Claim or provide any reasoning for its failure to do so.[129]

78. While the general applicability of international law to ICANN's conduct was not addressed, the Decision does contain the following erroneous statement regarding Claimant's position on the applicable law—one that Claimant has never taken expressly or in which it has acquiesced:

> At the hearing on Phase I, counsel for the Respondent, in response to a question from the Panel, submitted that in case of ambiguity the Interim Procedures, as well as the Articles and other "quasi-contractual" documents of ICANN, are to be interpreted in accordance with California law, since ICANN is a California not-for-profit corporation. The Claimant did not express disagreement with ICANN's position in this respect.[130]

79. With all due respect to the Panel, this statement should never have been included in the Decision. It is a word-for-word copy-paste of an identical statement from the Phase I

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[127] Decision, ¶ 287 (quoting Articles, **[Ex. C-2]**, Art. 2(III)).

[128] Decision, ¶ 289 (quoting Bylaws, **[Ex. C-1]**, Sec. 1.2(a)).

[129] The Panel's general boilerplate dismissal in the *Dispositif* of "all of the Parties' other claims and requests for relief" is insufficient to satisfy that the requirements that an IRP panel must make findings of fact and issue a well-reasoned decision resolving all of the claims presented to it. Decision, ¶ 410(14).

[130] Decision, ¶ 29.

Decision[131] that simply ignores the extensive briefing that Afilias provided on the application and relevance of international law to the issues presented for decision in Phase II of this IRP. Clearly no actual deliberation or analysis by the Panel in Phase II could have supported this passage, which constitutes a plain abdication of the Panel's obligation to hear and resolve the issues before it in the IRP.[132] One of the most critical issues for decision in any arbitration is that of the applicable law, rising to a ground for set aside or annulment in most systems of arbitration, including under the EAA.[133] We return to the issue of the Panel's findings on the applicable law in our requests for interpretation (*see* Paragraphs 97 to 107).

2. The Panel Must Resolve Afilias' International Law Claim regarding ICANN's Failure to Disqualify NDC.

80. Despite the uncontestable fact that ICANN is subject to obligations under international law and that Afilias submitted a claim regarding the breach of those obligations, the Panel's Decision failed entirely to consider or decide the substance of Afilias' International Law

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[131] Decision on Phase I (12 Feb. 2020), ¶ 27 ("At the hearing on Phase I, counsel for the Respondent, in response to a question from the Panel, submitted that in case of ambiguity the Interim Procedures, as well as the Articles of Incorporation and other 'quasi-contractual' documents of ICANN, are to be interpreted in accordance with California law, since ICANN is a California not-for-profit corporation. The Claimant did not express disagreement with ICANN's position in this respect.").

[132] It is equally the case that this statement should never have been included in the Phase I Decision. Even at that stage, it was abundantly clear that Afilias had taken the position in its Amended Request for IRP—submitted long before the Phase I Hearing and Decision—that:

> ICANN is required to interpret and enforce the New gTLD Program Rules strictly in accordance with its Articles and Bylaws, which, pursuant to ***the requirement that ICANN 'carry[] out its activities in conformity with relevant principles of international law[,]' requires ICANN to interpret and apply them in good faith.***

Amended Request for IRP, ¶ 10 (emphasis added). Afilias' counsel in fact stated on the record during the Phase I hearing that ICANN's Article and Bylaws require it to act in conformity with principles of international law and that "past panels have held that the relevant principles of international law include the obligation of good faith." Phase I Hearing, Tr. (2 Oct. 2019), 54-55.

[133] A decision by a tribunal to apply a law to which the parties had not agreed is an excess of powers under section 68(2)(b) of the EAA. It was stated in *B v A* that a challenge may be sustained where there is a "conscious disregard" of the parties' chosen law. *B v. A* [2010] EWHC 1626 (Comm), **[Ex. CA-161]**, ¶ [25]; *see also* English Arbitration Act 1996, **[Ex. AA-50]**, Sec. 46(1)(a) ("The arbitral tribunal shall decide the dispute … in accordance with the law chosen by the parties as applicable to the substance of the dispute.").

Claim. This failure amounts to a striking violation of the Panel's obligation to hear and resolve all of the claims submitted to it. Among other considerations of international law,[134] Afilias put forward the key claim that ICANN violated its international obligations of good faith, transparency, and respect for legitimate expectations when it failed to disqualify NDC's application and bid pursuant to a good faith application of the New gTLD Program Rules.[135]

81. Afilias clearly set out in its pleadings the claim that ICANN's failure to act against NDC's application was in violation of principles of international law, including good faith, transparency, and respect for legitimate expectations. Afilias made the following key submissions to describe its claim regarding ICANN's violations of international law:

> Instead, ICANN simply proceeded to delegate .WEB to NDC in an implicit acceptance of its conduct at the .WEB Auction. ***A good faith application of the New gTLD Program Rules to NDC's conduct—carried out consistent with ICANN's Articles and Bylaws—required ICANN to disqualify NDC's application and bid***.
>
> …
>
> ***Afilias, as a participant in ICANN's New gTLD Program, legitimately expected ICANN to comply with its own rules,***

[134] Afilias alleged that ICANN violated its international obligations, including of good faith, because "[e]ven in this IRP, ICANN has taken diametrically opposed positions as to whether or not it evaluated [Afilias'] concerns" about NDC's application. Afilias' Response to the *Amici*'s Briefs, ¶ 147. It further observed that ICANN failed to provide "any serious explanation of why—despite its Board's alleged decision not to take any action on .WEB until accountability mechanisms were concluded—ICANN nonetheless took the contention set off-hold and proceeded to delegate .WEB to NDC in June 2018." *Id.*, ¶ 157. In light of its own findings as described above (*see* Paragraphs 53 to 63), it was therefore also incumbent on the Panel to make the determination that ICANN had violated its international obligations—including of good faith, procedural fairness, and transparency—by adopting inconsistent positions regarding its decisions about Afilias' complaints and, indeed, by falsely insisting that it never resolved those complaints.

[135] Indeed, the Panel in its recitation of the parties' arguments expressly acknowledged that Afilias had presented a claim that ICANN violated international law by failing to disqualify NDC's application and bid:

> ***The Claimant further claims that the Respondent failed to respect its legitimate expectations*** despite its commitment to make decisions by applying documented policies consistently, neutrally, objectively and fairly. According to the Claimant, had the Respondent followed the New gTLD Program Rules, it would necessarily have disqualified NDC from the application and bidding process.

Decision, ¶ 193 (emphasis added) (citation omitted).

> ***policies, and procedures in its Bylaws, the Guidebook and the New gTLD Program Rules. ICANN did not.*** The plain text of the DAA is in violation of the New gTLD Program Rules when interpreted honestly, fairly, and loyally—*i.e.*, in good faith. Had ICANN actually followed the New gTLD Program Rules, it would have disqualified NDC from the application and bidding process.[136]

82. Afilias further underscored in its Revised Statement of Issues that this claim was squarely before the Panel for decision. There, Afilias put to the Panel the following issue:

> To the extent ICANN had discretion within its Articles and Bylaws to proceed to finalize a .WEB registry agreement with NDC despite NDC's violations of the New gTLD Rules, ***whether ICANN exercised such discretion consistently with*** its Articles and Bylaws, including, without limitation, its Competition Mandate and ***the international law obligation of good faith***.[137]

83. The claims that Afilias undisputedly presented on ICANN's violations of international law in its resolution of .WEB were never rebutted by ICANN or the *Amici*. To the contrary, ICANN accepted at the final hearing that "international law and norms of international arbitration … are also concepts that are baked into Section 4.3" of the Bylaws.[138]

84. For the reasons set out above, it is not open to the Panel to refuse to decide claims that are properly before it. Afilias' International Law Claim was squarely before the Panel, as the Panel itself acknowledged, and no action was taken by the Panel to resolve this claim. The Panel must now issue an additional decision addressing in a well-reasoned fashion Afilias' International Law Claim.

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[136] Afilias' Response to the *Amici*'s Briefs, ¶¶ 156, 161 (emphasis added) (citations omitted).

[137] Afilias' Revised Statement of Issues, ¶ 2 (p. 3) (emphasis added).

[138] Merits Hearing, Tr. Day 1 (3 Aug. 2020), 128:17-19.

D. The Panel Must Issue an Additional Decision Resolving Afilias' Disparate Treatment Claim.

85. The Panel also failed to resolve Afilias' claim—one that is distinct from the Rules Breach Claim—that ICANN violated its Articles and Bylaws through its disparate treatment of Afilias vis-à-vis Verisign and NDC. We refer to this claim as the **Disparate Treatment Claim**. Afilias argued to the Panel that "ICANN has applied its standards, policies, procedures, and practices inequitably and in a manner that has singled out parties for disparate treatment—*i.e.*, Afilias for less favorable treatment, and NDC and Verisign for more favorable treatment" in violation of ICANN's Articles and Bylaws.[139] Based on this submission, Afilias explicitly requested that the Panel decide "[w]hether ICANN violated its Articles of Incorporation and Bylaws through its disparate treatment of Afilias and Verisign/NDC[.]"[140] In its Decision, the Panel expressly acknowledged that Afilias had advanced this claim, noting that "the Claimant has advanced a number of related claims, including that the Respondent violated its Articles and Bylaws through its disparate treatment of Afilias and Verisign[.]"[141] However, the Panel determined, without providing adequate reasoning, that a decision on Afilias' Disparate Treatment Claim was "unnecessary." In so doing, the Panel again failed to discharge its mandate.

86. Consistent with Afilias' submissions, the Panel made several factual findings in its Decision that support Afilias' Disparate Treatment Claim. The Panel found that:

- "the Respondent has adopted contradictory positions, including in these proceedings, that at least in appearance undermine the impartiality of its processes."[142]

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[139] Afilias' PHB, ¶ 5; *id.*, ¶ 238 (seeking a declaration that ICANN violated Sections 1.2(a)(v) and 2.3 of the ICANN Bylaws "by the arbitrary, capricious, disparate, and discriminatory manner in which it treated Afilias").

[140] Afilias' Revised Statement of Issues, ¶ 3 (p. 1).

[141] Decision, ¶ 346.

[142] Decision, ¶ 297.

- Afilias sent ICANN two letters raising concerns about NDC's conduct on 8 August and 9 September 2016, and "in the meantime the Respondent had initiated a dialogue directly with Verisign[.]"[143]

- "the Respondent, NDC and Verisign had knowledge of the terms of the DAA at that time [16 September 2016], [but] Afilias and Ruby Glen did not. It seems to the Panel evident that this asymmetry of information put Afilias and Ruby Glen at a significant disadvantage in addressing the topics listed in the Questionnaire in the context of 'ICANN's evaluation of the issues raised'."[144]

- "the Respondent could have, and ought to have requested Verisign and NDC for authorization to disclose the DAA to the other addresses of its Questionnaire, be it on an 'external counsel's eyes only' basis."[145]

- "the Respondent's decision to move to delegation without having pronounced on the questions raised in relation to .WEB was inconsistent with the representations made in Ms. Willett's letter of 16 September 2016, the text in the introduction to the attached Questionnaire, and Mr. Atallah's letter of 30 September 2016."[146]

- "the Respondent was once again adopting a position that could have resulted in .WEB being delegated to NDC without the Board having determined whether NDC's arrangements with Verisign complied within the New gTLD Program Rules."[147]

- "from a due process perspective, the retroactive application of a time limitations provision is inherently problematic. … The fact that only a single case, the Claimant's IRP, was in fact affected by the retroactive application of the Interim Procedures only heightens the due process concern."[148]

- "[a]s regards the allegation of disparate treatment, it rests for the most part on facts already considered by the Panel in analysing the Claimant's core claims, such as turning to Verisign rather than NDC to obtain information about NDC's arrangements with Verisign, allowing for asymmetry of information to exist between the recipients of the 16 September 2016 Questionnaire, delaying providing a response to Afilias' letters of 8 August and 9 September 2016, submitting Rule 4 for adoption in spite of it being the subject of an ongoing

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[143] Decision, ¶ 302.

[144] Decision, ¶ 308; *id.*, ¶ 309 (explaining how "[o]ther topics in the Questionnaire would attract very different answers depending on whether the responding party had knowledge of the terms of the DAA.").

[145] Decision, ¶ 311.

[146] Decision, ¶ 332 (citations omitted).

[147] Decision, ¶ 342.

[148] Decision, ¶¶ 280-81.

> public comment process, and making that rule retroactive so as to encompass the Claimant's claims within its reach."[149]

Taken together, these determinations directly affirm the factual support for Afilias' Disparate Treatment Claim, which were identified in Afilias' Revised Statement of Issues.[150]

87. Yet, despite all of the facts evidencing ICANN's inequitable and disparate treatment of Afilias, the Panel did not resolve Afilias' claim. The Panel instead concluded that it "***does not consider it necessary, based on the allegations of disparate treatment, to add to its findings in relation to the Claimant's core claims***."[151] The Panel's failure to address and resolve Claimant's Disparate Treatment Claim—on the grounds that on the Panel's view that it was not "necessary" for the Panel to deal with it—is manifestly unfair to Claimant. This is especially so because the Panel has improperly remanded to the Respondent for decision the fundamental issue of NDC's compliance with the New gTLD Program Rules—as well as the consequences of any violations that Respondent now finds (assuming it finds any)—even while making factual findings demonstrating the Respondent's bias against the Claimant and in favor of Verisign and NDC. Here, as elsewhere, there is a "glaring illogicality" to the Panel's assertion that it is not "necessary" to resolve Afilias' Disparate Treatment Claim, even as the Panel blithely (and, for the reasons explained above, improperly) referred critical issues before it back to the ICANN Board to "take ownership of" and "pronounce" on.

88. The Panel, however, cannot simply decide not to resolve a claim that was presented to it. While Claimant certainly appreciates that the Panel has made findings that it was subject to inequitable and disparate treatment at the hands of ICANN, it is not an option for an IRP panel to

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[149] Decision, ¶ 347.

[150] *See* Afilias' Revised Statement of Issues, pp. 1-2.

[151] Decision, ¶ 347 (emphasis added).

determine that it is not "necessary" to decide a claim that has been squarely put to it, and then fail to resolve the claim on that basis. As explained in **Section II(A)(1)**, the Panel is obligated to "decide all issues submitted [to it] for determination" under the basic principle of arbitrator ethics and national arbitration laws.[152] Further, pursuant to ICANN's Bylaws (*i.e.*, the "rules applicable to the present IRP"),[153] the Panel must ***resolve all Disputes***.[154] The Bylaws do not provide the Panel with discretion to determine that it is not "necessary" to resolve a claim for a declaration that has been squarely put before it—or to make findings of fact but then decline "to determine whether the Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws."[155]

89. In the event that the Panel believes there is a legal basis for its choice to simply opine that it is not "necessary" to decide the Disparate Treatment Claim, then, consistent with its obligation to provide a "well-reasoned" decision, the Panel must identify its reasoning for its decision. The ICANN Bylaws, after all, require that "all IRP decisions shall be written and made public, ***and shall reflect a well-reasoned application*** of how the Dispute was resolved in compliance with the [Articles] and Bylaws, as understood in light of prior IRP decisions … and norms of applicable law."[156] Otherwise, the Panel must issue an additional decision addressing Afilias' Disparate Treatment Claim.

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[152] American Arbitration Association, The Code of Ethics for Arbitrators in Commercial Disputes (1 Mar. 2004), **[Ex. CA-151]**, Canon V(A).

[153] Decision, ¶ 27.

[154] Bylaws, **[Ex. C-1]**, Sec. 4.3(a), (g) (stating that the "IRP Panel shall be charged with hearing and resolving the Dispute"); *id.*, Sec. 4.3(i)(ii) (asserting that "[a]ll Disputes shall be decided").

[155] Bylaws, **[Ex. C-1]**, Sec. 4.3(i)(i).

[156] Bylaws, **[Ex. C-1]**, Sec. 4.3(v) (emphasis added).

III. REQUESTS FOR INTERPRETATION

90. In addition to completing its mandate under the Bylaws by issuing an additional decision addressing the undecided claims set out in the previous section, Afilias requests the Panel to provide an interpretation of several ambiguous and vague points of substance and reasoning contained in the Decision.

91. The clear import of the Panel's Decision is that the Dispute has not yet been brought to a full and final resolution. In fact, the Panel has all but invited a future IRP panel to be convened to address whether the DAA and NDC's other conduct complied with the New gTLD Program Rules and determine whether "NDC's application for .WEB should be rejected and its bids at the auction disqualified[.]"[157] Thus, depending on how the Panel rules on Afilias' request for an additional decision on the undecided claims discussed in the previous section, the precise meaning and scope of certain aspects of the Decision is required for any future resolution of the Dispute; and indeed, for the "pronouncement" by the Respondent. An interpretation is also called for in light of various other parts of the Decision that appear to be directly contradictory and otherwise illogical and, therefore, of no benefit to the Parties, to future IRP panels, or to the Internet Community.

92. Article 33 of the ICDR Rules provides that, "[w]ithin 30 days after the receipt of an award, any party, with notice to the other party, may request the arbitral tribunal to interpret the award…."[158] The purpose of such a provision is to provide "a vehicle for one or both parties to secure clarification of the award where necessary" including regarding "its exact meaning and

[157] Decision, ¶ 410(1), (5); *id.*, ¶ 360 ("Nevertheless, the Respondent does enjoy some discretion in addressing violations of the Guidebook and Auction Rules and it is best that the Respondent first exercises its discretion before it is subject to review by an IRP Panel.").

[158] ICDR Rules (2014), Art. 33(1).

scope."[159] A commentary on the ICDR Rules specifies that "the interpretation process … is to provide 'clarification of the award by ***resolving any ambiguity and vagueness in its terms***'."[160] It is also accepted that, even where a request for interpretation "does not fall" strictly within the scope of the interpretation provision, it may nevertheless "do no harm and possibly some good if [the tribunal] were to address certain of the points" albeit outside the formal confines of the provision.[161]

93. Critically, the scope of a request for interpretation of an IRP panel's decision must also be understood within the framework of the Panel's mandate to provide well-reasoned decisions for the purpose of guiding and informing future decision-making. The Bylaws provide that IRP decisions "shall reflect a well-reasoned application of how the Dispute was resolved in compliance with the Articles of Incorporation and Bylaws, ***as understood in light of prior IRP decisions***…."[162] Well-reasoned decisions are necessary because the central purpose of ICANN accountability through the IRP is advanced by "creating precedent to guide and inform the Board, Officers …, Staff members, Supporting Organizations, Advisory Committees, and the global Internet community in connection with policy development and implementation."[163] An IRP is no mere commercial arbitration where awards are confidential and of significance for only the direct

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[159] Report of the Secretary General: Revised Draft Set of Arbitration Rules for Optional Use in *Ad Hoc* Arbitration relating to International Trade (UNCITRAL Arbitration Rules) (addendum), Commentary on the Draft UNCITRAL Arbitration Rules, U.N. Doc. A/CN.9/112/Add.1 (12 Dec. 1975), *reprinted in* 7 Y.B. UNCITRAL 166 (1976), **[Ex. CA-162]**, Commentary on Article 30, ¶¶ 1-2 (at 180). It should be noted that the ICDR Rules originally derive from the 1976 UNCITRAL Rules and Article 33 remains materially similar on the availability of a request for interpretation. *Compare* ICDR Rules (2014), Art. 33(1) *with* UNCITRAL Arbitration Rules (1976), **[Ex. CA-163]**, Art. 35(1).

[160] Martin F. Gusy and James M. Hosking, *A Guide to the ICDR International Arbitration Rules* (2nd ed., 2019), **[Ex. CA-148]**, ¶ 33.13 (emphasis added) (citation omitted).

[161] *Methanex Corp. v. United States of America*, UNCITRAL, Letter to Parties from Tribunal (25 Sept. 2002), **[Ex. CA-164]**, ¶ 3 (at p. 3).

[162] Bylaws, **[Ex. C-1]**, Sec. 4.3(v) (emphasis added).

[163] Bylaws, **[Ex. C-1]**, Sec. 4.3(a)(vi).

parties to a dispute. Nor is the IRP an "advisory" process. Rather, the resulting precedent-setting decisions of an IRP serve as the basis for the global Internet community to hold ICANN accountable. Clarity and detailed reasoning is therefore essential.

94. It is therefore critical that the Panel provide interpretations of its Decision that are sufficient to remove all ambiguity and obscurity from the terms and phrasing employed as well as from the broader reasoning relied upon to reach its conclusions. Both must be sufficient to allow, not just the Parties, but also an objective observer in the global Internet community to understand how the Panel rendered its decisions and the implications of those decisions both for this Dispute and future Disputes. Thus, in accordance with Article 33 of the ICDR Rules, Afilias requests the Panel to provide interpretations of the following issues in the Decision that are vague, ambiguous, confusing, and/or contradictory:

- What is the scope and meaning of the terms "pronounce" and "pronouncement" as used by the Panel in stating that ICANN Staff did not "pronounce" on Afilias' complaints and in recommending that the Board should now "pronounce" on Afilias' complaints? (**Section III(A)**)

- Did the Panel determine that the Board must always "pronounce" on Staff action or inaction as a pre-condition for an IRP panel to decide a dispute based on Staff action or inaction? If so, what is the source for this pre-condition in the Bylaws? And, if not, then why has this pre-condition been inserted, given the Panel's observations that some sort of decision on Afilias' complaints was taken by Staff, which was at least implicitly approved by the Board through its inaction? (**Section III(B)**)

- What law (if any) did the Panel apply in this IRP—just California law or California and international law? If the latter, to which claims and issues did the Panel apply California law, and to which did it apply international law? (**Section III(C)**)

- On what legal or evidentiary basis did the Panel determine that ICANN has "the requisite knowledge, expertise, and experience, to pronounce" on Afilias' complaints compared to the Panel? (**Section III(D)**)

- What standard of proof did the Panel apply to each of Afilias' submissions in support of its claims? (**Section III(E)**)

A. What is the Scope and Meaning of the Terms "Pronounce" and "Pronouncement" as Used by the Panel in Stating that ICANN Staff did not "Pronounce" on Afilias' Complaints and in Recommending that the Board Should Now "Pronounce" on Afilias' Complaints?

95. As discussed above, in the Decision, the Panel repeatedly stated that ICANN failed to "pronounce" upon Afilias' complaints and thus recommended that it is now for the Board to "pronounce" in the first instance on Afilias' complaints regarding NDC's violations of the New gTLD Program Rules.

96. Afilias has carefully reviewed ICANN's Articles and Bylaws, the Applicant Guidebook, as well as the Interim Supplementary Procedures and the ICDR Rules. It has not been able to identify a single reference to or use of the terms "pronounce" or "pronouncement" in any of those instruments—documents that provide the legal framework for ICANN's activity and for the conduct of IRPs. It equally undertook a careful review of the submissions and statements, both oral and written, by the Parties and the *Amici* in this IRP. It was again unable to identify any reference to the terms "pronounce" or "pronouncement." The Panel thus appears to have fashioned from whole cloth the terms "pronounce" and "pronouncement" and in so doing introduced a new pre-requisite for claimants to bring IRPs that is neither included in the Bylaws nor the New gTLD Program Rules.

97. And yet the Decision does not provide any explanation as to the legal basis for this requirement or of the form or substance of the "pronouncements" that should have been made by the Respondent, or that the Respondent should now make for its conduct to be subject to review by an IRP panel. Because the Panel failed to explain this key term in its Decision, it is critical that the Panel provide well-reasoned guidance on what constitutes a "pronouncement" and what is the foundation in ICANN's documents or applicable law for the "pronouncement" requirement,

particularly in light of the Bylaws' definition that Covered Actions in respect of which claims may be brought include both Board and Staff action and inaction.

98. The Panel found that the ICANN Staff had implicitly decided the matter of NDC's application when Staff proceeded with the delegation of .WEB to NDC.[164] By that same logic, the Board too must have implicitly decided upon that matter when it stood passively by even while knowing that Staff was proceeding with the delegation.[165] Given that ICANN had indeed decided the matter of NDC's application by proceeding, the Panel's declaration that ICANN nonetheless had never "pronounced" on that matter is both vague and ambiguous. That is especially so given that elsewhere in its Decision, the Panel used the terms "decide" or "determine," which (as discussed above), are generally defined differently from "pronounced."[166] Afilias therefore requests an interpretation that clarifies what the Panel meant when it stated that ICANN had nevertheless failed to "pronounce" on the matter of NDC. It further requests that the Panel clarify what parts of ICANN's Articles and Bylaws as well as the Parties' submissions it has relied upon in concluding that ICANN failed to "pronounce," and that, consequently, ICANN must now "pronounce in the first instance" before Afilias can have its Rules Breach Claim resolved by an IRP Panel.

99. In addition, the Panel unilaterally fashioned a remedy—*i.e.*, one that was not formally requested as relief by ICANN—that depends entirely on the meaning of this term but has failed to provide any indication of what it involves in substance or form. Afilias therefore requests an interpretation of this key term as well as what process, form, and substance an adequate "pronouncement" must have to comply with the Panel's decision, as well as its basis in ICANN's

[164] Decision, ¶ 273.

[165] Decision, ¶ 333.

[166] *See* **Section III(B)(2)**.

Articles and Bylaws as well as in the Parties' submissions. In particular, it requests that the Panel address the following questions regarding the nature of a "pronouncement":

a) What constitutes a "pronouncement" and what is the foundation in ICANN's documents or applicable law for the "pronouncement" requirement, particularly in light of the Bylaws' definition that Covered Actions in respect of which claims may be brought include both Board and Staff action and inaction?

b) What should have been the form and substance of ICANN's "pronouncement" on Afilias' complaints?

c) On what sources did the Panel rely to fashion its "pronouncement" remedy?

d) Before ICANN issues the "pronouncement" recommended by the Panel, must Afilias and other Internet community members be given an opportunity to be heard by the Board?

e) Must the Respondent's "pronouncement" be issued following an opportunity for Afilias and other Internet community members to receive and comment on all relevant evidence and argument?

f) What materials, documentary or otherwise, must ICANN consider before it issues the "pronouncement" recommended by the Panel?

g) Must the "pronouncement" be issued in a written form and made public on ICANN's website?

h) Must the "pronouncement" be issued with full and adequate supporting reasoning following Board deliberation?

i) Must the "pronouncement" be issued with findings of fact and conclusions of law?

j) Must the "pronouncement" be issued without the participation of Board members with conflicts of interest?

B. Did the Panel Determine that the Board Must Always "Pronounce" on Staff Action or Inaction as a Pre-Condition for an IRP Panel to Decide a Dispute Based on Staff Action or Inaction?

100. As set forth above, the effect of the Decision is that Afilias' challenge to the action or inaction of Afilias' Staff must first be submitted to the Board for "pronouncement" before an

IRP may be pursued.[167] The Panel imposed this effective requirement notwithstanding the Panel's determination that the Board *knew* that the Staff had not disqualified or rejected NDC's application but instead had proceeded to delegate .WEB.[168] And it did so notwithstanding its determination that it was entirely within the power of the Staff acting alone to execute a registry agreement with NDC.[169] There is nothing in the record to indicate that, had Afilias not timely commenced CEP, Afilias' complaints would ever have been addressed by ICANN. Nonetheless, the Panel concluded that in this case, Afilias' claim about the Board's inaction was "premature,"[170] and that because of ICANN's supposed failure to "pronounce" on the threshold issues underlying Afilias' claim, the Board must "pronounce in the first instance" before Afilias' Rules Breach Claim can be addressed by an IRP Panel.[171] Here, too, the Panel failed to provide any reasoning or analysis to explain its conclusion that the threshold issues underlying that claim were "premature," so that the Panel could not resolve it.

101. Nothing in the Bylaws qualifies or restricts the right of the Claimant to immediately seek a neutral and binding determination of claims from an IRP panel about Staff action or inaction. The Bylaws provide a formal process—the Reconsideration Request—through which a person or entity ***may*** obtain review of a Staff action or inaction. This process is optional; it is *not a mandatory prerequisite* for commencing an IRP.[172] The Bylaws provide that "ICANN shall

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[167] This conclusion on the Decision's effect is further supported by the following passage from the Decision: "No such decision was made by ICANN's Staff in relation to the issues raised by the Claimant that could have formed the basis for a formal accountability mechanism, in the context of which positions would have been adopted, battle lines would have been drawn, and an adversarial process such as an IRP would have resulted in a reasoned decision binding on the parties." Decision, ¶ 337.

[168] Decision, ¶¶ 333, 344.

[169] Decision, ¶ 334.

[170] Decision, ¶ 410(7).

[171] Decision, ¶ 359.

[172] *See* Bylaws, **[Ex. C-1]**, Sec. 4.2 (nowhere requiring exhaustion of the Reconsideration Request prior to commencing an IRP).

have in place a process by which any person or entity materially affected by an action or inaction of the ICANN Board or Staff may request ('Requestor') the review or reconsideration of that action or inaction by the Board."[173] Upon receiving a Reconsideration Request, the "Board Accountability Mechanisms Committee shall make a final recommendation to the Board"[174] and then "[t]he Board shall issue its decision on the recommendation…."[175]

102. Indeed, the current "enhanced" IRP process directly eliminated the need for such recourse, a requirement that previously existed in earlier versions of the IRP. Prior to the revisions of the IRP on 1 October 2016, independent review could be sought only for ICANN Board actions inconsistent with the Articles or Bylaws, not for ICANN Staff actions.[176] If an ICANN Staff action was inconsistent with the Articles or Bylaws, the matter would have to be submitted to the ICANN Board through a reconsideration request.[177] Only the Board action on that reconsideration request could then be the subject of an IRP. The revised IRP directly and explicitly eliminated any such restriction and expressly permits the submission of claims directly against ICANN Staff action.

103. In light of the above, Afilias requests that the Panel provide an interpretation that explains whether its decision to remand to the Board for "pronouncement" assumes or requires that all future IRP challenges to Staff action or inaction must first be pronounced upon by the

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[173] Bylaws, **[Ex. C-1]**, Sec. 4.2(a).

[174] Bylaws, **[Ex. C-1]**, Sec. 4.2(q).

[175] Bylaws, **[Ex. C-1]**, Sec. 4.2(r).

[176] ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 11 Feb. 2016), **[Ex. C-23]**, Art. IV, Sec. 3(2), (4) ("Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. … Requests for such independent review shall be referred to an Independent Review Process Panel ('IRP Panel'), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.").

[177] ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 11 Feb. 2016), **[Ex. C-23]**, Art. IV, Sec. 2(2)(a) ("Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction ('Reconsideration Request') to the extent that he, she, or it have been adversely affected by: one or more staff actions or inactions that contradict established ICANN policy(ies)[.]").

Board. In addition, Afilias requests an interpretation as to the factual and legal basis for the Panel's conclusion that the threshold issues put to the Panel in order to resolve Afilias' claim that ICANN breached its Articles and Bylaws by failing to disqualify NDC's application and bids for .WEB and to offer .WEB to Afilias were "premature."

C. On What Law Did the Panel Rely to Address (Or Not) Claimant's Claims?

104. As discussed above, in the Decision, the Panel apparently determined that California law should be applied to the Dispute.[178] As explained previously,[179] and contrary to what the Panel suggests, it is far from the case that Claimant "did not express disagreement with ICANN's position" that California law is the primary governing law for ICANN or that California law serves as a gap filler.[180] Even when the Panel first issued these observations—in the Phase I Decision[181]—Afilias had already made clear its position that the key law applicable to ICANN includes international law.[182] Afilias developed this position in great written detail across its Request for IRP,[183] Amended Request for IRP,[184] Reply Memorial,[185] Response,[186] and Post-Hearing Brief.[187] In addition to putting the *ICM Registry* Declaration on record as its very first

[178] Decision, ¶ 29.

[179] *See* **Section II(C)(1)**.

[180] Decision, ¶ 29.

[181] Decision on Phase I (12 Feb. 2020), ¶ 27.

[182] Request for IRP, ¶ 9; Amended Request for IRP, ¶ 8; Phase I Hearing, Tr. (2 Oct. 2019), 54:12-17.

[183] Request for IRP, ¶ 9.

[184] Amended Request for IRP, ¶ 8.

[185] Afilias' Reply Memorial, ¶¶ 4, 26.

[186] Afilias' Response to the *Amici*'s Briefs, ¶¶ 140-61.

[187] Afilias' PHB, ¶¶ 1, 96, 238.

legal authority,[188] Afilias cited at least 32 international decisions and 11 other international authorities that address the relevant principles of international law.

105. If the Panel is truly of the view that Claimant "did not express disagreement with ICANN's position" concerning the application of California law, then Claimant can only conclude that the Panel failed to read Claimant's voluminous submissions on this point, and that Claimant was thus denied its right to be heard and to be treated fairly. As such, Claimant considers that the Panel must not have intended to hold that California law is the sole law applicable to ICANN, to the exclusion of the relevant principles of international law that the Articles and Bylaws explicitly state must apply to ICANN's execution of its activities. Instead, the Panel must have, at most, intended that California law would apply, non-exclusively, to privilege issues and to the substance of the business judgment rule (the application of which the Panel declined to reach). These are the only places in the Decision where the Panel appears to conclude that California law is relevant to a concrete legal issue.[189]

106. Nevertheless, the Panel does not identify the substantive law (if any) it deemed applicable to its other rulings. Indeed, even when the Panel set forth the general obligations under which it intended to assess ICANN's conduct, it did not specify what law would be used to interpret those obligations or to fill in any gaps in their application.[190] It merely quoted the relevant provisions of the Bylaws without explaining the basis on which it interpreted their meaning, and specifically the source of law that it used to do so. As such, the Decision is vague and ambiguous

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[188] *See ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, Declaration of the Independent Review Panel (19 Feb. 2010), **[Ex. CA-1]**.

[189] Decision, ¶¶ 30, 285, n. 254.

[190] Decision, ¶¶ 289-92.

as to the actual law applied to these obligations and indeed as to whether international law was applied, either as an interpretative parameter or as an independent source of obligation.

107. In light of the above, Afilias requests the Panel to provide an interpretation of its decision on the applicable law that clarifies (a) whether it held that California law is the sole law applicable to ICANN, (b) what specific law, if any, it applied to interpret the obligations contained in ICANN's Articles and Bylaws, and (c) whether international law is an independent source of obligation in light of the Articles' and Bylaws' requirement that ICANN "shall conduct its activities in conformity with relevant principles of international law."

D. On What Basis did the Panel Determine that ICANN has "the Requisite Knowledge, Expertise, and Experience, to Pronounce"?

108. In the Decision, the Panel twice expressed the view that ICANN has "knowledge, expertise, and experience" that uniquely qualifies it—we assume, in comparison to the Panel's assessment of its own knowledge, expertise and experience—to decide on Afilias' Rules Breach Claim. However, the Panel provided no explanation of ICANN's supposedly unique "knowledge, expertise, and experience" that makes ICANN distinctively suited, and better suited than the Panel, to make a first instance decision on NDC's (and indeed Verisign's) conduct. At no point in its Decision did the Panel provide any analysis or cite to any evidence that ICANN has "the requisite knowledge, expertise, and experience" to make such first instance decisions. Instead, the Panel appears to have acquiesced to ICANN's unsupported assertion on its "knowledge, expertise, and experience[.]" Indeed, the very words that the Panel used to describe ICANN's supposedly privileged position—"the requisite knowledge, expertise, and experience"—are *lifted verbatim* from ICANN's own pleadings.[191] However, the paragraph from which the Panel lifted ICANN's

[191] ICANN's Rejoinder Memorial, ¶ 82.

language is purely argumentative, identifying no documentary or testimonial evidence whatsoever to support the assertions made about ICANN's supposedly unique qualities.

109. The Panel parroted this assertion from ICANN even while recognizing that ICANN has done everything in its power to avoid demonstrating any such knowledge, expertise, or experience:

a) As the Panel held, "[t]he evidence in the present case shows that the Respondent, to this day, while acknowledging that the questions raised as to the propriety of NDC's and Verisign's conduct are legitimate, serious, and deserving of its careful attention, has nevertheless failed to address them."[192]

b) The Panel sharply criticized ICANN's persistent refusal "to take ownership" of NDC's compliance with the New gTLD Program Rules[193] and specifically took issue with ICANN's "submission in this IRP that the dispute arising out of NDC's arrangement with Verisign is in reality a dispute between the Claimant and the *Amici*."[194]

c) The Panel further criticized the fact that, in the IRP, "the Respondent … declines to take a position as to the propriety of the DAA under the Guidebook and Auction Rules in this IRP."[195]

d) The Panel stated that it could not "accept the Respondent's contention that there was nothing for the Respondent to consider, decide or pronounce upon in the absence of a formal accountability mechanism having been commenced by the Claimant. The fact of the matter is that the Respondent *represented* that it would consider the matter, and made the representation at a time when Ms. Willett confirmed the Claimant had no pending accountability mechanism."[196]

e) The Panel appropriately expressed bewilderment as to why ICANN had not considered, decided, or pronounced upon Afilias' complaints: "[S]ince the Respondent is responsible for the implementation of the New gTLD Program in accordance with the New gTLD Program Rules, it would seem to the Panel that the Respondent itself had an interest in ensuring that these questions, once raised, were addressed and resolved. That would be required not only to preserve and promote the integrity of the New gTLD Program, but also to

[192] Decision, ¶ 297.

[193] *See, e.g.*, Decision, ¶ 338.

[194] Decision, ¶ 338.

[195] Decision, ¶ 345.

[196] Decision, ¶ 319.

disseminate the Respondent's position on those questions within the Internet community and allow market participants to act accordingly."[197]

f) In commenting on ICANN's assertion that it "has been caught in the middle of this dispute between powerful and well-funded businesses[,]" the Panel stated that "in the Panel's view, it is not open to the Respondent to add, as it does in the same sentence of its Response, '[and ICANN] has not taken sides', as if the Respondent had no responsibility in bringing about a resolution of the dispute by itself taking a position as to the propriety of NDC's arrangements with Verisign."[198]

Simply put, the Panel found that ICANN has not acted in manner even remotely consistent with its supposedly unique knowledge, expertise, or experience.

110. Nor can ICANN be said to have unique knowledge, expertise, or experience simply because ICANN's constitutive documents distinctively empower it to make certain decisions. As an initial matter, ICANN's power to make those decisions does not itself entail that it has adequate, let alone unique, "knowledge, expertise, and experience" to make those decisions. But more importantly, ICANN's constitutive documents equally empower, and indeed require, the Panel to make decisions—including as to whether ICANN violated its Bylaws for failure to disqualify NDC and reject its application.[199] Indeed, the IRP Panel is tasked by ICANN's Bylaws to provide "***expert review of Covered Actions***"[200] and is empowered to seek "independent skilled technical experts at the expense of ICANN" upon request.[201] If the Panel considered it did not have the necessary "knowledge, expertise and experience" to undertake the review that Afilias squarely put before it, then the Panel should have exercised its authority to be assisted by "independent skilled

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197 Decision, ¶ 319.

198 Decision, ¶ 340 (citing and quoting ICANN's Response to Amended IRP Request, ¶4).

199 *See, e.g.*, Bylaws, **[Ex. C-1]**, Sec. 4.3(i)(i).

200 Bylaws, **[Ex. C-1]**, Sec. 4.3(a)(ii) (emphasis added).

201 Bylaws, **[Ex. C-1]**, Sec. 4.3(k)(iv).

technical experts" rather than simply send the central Covered Action in this IRP back to ICANN for pronouncement.

111. In light of the above, Afilias requests the Panel to provide an interpretation that clarifies the basis on which it determined that ICANN has the "knowledge, expertise, and experience" that uniquely qualifies it, as opposed to the Panel, to "pronounce" on Afilias' complaints regarding ICANN's obligations with respect to NDC's violations of the New gTLD Program Rules.

E. Did the Panel Apply a Heightened Burden of Proof to Any of Claimant's Claims?

112. In its Decision, the Panel states that it applied a heightened standard of proof to some of the issues before it, in light of allegations of dishonesty or fraud:

> As regards the standard (or degree) of proof to which a party will be held in determining whether it has successfully carried its burden, it is generally accepted in practice in international arbitration that it is normally that of the balance of probabilities, that is, 'more likely than not'. That said, it is also generally accepted that allegations of dishonesty or fraud will attract very close scrutiny of the evidence in order to ensure that the standard is met. To quote from a leading textbook, '[t]he more startling the proposition that a party seeks to prove, the more rigorous the arbitral tribunal will be in requiring that proposition to be fully established'.
>
> These principles were applied by the Panel in considering the issues in dispute in Phase II of this IRP.[202]

113. However, the Panel did not identify at any point in the Decision the issues to which it applied these principles, and so the standard of proof applicable to the issues ultimately resolved in the *Dispositif* is left indeterminate.[203] Nevertheless, the standard of proof applied to the various

[202] Decision, ¶¶ 32 (quoting Nigel Blackaby *et al.*, *Redfern and Hunter on International Arbitration* (6th ed., 2015), ¶ 6.87), 33.

[203] Decision, ¶ 410(1)-(3), (7).

issues may make a crucial difference to how other decision-makers, including ICANN's Board and future IRP panels understand the Panel's decisions. The Panel must provide explicit guidance on the standard of review in order to fulfill the IRP's purpose of "creating precedent to guide and inform the Board, Officers …, Staff members, Supporting Organizations, Advisory Committees, and the global Internet community in connection with policy development and implementation."[204]

114. In light of the above, Afilias requests that the Panel provide an interpretation that clarifies the issues to which a heighted standard of proof was applied. Afilias further requests an interpretation that clarifies whether the application of a heightened standard of proof affected the Panel's resolution of those issues. In particular, but not exclusively, Afilias requests that the Panel provide this interpretation regarding the following issues:

a) Whether Rule 4 of the Interim Supplementary Procedures was enacted in order to time bar Afilias' claims (Paragraphs 279 through to 281 in connection with paragraphs 1 through 3 of the *Dispositif*)?

b) Whether the pre-auction investigation, including ICANN's communications with Mr. Rasco, violated the Articles and Bylaws (Paragraphs 294 through to 295 in connection with paragraph 7 of the *Dispositif*)?

c) Whether the preparation and issuance of the Questionnaire absent disclosure of the DAA violated the Articles and Bylaws (Paragraphs 307 through to 312 in connection with paragraph 7 of the *Dispositif*)?

d) Whether the failure to disclose the "decision" from the 3 November 2016 Board workshop violated the Articles and Bylaws (Paragraphs 321 through to 329 in connection with paragraph 3 of the *Dispositif*)?

e) Whether the failure to "pronounce" on Afilias' complaints regarding NDC violated the Articles and the Bylaws (Paragraphs 330 through to 344 of the Decision in connection with paragraph 1 of the *Dispositif*)?

f) Whether proceeding toward delegation of .WEB to NDC without a "pronouncement" violated the Articles and Bylaws (Paragraphs 330 through to 344 in connection with paragraph 1 of the *Dispositif*)?

[204] Bylaws, **[Ex. C-1]**, Sec. 4.3(a)(vi).

g) Whether the disparate treatment of Afilias violated the Articles and Bylaws (paragraph 347 in connection with paragraph 7 of the *Dispositif*)?

h) Whether the failure to promote competition violated the Articles and Bylaws (paragraphs 348 through to 348 of the Decision in connection with paragraph 1 of the *Dispositif*)?

IV. CONCLUSION: THE PANEL DECISION UNDERMINES THE PURPOSES OF THE IRP

115. It is regrettable that the Panel failed to address all of the claims presented to it for decision and resolution, as plainly required by its mandate under the Bylaws, or to provide a sufficiently well-reasoned decision free of ambiguity, as also required by the Bylaws, and indeed good arbitral practice. The Panel's Decision is the first to be issued under the most current version of the Bylaws applicable to this IRP and the "enhanced" accountability[205] mechanism that those Bylaws put in place. What is therefore equally regrettable is that far from advancing the system of ICANN accountability with a well-reasoned decision that finally resolves the Dispute presented to it by Afilias, the Panel's Decision has seriously undermined the dispute resolution system upon which the global Internet community critically relies to hold ICANN accountable. Indeed, in some cases such as the present one, at the core of which is ICANN's enforcement of the New gTLD Program Rules, it is the only system through which ICANN says it can be held accountable.

116. The "Purposes of the IRP" are clearly articulated in the opening article of Section 4.3 of the Bylaws.[206] We set out below various provisions of Article 4.3(a) together with our main observations regarding how the Panel's Decision fails to advance the "Purposes of the IRP" ("[t]he IRP is intended to hear and resolve Disputes for the following purposes….").

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[205] CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), **[Ex. C-91]**, ¶ 3 (at p. 5); Afilias' PHB, ¶¶ 209, 211-13.

[206] The substantive importance of the "Purposes of the IRP" lies in the clear instruction set out in Article 4.3(a) that "[t]his Section 4.3 shall be ***construed, implemented, and administered*** in a manner consistent with these Purposes of the IRP." Bylaws, **[Ex. C-1]**, Sec. 4.3 (emphasis added).

117. **Article 4.3(a)(i) ("Ensure that ICANN does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws")**: As we have laid out in this application, the Panel failed to decide and resolve all of the claims submitted to it, provided insufficient reasoning in connection with those matters that it did decide, and reverted to the Respondent the central Covered Action underlying the Dispute—even while finding that ICANN's initial failure to "pronounce" on Afilias' complaints constituted a violation of the Articles and Bylaws. By so doing, the Panel abdicated its responsibility to "[e]nsure that ICANN does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws."

118. **Article 4.3(a)(ii) ("Empower the global Internet community and Claimants to enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable and accessible expert review of Covered Actions (as defined in Section 4.3(b)(i))")**: Rather than issuing a Decision that supports the objective of "empower[ing]" the global Internet community and Claimants like Afilias, by sending the issue of ICANN's proper enforcement of the New gTLD Program Rules back to ICANN, the Panel has essentially eviscerated the force and intended effects of the IRP. This is reflected most starkly in the Panel's "firm view" that it is ICANN that has greater expertise, knowledge and experience to address the application of the New gTLD Program Rules compared to an IRP Panel, even though such panels are established precisely to undertake an "expert review of Covered Actions." The Panel's opinion that it is not as or better positioned than ICANN to interpret, apply and enforce ICANN's obligations arising from its policies and rules emasculates rather than empowers the global Internet community and Claimants to enforce ICANN's compliance with the Articles and Bylaws.

119. **Article 4.3(a)(iii) ("Ensure that ICANN is accountable to the global Internet community and Claimants")**: For the reasons already provided above, the Panel's Decision does nothing to "[e]nsure that ICANN is accountable to the global Internet community and Claimants." Far from advancing this purpose of the IRP, the Panel's Decision has set the precedent that where ICANN is charged with wrongdoing, it will be given the latitude and deference by an IRP panel to correct its actions and omissions constituting violations of the Bylaws, and it is that opportunity to correct that will be the subject of an IRP Panel's review. This is not accountability. It is a free pass.

120. **Article 4.3(a)(vi) ("Reduce Disputes by creating precedent to guide and inform the Board, Officers (as defined in Section 15.1), Staff members, Supporting Organizations, Advisory Committees, and the global Internet community in connection with policy development and implementation")**: There is no indication that the Panel followed any earlier IRP precedents and, to the extent that the Panel's Decision will stand as precedent, it is one that provides scant guidance in terms of reasoning or outcome. Moreover, far from reducing Disputes, the Panel itself has suggested that it should be for a future IRP panel to decide the very claims associated with the very Covered Action that was put it for decision; notwithstanding the three years and millions of dollars that were involved in this IRP.

121. **Article 4.3(a)(vii) ("Secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes")**: An outcome is "just" if it is fair. The outcome of this IRP can hardly be described as just or fair, whether to Afilias or ICANN. Insofar as Claimant is concerned, the outcome of this IRP can hardly be considered fair—the Panel failed to decide all of its claims, and even though the Panel found that ICANN breached its Articles and Bylaws, this finding was made in respect of a Covered Action that Afilias did not actually present to the Panel

for decision as a claim. Further, while making specific findings supporting a declaration that ICANN treated Afilias disparately—but then refusing to make a declaration in this regard—and while being fully aware of the positions that ICANN has taken in this IRP on the merits of Afilias' claims, the Panel has placed Afilias' fate in ICANN's hands; it is requiring Afilias to re-enter the lion's den, but without the benefit of a clear, definitive and comprehensive ruling from the Panel on the core issues on which Afilias asked for a decision. With respect to ICANN, the Panel has put the Board in an untenable position by failing to provide it with any guidance as to the considerations that should guide its "pronouncement" on Afilias' claims; indeed, the Board is likely to also be left wondering what the Panel intended by requiring it to "pronounce" on the issue of NDC's compliance with the New gTLD Program Rules and the consequences of Verisign's attempt to circumvent them. Whatever the Board ultimately does, will result in yet another IRP over the fate of .WEB, further delays in its delegation, and millions more in legal and other fees. This is hardly fair to ICANN org or to the global Internet community—or to Afilias.

122. **Article 4.3(a)(viii) ("Lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction")**: To put it plainly, there is nothing in the Decision's *Dispositif* that reflects a "final resolution" of the "Dispute concerning Covered Actions" that Afilias presented to the Panel. Nor is there in any outcome by way of relief associated with the liability findings that the Panel did make that Afilias could enforce in a court with proper jurisdiction.

123. **Article 4.3(a)(ix) ("Provide a mechanism for the resolution of Disputes, as an alternative to legal action in the civil courts of the United States or other jurisdictions")**: The Purposes of the IRP could not be clearer that the system was set up to ensure the "resolution of Disputes." That is, to resolve the claims associated with the Covered Actions presented to an IRP

panel by a Claimant. The IRP is a binding "alternative dispute resolution" system to litigation before the courts, and must be implemented as such. This, the Panel in this IRP did not do. No court or arbitral tribunal, properly exercising its jurisdiction, would revert the core claims presented to it for resolution back to the very party whose conduct gave rise to the claims in the first place to re-decide the matter or provide justifications for its conduct. As the Panel is aware, pursuant to the Bylaws, the Panel's mandate required it to conduct a "de novo" and not a deferential review of ICANN's conduct, just as would be the case before a court or arbitral tribunal. The Panel has fallen short in conducting such a review.

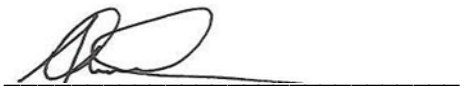
V. RELIEF REQUESTED

124. In light of the foregoing submissions, Afilias requests the Panel to issue an Amended Final Decision:

(1) Finally deciding and resolving in a well-reasoned manner Afilias' Rules Breach Claim, International Law Claim and Disparate Treatment Claim; and

(2) Providing the interpretations as set out in Section III of this application.

Respectfully submitted,



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R-12

RESPONDENT'S EXHIBIT

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

ICDR Case No. 01-18-0004-2702

AFILIAS DOMAINS NO. 3 LIMITED,
(n/k/a ALTANOVO DOMAINS LTD.)
Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,
Respondent

DECISION ON AFILIAS' ARTICLE 33 APPLICATION

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21 December 2021

Members of the IRP Panel

Catherine Kessedjian
Richard Chernick
Pierre Bienvenu Ad. E., Chair

Administrative Secretary to the IRP Panel

Virginie Blanchette-Séguin

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I. OVERVIEW

1. In this decision the Panel rules on an application by the Claimant presented under Article 33 of the International Arbitration Rules of the ICDR (amended and effective 1 June 2014) (**ICDR Rules**) entitled "Afilias Domains No. 3 Limited's Rule 33 Application for an Additional Decision and for Interpretation", dated 21 June 2021 (**Application**). The Application states that it requests an additional decision and interpretation of the Panel's Final Decision in this IRP (**Final Decision**).[1]

2. For the reasons set out below, the Panel unanimously denies the Application in its entirety.

II. HISTORY OF PROCEEDINGS

3. The history of the proceedings in this IRP up to 12 February 2020, the date of the Decision on Phase I, is set out at paragraphs 33 to 67 of that decision. The history of the proceedings between 12 February 2020 and 20 May 2021, the date of the Final Decision, is set out at paragraphs 35 to 81 of the Final Decision. Both narratives are incorporated by reference in this decision.

4. In its Final Decision, the Panel found, among others, that the Respondent had acted contrary to its Articles and Bylaws in the manner in which it had dealt with the Claimant's complaints that NDC had breached the Guidebook and Auction Rules through its arrangements with Verisign in connection with NDC's application for .WEB.[2] However, the Panel denied the Claimant's request that the Respondent be ordered to disqualify NDC's bid for .WEB and proceed with contracting the Registry Agreement for .WEB with the Claimant, in exchange for a price to be specified by the Panel and paid by the Claimant.[3]

5. On 21 June 2021, the Parties filed a Joint Request for Corrections to the Panel's Final Decision pursuant to Article 33 of the ICDR Rules, seeking the correction of certain clerical or typographical errors and of the numbering of certain paragraphs in the Final Decision. On 15 July 2021, the Panel issued a Decision on the Parties' Joint Request for Corrections confirming that the requested corrections all related to errors that were clerical or typographical in nature and, as such, fell within the scope of Article 33. The Panel granted the Parties' Joint Request for Corrections, held that the Final Decision should be corrected as jointly requested by the Parties, and attached for the Parties' convenience a corrected version dated 15 July 2021 of the Final Decision.

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[1] Unless otherwise indicated, all capitalized terms in the present decision have the meaning ascribed to these defined terms in the Final Decision dated 20 May 2021. All references to, and citations from, the Final Decision in the present decision are to the corrected version of the Final Decision dated 15 July 2021.

[2] Final Decision, para. 8.

[3] *Ibid*, para. 9.

6. As already indicated, Afilias' own Application under Article 33 was also filed on 21 June 2021. Following receipt of the Application, the Panel, by email dated 23 June 2021, invited the Parties to consult and submit either a joint proposal for a briefing schedule on Afilias' Application or the Parties' respective positions as to the procedure to be followed in respect of this Application. The Panel also asked that the Parties reach out to the *Amici* to ascertain their positions in respect of the Application.

7. On 28 June 2021, the Parties proposed the following briefing schedule for the Application:

6 August 2021	ICANN Response to Claimant's Rule 33 Application (If permitted to participate in these additional proceedings, the *Amici* would file a joint submission on this date.)
20 September 2021	Afilias Rejoinder to ICANN Response (if *Amici* are not permitted to participate)
30 September 2021	Afilias Rejoinder to ICANN Response and Response to *Amici* Observations (if *Amici* are permitted to participate)

8. In the same communication Afilias noted that it objected to the *Amici*'s announced intention to participate in this new phase of the IRP, while ICANN indicated that it had no objection to their participation. The Parties added that they proposed to leave it to the Panel to decide whether there should be a hearing on Afilias' Application.

9. On 28 June 2021, the *Amici* requested an opportunity to make submissions in response to Afilias' Application and suggested the adoption of a more expedited briefing schedule than that proposed by the Parties. On 1 July 2021, Afilias objected to the *Amici*'s request to make submissions on its Article 33 Application as well as to their suggestion regarding the briefing schedule.

10. On 3 July 2021, the Panel granted the *Amici*'s request to make submissions on Afilias' Article 33 Application. The Panel reasoned that the *Amici* having participated in Phase II of the IRP to the full extent permitted by the Panel's Decision on Phase I, it was both appropriate and just that they be given an opportunity to make representations on Afilias' Article 33 Application, which directly relates to the Final Decision.

11. In its communication of 3 July 2021, the Panel indicated that it was prepared to accept the briefing schedule proposed by the Parties even though it was longer than what might be expected for an application of that nature. The Panel's acceptance of that schedule came, however, with the caveat that by reason of pre-existing commitments on the part of its members, the Panel might not be in a position to issue its decision on Afilias' Article 33 Application within thirty (30) days after 30 September 2021, the date proposed for the filing of the last submission on the Application, as required under Article 33(2) of the ICDR Rules. The Panel added that while in its experience

it would be exceptional for a hearing to be held in connection with an application for interpretation, correction, and/or for an additional award, the matter would be left open pending consideration of the written submissions to be made by the Parties and *Amici* in connection with the Application.

12. On 3 July 2021, the Respondent confirmed its waiver of the 30-day requirement provided by Article 33(2) with respect to the Panel's determination of Afilias' Article 33 Application. The Claimant and the *Amici* did the same on 5 July 2021.

13. In the event, the Parties and the *Amici* filed their respective submissions in accordance with the agreed Briefing Schedule. These submissions are summarized in the next section of this decision.

14. On 5 October 2021, having considered the comprehensive submissions contained in the Application, the Respondent's Response thereto, the *Amici*'s Submission, and the Claimant's Reply to the Application, the Panel advised the Parties and the *Amici* that it did not see a need to hold a hearing in relation to the Application.

15. As noted in the Final Decision,[4] in late 2020 the Claimant's former parent company, Afilias, Inc., merged with Donuts, Inc. The Claimant explains in the Application that it and its .WEB application were carved out of the merger transaction and that the Claimant is now known as Altanovo Domains Ltd. While the Claimant is now part of a group of companies that is separate from Afilias, Inc. and Donuts, Inc., the Claimant has chosen "for the sake of consistency and ease of reference"[5] to continue to refer to itself as "Afilias" throughout the Application. Having noted the Claimant's change of corporate name and affiliation, the Panel adopts the same approach and refers to the Claimant as "Afilias" throughout this decision.

III. POSITIONS OF THE PARTIES AND RELIEF REQUESTED

16. The Application and the submissions filed in relation thereto are voluminous, running in total to more than 250 pages. While summaries of these submissions are included below to provide context, the Panel notes that in coming to its decision on the Application it has carefully considered all of the Parties' and *Amici*'s arguments and submissions, as well as the authorities submitted in support thereof.

[4] Final Decision, paras. 11 and 247-252.

[5] Application, para. 1, fn. 1.

A. Afilias' Article 33 Application

1. Overview

17. In its Application, Afilias requests both an additional decision[6] and an interpretation of the Final Decision.[7] In Afilias' submission, by failing to resolve all the "claims and issues" presented by Afilias, the Panel "failed to satisfy its mandate" and "undermined the very purposes of the IRP", especially by its decision to refer Afilias' claim arising from NDC's alleged violation of the New gTLD Program Rules back to ICANN's Board and Staff to "pronounce" upon "in the first instance".[8]

2. Request for an Additional Decision

18. Afilias argues that the purpose of an additional award is to ensure that an arbitral tribunal fulfills its mandate and avoids rendering an award that is *infra petita*, that is, that fails to resolve all claims presented to the tribunal as required by the arbitration agreement. In Afilias' view, such an award is subject to set aside, including under the English Arbitration Act (**EAA**), is unjust to the party that has presented the claim and constitutes a waste of the parties' time and resources.[9]

19. Afilias contends that any omission to decide a properly submitted claim is grounds for an additional award, and that the Panel must resolve all of the claims and issues before it in a manner consistent with its mandate as set out in Section 4.3(g) of the Bylaws.[10] That section provides that the "IRP Panel shall be charged with hearing and resolving the Dispute, considering the Claim and ICANN's written response". Afilias argues that the term "Claim" (with a capital "C") refers to a claimant's "written statement of a Dispute" which describes the Covered Actions that the claimant considers has given rise to a Dispute. In turn, the Bylaws define "Covered Actions" as "any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members, that give rise to a Dispute."[11] Afilias adds that each "IRP Panel shall conduct an objective, *de novo* examination of the Dispute",[12] that the "IRP is intended as a final, binding arbitration

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[6] The Panel agrees with the Claimant that the term "decision" can, in the context of this IRP, be used interchangeably with the term "award", which is used in the ICDR Rules. See Application, para. 1, fn. 2.

[7] Application, para. 1.

[8] *Ibid*, para. 2.

[9] *Ibid*, paras. 5-7.

[10] *Ibid*, paras. 8-11.

[11] *Ibid*, para. 11, quoting from Sections 4.3(d), 4(3)(b)(iii)(A) and 4.3(b)(ii) of the Bylaws, Ex. C-1 [emphasis omitted].

[12] Application, para. 12, quoting from Section 4.3(i) of the Bylaws, Ex. C-1.

process",[13] and that IRP decisions "are intended to be enforceable in any court with jurisdiction over ICANN".[14]

20. According to Afilias, the Panel failed to fulfill its mandate with respect to three (3) claims that were put to it for resolution.[15]

21. First, Afilias argues that the Panel did not resolve its claim regarding the following Covered Actions: that ICANN violated its Articles and Bylaws by (a) not rejecting NDC's application, and/or (b) not declaring NDC's bids at the ICANN auction invalid, and/or (c) not deeming NDC ineligible to enter into a registry agreement for .WEB because of its violations of the New gTLD Program Rules, and (d) not offering .WEB to Afilias as the next highest bidder. Afilias defines this claim as its **Rules Breach Claim**.[16] Afilias stresses that its claim was not that ICANN failed to decide or pronounce on the propriety of the DAA, and NDC's and Verisign's other conduct. Rather, the question raised by Afilias was whether ICANN's failure to disqualify NDC and to offer .WEB to Afilias was consistent with the Articles, Bylaws and New gTLD Program Rules, and that question was fully argued in this IRP.[17]

22. Afilias avers that ICANN supported the *Amici*'s request to participate in these proceedings for the specific purpose of responding substantively to Afilias' Rules Breach Claim.[18] According to Afilias, the Panel's findings of fact cannot be reconciled with its referral of the claim back to the Board for "pronouncement" "in the first instance".[19] In Afilias' view, the Panel failed to resolve the Rules Breach Claim as required by its mandate[20] and invented a prerequisite that the Board must "pronounce", "decide" or "determine" the matter in the first instance before a claimant can assert in an IRP that ICANN has breached its Articles and Bylaws by failing to act as required based on that violation.[21] This, argues the Claimant, eliminates ICANN's accountability.[22] Afilias adds that

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13 Application, para. 14, quoting from Section 4.3(x) of the Bylaws, Ex. C-1.

14 Application, para. 14, quoting from Section 4.3(x)(ii) of the Bylaws, Ex. C-1.

15 Application, para. 15.

16 *Ibid*, para. 16.

17 *Ibid*, paras. 21-27 and 35-36.

18 *Ibid*, paras. 28-31.

19 *Ibid*, paras. 17 and 52-58.

20 *Ibid*, paras. 37-43, 49-50 and 62.

21 *Ibid*, paras. 44-48, 51, 54 and 63.

22 *Ibid*, paras. 64-66.

the issue of remedy for the Rules Breach Claim had also been properly submitted and fully arbitrated before the Panel.[23]

23. Second, Afilias contends that the Panel failed to resolve its claim that ICANN violated its obligation to conduct its activities in accordance with relevant principles of international law. Afilias defines this as its **International Law Claim**, a claim it argues was properly presented to the Panel. Afilias avers that it elaborated as to what the four (4) following specific facets of the international law principle of good faith required of ICANN: (1) procedural fairness and due process, (2) impartiality and non-discriminatory treatment, (3) openness and transparency, and (4) respect for legitimate expectations. In Afilias' view, the Panel never denied that obligations under international law apply to ICANN, but did not address Afilias' International Law Claim or provide reasoning for its failure to do so.[24] According to Afilias, the Panel must now resolve in an additional decision the International Law Claim regarding ICANN's failure to disqualify NDC contrary to ICANN's international law obligations.[25]

24. Third, Afilias submits that the Panel did not resolve its claim that ICANN violated its Articles and Bylaws through its inequitable and disparate treatment of Afilias as compared to its treatment of NDC and Verisign. That is what Afilias defines in the Application as its **Disparate Treatment Claim**. It is argued that the Panel failed to determine that claim even though the Panel made findings of fact establishing its validity. Afilias therefore argues that the Panel must issue an additional decision resolving its Disparate Treatment Claim. Afilias characterizes as manifestly unfair the Panel's view, expressed in the Final Decision, that it was not "necessary, based on the allegations of disparate treatment, to add to its findings in relation to the Claimant's core claims". According to Afilias, it is not open to an IRP panel to determine that it is not "necessary" to decide a claim that was put to it, and then fail to resolve the claim on that basis.[26]

3. Requests for Interpretation

25. In addition to its request for an additional decision, Afilias asks the Panel to provide an interpretation of several allegedly "ambiguous and vague points of substance and reasoning contained in the Final Decision".[27] According to Afilias, the precise meaning and scope of certain aspects of the Final Decision are required for any future resolution of the Dispute, and indeed also for

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[23] Application, paras. 67-70.

[24] *Ibid*, paras. 18 and 71-84.

[25] *Ibid*, paras. 80-84.

[26] *Ibid*, paras. 19 and 85-89, quoting from para. 350 of the Final Decision.

[27] Application, paras. 90-114.

the pronouncement to be made by the Respondent's Board.[28] Afilias underscores that an IRP results in a precedent-setting decision which serves as the basis for the global Internet community to hold ICANN accountable. In that context, Afilias asks the Panel to provide interpretations of the Final Decision that are sufficient to remove all ambiguity and obscurity from the terms and phrasing employed as well as from the broader reasoning relied upon to reach its conclusions.[29]

26. The issues which, according to Afilias, require interpretation are the following:[30]

a) What is the scope and meaning of the terms "pronounce" and "pronouncement" as used by the Panel in stating that ICANN Staff did not "pronounce" on Afilias' complaints and in recommending that the Board should now "pronounce" on Afilias' complaints?[31]

b) Did the Panel determine that the Board must always "pronounce" on Staff action or inaction as a pre-condition for an IRP panel to decide a dispute based on Staff action or inaction? If so, what is the source for this pre-condition in the Bylaws? And, if not, then why has this pre-condition been inserted, given the Panel's observations that some sort of decision on Afilias' complaints was taken by Staff, which was at least implicitly approved by the Board through its inaction?[32]

c) What law (if any) did the Panel apply in this IRP – just California law or California and international law? If the latter, to which claims and issues did the Panel apply California law, and to which did it apply international law?[33]

d) On what legal or evidentiary basis did the Panel determine that ICANN has "the requisite knowledge, expertise, and experience, to pronounce" on Afilias' complaints compared to the Panel?[34]

e) What standard of proof did the Panel apply to each of Afilias' submissions in support of its claims?[35]

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[28] Application, para. 91.

[29] *Ibid*, paras. 90-94.

[30] *Ibid*, para. 94.

[31] *Ibid*, paras. 95-99.

[32] *Ibid*, paras. 100-103.

[33] *Ibid*, paras. 104-107.

[34] *Ibid*, paras. 108-111.

[35] *Ibid*, paras. 112-114.

27. It bears mentioning that some of the above-cited issues as to which Afilias requests interpretation are further distilled in series of additional questions that Afilias requests the Panel to address. For example, Afilias' request for interpretation of the terms pronounce and pronouncement (issue a) above) includes the request that the Panel address the following questions "regarding the nature of a 'pronouncement'":

> a) What constitutes a "pronouncement" and what is the foundation in ICANN's documents or applicable law for the "pronouncement" requirement, particularly in light of the Bylaws' definition that Covered Actions in respect of which claims may be brought include both Board and Staff action and inaction?
>
> b) What should have been the form and substance of ICANN's "pronouncement" on Afilias' complaints?
>
> c) On what sources did the Panel rely to fashion its "pronouncement" remedy?
>
> d) Before ICANN issues the "pronouncement" recommended by the Panel, must Afilias and other Internet community members be given an opportunity to be heard by the Board?
>
> e) Must the Respondent's "pronouncement" be issued following an opportunity for Afilias and other Internet community members to receive and comment on all relevant evidence and argument?
>
> f) What materials, documentary or otherwise, must ICANN consider before it issues the "pronouncement" recommended by the Panel?
>
> g) Must the "pronouncement" be issued in a written form and made public on ICANN's website?
>
> h) Must the "pronouncement" be issued with full and adequate supporting reasoning following Board deliberation?
>
> i) Must the "pronouncement" be issued with findings of fact and conclusions of law?
>
> j) Must the "pronouncement" be issued without the participation of Board members with conflicts of interest?

28. By way of further example, the last of the issues as to which Afilias seeks interpretation of the Final Decision, relating to the standard of proof applied by the Panel (issue e) in paragraph 26 above), includes the request that:

> … the Panel provide this interpretation regarding the following issues:
>
> a) Whether Rule 4 of the Interim Supplementary Procedures was enacted in order to time bar Afilias' claims (Paragraphs 279 through to 281 in connection with paragraphs 1 through 3 of the *Dispositif*)?
>
> b) Whether the pre-auction investigation, including ICANN's communications with Mr. Rasco, violated the Articles and Bylaws (Paragraphs 294 through to 295 in connection with paragraph 7 of the *Dispositif*)?
>
> c) Whether the preparation and issuance of the Questionnaire absent disclosure of the DAA violated the Articles and Bylaws (Paragraphs 307 through to 312 in connection with paragraph 7 of the *Dispositif*)?
>
> d) Whether the failure to disclose the "decision" from the 3 November 2016 Board workshop violated the Articles and Bylaws (Paragraphs 321 through to 329 in connection with paragraph 3 of the *Dispositif*)?
>
> e) Whether the failure to "pronounce" on Afilias' complaints regarding NDC violated the Articles and the Bylaws (Paragraphs 330 through to 344 of the Decision in connection with paragraph 1 of the *Dispositif*)?

> f) Whether proceeding toward delegation of .WEB to NDC without a "pronouncement" violated the Articles and Bylaws (Paragraphs 330 through to 344 in connection with paragraph 1 of the *Dispositif*)?
>
> g) Whether the disparate treatment of Afilias violated the Articles and Bylaws (paragraph 347 in connection with paragraph 7 of the *Dispositif*)?
>
> h) Whether the failure to promote competition violated the Articles and Bylaws (paragraphs 348 through to 348 of the Decision in connection with paragraph 1 of the *Dispositif*)?[36]

29. Afilias concludes the Application by deploring that the Panel, in its view, failed to address all of the claims presented to it for decision and resolution and to provide a sufficiently well-reasoned decision free of ambiguity as required by the Bylaws and good arbitral practice. The Final Decision, Afilias complains, has seriously undermined the dispute resolution system upon which the global Internet community relies to hold ICANN accountable, and put the Board in an untenable position by failing to provide it with any guidance as to the considerations that should inform its "pronouncement".[37]

4. Request for Relief

30. By way of relief, Afilias requests the Panel to issue:

> … an Amended Final Decision:
>
> (1) Finally deciding and resolving in a well-reasoned manner Afilias' Rules Breach Claim, International Law Claim and Disparate Treatment Claim; and
>
> (2) Providing the interpretations as set out in [the section requesting interpretation of the Application].[38]

B. Respondent's Response to Afilias' Article 33 Application

1. Overview

31. In its Response to the Application (**Response**), ICANN submits that the Application is an abuse of Article 33 of the ICDR Rules. In spite of its title, which the Respondent characterizes as misleading, the Respondent contends that the Application does not seek an additional decision on any claim purportedly omitted from the Final Decision or an interpretation of any purported ambiguity in the Final Decision. According to the Respondent, the Application in reality seeks that the Panel reconsider and reverse its determination that ICANN, rather than the Panel, is charged with interpreting and applying the New gTLD Program Rules and resolving disputes among

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[36] Application, para. 114.

[37] *Ibid*, paras. 115-123.

[38] *Ibid*, para. 124.

applicants. Requests for reconsideration, the Respondent contends, are not permitted by Article 33 of the ICDR Rules, nor by the EAA.[39]

32. The Respondent argues that Article 33 provides for a limited exception to the *functus officio* doctrine and does not allow a party to seek reconsideration of the substance of a final award, nor offers a tribune for a Panel to issue an amended award that conflicts with and supersedes a final award.[40] The *infra petita* doctrine, it is argued, does not apply to an application to the tribunal for an additional award, but rather to a challenge to the final award in court on the basis that the tribunal has failed to consider and decide all claims properly submitted to it.[41] As for Afilias' requests for interpretation, the Respondent avers that they are based on a series of willful misreadings and distortions of the Final Decision.

2. Request for an Additional Decision

33. ICANN submits that the Panel resolved Afilias' Rules Breach Claim. According to ICANN, Afilias wrongly suggests that ICANN never argued that the Panel should not act as the decision-maker of first instance for the Rules Breach Claim. On the contrary, the Respondent submits, its principal defense to Afilias' Rules Breach Claim was that ICANN, not an IRP Panel, was the appropriate decision-maker.[42]

34. ICANN underscores that the Guidebook and Auction Rules give it discretion with regard to the interpretation and application of the New gTLD Program Rules.[43] ICANN submits that the Panel unequivocally denied Afilias' request for a declaration that the Bylaws and Articles require that ICANN find NDC in breach of the New gTLD Program Rules, disqualify NDC and proceed to enter a Registry Agreement for .WEB with Afilias.[44] In ICANN's view, Afilias now seeks a different decision and is re-arguing its case.[45]

35. ICANN contends that the Panel did not act *extra petita* in determining that it is for ICANN to pronounce in the first instance on the Rules Breach Claim, and that that determination cannot be revisited through an Article 33 application. In this regard, the Respondent avers that Afilias mischaracterizes the Panel's decision in order to attack it. By rejecting Afilias' request for a

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[39] Response, paras. 1-2.

[40] *Ibid*, paras. 1 and 8-11.

[41] *Ibid*, paras. 12-14.

[42] *Ibid*, para. 19.

[43] *Ibid*, paras. 18-22.

[44] *Ibid*, para. 23.

[45] *Ibid*, paras. 24-26.

declaration that ICANN violated its Bylaws and Articles by not finding NDC in breach of the New gTLD Program Rules, and by not disqualifying NDC's application for .WEB, the Panel was acting within its authority under Article 4.3(o)(iii) of the Bylaws, as the authority to grant declaratory relief necessarily entails the authority to deny it.[46]

36. With respect to the International Law Claim, ICANN avers that Afilias did not assert any discrete "international law claim", but rather sought an undifferentiated declaration "that ICANN has acted inconsistently with its Articles and Bylaws, breached the binding commitments contained in the [Guidebook], and violated international law."[47] ICANN argues that the Panel resolved this issue in two ways: (1) it found that ICANN violated its Bylaws by never determining whether NDC violated the New gTLD Program Rules, and (2) it rejected Afilias' claim that ICANN was subject to a competition mandate that compelled it to reject NDC's application.[48] According to ICANN, the Panel would not have had jurisdiction to adjudicate a freestanding international law claim had one in fact been presented by the Claimant.[49]

37. ICANN further argues that while Afilias made various arguments based on international law, those added little to the plain terms of the Bylaws.[50] In ICANN's words, the International Law Claim "is just a repackaging of Afilias' Rules Breach Claim" and Afilias' "gripe" is that the Panel did not refer to international law in determining whether ICANN violated the Articles and Bylaws. ICANN opines that that complaint is misguided because the Panel did refer to international law and, even if the Panel had omitted any reference to international law, that would not be ground for an additional decision.[51] ICANN states that the Panel granted Afilias' claim regarding the violation by ICANN of its Articles and Bylaws by failing to enforce the New gTLD Program Rules and proceeding to delegate .WEB to NDC, so that claim did not demand a more in-depth examination of international law.[52] ICANN also contends that an additional decision addressing Afilias' international law argument is unnecessary and beyond the scope of the Panel's authority, since there is no "claim" that has not been dealt with.[53]

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46 Response, paras. 27-36.

47 *Ibid*, paras. 37-38, quoting from Afilias' Amended Request for IRP, para. 89(1).

48 Response, para. 39.

49 *Ibid*, paras. 40-41.

50 *Ibid*, paras. 42-44.

51 *Ibid*, paras. 45-48.

52 *Ibid*, para. 49.

53 *Ibid*, paras. 50-51.

38. ICANN likewise argues that the Claimant's Amended Request for IRP, Reply Memorial, and List of Phase II Issues do not state a "Disparate Treatment Claim", and only refer to disparate treatment in support of the Rules Breach Claim or competition claim.[54] ICANN argues that Afilias substantially expanded its "disparate treatment" arguments in its Post-Hearing Brief and its accompanying Revised Issues List, but (assuming those could be considered claims) that Afilias could not introduce new claims in its post-hearing submissions, after the evidentiary record had closed and when ICANN had no opportunity to respond.[55]

39. In ICANN's submission, the Panel correctly found that the substance of Afilias' allegations of disparate treatment were considered in the analysis of Afilias' core claims. ICANN argues that Afilias cannot use its Article 33 Application to ask the Panel to reconsider its deliberate decision not to make additional findings with respect to the Claimant's allegations of disparate treatment.[56]

3. Requests for Interpretation

40. ICANN notes at the outset that requests for interpretation should be granted only where an award is ambiguous in such a way that the parties may legitimately disagree as to their obligations under it.[57] ICANN argues that Afilias' requests for interpretation are based on improperly isolating particular words and phrases to create the appearance of ambiguity where none exists.[58] Moreover, it is contended that nearly all of the matters on which Afilias seeks further interpretation do not go to the dispositive part of the Final Decision and are therefore not appropriate subjects for interpretation under Article 33.[59]

41. ICANN argues that there is no ambiguity in the Panel's use of the term "pronounce", which is used interchangeably in the Final Decision with "decide", "determine" or "resolve".[60] In its view, Afilias is misusing Article 33 to seek a further decision on a series of issues that have never been briefed by the Parties or put to the Panel, notably on the procedure the Board should follow in its consideration and resolution of Afilias' complaints against NDC. ICANN avers that the Panel has no jurisdiction to provide advice on such issues.[61]

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[54] Response, paras. 52-53.

[55] *Ibid*, para. 54.

[56] *Ibid*, paras. 55-56.

[57] *Ibid*, paras. 57-60.

[58] *Ibid*, para. 61.

[59] *Ibid*, paras. 62-63.

[60] *Ibid*, paras. 64-66.

[61] *Ibid*, paras. 67-68.

42. According to ICANN, Afilias wrongly asserts that the Final Decision holds that, for all future IRP challenges, the action or inaction at issue must first be submitted to the Board for pronouncement before an IRP may be pursued.[62] On the contrary, ICANN gives several examples of findings by the Panel, in Afilias' favor, in respect of actions and inactions on which the Board never pronounced.[63] In ICANN's submission, what Afilias is arguing is that the Panel reached the wrong conclusion or that its reasoning or analysis is insufficient, and that type of challenge is meritless in the context of an Article 33 application.[64]

43. Turning to the request for interpretation concerning the law applied by the Panel, ICANN argues that the Panel addressed the governing law at Section I.H of the Final Decision, when stating that the "rules applicable to the present IRP are, in the main, those set out in the Bylaws and the Interim Procedures," including the section of the Bylaws requiring ICANN "to carr[y] out its activities in accordance with relevant principles of international law and international conventions and applicable local law". According to ICANN, Afilias wrongly asserts that the Panel determined that California law is the primary governing law for ICANN, whereas the Panel stated only that the Interim Supplementary Procedures, Articles and Bylaws are to be interpreted in accordance with California law in case of ambiguity.[65] With respect to Afilias' contention that the Panel failed to consider its submissions inviting application of international law, ICANN notes that the Panel repeatedly stated in the Final Decision that ICANN must carry "out its activities in conformity with relevant principles of international law and international conventions."[66]

44. ICANN argues that the Panel should reject the request that it set out in detail the basis on which it determined that ICANN has the knowledge, expertise, and experience to act as first-instance decision-maker for disputes among applicants under the New gTLD Program Rules, as this is not a proper subject for an additional award under Article 33 of the ICDR Rules.[67] In Respondent's submission, a request for interpretation cannot be used to seek revision, reformulation, or additional explanation for a given decision. In addition, ICANN contends that this determination by the Panel is correct and self-evident considering that ICANN created the New gTLD Program Rules and has ultimate responsibility for the program and for resolving disputes thereunder.[68]

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62 Response, para. 69.

63 *Ibid*, para. 70.

64 *Ibid*, paras. 71-73.

65 *Ibid*, paras. 74-77.

66 *Ibid*, paras. 78-79, referring to the Final Decision at paras. 28, 290 and 292.

67 Response, paras. 80-81.

68 *Ibid*, para. 82.

45. ICANN argues finally that the Panel set out the standard of proof in the Final Decision, namely the balance of probabilities, and applied that standard in the normal manner under which more startling propositions such as allegations of fraud require more cogent evidence.[69]

4. Costs

46. ICANN claims that it is entitled to recover its costs and legal fees in responding to Afilias' Article 33 Application. ICANN contends that Afilias' application is abusive because it is unquestionably an improper use of Article 33, seeking as it does reconsideration of core elements of the Final Decision, and requesting that the Panel issue additional declarations and advisory opinions on a series of questions that were never put to the Panel during the course of the IRP.[70]

47. ICANN also submits that the Application is frivolous since it has no sound basis and is based on a series of indefensible and willful misreadings of the Final Decision.[71]

5. Request for Relief

48. ICANN submits that Afilias' Article 33 Application should be denied in its entirety and that it as Respondent should be awarded its costs and legal fees incurred as a result of Afilias' Application, in the amount of US $ 236,884.39, plus the Panel's fees to resolve the Application.[72]

C. *Amici*'s Submission on Afilias' Article 33 Application

1. Overview

49. The *Amici* aver that the Final Decision comprehensively addressed and resolved all of the claims and material issues raised by Afilias, consistent with both the evidence presented at the hearing and the limits on the Panel's jurisdiction and remedial authority under the Bylaws. Nonetheless, the *Amici* argue, "Afilias is back again, seeking the same relief based on the same arguments."[73] The *Amici* state that while Afilias styled its demand as an application pursuant to Article 33, in reality Afilias seeks reconsideration of the Final Decision – a reconsideration that is improper and unauthorized by Article 33 or any other rule. In the *Amici*'s submission, there can be no doubt that

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[69] Response, paras. 83-87.

[70] *Ibid*, paras. 88-91.

[71] *Ibid*, para. 92.

[72] *Ibid*, paras. 93-94 and its Appendix B.

[73] *Amici*'s Submission on Afilias' Article 33 Application (***Amici*'s Submission**), para. 4.

the Application seeks reversal of the Panel's decision rejecting what Afilias characterizes as its "core claims" in this IRP.

2. Request for an Additional Decision

50. The *Amici* submit that Afilias' request for an additional decision with respect to the three (3) purported claims identified in the Application are unjustified and should be rejected. The *Amici* stress that an arbitral tribunal has wide discretion to determine whether a request for an additional decision is "justified".[74]

51. According to the *Amici*, each of the "claims" asserted in the Application is in reality an argument rather than a claim, and is therefore not suitable for an additional decision pursuant to Article 33 of the ICDR Rules.[75] The *Amici* contend that, in each case, acceptance of Afilias' additional argument or ground would require a reversal of the Final Decision with respect to the considered claim. In the *Amici*'s submission, the only "claim" at issue in this IRP that the Panel was obligated to decide was whether ICANN breached its Articles and Bylaws. As for ICANN's impugned "actions or failures to act", these were not distinct claims but grounds or arguments on which that claim was based.[76]

52. The *Amici* argue alternatively that, even if Afilias' additional arguments or grounds were characterized as claims, the Panel sufficiently addressed each of them such that there still would be no basis for an additional decision.[77]

53. The *Amici* set out the applicable standard required to be met for a tribunal to issue an additional decision under Article 33. For starters, it is impressed that, exactly as the Panel did in this case, a tribunal can avoid any ambiguity concerning the fact that it has resolved all claims put to it by recording in the *Dispositif* that it rejects all other claims and submissions.[78] The *Amici* then contend that requests for an additional decision are intended to cover only obvious cases of omission; that a tribunal may decide claims impliedly; and that additional decisions are unavailable where an arbitral tribunal intentionally has chosen not to address a claim.[79] The *Amici* also aver that requests for an additional decision are not intended to be used by an aggrieved party to reargue a

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74 *Amici*'s Submission, paras. 21-23.

75 *Ibid*, paras. 24-25.

76 *Ibid*, paras. 26-29.

77 *Ibid*, paras. 30-32.

78 *Ibid*, para. 33.

79 *Ibid*, paras. 34-36.

particular point.[80] The *Amici* argue as well that Afilias attempts to confuse the issues by conflating the standard for an additional decision with the scope of the Panel's so-called "mandate".[81] Finally, the *Amici* say that Afilias is mistaken where it suggests that the Final Decision would be subject to set aside in the English courts on the ground that it is *infra petita*. On the contrary, it is argued that the standard to set aside an award as *infra petita* under the EAA is consistent with the high standard for an additional decision under Article 33 of the ICDR Rules and international arbitration practice.[82]

54. Applying those principles to the case at hand, the *Amici* argue that, even if the Rules Breach Claim were a "claim", it was sufficiently addressed in the Final Decision.[83] The *Amici* first note that the Panel having dismissed all of the Parties' other claims in the *Dispositif*, that necessarily encompassed the Rules Breach Claim. They go on to argue that the scope and detail of Afilias' argument itself demonstrate that the alleged omission of a decision on the Rules Breach Claim does not constitute and "obvious case of omission". The *Amici* also submit that the Panel impliedly rejected the Rules Breach Claim by denying the affirmative relief that Afilias had been seeking and by concluding instead that ICANN must pronounce in the first instance as to the propriety of NDC's alleged conduct.[84] In this regard, the *Amici* reject the Claimant's assertion that the Panel never reached the issue of the remedies requested by the Claimant.

55. In the submission of the *Amici,* the route by which the Panel approached the issues in the IRP rendered an express decision on the so-called Rules Breach Claim moot. That is so because the Panel found that it did not have the authority to decide what Afilias characterizes as the threshold issue of the Rules Breach Claim, namely, whether the DAA and NDC's other conduct violated the New gTLD Program Rules. Likewise, the Claimant's contention that the Respondent's "failure" to disqualify NDC or other purported inaction violated the Articles and Bylaws is a false premise in so far as the Panel determined that it was reasonable for the Board to defer consideration of the complaints that had been raised in relation to NDC's application and its auction bids.

56. The *Amici* also say that Afilias used its request concerning the Rules Breach Claim to dispute the soundness of the Panel's reasoning and findings, and to reargue its case in the underlying IRP.[85] The *Amici* argue that Afilias' complaints about the Panel's reasoning are unfounded and that there

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[80] *Amici*'s Submission, para. 37.

[81] *Ibid*, paras. 38-39.

[82] *Ibid*, paras. 40-41.

[83] *Ibid*, para. 43.

[84] *Ibid*, paras. 44-47.

[85] *Ibid*, paras. 47-51.

was ample IRP precedent for the Panel's decision that ICANN must indeed pronounce in the first instance as to whether there has been a violation of the New gTLD Program Rules.[86]

57. Turning to the International Law Claim, the *Amici* reiterate the submission that this is an argument – or a reason in support of an argument – rather than a "claim", and that, in any event, it was sufficiently addressed in the Final Decision in so far as the same facts and circumstances that underpin the Rules Breach Claim form the basis for the International Law Claim.[87] The *Amici* add that the International Law Claim added nothing to Afilias' claim that ICANN breached the Articles and Bylaws by violating commitments in those instruments because the principles of international law invoked by Afilias are equally reflected in the Bylaws.[88] In addition, the *Amici* aver that since the International Law Claim relates to the same request for affirmative relief that Afilias sought in connection with its Rules Breach Claim, the rejection of such request for relief in the Final Decision impliedly rejected the International Law Claim associated with this request.[89]

58. As for the Disparate Treatment Claim, the *Amici* submit that, even if it were a "claim", it was sufficiently addressed in the Final Decision. The *Amici* note that the Panel found that ICANN breached its commitment to apply documented policies objectively and fairly.[90] According to the *Amici*, the Panel did not decline to decide the Disparate Treatment Claim, but rather declined to add additional findings of fact because the claim was already upheld based on findings of fact that the Panel had made in connection with Afilias' "core claims".[91]

59. In any event, the *Amici* describe as mistaken the assertion that it is not open to an IRP panel to determine that it is not necessary to decide a claim or issue, and cites another IRP panel that has adopted this approach.

3. Requests for Interpretation

60. The *Amici* submit that the Claimant's requests for interpretation are unjustified, misuse Article 33 for improper purposes, and should be summarily dismissed.

61. The *Amici* say that Afilias seeks to transform the purpose and narrow interpretation process contemplated by Article 33 into an *ex-post* review of the Final Decision to effectively appeal that

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[86] *Amici*'s Submission, paras. 52-53.

[87] *Ibid*, paras. 56-58.

[88] *Ibid*, paras. 59-66.

[89] *Ibid*, para. 67.

[90] *Ibid*, paras. 69-70.

[91] *Ibid*, paras. 71-74.

decision, delay resolution of the .WEB gTLD and influence ICANN's future actions. According to the *Amici*, interpretation of an arbitral award is only really helpful where the ruling is so ambiguous that the parties could legitimately disagree as to its meaning.[92]

62. Turning to Afilias' specific requests for interpretation, the *Amici* argue that it is not necessary to interpret the term "pronounce". In their submission, there is no ambiguity as to the meaning of the term "pronounce", which, in context, is a transitive verb meaning to declare officially or authoritatively.[93] The *Amici* further contend that Afilias' requests regarding (1) the basis for the Panel's use of the term "pronounce" and (2) the process, form and substance of an adequate pronouncement would exceed the Panel's authority under Article 33. The *Amici* insist that Article 33 cannot be used to seek an explanation of the factual basis for the Panel's determinations or reasoning.[94] According to the *Amici*, Afilias' request that the Panel state whether the Board must always "pronounce" on Staff's action or inaction is also not a proper request for interpretation since it concerns ICANN's future obligations and is therefore beyond the Panel's jurisdiction.[95]

63. The *Amici* argue that Article 33 does not permit Afilias to request a detailed explanation regarding the law the Panel applied in reviewing and reaching its conclusions.[96] Moreover, the real complaints advanced under this rubric are that the Panel's application of the law and reasoning was erroneous, not, as it must under Article 33, that there is ambiguity.

64. According to the *Amici*, Afilias' request regarding ICANN's knowledge, expertise, and experience is also improper because a party cannot use interpretation requests to ascertain which precise documents and other evidence the tribunal relied on in support of its findings. The *Amici* state that such evidence was presented in pre-hearing submissions and at the IRP hearing itself. In the *Amici*'s submission, this is another attempt to argue that the Panel's conclusion is wrong.[97]

65. The *Amici* submit that Afilias' request regarding the standard of proof is similarly beyond the scope of Article 33 and should also be denied. According to the *Amici*, the Panel unambiguously applied the principle that, in international arbitration, the standard is the balance of probabilities and that allegations of dishonesty will attract close scrutiny in order to ensure that that standard is met.

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92 *Amici*'s Submission, paras. 76-81.

93 *Ibid*, paras. 83-85.

94 *Ibid*, paras. 86-90.

95 *Ibid*, paras. 91-92.

96 *Ibid*, paras. 93-94.

97 *Ibid*, paras. 95-98.

The *Amici* add that, in any event, that question would not affect how the award should be carried out and that Afilias impermissibly asks the Panel to correct the substance of its decision.[98]

66. Finally, the *Amici* aver that the Final Decision is fully consistent with the purposes of the IRP and that, in any event, those purposes have no relevance to the narrow issues permitted to be addressed by an Article 33 Application. According to the *Amici*, Afilias' "purposes of the IRP" argument is a near *verbatim* repeat of the same argument it has made throughout these proceedings in an attempt to induce the Panel to ignore the limits on its jurisdiction set forth in the Bylaws.[99]

67. The *Amici* reject as ill-founded the contention that the Panel did not follow IRP precedents by finding that it is for ICANN to pronounce first on Afilias' objections regarding the .WEB auction, and point to a number of IRP decisions declining to go beyond declaring whether ICANN's action violated the Articles or Bylaws.

68. In sum, the *Amici* say that the Panel's decision not to issue a ruling on the underlying dispute and instead to defer to ICANN to first pronounce on the dispute affirms, rather than undermines, the IRP process and policies set forth in the Bylaws and confirmed in prior IRP decisions.[100]

D. Afilias' Reply in Support of the Application

69. In its 70-page Reply in support of the Application (**Afilias' Reply**), Afilias revisits each of the grounds set out in the Application and takes issue with the submissions of the Respondent and *Amici* concerning the scope of Article 33 of the ICDR Rules.

1. Framework for Interpreting Article 33

70. According to Afilias, ICANN and the *Amici* urge the Panel to adopt an extremely narrow interpretation of Article 33. Afilias argues that based on the text and purpose of Article 33, the applicable provisions of the EAA, and the Parties' dispute resolution agreement, any omission to decide a properly submitted claim is grounds for an additional award.[101]

71. Regarding the Parties' dispute resolution agreement included in the Guidebook, Afilias argues that ICANN's decision to delegate .WEB to NDC was a "final decision", which decision would have

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[98] *Amici*'s Submission, paras. 99-104.

[99] *Ibid*, paras. 105-115.

[100] *Ibid*, p. 58 (unnumbered paragraph).

[101] Afilias' Reply, paras. 2 and 10-18.

taken effect and been irreversible had Afilias not commenced a CEP.[102] Afilias adds that Article 33 must be interpreted and given effect based on the IRP's dispute resolution system or framework – and not in the abstract with reference to general arbitral practice and scholarly commentary.[103] Afilias also denies that it is asking the Panel to "reverse" or "reconsider" any dispute that was resolved by the Panel consistent with its mandate.[104]

2. Request for an Additional Decision

72. In relation to the so-called Rules Breach Claim, Afilias argues that ICANN's failure to conclude that NDC breached the Auction Rules, and to disqualify NDC's application were "covered actions", and that ICANN was required to take those actions to satisfy its obligation to make decisions by applying its documented policies neutrally, objectively and fairly.[105] Afilias argues further that while the Panel denied the "affirmative" or "binding declaratory" relief that it was seeking in relation to the Rules Breach Claim, it omitted to resolve Afilias' requests for declaratory relief on this Rules Breach Claim, *i.e.*, that ICANN was required to enforce the New gTLD Program Rules as specified by Afilias, and that ICANN's failure to do so violated the Articles, Bylaws, and New gTLD Program Rules.[106]

73. Afilias rejects the notion that the Panel resolved the claim for declaratory relief on the Rules Breach Claim on jurisdictional grounds, as submitted by the Respondent and the *Amici*. However, it adds that if that is indeed what the Panel intended, then the Panel must say so in a well-reasoned decision consistent with the Bylaws.[107]

74. Afilias argues that ICANN's jurisdictional objection based on the Panel's alleged lack of jurisdiction to resolve disputes under the New gTLD Program Rules is untimely and incorrect.[108] Afilias further avers that if the Panel resolved the Rules Breach Claim on jurisdictional grounds, then Afilias has been deprived of due process and its right to be heard because ICANN never made any jurisdictional objection to Afilias' claim for declaratory relief in connection with the New gTLD Program Rules.[109] Besides, still in Afilias' submission, there are no legal or factual bases on which

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[102] Afilias' Reply, paras. 19-20.

[103] *Ibid*, paras. 20-28.

[104] *Ibid*, para. 31.

[105] *Ibid*, para. 32.

[106] *Ibid*, para. 34.

[107] *Ibid*, para. 35.

[108] *Ibid*, para. 36.

[109] *Ibid*, paras. 38-43.

the Panel could have resolved the claim for lack of jurisdiction.[110] Afilias takes issue with ICANN and the *Amici*'s position that the Board functions as a first instance decision-maker on all matters arising from the New gTLD Program Rules.[111] Afilias insists that the Panel did not state in the Final Decision that it did not have jurisdiction to determine the Rules Breach Claim, and that in any event such conclusion could not be reconciled with other findings of fact and rulings made in the Final Decision.[112]

75. Afilias argues that the Panel's conclusion that ICANN violated its Articles and Bylaws by failing to "pronounce" on Afilias' complaint constituted a declaration that Afilias had never requested.[113] Afilias considers that the Panel's recommendation that ICANN "stay any and all action or decision that would further the delegation of the .WEB gTLD until such time as [ICANN's] Board has considered the opinion of the Panel in this Final Decision" is illogical and inconsistent with the Panel's conclusion regarding ICANN's persistent refusal to take any position on Afilias' complaints.[114]

76. Afilias concludes this section of its Reply by clarifying that it is not seeking an order that ICANN conclude that NDC violated the New gTLD Program Rules, and that it should disqualify NDC's application on that basis, but rather an additional decision that "declares on Afilias' requested declaratory relief in connection to the Rules Breach Claim", and recommendations with respect to that declaration.[115]

77. With respect to the International Law Claim, Afilias argues that the Panel acknowledged the claim but did not address it, whether as a matter of jurisdiction or on the merits.[116] According to Afilias, a finding in its favor on the International Law Claim would not require the Panel to overturn the decisions that it has already rendered; it would rather necessitate that the Panel declare that ICANN failed to interpret and apply the New gTLD Program Rules in accordance with the international principle of good faith.[117] That declaration is especially important if the Panel declines to make an additional decision on Afilias' Rules Breach Claim, and simply remands the core claims to the Respondent's Board with no further guidance.

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[110] Afilias' Reply, para. 44.

[111] *Ibid*, paras. 45-48.

[112] *Ibid*, paras. 49-51.

[113] *Ibid*, paras. 52-54.

[114] *Ibid*, paras. 55-57.

[115] *Ibid*, para. 58.

[116] *Ibid*, para. 59.

[117] *Ibid*, para. 61.

78. Afilias urges that it presented a distinct International Law Claim for the Panel's determination and that there is no mention of the claim in the body of the Panel's reasoning nor any reference to it in the Final Decision's *Dispositif*.[118] In Annex A of the Reply, Afilias sets out the various instances where it allegedly made clear that it was presenting an independent claim based on an alleged breach of international law. Afilias argues that it explicitly took the position that international law is an independent source of obligation and basis for decision.[119]

79. According to Afilias, its International Law Claim is within the Panel's jurisdiction. In this regard, Afilias avers that the Bylaws require ICANN to carry out its activities in conformity with relevant principles of international law in addition to its obligations under the Articles and Bylaws.[120] In Afilias' submission, ICANN is wrong to argue that the Panel sufficiently referred to the International Law Claim in the part of the Final Decision preceding the *Dispositif*.[121] Afilias argues that the Panel did not implicitly resolve Afilias' International Law Claim in its decision either, as the Panel announced that the law applicable to the "quasi-contractual documents of ICANN" was California law and did not mention international law except in the section entitled "Applicable Law".[122]

80. Turning to the Disparate Treatment Claim, Afilias argues that there is no debate that this claim was not decided since the Panel explicitly stated that it did "not consider it necessary, based on the allegation of disparate treatment, to add to its findings in relation to the Claimant's core claims".[123] Afilias rejects the notion that its Disparate Treatment Claim was sufficiently dealt with through Afilias' core claims. According to Afilias, the Panel's factual findings in dealing with its core claims are more than sufficient for the Panel to conclude that Afilias was treated disparately, and what is lacking is a decision to that effect and a declaration in the Final Decision's *Dispositif*.[124]

81. Afilias also rejects ICANN and the *Amici*'s assertion that any resolution now of its allegedly unresolved claims would in some way be inconsistent with the *Dispositif* in the Decision. In this respect, Afilias denies that it is seeking "reconsideration", "revocation" or "reversal" of the Final Decision on the claims that were decided and contends that the Panel would not need to alter a

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[118] Afilias' Reply, paras. 63-64.

[119] *Ibid*, paras. 65-68.

[120] *Ibid*, paras. 69-71.

[121] *Ibid*, paras. 72-76.

[122] *Ibid*, paras. 77-83.

[123] *Ibid*, paras. 84-87.

[124] *Ibid*, paras. 88-89.

single word of the Decision's existing *Dispositif* in order to decide the outstanding claims and issue the corresponding declarations on each of these claims.[125]

3. Requests for Interpretation

82. Afilias states that it requests interpretation of the Final Decision "simply because there are core elements of the Decision that struck [its counsel] as simply inconsistent, incongruous and hard to follow".[126] Afilias contends that Article 33 of the ICDR Rules expressly provides the Parties with a proper method to request formally that the Panel clarify its decision.[127] According to Afilias, both ICANN and the *Amici* reinforce the Final Decision's ambiguity and thus the need for the requested interpretations.[128] In the Claimant's submission, those clarifications would go a long way towards minimizing any future unfair or discriminatory treatment of Afilias by ICANN in the context of ICANN's implementation of the Panel's Final Decision.[129]

83. Afilias argues that interpretation is rarely granted simply because it is rarely sought. Afilias stresses that this IRP being the first to be conducted under ICANN's new enhanced accountability rules, it is certainly one that falls within the purview of the rare instances where interpretation is warranted.[130]

84. Afilias argues that its requested interpretation of the term "pronounce" is necessary so that Afilias and future IRP applicants can understand whether there is a jurisdictional pre-requisite requiring some form of formal Board pronouncement before an IRP may be commenced; what form such a pronouncement must take; and what the interrelationship is between the requirement of a pronouncement and the fact that the Bylaws provide a clear jurisdictional basis for an IRP based on Board or Staff inaction and action.[131] What Afilias characterizes as a disagreement between ICANN and the *Amici* on the meaning of the term "pronounce" shows that the *Dispositif* is vague and ambiguous.[132] Afilias contends that it is critical that the Panel interpret this holding for the effective execution of the Final Decision in this case and beyond.[133]

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125 Afilias' Reply, paras. 91-94 and Annex B thereto.

126 *Ibid*, para. 96.

127 *Ibid*, para. 97.

128 *Ibid*, paras. 98 and 102-104.

129 *Ibid*, para. 99.

130 *Ibid*, paras. 100-104.

131 *Ibid*, para. 106.

132 *Ibid*, paras. 107-110.

133 *Ibid*, paras. 111-114.

85. According to Afilias, without the requested clarification on ICANN's knowledge, expertise and experience, Afilias, ICANN and the *Amici* will be unable to determine when a future panel addressing .WEB (or other future claims in an IRP) might decline to decide claims otherwise properly before it.[134] In Afilias' view, it is puzzling that the Panel afforded deference to ICANN based on the latter's knowledge, expertise and experience, considering that the Panel is required to resolve Disputes consistent with the Articles and Bylaws, in the context of prior IRP decisions, and that prior IRP decisions have consistently rejected the application of a deferential standard when reviewing ICANN's decisions.[135]

86. With respect to the requested clarification of the applicable law, Afilias contends that it is necessary for the effective execution of the Final Decision since the applicable law determines the content of ICANN's legal obligations.[136]

87. Afilias argues that an interpretation of the standard of proof, including precisely where the Panel applied a heightened standard, is critical to the effective execution of the Decision since the standard applied by the Panel will necessarily guide any analysis performed by the Board and any future IRP panels.[137]

88. According to Afilias, fairness and due process also require the Panel to interpret and clarify its decision. The Panel's decision to give the Board a "second chance" to consider and pronounce upon NDC's conduct and the DAA's compliance with the New gTLD Program Rules, without providing any guidance on important issues such as those as to which an interpretation is requested, gives ICANN a "free hand". Afilias avers that ICANN's hands are by no means clean and that it "should not be allowed to use the Panel's opaque reasoning to wash them clean".[138]

4. Costs

89. Afilias accepts that the Panel has, in principle, the power to allocate the costs of the Application as between the Parties.[139] However, Afilias submits that ICANN's costs claim is without merit because even if Afilias does not prevail (in whole or in part), the Respondent is not entitled to its costs since

[134] Afilias' Reply, paras. 115-117.

[135] *Ibid*, paras. 118-119.

[136] *Ibid*, paras. 120-123.

[137] *Ibid*, paras. 124-126.

[138] *Ibid*, paras. 127-129.

[139] *Ibid*, para. 131.

the Application cannot be said to be frivolous or abusive as these terms have been defined and applied in the Final Decision.[140]

IV. ANALYSIS

90. As the Claimant correctly points out at the outset of its Reply, the Panel must first decide the scope of Article 33 of the ICDR Rules.[141] This is so as a matter of logic and in view of the diametrically opposed positions taken by the Claimant and the Respondent on this question, whether it be in regard to the Claimant's request for an additional decision or its requests for interpretation.

91. Having identified the applicable standards to a request for an additional decision and a request for interpretation, the Panel will turn to considering, first, the request for an additional decision in respect of each of the three (3) claims the Panel is said to have failed to decide or resolve; and second, the various requests for interpretation of the Final Decision.

A. Article 33 of the ICDR Rules

1. Overview

92. Article 33 of the ICDR Rules reads as follows:

> **Article 33: Interpretation and Correction of Award**
>
> **1.** Within 30 days after the receipt of an award, any party, with notice to the other party, may request the arbitral tribunal to interpret the award or correct any clerical, typographical, or computational errors or make an additional award as to claims, counterclaims, or setoffs presented but omitted from the award.
>
> **2.** If the tribunal considers such a request justified after considering the contentions of the parties, it shall comply with such a request within 30 days after receipt of the parties' last submissions respecting the requested interpretation, correction, or additional award. Any interpretation, correction, or additional award made by the tribunal shall contain reasoning and shall form part of the award.
>
> **3.** The tribunal on its own initiative may, within 30 days of the date of the award, correct any clerical, typographical, or computational errors or make an additional award as to claims presented but omitted from the award.
>
> **4.** The parties shall be responsible for all costs associated with any request for interpretation, correction, or an additional award, and the tribunal may allocate such costs.

93. It is generally accepted that the opportunity given to an arbitral tribunal to correct or interpret an award, and to make an additional award on claims presented but omitted from the award, is a

[140] Afilias' Reply, paras. 130-138.

[141] *Ibid*, para. 2.

narrow exception to the basic rule of finality of awards, and the principle that once an arbitral tribunal has issued a final award it is "*functus officio*".[142] To quote from a leading treatise:

> There are strong policies counseling against alteration of an award after it has been made. One of the most fundamental purposes of the arbitral process is to obtain a speedy, final resolution of the parties' disputes, without the costs and delays of litigation. Further, as discussed below, most national legal systems provide that an arbitral tribunal is "functus officio" once it has made its award. This again reflects the powerful interest in the finality of awards, free from continuing dispute about their correctness, completeness, or meaning. A liberal approach to "corrections" or "interpretations" is in obvious tension with these policies.[143]

94. It is noted in this same treatise that while the EAA does not expressly provide that the issuance of a final award terminates the arbitral tribunal's mandate, the *functus officio* doctrine is "well-settled in England as a common law rule."[144]

95. It follows from the foregoing that unless a request for correction, interpretation or for an additional award meets the conditions laid out in Article 33 of the ICDR Rules, an arbitral tribunal has no authority to reconsider, supplement or vary a final award. The same is true of the Panel's Final Decision which, under English law and pursuant to the Respondent's Bylaws, is final and binding.[145] As noted by the Claimant in its Reply, the Parties agree that the "final decision" of an IRP panel under the Respondent's Articles, Bylaws and Interim Procedures is the same as an "award" under the New York Convention and the EAA.[146]

2. Applicable Standard to a Request for an Additional Award

96. Article 33 of the ICDR Rules sets out explicitly the basic conditions that must be met for a party to obtain an additional award from an arbitral tribunal. The request must first identify "claims, counterclaims or setoffs presented but omitted from the award"; second, the moving party must persuade the tribunal that the request for an additional award is "justified".

97. Section 57(3) of the EAA provides that an arbitral tribunal may "make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award". In the context of Section 57(3) of the EAA, the English courts have held that "the terms of s 57(3)(b) are apt to refer to a head of claim for damages or some other

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[142] David D. Caron and Lee M. Caplan, "Part VI The Award, Ch. Post-Award Proceedings" in *The UNCITRAL Arbitration Rules: A Commentary*, Oxford University Press, 2013, p. 802 [**Caron**].

[143] Gary B. Born, "Chapter 24: Correction, Interpretation and Supplementation of International Arbitral Awards" *International Commercial Arbitration*, 3rd ed., Kluwer Law International, 2021, p. 3370 [**Born**].

[144] *Ibid*, p. 3378.

[145] See Bylaws, Section 4.3(x).

[146] Afilias' Reply, fn. 4.

remedy (including specifically claims for interest or costs) but not to an issue which is part of the process by which a decision is arrived at on one of those claims".[147]

98. A similar distinction was drawn in respect of the word "issues" as used in Section 68(2)(d) of the EAA, which provides that an award may be challenged for "serious irregularity" in the event of a "failure by the tribunal to deal with all the issues that were put to it", where such failure "has caused or will cause substantial injustice to the applicant". In interpreting the word "issues" as used in that provision, the English courts have observed:

> (ii) There is a distinction to be drawn between "issues" on the one hand and "arguments", "points", "lines of reasoning" or "steps" in an argument, although it can be difficult to decide quite where the line demarking issues from arguments falls. […]
>
> (iii) While there is no expressed statutory requirement that the Section 68(2)(d) issue must be "essential", "key" or "crucial", a matter will constitute an "issue" where the whole of the applicant's claim could have depended upon how it was resolved, such that "fairness demanded" that the question be dealt with […].
>
> (vi) If the tribunal has dealt with the issue in any way, Section 68(2)(d) is inapplicable and that is the end of the enquiry […]; it does not matter for the purposes of Section 68(2)(d) that the tribunal has dealt with it well, badly or indifferently.
>
> (vii) It matters not that the tribunal might have done things differently or expressed its conclusions on the essential issues at greater length […].
>
> (viii) A failure to provide any or any sufficient reasons for the decision is not the same as failing to deal with an issue […]. A failure by a tribunal to set out each step by which they reach its conclusion or deal with each point made by a party is not a failure to deal with an issue that was put to it […].
>
> (ix) There is not a failure to deal with an issue where arbitrators have misdirected themselves on the facts or drew from the primary facts unjustified inferences […]. The fact that the reasoning is wrong does not as such ground a complaint under Section 68(2)(d) […].
>
> (x) A tribunal does not fail to deal with issues if it does not answer every question that qualifies as an "issue". It can "deal with" an issue where that issue does not arise in view of its decisions on the facts or its legal conclusions. A tribunal may deal with an issue by so deciding a logically anterior point such that the other issue does not arise […]. If the tribunal decides all those issues put to it that were essential to be dealt with for the tribunal to come fairly to its decision on the dispute or disputes between the parties, it will have dealt with all the issues […].[148]

99. It follows from the foregoing that a request for an additional award is not appropriate if it relates to an arbitral tribunal's omission to deal, not with a claim but rather with arguments or grounds in support of a claim.[149]

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147 *Torch Offshore LLC v. Cable Shipping Inc.*, [2004] EWHC (Comm) 787, para. 27 (Eng.) [emphasis added].

148 *Symbion Power*, [2017] EWHC (TCC) 348 (Eng.), para. 18, quoting *Sec'y of State for the Home Dep't v. Raytheon Sys. Ltd.*, [2014] EWHC (TCC) 4375 (Eng.), para. 33.

149 The *Amici* cite an article highlighting the distinction between a "claim" and a "ground for relief put forward in support of a claim", in which the author notes that "[g]rounds […] are the reasons forming the basis of a claim". Klaus Reichert, "Prayers for Relief – The Focus for Organization" in *Evolution and Adaptation: The Future of International Arbitration*, Jean Engelmayer Kalicki and Mohamed Abdel Raouf (eds.), Kluwer Law International, 2019, p. 717.

100. Turning to the requirement that the claim subject to the application for an additional award has been "omitted from the award", Gary B. Born observes in the above-quoted treatise:

> The mere fact that an arbitral tribunal has not expressly addressed a particular claim does not automatically require issuance of an additional award: a tribunal may be taken to have impliedly rejected claims as to which it does not grant relief (although the better practice is clearly to address issues explicitly and although the failure to do so may give rise to claims that the award is, in some respects, unreasoned).[150]

101. It is also generally accepted that requests for an additional award are not available to revisit a tribunal's decision deliberately not to address a particular claim or issue, for example because it considers it unnecessary to do so in light of its decisions on other issues. In the words of the late Professor David D. Caron, when commenting on deliberate omissions to address a claim in the context of Article 39 of the UNCITRAL Rules:[151]

> Article 39 obviously has no effect in cases of deliberate omission where an arbitral tribunal has for specific reasons intentionally chosen not to address a claim or issue in the award. Nevertheless, to avoid any misunderstandings, it is good practice for an arbitral tribunal to document in the award the disposition of each of the parties' respective claims, no matter how small or inconsequential their bearing is on the outcome of the case.[152]

102. Turning to the second requirement of Article 33 of the ICDR Rules for a party to obtain an additional award, it seems to be common ground between the Parties that it is for the arbitral tribunal, in its discretion, to decide whether a request for an additional award is "justified" within the meaning of Article 33.

103. In its discussion of the legal standard applicable to a request for an additional award under English law and pursuant to Article 33 of the ICDR Rules, the Claimant submits that "any omission to decide a properly submitted claim – whether deliberate, inadvertent, or otherwise – is grounds for an additional award."[153] In light of the text of Article 33 and the authorities canvassed above, the Panel finds this to be an overly broad expression of the standard to be met by an applicant for an additional award, and must therefore reject it.

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[150] Born, *supra* note 143, p. 3407.

[151] Article 39 of the 2010 UNCITRAL Rules reads as follows:

1. Within 30 days after the receipt of the termination order or the award, a party, with notice to the other parties, may request the arbitral tribunal to make an award or an additional award as to claims presented in the arbitral proceedings but not decided by the arbitral tribunal.
2. If the arbitral tribunal considers the request for an award or additional award to be justified, it shall render or complete its award within 60 days after the receipt of the request. The arbitral tribunal may extend, if necessary, the period of time within which it shall make the award.
3. When such an award or additional award is made, the provisions of article 34, paragraphs 2 to 6, shall apply.

[152] Caron, *supra* note 142, p. 823. See also Jan Paulsson and Georgios Petrochilos, *UNCITRAL Arbitration Rules, Section IV, Article 39 [Additional Award]*, Kluwer Law International, 2017, p. 356.

[153] Application, para. 8. See also Afilias' Reply, para. 11.

3. Applicable Standard to a Request for Interpretation of an Award

104. For a request to interpret an award to be "justified", the moving party must demonstrate "that the award is ambiguous and requires clarification for its effective execution". [154] It is also well accepted that a request for interpretation cannot be used to invite reconsideration of an award, or to challenge a tribunal's reasoning:

> - The power to issue an interpretation does not "enable the arbitrator to change his mind on any matter which has been decided by the award, and attempts to use the section for this purpose should be firmly resisted." [155]
>
> - It is well settled that such a request is limited to an interpretation of the award in the form of clarification; and that it cannot extent to a request to modify or annul the award or take the form of an appeal or review of the award.[156]
>
> - A request for an interpretation may not be used to challenge the tribunal's reasoning or dispositions.[157]
>
> - Tribunals should reject any request which goes beyond the interpretation of the award; provisions in arbitration rules for the interpretation of awards are not meant to empower the tribunal to change the substance of their ruling.[158]

105. As was succinctly put in the decision of an ICC tribunal:

> As to the scope of "interpretation", which might be regarded as broader than the "correction" feature, there is virtual unanimity that an application of that sort cannot be used to seek revision, reformulation or additional explanations of a given decision.[159]

106. In support of its requests for interpretation, the Claimant contends that Article 33 of the ICDR Rules is "a vehicle for one or both parties to secure clarification of the award where necessary", including regarding "its exact meaning and scope"; and that this mechanism "is to provide clarification of the award by *resolving any ambiguity and vagueness in its terms*".[160] Such a formulation of the standard to request interpretation omits mention of the need to safeguard against indirect requests for reconsideration or challenges of the tribunal's reasoning presented under the guise of a request for

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[154] Born, *supra* note 143, p. 3401.

[155] *Al Hadha Trading Co. v. Tradigrain S.A.*, [2002] Lloyd's Law Reports 512, para. 66, quoting *Mustill & Boyd on Commercial Arbitration*, 2nd ed., Companion Volume 2001, p. 341. See also Born, *supra* note 143, p. 3405 ("In practice, requests for interpretation will ordinarily only be successful if directed to specific portions of the dispositive part of the award."); and Julian David Mathew Lew, Loukas Mistelis, *et al.*, "Chapter 24 Arbitration Award" in *Comparative International Commercial Arbitration*, Kluwer Law International, 2003, p. 658 [**Lew**] ("Interpretation of an award is justified only when the ruling, rather than the discussion of facts and arguments, is expressed in vague terms or where there is ambiguity as to how the award should be executed.")

[156] *Methanex Corp. v. United States*, UNCITRAL, Letter to Parties from Tribunal ¶ 2, 25 September 2002.

[157] Born, *supra* note 143, p. 3405.

[158] Lew, *supra* note 155, p. 659, § 24-97.

[159] *Procedural Order of 6 January 2003 in ICC Case 11451 (Extract)*, in ICC, *Decisions on ICC Arbitration Procedure: A Selection of Procedural Orders Issued by Arbitral Tribunals Acting Under the ICC Rules of Arbitration (2003-2004)*, pp. 19 (2010).

[160] Application, para. 92 [emphasis in the original].

interpretation. As noted below, it is altogether clear that the Claimant is not merely seeking "clarification" of the Final Decision, but rather a reversal of its key findings and conclusions.

107. Having identified the standards applicable, respectively, to a request for an additional award and a request for interpretation, the Panel turns to considering the various requests set out in the Application.

B. Afilias' Request for an Additional Decision

108. Three (3) claims are said to have been presented by the Claimant but omitted by the Panel in the Final Decision. The Panel addresses each of them in turn.

1. The "Rules Breach Claim"

109. As noted already, the Claimant defines the "Rules Breach Claim" as:

> …the […] specifically pled Covered Actions: that ICANN violated its Articles and Bylaws by (a) not rejecting NDC's application, and/or (b) not declaring NDC's bids at the ICANN auction invalid, and/or (c) not deeming NDC ineligible to enter into a registry agreement for .WEB because of its violations of the New gTLD Program Rules, and (d) not offering .WEB to Afilias as the next highest bidder […].[161]

110. The Claimant avers that in omitting to decide Afilias' claim that ICANN breached its Articles and Bylaws through its *inaction* – and instead referring the claim back to the ICANN Board to "pronounce" on it "in the first instance" – the Panel failed to resolve that specific claim, as required by Article 4.3(g) of the Bylaws, and thus acted *infra petita*.

111. The Claimant argues that it had sought two (2) separate types of relief with respect to the "Rules Breach Claim": first, "declaratory relief"; and second, "affirmative" or "binding declaratory relief" (also referred to by the Claimant and the Respondent as "injunctive relief", a terminology which the Panel adopts in this decision to avoid confusion with the first "type" of relief).[162] According to the Claimant, while the Panel denied the request for injunctive relief, the Panel omitted to resolve Afilias' request for declaratory relief on the so-called Rules Breach Claim. The Claimant submits:

> The Panel's denial of Afilias' requested injunctive relief did not and could not encompass Afilias' requested declaratory relief. The Panel thus left Afilias' principal claim undecided – even though it had been extensively arbitrated by Afilias, ICANN, and the Amici, and submitted to the Panel for resolution.[163]

112. With respect, the Panel finds this reasoning to be mistaken and based on false premises.

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[161] Application, para. 16; see also para. 4(1). Covered Actions is defined at Sec. 4.3(b)(ii) of the Bylaws as "any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute."

[162] Application, para. 68 ("Afilias sought both declaratory relief and affirmative declaratory relief (what ICANN more accurately called 'injunctive' relief) for its Rules Breach Claim in the IRP."); Afilias' Reply, para. 34.

[163] Afilias' Reply, para. 34.

113. The Panel recalls that the Claimant requested the following relief in its Amended Request for IRP:

> 89. Reserving its rights to amend the relief requested below, inter alia, to reflect document production and further witness evidence, Afilias respectfully requests the IRP Panel to issue a binding Declaration:
>
> (1) that ICANN has acted inconsistently with its Articles and Bylaws, breached the binding commitments contained in the AGB, and violated international law;
>
> (2) that, in compliance with its Articles and Bylaws, ICANN must disqualify NDC's bid for .WEB for violating the AGB and Auction Rules;
>
> (3) ordering ICANN to proceed with contracting the Registry Agreement for .WEB with Afilias in accordance with the New gTLD Program Rules;
>
> (4) specifying the bid price to be paid by Afilias;
>
> (5) that Rule 7 of the Interim Procedures is unenforceable and awarding Afilias all costs associated with the additional work needed to, among other things, address arguments and filings made by VeriSign and/or NDC;
>
> (6) declaring Afilias the prevailing party in this IRP and awarding it the costs of these proceedings; and
>
> (7) granting such other relief as the Panel may consider appropriate in the circumstances.[164]

114. In its Post-hearing Brief, the Claimant articulated its request for declaratory relief as follows:

> 238. As an initial matter, ICANN agrees that "declarations finding that ICANN violated the Articles or Bylaws would be within the Panel's authority." Thus the Panel can indisputably declare that ICANN has breached:
>
> - Sections 1.2(a)(v), 1.2(c) of the Bylaws by failing to reject NDC's application, and/or disqualify its bids, and/or deem it ineligible to execute a registry agreement because NDC violated the following sections of the New gTLD Program Rules: Sections 1 and 10 of Module 6, Section 1.2.7 of Module 1, and Sections 4.3.1(5) and 4.3.1(7) of Module 4 of the AGB, as well as Rules 12, 13, 32 of the Auction Rules;
> - Sections 1.2(a)(v) and 2.3 of the Bylaws by the arbitrary, capricious, disparate, and discriminatory manner in which it treated Afilias;
> - Article III of ICANN's Articles of Incorporation and Sections 1.2(a), 1.2(b), and 3.1 of the Bylaws by failing to act transparently to the maximum extent feasible;
> - Article III of ICANN's Articles of Incorporation and Sections 1.2(a) and 1.2(b)(iv) of the Bylaws by failing to act in accordance with its competition mandate;
> - Sections 1.2(a), 1.1(a)(i), 1.2(a)(iv), 3.1, 3.6(a)(i)-(ii), 4,3(n)(i), and 4.3(n)(ii) of the Bylaws by adopting Rule 7 of the Interim Supplemental Procedures for IRP;
> - Article III of ICANN's Articles of Incorporation and Sections 1.2, 1.2(a), 1.2(c) of the Bylaws by failing to conduct itself in accordance with relevant principles of international law, specifically the obligation of good faith.[165]

115. As for the Claimant's request for injunctive relief, it was set out in the immediately following paragraphs of the Claimant's Post-Hearing Brief:

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[164] Amended Request for IRP, para. 89.

[165] Claimant's PHB, para. 238.

> 239. In light of the foregoing declarations, the Panel should also grant Afilias' requested injunctive remedies as well as its request for costs (as set forth in Afilias' separate submission on costs filed herewith). Such remedies are entirely within the Panel's jurisdiction and are necessary to "[e]nsure that ICANN … complies with its Articles of Incorporation and Bylaws" and to achieve a "binding, final resolution[]" of this dispute that is "consistent with international arbitration norms" and that is "enforceable in any court with proper jurisdiction."
>
> 240. Specifically, as injunctive relief, in addition to granting such other relief as the Panel considers appropriate in the circumstances of this case, the Panel should order and recommend that ICANN:
>
> • Reject NDC's application for the .WEB gTLD;
>
> • Disqualify NDC's bids at the ICANN auction for the .WEB gTLD;
>
> • Deem NDC ineligible to execute a registry agreement for the .WEB gTLD;
>
> • Offer the registry rights to the .WEB gTLD to Afilias, as the next highest bidder in the ICANN auction;
>
> • Set the bid price to be paid by Afilias for the .WEB gTLD at USD 71.9 million;
>
> • Pay Afilias' fees and costs as set out in Afilias' accompanying costs submission[166].

116. In paragraph 254 of the Final Decision, the Panel described the Claimant's principal claims in the IRP, which the Panel characterized as the Claimant's "core claims".[167] In the immediately following paragraph, paragraph 255, the Panel described the request for relief associated with the Claimant's core claims. For ease of reference, the Panel reproduces these two (2) paragraphs in full:

> 254. The Claimant's core claims against the Respondent in this IRP arise from the Respondent's failure to reject NDC's application for .WEB, disqualify its bids at the auction, and deem NDC ineligible to enter into a registry agreement with the Respondent in relation to .WEB because of NDC's alleged breaches of the Guidebook and Auction Rules. The Respondent's impugned conduct engages its Staff's actions or inactions in relation to allegations of non-compliance with the Guidebook and Auction Rules on the part of NDC, communicated in correspondence to the Respondent in August and September 2016, and the Staff's decision to move to delegate .WEB to NDC in June 2018 by proceeding to execute a registry agreement in respect of .WEB with that company; as well as the Board's decision not to pronounce upon these allegations, first in November 2016, and again in June 2018 when, to the knowledge of the Board, the .WEB contention set was taken off hold and the Staff put in motion the process to delegate the .WEB gTLD to NDC.
>
> 255. As already noted, the Claimant's core claims serve to support the Claimant's requests that the Panel disqualify NDC's bid for .WEB and, in exchange for a bid price to be specified by the Panel and paid by the Claimant, order the Respondent to proceed with contracting the Registry Agreement for .WEB with the Claimant.[168]

117. It is immediately apparent that the Claimant is seeking to recast as a distinct claim – the so-called Rules Breach Claim – what the Panel described in the Final Decision as the Claimant's core claims and the request for relief that the Claimant had sought in respect thereof. Properly understood, the Claimant's request for an additional award in relation to the Rules Breach Claim is thus but an

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166 Claimant's PHB, para. 240.

167 In support of the statement at paragraph 32 of its Reply that the Rules Breach Claim was its "principal claim", the Claimant refers to the paragraph of the Final Decision that describes the "core claims".

168 Final Decision, paras. 254-255 [emphasis added].

expression of the Claimant's disagreement with the Panel's determination of its core claims and the denial of the request for relief associated therewith.

118. It can also be seen that the Panel's description of the Claimant's core claims includes the constituent elements of what the Claimant now calls the "Rules Breach Claim". Moreover, as attested to by the words emphasized in the above quote of paragraph 254 of the Final Decision, it was well understood that the Claimant's claims encompassed the alleged *inaction* of the Respondent when Afilias first asserted that the Respondent was required to reject NDC's application for .WEB,[169] declare NDC's bids at the ICANN auction invalid,[170] and/or deem NDC ineligible to enter into a registry agreement for .WEB because of its violations of the New gTLD Program Rules,[171] and offer .WEB to Afilias as the next highest bidder.[172]

119. In the Panel's opinion, it simply cannot be argued that the Final Decision omitted to deal with the "claim" that the Respondent had wrongfully failed to address these assertions, when they were first raised and thereafter later on in the process in June 2018. Insofar as the Respondent's Staff is concerned, the Panel found, at paragraph 413(1):

> Declares that the Respondent has violated its [Articles and Bylaws] by (a) its staff (Staff) failing to pronounce on the question of whether the [DAA] complied with the New gTLD Program Rules following the Claimant's complaints that it violated the Guidebook and Auction Rules, and, while these complaints remained unaddressed, by nevertheless moving to delegate .WEB to NDC in June 2018, upon the .WEB contention set being taken "off hold";[173]

120. Insofar as the alleged inaction of the Respondent's Board is concerned, the Panel decided:

> 331. The Respondent urges that it was not a violation of the Respondent's Bylaws for the Board, on 3 November 2016, to defer consideration of the complaints that had been raised in relation to NDC's application and auction bids for .WEB. It is common ground that there were Accountability Mechanisms in relation to .WEB pending at the time, and **it seems to the Panel reasonable for the Board to have decided** to await the outcome of these proceedings before considering and determining what action, if any, it should take. The Panel notes that **it reaches that conclusion** without needing to rely on the provisions of Section 4.3(i)(iii) of the Bylaws, and determining whether or not that decision involved the Board's exercise of its fiduciary duties.
>
> 332. The Panel does find, however, that it was a violation of the commitment to operate "in an open and transparent manner and consistent with procedures to ensure fairness" for the Respondent to have failed to communicate the Board's decision to the Claimant. As noted already, the Respondent had clearly represented in its letters of 16 and 30 September 2016 that it would evaluate the issues raised in connection with NDC's application and auction bids for .WEB. Since the Board's decision to defer consideration of these issues contradicted the Respondent's representations, it was incumbent upon the Respondent to communicate that decision to the Claimant.[174]

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169 Which corresponds to subparagraph a) of the Rules Breach Claim, as framed by the Claimant in the Application, at para. 16.

170 Which corresponds to subparagraph b) of the Rules Breach Claim, as framed by the Claimant in the Application, at para. 16.

171 Which corresponds to subparagraph c) of the Rules Breach Claim, as framed by the Claimant in the Application, at para. 16.

172 Which corresponds to subparagraph d) of the Rules Breach Claim, as framed by the Claimant in the Application, at para. 16.

173 Final Decision, para. 413(1) [emphasis added].

174 *Ibid*, paras. 331-332 [emphasis added].

121. The Panel having found that the Respondent was not obligated to act upon the Claimant's complaints during the pendency of these proceedings, the Panel thus necessarily also found that the Respondent's failure to act in this respect (*i.e.*, its alleged *inaction*) was *not* a violation of its Articles and Bylaws. That is precisely the declaratory relief that the Claimant contends the Panel omitted to deal with under the rubric of the Rules Breach Claim.

122. As regards the Respondent's impugned inaction in June 2018, the Panel made the following additional findings – in favor of the Claimant – in respect of both the Staff's and Board's conduct:

> 347. In sum, the Panel finds that it was inconsistent with the representations made to the Claimant by ICANN's Staff, and the rationale of the Board's decision, in November 2016, to defer consideration of the issues raised in relation to NDC's application for .WEB, for the Respondent's Staff, to the knowledge of the Respondent's Board, to proceed to delegation without addressing the fundamental question of the propriety of the DAA under the New gTLD Program Rules. The Panel finds that in so doing, the Respondent has violated its commitment to make decisions by applying documented policies objectively and fairly.[175]

123. As regards the Claimant's request for relief in relation to its core claims, or Rules Breach Claim, there can be no question that it was denied, and that the associated claims were therefore fully dealt with. In the section of the Final Decision entitled "Determining the Proper Relief", the Panel quoted Section 4.3(o) of the Bylaws, which defines the authority of IRP panels, and decided that "the Claimant [was] entitled to a declaration that the Respondent violated its Articles and Bylaws to the extent found by the Panel in the previous sections of this Final Decision […]."[176] The Panel then turned to the relief sought by the Claimant in respect of what is being referred to in the Application as the Rules Breach Claim, and explained in the following terms its decision to deny it:

> 362. As foreshadowed earlier in these reasons, the Panel is firmly of the view that it is for the Respondent, that has the requisite knowledge, expertise, and experience, to pronounce in the first instance on the propriety of the DAA under the New gTLD Program Rules, and on the question of whether NDC's application should be rejected and its bids at the auction disqualified by reason of its alleged violations of the Guidebook and Auction Rules.
>
> 363. The Panel also accepts the Respondent's submission that it would be improper for the Panel to dictate what should be the consequence of NDC's violation of the New gTLD Program Rules, assuming a violation is found.[177]

124. This decision is carried forward in the *Dispositif* as follows:

> **Dismisses** the Claimant's other requests for relief in connection with its core claims and, in particular, the Claimant's request that that the Respondent be ordered by the Panel to disqualify NDC's bid for .WEB, proceed with contracting the Registry Agreement for .WEB with the Claimant in accordance with the New gTLD Program Rules, and specify the bid price to be paid by the Claimant, all of which are premature pending consideration by the Respondent of the questions set out above in sub-paragraph 410(5);[178]

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[175] Final Decision, para. 347 [emphasis added].

[176] *Ibid*, para. 361.

[177] *Ibid*, paras. 362-363.

[178] *Ibid*, para. 413(7) [emphasis added]

125. It is equally apparent that the so-called declaratory relief that the Claimant is seeking in the Application would directly contradict the Panel's decision that it is for the Respondent to pronounce in the first instance on the substance of the constituent elements of the Rules Breach Claim. In this regard, the Panel must reject the Claimant's argument that "the Panel would not need to alter a single word of the Decision's existing *Dispositif* in order to decide the outstanding claims and issue the corresponding declarations on each."[179] In support of this argument, the Claimant has reproduced in Annex B to the Reply the amendments to the *Dispositif* of the Final Decision that it contends would be required in order for the Panel to grant the relief it is requesting in relation to the Rules Breach Claim. The language that the Claimant requests be added to the *Dispositif* reads as follows:

> **Declares** that ICANN violated its Articles and Bylaws by (a) not rejecting NDC's application, (b) not declaring NDC's bids at the ICANN auction invalid, (c) not deeming NDC ineligible to enter into a registry agreement for .WEB because of its violations of the New gTLD Program Rules, and (d) not offering .WEB to Afilias as the next highest bidder;[180]

126. In the Panel's opinion, it would appear undisputable that the Claimant's proposed additional declaration directly contradicts the Panel's "firm view", as it was put in paragraphs 362 and 363 of the Final Decision, that it is for the Respondent to pronounce in the first instance on the propriety of the DAA under the New gTLD Program Rules, and on the question of whether NDC's application should be rejected and its bids at the auction disqualified by reason of its alleged violations of the Guidebook and Auction Rules; as well as the finding that it would be improper for the Panel to dictate what should be the consequence of NDC's violation of the New gTLD Program Rules, assuming a violation is found. Having expressed that opinion, made that decision and fully exercised its authority in relation to the Rules Breach Claim in the Final Decision by dismissing the relief sought in relation to the Claimant's core claims, the Panel is *functus officio* and without any authority to issue an additional award regarding that "claim" or any other claim dealt with in the Final Decision.

2. The "International Law Claim"

127. The Claimant defines the "International Law Claim" in the Application in the following terms:

> Claimant's claim that ICANN breached its Articles and Bylaws by failing to conduct its activities in accordance with relevant principles of international law by failing to enforce the New gTLD Program Rules and proceeding to delegate .WEB to NDC despite NDC breaches of the Rules;[181]

and

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[179] Reply, para. 94.

[180] Annex B to the Reply, at proposed additional para. 5.

[181] Application, para. 4.

> Afilias claimed from the very outset that ICANN violated its obligation to conduct its activities in conformity with relevant principles of international law by failing to enforce the New gTLD Program Rules and by proceeding to delegate .WEB to NDC.[182]

128. Two (2) preliminary observations are in order. As the first of these formulations makes clear, the contention that the Respondent "*breached its Articles and Bylaws by failing to conduct its activities in accordance with relevant principles of international law*" illustrates that the Claimant's arguments based on international law served to support the Claimant's claim that the Respondent had violated its Articles and Bylaws through the actions and inactions that were being impugned by the Claimant in this IRP. This is so because under its Articles and Bylaws the Respondent is obligated to carry out its activities in conformity with relevant principles of international law and international conventions, as well as applicable local law. This was expressly noted by the Panel in the Applicable Law section of the Final Decision:

> 28. Section 1.2(a) of the Bylaws provides that "[i]n performing its Mission, ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law […]". The Panel notes that Article III of the Articles is to the same effect as Section 1.2(a) of the Bylaws.[183]

129. The other preliminary observation arises from the second formulation of the Claimant's "International Law Claim", and the fact that it is based on the same facts and circumstances as the Rules Breach Claim. Indeed, the contention that the Respondent violated international law "*by failing to enforce the New gTLD Program Rules and proceeding to delegate .WEB to NDC*" is inseparable from the Claimant's core claims in the IRP, as described in the Final Decision. As noted already, the Panel is of the view that the core claims, including the so-called Rules Breach Claim, were fully dealt with in the Final Decision.

130. While the Claimant presented various arguments based on principles of international law in support of its core claims, it did not advance a distinct claim based on international law. Indeed, the Claimant had observed that the principles of international law it was relying on provided "independent" but "generally overlapping" safeguards to those arising from the terms of the Articles and Bylaws,[184] and submitted that these international law principles were a "lens" through which the Panel should view the provisions of the Bylaws.[185] The excerpts reproduced in Annex A of the Claimant's Reply exemplify these observations and submissions rather than establish that the Claimant had articulated and advanced an international law claim separate and distinct from its core claims. In sum, the principles of international law relied upon by the Claimant were presented as providing

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[182] Application, para. 38.

[183] Final Decision, para. 28.

[184] Afilias' Response to the *Amici*'s Briefs, para. 143.

[185] Claimant's PHB, fn. 203.

an additional basis for the Panel to find in the Claimant's favor in regard to its core claims, or what is now presented as the Rules Breach Claim.

131. As noted in the Panel's discussion of the applicable standard to a request for an additional award, there is a fundamental distinction between, on the one hand, a "claim" and, on the other, grounds or arguments put forward in support of a claim. A request for an additional award is not appropriate if it relates to an arbitral tribunal's omission to deal, not with a claim, but with one or more arguments or grounds put forward in support of a claim.

132. In the present case, the Panel was well aware of the provisions of Section 1.2(a) of the Bylaws, and the Claimant's arguments based on certain principles of international law. The Final Decision explicitly refers to both Section 1.2(a)[186] and the Claimant's arguments based on principles of international law.[187] The Panel found in favor of the Claimant by the application of the Respondent's commitments, under the Bylaws, to make decisions by applying documented policies objectively and fairly (*Dispositif*, para. 2) and to operate in an open and transparent manner and consistent with procedures to ensure fairness (*Dispositif*, para. 3). The fact that the Panel did not explicitly take the further step to articulate how these same findings in relation to the same claim could find support in certain principles of international law does not provide a ground for a request for an additional decision.

133. The Claimant not having presented an international law claim that was separate and distinct from the Claimant's core claims, it cannot be argued in relation to the Claimant's international law arguments that a claim was "presented but omitted from the award", as required by Article 33 of the ICDR Rules. The Panel is of the view that it has fully dealt with and resolved the Claimant's core claims, and must therefore reject the request for an additional decision in respect of what is now described as the "International Law Claim".

3. The "Disparate Treatment Claim"

134. The Claimant defines the "Disparate Treatment Claim" as follows:

> Claimant's claim that ICANN breached its Articles and Bylaws by treating Afilias inequitably and disparately when compared to the manner in which it treated NDC and non-applicant Verisign.[188]

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[186] See, among others, para. 28 of the Final Decision. See also para. 290, where the Panel quotes Article 2, paragraph III of the Respondent's Articles.

[187] See paras. 129, 131, 194-196, 200 and 221 of the Final Decision. The Panel noted in para. 195 of the Final Decision that the requirement under the Bylaws to afford impartial and non-discriminatory treatment was "consistent with the principles of impartiality and non-discrimination under international law."

[188] Application, para. 4. See also para. 85.

135. In respect of the Claimant's allegation of disparate treatment, the Panel stated the following in the Final Decision:

> 350. As regards the allegation of disparate treatment, it rests for the most part on facts already considered by the Panel in analysing the Claimant's core claims, such as turning to Verisign rather than NDC to obtain information about NDC's arrangements with Verisign, allowing for asymmetry of information to exist between the recipients of the 16 September 2016 Questionnaire, delaying providing a response to Afilias' letters of 8 August and 9 September 2016, submitting Rule 4 for adoption in spite of it being the subject of an ongoing public comment process, and making that rule retroactive so as to encompass the Claimant's claims within its reach. Accordingly, the Panel does not consider it necessary, based on the allegation of disparate treatment, to add to its findings in relation to the Claimant's core claims.[189]

136. This paragraph makes clear that the Panel's decision not to make further findings in relation to what the Claimant describes as the Disparate Treatment Claim was deliberate. Equally clear is the fact that the Panel considered the allegation of disparate treatment and provided reasons for its decision in regard thereto: the allegation of disparate treatment supported the Claimant's core claims; the Panel had fully disposed of those claims; and the Panel therefore "[did] not consider it necessary to add to its findings in relation to the Claimant's core claims". As explained previously in this decision, such a conclusion cannot be revisited in the context of a request for an additional award.[190]

137. Having already fully exercised its authority in the Final Decision in relation to the allegation of disparate treatment, the Panel is *functus officio* and without any authority to issue an additional decision regarding what the Claimant describes in the Application as the Disparate Treatment Claim.

4. Conclusion

138. For all of these reasons, the Panel must decline to issue an additional decision in respect of the three (3) "claims" that the Claimant contends had been presented but allegedly omitted by the Panel in the Final Decision. In the Panel's opinion, the first two (2) "claims" set out in the Application are *post hoc* constructs that seek to repackage the claims actually presented to the Panel and recast the manner in which they were advanced. The Panel is of the view that these "claims" were not actually presented as distinct claims, nor were "omitted" within the meaning of Article 33 of the ICDR Rules. As for the allegation of disparate treatment, the Final Decision evidences that it was considered and dealt with to the extent the Panel felt it necessary. Moreover, and in any event, an attestation of the Panel's resolution of *all* claims that had been put before it is

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189 Final Decision, para. 350.

190 See, in the context of Article 39 of the UNCITRAL Rules: Caron, *supra* note 142, p. 823. See also Jan Paulsson and Georgios Petrochilos, *UNCITRAL Arbitration Rules, Section IV, Article 39 [Additional Award]*, Kluwer Law International, 2017, p. 356.

provided in the last paragraph of the Final Decision's *Dispositif*, in which the Panel "*[d]ismisse[d] all of the Parties' other claims and requests for relief*".

C. Afilias' Requests for Interpretation of the Final Decision

139. The five (5) "issues" which the Claimant contends are "vague, ambiguous, confusing, and/or contradictory"[191] and requiring interpretation are the following:

a) What is the scope and meaning of the terms "pronounce" and "pronouncement" as used by the Panel in stating that ICANN Staff did not "pronounce" on Afilias' complaints and in recommending that the Board should now "pronounce" on Afilias' complaints?[192]

b) Did the Panel determine that the Board must always "pronounce" on Staff action or inaction as a pre-condition for an IRP panel to decide a dispute based on Staff action or inaction? If so, what is the source for this pre-condition in the Bylaws? And, if not, then why has this pre-condition been inserted, given the Panel's observations that some sort of decision on Afilias' complaints was taken by Staff, which was at least implicitly approved by the Board through its inaction?[193]

c) What law (if any) did the Panel apply in this IRP – just California law or California and international law? If the latter, to which claims and issues did the Panel apply California law, and to which did it apply international law?[194]

d) On what legal or evidentiary basis did the Panel determine that ICANN has "the requisite knowledge, expertise, and experience, to pronounce" on Afilias' complaints compared to the Panel?[195]

e) What standard of proof did the Panel apply to each of Afilias' submissions in support of its claims?[196]

140. The Panel addresses each of these requests for interpretation in turn.

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[191] Application, para. 94.

[192] *Ibid*, paras. 94 and 95-99.

[193] *Ibid*, paras. 94 and 100-103.

[194] *Ibid*, paras. 94 and 104-107.

[195] *Ibid*, paras. 94 and 108-111.

[196] *Ibid*, paras. 94, 112-114.

1. Alleged Ambiguity of the term "Pronounce"

141. Afilias argues that there is ambiguity as to the scope and meaning of the terms "pronounce" and "pronouncement" as used by the Panel in the Final Decision.[197] Its request for interpretation of these terms includes the request "that the Panel address the following questions regarding the nature of a 'pronouncement'":

> a) What constitutes a "pronouncement" and what is the foundation in ICANN's documents or applicable law for the "pronouncement" requirement, particularly in light of the Bylaws' definition that Covered Actions in respect of which claims may be brought include both Board and Staff action and inaction?
>
> b) What should have been the form and substance of ICANN's "pronouncement" on Afilias' complaints?
>
> c) On what sources did the Panel rely to fashion its "pronouncement" remedy?
>
> d) Before ICANN issues the "pronouncement" recommended by the Panel, must Afilias and other Internet community members be given an opportunity to be heard by the Board?
>
> e) Must the Respondent's "pronouncement" be issued following an opportunity for Afilias and other Internet community members to receive and comment on all relevant evidence and argument?
>
> f) What materials, documentary or otherwise, must ICANN consider before it issues the "pronouncement" recommended by the Panel?
>
> g) Must the "pronouncement" be issued in a written form and made public on ICANN's website?
>
> h) Must the "pronouncement" be issued with full and adequate supporting reasoning following Board deliberation?
>
> i) Must the "pronouncement" be issued with findings of fact and conclusions of law?
>
> j) Must the "pronouncement" be issued without the participation of Board members with conflicts of interest?[198]

142. The terms "pronounce" or "pronouncement" are used throughout the Final Decision, including in the following two (2) sub-paragraphs of the *Dispositif*:[199]

> 1. **Declares** that the Respondent has violated its *Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers*, as approved by the ICANN Board on 9 August 2016, and filed on 3 October 2016 (**Articles**), and its Bylaws for Internet Corporation for Assigned Names and Numbers, as amended on 18 June 2018 (**Bylaws**), by (a) its staff (**Staff**) failing to pronounce on the question of whether the Domain Acquisition Agreement entered into between Nu DotCo, LLC (**NDC**) and Verisign Inc. (**Verisign**) on 25 August 2015, as amended and supplemented by the "Confirmation of Understanding" executed by these same parties on 26 July 2016 (**DAA**), complied with the New gTLD Program Rules following the Claimant's complaints that it violated the Guidebook and Auction Rules, and, while these complaints remained unaddressed, by nevertheless moving to delegate .WEB to NDC in June 2018, upon the .WEB contention set being taken "off hold"; and (b) its Board, having deferred consideration of the Claimant's complaints about the propriety of the DAA while accountability mechanisms in connection with .WEB remained pending, nevertheless (i) failing to prevent the Staff, in June 2018, from moving to delegate .WEB to NDC, and (ii) failing itself to pronounce on these complaints while taking the position in this IRP, an accountability mechanism in which these complaints were squarely raised, that the Panel should not

[197] Application, paras. 95-99.

[198] *Ibid*, para. 99.

[199] Final Decision, para. 413 [emphasis added].

> pronounce on them out of respect for, and in order to give priority to the Board's expertise and the discretion afforded to it in the management of the New gTLD Program;
>
> […]
>
> 5. **Recommends** that the Respondent stay any and all action or decision that would further the delegation of the .WEB gTLD until such time as the Respondent's Board has considered the opinion of the Panel in this Final Decision, and, in particular (a) considered and pronounced upon the question of whether the DAA complied with the New gTLD Program Rules following the Claimant's complaints that it violated the Guidebook and Auction Rules and, as the case may be, (b) determined whether by reason of any violation of the Guidebook and Auction Rules, NDC's application for .WEB should be rejected and its bids at the auction disqualified;

143. The context for the declarations and the recommendation just quoted – and the use therein of the terms "pronounce" and "pronouncement" – is provided in the following extracts of the Final Decision:[200]

> 299. The evidence leads the Panel to a different conclusion insofar as the post-auction actions and inactions of the Respondent are concerned. What the evidence establishes is that upon it being revealed that Verisign had entered into an agreement with NDC and provided funds in support of NDC's successful bid for .WEB, questions were immediately raised by two (2) members of the .WEB contention set as to the propriety of NDC's conduct as a gTLD applicant in light of the New gTLD Program Rules. As explained later in these reasons, the Panel accepts that these questions, including the fundamental question of whether or not the DAA violates the Guidebook and the Auction Rules, are better left, in the first instance, to the consideration of the Respondent's Staff and Board. However, it needs to be emphasized that this deference is necessarily predicated on the assumption that the Respondent will take ownership of these issues when they are raised and, subject to the ultimate independent review of an IRP Panel, will take a position as to whether the conduct complained of complies with the Guidebook and Auction Rules. After all, these instruments originate from the Respondent, and it is the Respondent that is entrusted with responsibility for the implementation of the gTLD Program in accordance with the New gTLD Program Rules, not only for the benefit of direct participants in the Program but also for the benefit of the wider Internet community.
>
> 300. The evidence in the present case shows that the Respondent, to this day, while acknowledging that the questions raised as to the propriety of NDC's and Verisign's conduct are legitimate, serious, and deserving of its careful attention, has nevertheless failed to address them. Moreover, the Respondent has adopted contradictory positions, including in these proceedings, that at least in appearance undermine the impartiality of its processes.
>
> […]
>
> 322. The Panel has no hesitation in finding, based on the above, that that the Respondent represented by its conduct that the questions raised by the Claimant and "others in the contention set" were worthy of the Respondent's consideration, and that the Respondent would consider, evaluate, and seek informed resolution of the issues arising therefrom. By reason of this conduct on the part of the Respondent, the Panel cannot accept the Respondent's contention that there was nothing for the Respondent to consider, decide or pronounce upon in the absence of a formal accountability mechanism having been commenced by the Claimant. The fact of the matter is that the Respondent represented that it would consider the matter, and made that representation at a time when Ms. Willett confirmed the Claimant had no pending accountability mechanism. Moreover, since the Respondent is responsible for the implementation of the New gTLD Program in accordance with the New gTLD Program Rules, it would seem to the Panel that the Respondent itself had an interest in ensuring that these questions, once raised, were addressed and resolved. This would be required not only to preserve and promote the integrity of the New gTLD Program, but also to disseminate the Respondent's position on those questions within the Internet community and allow market participants to act accordingly.

[200] Final Decision, paras. 299-300, 322, 330-331, 335, 344, 347-347 and 352 [emphasis added, except in para. 330 where the emphasis is in the original].

[…]

330. Mr. Disspain was invited by the Panel to confirm that after the November 2016 Board workshop, he knew that the question of whether NDC's bid was compliant with the New gTLD Program Rules had been raised by Afilias and was a "pending question, one on which the Board had not pronounced and had decided not to address." [emphasis added] Mr. Disspain provided this confirmation. The Panel can safely assume that what was true for Mr. Disspain was equally true for his fellow Board members who were in attendance at the workshop.

331. The Respondent urges that it was not a violation of the Respondent's Bylaws for the Board, on 3 November 2016, to defer consideration of the complaints that had been raised in relation to NDC's application and auction bids for .WEB. It is common ground that there were Accountability Mechanisms in relation to .WEB pending at the time, and it seems to the Panel reasonable for the Board to have decided to await the outcome of these proceedings before considering and determining what action, if any, it should take. The Panel notes that it reaches that conclusion without needing to rely on the provisions of Section 4.3(i)(iii) of the Bylaws, and determining whether or not that decision involved the Board's exercise of its fiduciary duties.

[…]

335. In the opinion of the Panel, the Respondent's decision to move to delegation without having pronounced on the questions raised in relation to .WEB was inconsistent with the representations made in Ms. Willett's letter of 16 September 2016, the text in the introduction to the attached Questionnaire, and Mr. Atallah's letter of 30 September 2016. The Panel also finds this conduct to be inconsistent with the Board's decision of 3 November 2016 which, while it deferred consideration of the .WEB issues, nevertheless acknowledged that they were deserving of consideration, a position reiterated by the Respondent in this IRP.

[…]

344. In the opinion of the Panel, there is an inherent contradiction between proceeding with the delegation of .WEB to NDC, as the Respondent was prepared to do in June 2018, and recognizing that issues raised in connection with NDC's arrangements with Verisign are serious, deserving of the Respondent's consideration, and remain to be addressed by the Respondent and its Board, as was determined by the Board in November 2016. A necessary implication of the Respondent's decision to proceed with the delegation of .WEB to NDC in June 2018 was some implicit finding that NDC was not in breach of the New gTLD Program Rules and, by way of consequence, the implicit rejection of the Claimant's allegations of non-compliance with the Guidebook and Auction Rules. This is difficult to reconcile with the submission that "ICANN has taken no position on whether NDC violated the Guidebook".

[…]

347. In sum, the Panel finds that it was inconsistent with the representations made to the Claimant by ICANN's Staff, and the rationale of the Board's decision, in November 2016, to defer consideration of the issues raised in relation to NDC's application for .WEB, for the Respondent's Staff, to the knowledge of the Respondent's Board, to proceed to delegation without addressing the fundamental question of the propriety of the DAA under the New gTLD Program Rules. The Panel finds that in so doing, the Respondent has violated its commitment to make decisions by applying documented policies objectively and fairly.

348. As a direct result of the foregoing, the Panel has before it a party – the Claimant – attacking a decision – the Respondent's failure to disqualify NDC's application and auction bids – that the Respondent insists it has not yet taken. Moreover, the Panel finds itself in the unenviable position of being presented with allegations of non-compliance with the New gTLD Program Rules in circumstances where the Respondent, the entity with primary responsibility for this Program, has made no first instance determination of these allegations, whether through actions of its Staff or Board, and declines to take a position as to the propriety of the DAA under the Guidebook and Auction Rules in this IRP. The Panel addresses these peculiar circumstances further in the section of this Final Decision addressing the proper relief to be granted.

[…]

352. For reasons expressed elsewhere in this Final Decision, the Panel is of the opinion that it is for the Respondent to decide, in the first instance, whether NDC violated the Guidebook

> and Auction Rules and, assuming the Respondent determines that it did, what consequences should follow. […]

144. In the opinion of the Panel, there is and can be no ambiguity as to the meaning of the words "pronounce" and "pronouncement" in the Final Decision when read in their proper context. These words are used by the Panel interchangeably with the words "decide" (paras. 322 and 352), "resolve" (para. 322) and "determine" (para. 352), thus confirming that they are to be given their usual dictionary meaning, *to wit*: "to give a judgement, or opinion or statement formally, officially or publicly";[201] "to formally state an official opinion or decision"[202]; "to utter formally, officially, and solemnly; to declare aloud and in a formal manner. In this sense a Court is said to 'pronounce' judgment or a sentence".[203]

145. The Panel notes that Google's English dictionary provided by Oxford Languages lists among the synonyms of the verb "to pronounce" the verbs: "to declare", "to rule", "to adjudicate", and "to judge".[204] That the verb "to pronounce" and the noun "pronouncement" were used in the Final Decision in the sense just indicated is also confirmed by the fact that the word "pronounce" is used in paragraph 413(1) of the Final Decision, quoted above, to refer to the decision that the Panel itself was invited to make by the Claimant in this IRP.

146. Finally, the Panel observes that when the word "pronounced" was used by a member of the Panel to seek confirmation from Mr. Disspain, a long-time serving member of the Respondent's Board, that after the November 2016 Board workshop he knew that the question of whether NDC's bid was compliant with the New gTLD Program Rules had been raised by Afilias and was a "*pending question, one on which the Board had not pronounced and had decided not to address*",[205] Mr. Disspain had no difficulty understanding the question, and neither the Claimant nor the Defendant raised objection that it somehow lacked clarity.

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[201] Oxford Learner's Dictionaries, *s.v.* "Pronounce", https://www.oxfordlearnersdictionaries.com/us/definition/english/pronounce ("to give a judgement, opinion or statement formally, officially or publicly").

[202] MacMillan Dictionary, *s.v.* "Pronounce", https://www.macmillandictionary.com/us/dictionary/american/pronounce ("to formally state an official opinion or decision").

[203] The Law Dictionary (on-line version), *s.v.* "Pronounce", https://thelawdictionary.org/pronounce ("To utter formally, officially, and solemnly; to declare aloud and in a formal manner. In this sense a court is said to 'pronounce' judgment or a sentence.")

[204] Google Dictionary provided by Oxford Languages, *s.v.* "Pronounce", https://www.google.com/search?q=pronounce+meaning&rlz=1C1GCEB_enCA924CA924&ei=ZuuwYfvdAbOcptQPn8iNgAo&ved=0ahUKEwj7qJaf3dT0AhUzjokEHR9kA6AQ4dUDCA4&uact=5&oq=pronounce+meaning&gs_lcp=Cgdnd3Mtd2l6EAMyCAgAEAcQChAeMggIABAHEAoQHjIGCAAQBxAeMgYIABAHEB4yBggAEAcQHjIGCAAQBxAeMgYIABAHEB4yBggAEAcQHjIGCAAQBxAeMgYIABAHEB46BAgAEBM6BggAEB4QEzoICAAQBRAeEBM6CAgAEAcQHhATSgQIQRgASgQIRhgAUMQCWN8EYMcNaAFwAHgAgAFkiAGYApIBAzIuMZgBAKABAcABAQ&sclient=gws-wiz.

[205] Merits hearing transcript, 7 August 2020 (Mr. Disspain), pp. 976-977, quoted in Final Decision, para. 330, and quoted above in this decision at para. 143. See also Merits hearing transcript, 7 August 2020 (Mr. Rasco), pp. 898.

147. In their Submission on the Application, the *Amici* refer to a press release dated 9 June 2021 issued by counsel for the Claimant announcing that they had "[…] Secure[d] Another Victory Against ICANN in .Web Arbitration". This press release concerns the Final Decision and it describes in terms free from ambiguity the Panel's decision that the Respondent's Board should consider and pronounce upon the Claimant's claims:

> The ICDR Panel has directed ICANN's Board to conduct an objective and fair review of Afilias' Complaints, consider whether NDC violated ICANN's rules and what the consequences should be if a determination of illegality is made.[206]

148. For all of the above reasons, the Panel has no hesitation in rejecting outright the contention that the terms "pronounce" or "pronouncement" as used in the Final Decision raise any ambiguity. By way of consequence, the Panel must deny the request for an interpretation of those terms.

149. The Panel also denies as falling manifestly outside the scope of Article 33 the Claimant's request that the Panel address the ten (10) questions said to regard the "nature of a 'pronouncement'". As the Respondent correctly notes, many of those questions seek advisory opinions from the Panel on the procedures and processes that the Board should follow when it comes to consider and resolve the Claimant's complaints against NDC and the DAA, issues as to which neither party made submissions or sought findings or declarations and which are not addressed in the Final Decision.[207]

2. Alleged Ambiguity as to the Purported Requirement of a Pronouncement as a Pre-Condition to Asserting a Claim in an IRP

150. The Claimant's second request for interpretation comes in the form of three (3) questions:

> Did the Panel determine that the Board must always "pronounce" on Staff action or inaction as a pre-condition for an IRP panel to decide a dispute based on Staff action or inaction? If so, what is the source for this pre-condition in the Bylaws? And, if not, then why has this pre-condition been inserted, given the Panel's observations that some sort of decision on Afilias' complaints was taken by Staff, which was at least implicitly approved by the Board through its inaction?[208]

151. This second request for interpretation seeks to build on the Claimant's assertion that the effect of the Final Decision is that the impugned action or inaction of the Respondent's Staff must first be submitted to the Board for pronouncement before an IRP may be pursued.[209] On the basis of that assertion, Afilias requests "that the Panel provide an interpretation that explains whether its

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[206] See *Amici*'s Submission, para. 19, fn. 27.

[207] Response, para. 68.

[208] Application, para. 94.

[209] *Ibid*, paras. 100 and 103.

decision to remand to the Board for "pronouncement" assumes or requires that all future IRP challenges to Staff action or inaction must first be pronounced upon by the Board."[210]

152. However, not only does the Claimant fail to support its basic assertion by reference to specific language in the Final Decision, the assertion is actually disproved by some of the Panel's actual findings in the Final Decision. Indeed, and as the Respondent observes, "the Panel found in Afilias' favor with regard to actions and inactions [of the Staff] for which the ICANN Board never pronounced."[211] For example, the Panel found that the Staff had acted contrary to the Respondent's Articles and Bylaws by preparing and issuing the Questionnaire of 16 September 2016 and, in June 2018, by moving toward the delegation of .WEB without the question of whether NDC had violated the New gTLD Program Rules having been determined. These Staff actions or inactions had not previously been submitted to the Board for pronouncement, and the Panel's findings in relation thereto therefore contradict and disprove the assertion and associated concerns on which this second request for interpretation is premised.

153. This suffices for the Panel to find that the Claimant's second request for interpretation is based on a false premise and, in any event, that it fails to identify an ambiguity in the Final Decision requiring clarification or interpretation.

3. Alleged Ambiguity as to the Law Applied by the Panel

154. The Claimant's third request for interpretation of the Final Decision concerns to the law applied by the Panel in this IRP. The Claimant contends that the Final Decision is vague and ambiguous as to the actual law applied by the Panel and requests the Panel:

> …to provide an interpretation of its decision on the applicable law that clarifies (a) whether it held that California law is the sole law applicable to ICANN, (b) what specific law, if any, it applied to interpret the obligations contained in ICANN's Articles and Bylaws, and (c) whether international law is an independent source of obligation in light of the Articles' and Bylaws' requirement that ICANN "shall conduct its activities in conformity with relevant principles of international law."[212]

155. The Application asserts that the Panel "apparently determined that California law should be applied to the Dispute".[213] After reproaching the Panel for recording in the Final Decision that the Claimant "did not express disagreement with ICANN's position" concerning the application of California law,[214] the Claimant goes on further to assert that the Panel "does not identify the substantive law

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[210] Application, para. 103.

[211] Response, para. 70.

[212] Application, para. 107.

[213] *Ibid*, para. 104.

[214] *Ibid*, paras. 105-106.

(if any) it deemed applicable" to its rulings (other than those on privilege issues and the substance of the business judgment rule).[215]

156. These assertions completely distort the Final Decision in so far as the applicable law is concerned.

157. Before quoting the relevant section of the Final Decision on the Applicable Law, it bears recalling that this IRP proceeded in two (2) phases, and that while the Final Decision completed Phase II, it was the Final Decision *in the IRP*. As a consequence, some sections of the Introduction to the Final Decision relate to Phase I, some to Phase II, while others relate to the IRP as a whole. This explains why certain paragraphs of the Final Decision reproduce entire paragraphs from the Decision in Phase I, while others, in order to abbreviate the Final Decision, incorporate by reference whole sections of the Phase I Decision.[216]

158. The Panel reproduces below in full the Applicable Law section of the Final Decision:

> **H. Applicable Law**
>
> 27. The rules applicable to the present IRP are, in the main, those set out in the Bylaws and the Interim Procedures.
>
> 28. Section 1.2(a) of the Bylaws provides that "[i]n performing its Mission, ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law […]". The Panel notes that Article III of the Articles is to the same effect as Section 1.2(a) of the Bylaws.
>
> 29. At the hearing on Phase I, counsel for the Respondent, in response to a question from the Panel, submitted that in case of ambiguity the Interim Procedures, as well as the Articles and other "quasi-contractual" documents of ICANN, are to be interpreted in accordance with California law, since ICANN is a California not-for-profit corporation. The Claimant did not express disagreement with ICANN's position in this respect.
>
> 30. As noted later in these reasons, the issues of privilege that arose in the document production phase of this IRP were resolved applying California law, as supplemented by US federal law.[217]

159. As indicated in the above quoted paragraphs, the only issues that the Panel stated were resolved applying California law were the issues of privilege that arose in the document production phase of this IRP.[218] As for the statement the Claimant reproaches the Panel for having repeated in the Final Decision, namely that the Claimant "did not express disagreement with ICANN's position", paragraph 29 of the Final Decision states explicitly that it was made in answer to a question at the hearing on Phase I and that it concerned the law applicable to the interpretation of the Interim

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[215] Application, paras. 104-106; see also paras. 78-79.

[216] See, for example, para. 35 of the Final Decision which incorporates by reference paras. 33-67 of the Phase I Decision.

[217] Final Decision, paras. 27-30 [emphasis added].

[218] *Ibid*, para. 30. This is further elaborated on in paragraph 59 of the Final Decision. The Panel also declined the Respondent's invitation to apply California law to determine the meaning of the terms "frivolous" and "abusive" as used in Section 4.3 (r) of the Bylaws (Final Decision, para. 400).

Procedures, as well as the Articles and other "quasi-contractual" documents of ICANN, in case of ambiguity. As the Claimant itself notes in the Application, paragraph 29 of the Final Decision reproduced *verbatim* paragraph 27 of the Phase I Decision and concerned issues that had been discussed in Phase I.[219]

160. As regards the other issues in dispute, the first paragraph of the Applicable Law section of the Final Decision states that the "rules applicable to the present IRP are, in the main, those set out in the Bylaws and the Interim Procedures", while the next paragraph quotes extensively from Section 1.2(a) of the Bylaws, including its reference to relevant principles of international law.

161. In the Panel's opinion, the Final Decision is explicit as to the rules that the Panel has applied to arrive at its various findings and conclusions and, consistent with paragraph 28 of the Final Decision, these rules are, in the main, those set out in the Bylaws and the Interim Procedures. As regards the Respondent's time limitations defence, the Panel identified the relevant rule of the Interim Procedures in the section of the Final Decision entitled "Applicable Time Limitation Rule".[220] In so far as the merits of the Claimant's claims are concerned, "the key standards against which the Respondent has determined that its conduct should be assessed" are set out in the section of the Final Decision entitled "Relevant Provisions of the Articles and Bylaws",[221] many of which are quoted in full.

162. In the Panel's opinion, in regard to the law applied by the Panel in this IRP, the Application fails to identify any ambiguity requiring clarification or interpretation. The Claimant's third request for interpretation must therefore be denied.

4. Alleged Ambiguity as to the Basis for the Determination Concerning ICANN's Knowledge, Expertise and Experience

163. The Claimant's fourth request for interpretation of the Final Decision is directed to an alleged ambiguity as to the basis for the Panel's determination concerning ICANN's knowledge, expertise and experience. However, instead of pointing to language that, by reason of its alleged ambiguity, might require clarification or interpretation,[222] the Claimant criticizes that determination and seeks an explanation as to the basis on which it was made:

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[219] Application, para. 79.

[220] Final Decision, paras. 259-268.

[221] *Ibid*, paras. 289-296.

[222] In regard to the Respondent's knowledge, expertise and experience with the gTDL Program Rules, the Panel noted that the Guidebook and Auction Rules "originate from the Respondent and it is the Respondent that is entrusted with responsibility for the implementation of the gTDL Program in accordance with the gTLD Program Rules […]. " (Final Decision, para. 299). The Respondent does not cite this observation in its discussion of its fourth request for interpretation, nor does it refer to the

> Afilias requests the Panel to provide an interpretation that clarifies the basis on which it determined that ICANN has the "knowledge, expertise, and experience" that uniquely qualifies it, as opposed to the Panel, to "pronounce" on Afilias' complaints regarding ICANN's obligations with respect to NDC's violations of the New gTLD Program Rules.[223]

164. This is not a proper request for interpretation. As noted earlier in this decision, a request for interpretation may not be used to challenge the tribunal's reasoning or dispositions, to seek revision, reformulation or additional explanations of a given decision, or "to ascertain which precise documents and other evidence the tribunal relied on in support of the findings in question."[224]

165. This suffices to dispose of the Claimant's fourth request for interpretation, which must be denied as being unauthorized under Article 33 of the ICDR Rules.

5. Alleged Ambiguity as to the Standard and Burden of Proof Applied by the Panel

166. Finally, the Claimant argues that there is an ambiguity in the Final Decision as to the standard and burden of proof applied by the Panel. In the Claimant's submission, the ambiguity stems from paragraphs 32 and 33 of the Final Decision, which the Panel cites below along with paragraph 31, which introduces the section of the Final Decision entitled "Burden and Standard of Proof":

> **I. Burden and Standard of Proof**
>
> 31. It is a well-known and accepted principle in international arbitration that the party advancing a claim or defence carries the burden of proving its case on that claim or defence.
>
> 32. As regards the standard (or degree) of proof to which a party will be held in determining whether it has successfully carried its burden, it is generally accepted in practice in international arbitration that it is normally that of the balance of probabilities, that is, "more likely than not". That said, it is also generally accepted that allegations of dishonesty or fraud will attract very close scrutiny of the evidence in order to ensure that the standard is met. To quote from a leading textbook, "[t]he more startling the proposition that a party seeks to prove, the more rigorous the arbitral tribunal will be in requiring that proposition to be fully established."
>
> 33. These principles were applied by the Panel in considering the issues in dispute in Phase II of this IRP.[225]

167. In relation to this last request for interpretation, the Claimant begins by asserting, based on the above-quoted language of paragraph 32, that "the Panel state[d] that it applied a heightened standard of proof to some issues before it, in light of allegations of dishonesty or fraud".

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evidence of Ms. Christine Willett and Ms. Samantha Eisner, two (2) members of the Respondent's Staff, or that of Ms. J. Beckwith Burr and Mr. Christopher Disspain, two (2) Board members, all of whom filed witness statements and testified at the evidentiary hearing (see Final Decision, paras. 68 and 70).

223 Application, para. 111 [emphasis added].

224 Stuart Isaacs, "Chapter 22: Life after Death: The Arbitral Tribunal's Role Following its Final Award" in Neil Kaplan & Michael J. Moser (eds.), *Jurisdiction, Admissibility and Choice of Law in International Arbitration*, Kluwer Law International, 2018, p. 367.

225 Final Decision, paras. 31-33.

The Claimant goes on to state that the Panel failed to identify at any point in the Decision the issues to which it applied these principles such that "the standard of proof applicable to the issues ultimately resolved in the *Dispositif* is left indeterminable."[226] Based on that reasoning, the Claimant requests that:

> … the Panel provide this interpretation regarding the following issues:
>
> a) Whether Rule 4 of the Interim Supplementary Procedures was enacted in order to time bar Afilias' claims (Paragraphs 279 through to 281 in connection with paragraphs 1 through 3 of the *Dispositif*)?
>
> b) Whether the pre-auction investigation, including ICANN's communications with Mr. Rasco, violated the Articles and Bylaws (Paragraphs 294 through to 295 in connection with paragraph 7 of the *Dispositif*)?
>
> c) Whether the preparation and issuance of the Questionnaire absent disclosure of the DAA violated the Articles and Bylaws (Paragraphs 307 through to 312 in connection with paragraph 7 of the *Dispositif*)?
>
> d) Whether the failure to disclose the "decision" from the 3 November 2016 Board workshop violated the Articles and Bylaws (Paragraphs 321 through to 329 in connection with paragraph 3 of the *Dispositif*)?
>
> e) Whether the failure to "pronounce" on Afilias' complaints regarding NDC violated the Articles and the Bylaws (Paragraphs 330 through to 344 of the Decision in connection with paragraph 1 of the *Dispositif*)?
>
> f) Whether proceeding toward delegation of .WEB to NDC without a "pronouncement" violated the Articles and Bylaws (Paragraphs 330 through to 344 in connection with paragraph 1 of the *Dispositif*)?
>
> g) Whether the disparate treatment of Afilias violated the Articles and Bylaws (paragraph 347 in connection with paragraph 7 of the *Dispositif*)?
>
> h) Whether the failure to promote competition violated the Articles and Bylaws (paragraphs 348 through to 348 of the Decision in connection with paragraph 1 of the *Dispositif*)?[227]

168. The Panel finds no basis in paragraph 32 or elsewhere in the Final Decision for the Claimant's assertion that the Panel "applied *a heightened standard* of proof to some of the issues before it, in light of allegations of dishonesty or fraud", and the Claimant does not cite any. To the contrary, paragraph 32 identifies *one* standard of proof – the balance of probabilities – and adds that allegations of dishonesty or fraud will attract close scrutiny to ensure "*that **the** standard is met*".[228] The Panel goes on to state that "these principles were applied by the Panel in considering *the issues in dispute in Phase II of this IRP*",[229] without differentiating among these issues.

169. Nowhere in the Final Decision is there any suggestion that the Panel applied a different standard of proof than the standard identified in paragraph 32, or that it was felt appropriate to apply to any

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[226] Final Decision, paras. 112-113.

[227] Afilias' Article 33 Application, para. 114.

[228] Final Decision, para. 32 [emphasis added].

[229] *Ibid*, para. 33 [emphasis added].

of the issues determined by the Panel close scrutiny to ensure that the standard was met. Indeed, the only explicit reference to the standard of proof in the Final Decision (other than in paragraph 32) provides confirmation that the standard applied was that identified in that paragraph.

> […] Having considered the witness and documentary evidence on [the Respondent's pre-auction investigation], which is preponderant, the Panel finds […].[230]

170. As discussed in the Decision on Phase I, the Claimant had made allegations of misconduct on the part of the Respondent and members of its Staff in relation to the adoption of Rule 7 of the Interim Procedures. The Respondent's good faith in the enactment of Rule 4 was also impugned by the Claimant in its submissions concerning the time limitation defence. However, and for reasons set out in the Final Decision, the Panel did not make any finding in relation to the Rule 7 Claim[231] or the Claimant's allegations concerning the adoption of Rule 4.[232]

171. In sum, and contrary to the Claimant's assertions, the Panel did not apply a "heightened standard of proof to some of the issues". Accordingly, and quite aside from the Claimant's failure to identify any ambiguity requiring interpretation or clarification, there is no basis for the Claimant's request that the Panel identify the issues as to which it applied a heightened standard of proof, nor for its request that the Panel address the eight (8) questions listed as part of its fifth request for interpretation.

172. For these reasons, the Claimant's fifth request for interpretation is denied.

6. Conclusion

173. For the reasons explained in this section, the Panel declines to provide an interpretation of the Final Decision regarding the five (5) issues identified in the Application. In the Panel's opinion, none of those five (5) requests meets the requirements for interpretation of an award set out in Article 33 of the ICDR Rules.

D. Costs

174. The Respondent claims its costs and legal fees incurred as a result of the Application, as well as the Panel's fees in resolving the Application. According to the Respondent, the Application is both "frivolous" and "abusive" as these terms were defined by the Panel in the Final Decision.

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[230] Final Decision, para. 298. Inexplicably, the Claimant includes a request for interpretation regarding the standard applied to that issue in the list of questions cited in the text at para. 167 (see para. b).

[231] Final Decision, paras. 7, 355-357 and 413(9).

[232] *Ibid*, paras. 282-284.

175. The Claimant accepts that the Panel has the power to allocate the costs of the Application as between the Parties, and agrees with the Respondent that the "frivolous or abusive" standard set out in Section 4.3(r) of the Bylaws applies.[233] However, the Claimant urges that the Application is neither frivolous, nor abusive.

176. Article 33 (4) of the ICDR Rules, already cited, provides that the parties are responsible for all costs associated with any request for interpretation, correction, or an additional award, and that the Tribunal "may allocate such costs."

177. Section 4.3(r) of the Bylaws reads as follows:

> (r) ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members. Except as otherwise provided in Section 4.3(e)(ii), each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, including the costs of all legal counsel and technical experts. Nevertheless, except with respect to a Community IRP, the IRP Panel may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.[234]

178. In the Final Decision, the Panel defined frivolous as used in Section 4.3(r) as "of little weight or importance", "having no sound basis (as in fact or law)", "lacking in seriousness" or "clearly insufficient on its face".[235] As for the term "abusive", the Panel defined it as "characterized by wrong or improper use or action".[236]

179. The Panel has dismissed the Application in its entirety. In the opinion of the Panel, under the guise of seeking an additional decision, the Application is seeking reconsideration of core elements of the Final Decision. Likewise, under the guise of seeking interpretation, the Application is requesting additional declarations and advisory opinions on a number of questions, some of which had not been discussed in the proceedings leading to the Final Decision.

180. In such circumstances, the Panel cannot escape the conclusion that the Application is "frivolous" in the sense of it "having no sound basis (as in fact or law)". This finding suffices to entitle the Respondent to the cost shifting decision it is seeking and obviates the necessity of determining whether the Application is also "abusive".

181. The Respondent avers that it has incurred US $236,884.39 in legal fees opposing Afilias' Article 33 Application and submits that this sum is reasonable. The Respondent points out that the Application consisted of 68 pages of text with over 200 footnotes; cited 17 new authorities comprising more

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[233] Afilias' Reply, para. 131.

[234] Bylaws, Section 4.3(r) [emphasis added].

[235] Final Decision, para. 401.

[236] *Ibid.*

than 170 pages; and sought far-reaching relief, all of which required the Respondent to take the Application seriously and respond accordingly. A schedule of fees incurred in responding to the Application was attached as Appendix B to the Response. In regard to the amount claimed by the Respondent for its legal fees, the Panel notes that while the Claimant has denied that the Application is frivolous or abusive, it did not challenge the reasonableness of the amount of fees claimed by the Respondent.

182. The Panel finds that the amount of fees incurred by the Respondent to respond to the Application, as detailed in Appendix B to the Response, is reasonable. Considering the Panel's above finding in paragraph 180, the Panel considers that the Respondent, which is clearly "the prevailing party" in respect of the Application, should be reimbursed its legal fees under Section 4.3(r) of the Bylaws, and the Panel so orders.

183. The ICDR has informed the Panel that the fees and expenses of the Panelists in relation to the Application total US $140,335.30, and that there are no administrative fees of the ICDR in relation to the Application. The ICDR has further advised that the entire advance on non-party costs in relation to the Application has been paid by the Respondent.

184. Considering the outcome of the IRP as a whole, including the findings of breach of the Articles and Bylaws by the Respondent as set out in the Final Decision, the Panel denies the Respondent's claim that the Claimant also be made to bear the fees of the Panel members in relation to the Application, which, as part of the administrative costs of the IRP, shall be borne by the Respondent in accordance with the default rule set out in Section 4.3 (r) of the Bylaws.

V. *DISPOSITIF*

185. For the reasons set out in this decision, the Panel hereby unanimously:

> 1. **Denies** in its entirety Afilias Domains No. 3 Limited's Rule 33 Application for an Additional Decision and for Interpretation, dated 21 June 2021 (**Application**);
>
> 2. **Grants** the Respondent's request that the Panel shift liability for the legal fees incurred by the Respondent in connection with the Application, **fixes** at US $236,884.39 the amount of the legal fees to be reimbursed to the Respondent by the Claimant on account of those legal fees, and **orders** the Claimant to pay this amount to the Respondent within thirty (30) days of the date of notification of this decision, after which 30-day period this amount shall bear interest at the rate of 10% *per annum*;
>
> 3. **Fixes** the costs of the Application, consisting of the fees and expenses of the Panel members, at US $140,335.30;
>
> 4. **Denies** the Respondent's request that the Claimant bear the fees of the Panel members in connection with the Application, and **declares** that the costs of

the Application, inclusive of the fees and expenses of Panel members, shall be borne in their entirety by the Respondent.

186. This Decision may be executed in counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Place of the IRP: London, England

Catherine Kessedjian

Richard Chernick

Pierre Bienvenu, Ad. E., Chair

Dated: 21 December 2021

the Application, inclusive of the fees and expenses of Panel members, shall be borne in their entirety by the Respondent.

186. This Decision may be executed in counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Place of the IRP: London, England

Catherine Kessedjian

Richard Chernick

Pierre Bienvenu, Ad. E., Chair

Dated: 21 December 2021

the Application, inclusive of the fees and expenses of Panel members, shall be borne in their entirety by the Respondent.

186. This Decision may be executed in counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Place of the IRP: London, England

Catherine Kessedjian

Richard Chernick

Pierre Bienvenu, Ad. E., Chair

Dated: 21 December 2021

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RESPONDENT'S EXHIBIT

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Minutes | Board Accountability Mechanisms Committee (BAMC) Meeting |

BAMC Attendees: Alan Barrett, Becky Burr, Edmon Chung, Patricio Poblete, León Sánchez, and Katrina Sataki

BAMC Member Appologies: Sarah Deutsch

ICANN organization Attendees: Franco Carrasco (Board Operations Specialist), Casandra Furey (Associate General Counsel), John Jeffrey (General Counsel and Secretary), Elizabeth Le (Associate General Counsel), Wendy Profit (Board Operations Senior Manager), and Amy Stathos (Deputy General Counsel)

The following is a summary of discussions, actions taken, and actions identified:

1. **Consideration of the *Afilias Domains No. 3 Ltd. (Afilias) v. ICANN* Independent Review Process (.WEB IRP) Final Declaration** – Edmon Chung recused himself from the discussion noting potential conflicts of interest. At its 16 January 2022 meeting, the Board requested that the BAMC review, consider, and evaluate the .WEB IRP Final Declaration and recommendation, and provide the Board with its findings to consider and act upon before the organization takes any further action toward contracting for or delegation of .WEB. The Committee reviewed and discussed the background of the .WEB contention set as well as the .WEB IRP Final Declaration and the recommendation in that declaration. The Committee discussed that in light of the Panel's determinations and recommendation in the Final Declaration, as well as the claims raised in the IRP and in additional correspondence, it seems appropriate for ICANN to undertake an analysis of the allegations regarding the Domain Acquisition Agreement (DAA) between Nu Dotco, LLC (NDC) and Verisign, Inc. regarding .WEB, as well as the allegations regarding Afilias' conduct during the Auction Blackout Period in order to determine if any consequences are warranted with respect to any of the .WEB applications before moving forward with .WEB. Following discussion, the BAMC agreed to recommend that the Board: (a) ask the BAMC to review, consider and evaluate the claims relating to the DAA and the claims relating to Afilias' conduct during the Auction Blackout Period; (b) ask the BAMC to provide the Board with its findings and recommendations as to whether the alleged actions of NDC and/or Afilias warrant disqualification or other consequences, if any, related to any relevant .WEB application; and (c) direct ICANN to continue refraining from contracting for or delegation of .WEB until ICANN has made its determination regarding the .WEB application(s).

   - Actions: ICANN org to prepare relevant Board materials.

2. **Update re IRP Standing Panel Selection Process** – The BAMC received an status update on the composition of the omnibus IRP Standing Panel. The org reported that on 17 February 2022, the names of the IRP Community Representatives Group were announced (Group). The Group members, which were empowered by Supporting Organizations and Advisory Committtees, are responsible for proposing a slate of nominees, for confirmation by the ICANN Board of Directors, to constitute the omnibus Standing Panel that will hear and resolve disputes filed under the IRP described in the ICANN Bylaws. The IRP Standing Panel candidates (Candidates) have been informed of the Group membership and have been asked to identify if they know any of the Group members. The Rules of Engagement, which govern how the parties involved in the selection process should conduct themselves, have been finalized and shared with the Candidates and the Group members. A first meeting of Group is being organized for immediately after ICANN73.

Published on 7 April 2022

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RESPONDENT'S EXHIBIT

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1. Consent Agenda:

a. Appointment of Independent Audit Firm for FY22

Whereas, **Article 22, Section 22.2 of the ICANN Bylaws** requires that at the end of the fiscal year, the books of ICANN must be audited by certified public accountants." Section 22.2 further states that the appointment of the fiscal auditors shall be the responsibility of the Board.

Whereas, ICANN organization has carried out a request for proposal for independent audit services, which has resulted in identifying [*Redacted – Confidential Negotiation Information*] as the most suitable for ICANN at this time.

Whereas, the Board Audit Committee has discussed the recommendation from ICANN org and has recommended that the Board authorize the President and CEO, or his designee(s), to take all steps necessary to engage [*Redacted – Confidential Negotiation Information*] to carry out the independent audit for the fiscal year ending 30 June 2022.

Resolved (2022.03.10.01), the Board authorizes the President and CEO, or his designee(s), to take all steps necessary to engage [*Redacted – Confidential Negotiation Information*] as the audit firm(s) for the financial statements for the fiscal year ending 30 June 2022.

Resolved (2022.03.10.02), specific items within this resolution shall remain confidential for negotiation purposes pursuant to Article 3, section 3.5(b) of the ICANN Bylaws until the President and CEO determines that the confidential information may be released.

Rationale for Resolutions 2022.03.10.01 - 2022.03.10.02

ICANN has engaged the same independent audit firm since the audit of fiscal year 2014.

In 2021, the Board Audit Committee (BAC) recommended that ICANN organization perform a Request for Proposal (RFP) for the selection of the audit firm for FY22. ICANN org issued the direct RFP to numerous audit firms and received five expressions of interest. After evaluating a completed 75-part questionnaire received from each of the five firms, ICANN org invited all five firms to make an oral presentation.

ICANN org evaluated the interested firms on several attributes such as the overall capabilities of the firm, the professional team assigned, understanding the assignment, financial value/pricing, and proposed methodology/audit approach.

ICANN org evaluated [*Redacted – Confidential Negotiation Information*] as the most suitable for ICANN based on the firm's strong partner tenure, team experience in the Not-for-Profit and Technology sectors, and value for completing much of the transaction testing before the year-end audit begins. [*Redacted – Confidential Negotiation Information*]

Taking this decision is both consistent with ICANN's Mission and in the public interest as the engagement of an independent audit firm is in fulfillment of ICANN org's obligations to undertake an audit of ICANN org's financial statements and helps serve ICANN's stakeholders in a more accountable manner.

This decision will have a fiscal impact on ICANN, which is accounted for in the FY22 ICANN Operating Plan and Budget. This decision should not have any direct impact on the security, stability and resiliency of the domain name system.

This is an Organizational Administrative Function not requiring public comment.

2. Main Agenda:

a. Deferral of the Third Review of Security, Stability and Resiliency of the Domain Name System

Whereas, **Section 4.6 (c) of the ICANN Bylaws** stipulates that the Board shall cause a periodic review of ICANN's execution of its commitment to enhance the operational stability, reliability, resiliency, security, and global interoperability of the systems and processes, both internal and external, that directly affect and/or are affected by the Internet's system of unique identifiers that ICANN coordinates. The Stability, Security and

Resiliency Review (SSR) shall be conducted no less frequently than every five years, measured from the date the previous SSR Review Team was convened; the Second Review of the Stability, Security and Resiliency of the Domain Name System (SSR2) was convened in March 2017.

Whereas, on 30 November 2020, the Board approved recommendations from the Third Accountability and Transparency Review (ATRT3) pertaining to reviews, subject to prioritization and community agreement on the Bylaws change. Recommendation 3.3 states that Security, Stability and Resiliency Reviews shall be suspended until the next Accountability and Transparency Review Team shall decide if these reviews should be terminated, amended or kept as is.

Whereas, the SSR2 completed its work and delivered its **Final Report** to the Board on 25 January 2021, with the Board **taking action on the 63 recommendations** on 22 July 2021. The implementation preparations are underway for recommendations approved by the Board, and work is progressing to inform Board action on the 34 recommendations placed into "pending" status.

Whereas, the ICANN Board's Organizational Effectiveness Committee (OEC) recommends the Board to defer the Third Review of the Security, Stability and Resiliency of the Domain Name System (SSR3), determining that it would be neither prudent nor feasible to begin this review now, given the ATRT3 recommendation to suspend and before the implementation of SSR2 recommendations has been completed.

Resolved (2022.03.10.03), the ICANN Board defers the SSR3 to allow the ICANN community and organization sufficient time to plan for, and implement pertinent ATRT3 recommendations once prioritized for implementation. The Board acknowledges that the Bylaws state that the SSR Review should be conducted every five years. The Board also acknowledges the ATRT3 recommendation, to suspend the SSR3 Review until the next ATRT makes a further recommendation on timing. The Board will oversee the implementation of ATRT3 recommendations and determine whether the timing of SSR3 should be re-examined based on the changing environment, including various dependencies.

Rationale for Resolution 2022.03.10.03

The Board action today is an essential step in its oversight responsibility over Specific Reviews, including the review of the Security, Stability and Resiliency of the Domain Name System (SSR). The Board recognizes that the current timing specified in the Bylaws to commence SSR3 in March 2022 is not prudent in light of recently issued and approved community recommendations, nor feasible given insufficient time to implement SSR2 recommendations nor determine their effectiveness, prior to starting the next review. By deferring the start of SSR3, the Board is acting in line with the ATRT3 recommendations as also supported by the ICANN community. The Board expects that once ATRT3 recommendations are prioritized, the implementation work will result in a package of proposed amendments to the ICANN Bylaws, some of which would address the timing of future reviews, including SSR3.

The ATRT3 Recommendation 3.3 states that: "Given SSR2 will not be finalized prior to ATRT3 completing its work, ATRT3 recommends that SSR Reviews shall be suspended until the next ATRT Review (or any type of review that include current ATRT duties) which shall decide if these should be terminated, amended or kept as is. This review could be re-activated at any time by the ICANN Board should there be a need for this." The Board approved this recommendation in November 2020, subject to community agreement on a Bylaws

change, stating that "When deemed appropriate through the prioritization process, the Board directs ICANN org to begin the process to make the appropriate Bylaw amendments, but if the Empowered Community rejects the Bylaws changes, further ICANN community discussion would be required before implementation."

Today's action supports the Board's continued commitment to proactively implement community-issued recommendations and to evolve Specific Reviews in collaboration with the ICANN community, to produce impactful outcomes that serve the public interest. Continuously improving delivery of Specific Reviews is a cornerstone of ICANN's commitment to accountability and transparency. It is in the public interest in that it will continue to support and improve the reviews of ICANN's responsibility for the security, stability and resiliency of the DNS toward improved outcomes.

Public comment proceeding is not considered necessary, since the ATRT3 recommendation to suspend SSR3 until the next ATRT was the subject of two public comment proceedings – on the **Draft** and **Final** SSR2 Reports.

This action is expected to result in positive impact to the security, stability or resiliency of the Internet's DNS, by allowing sufficient time to implement SSR2 recommendations and assess their impact as well as by enabling a community-based evaluation of the future of this review. This action is anticipated to result in positive budgetary or financial implications in the near term, in that the expenditure for the next review of the SSR will be deferred. It is also anticipated to have a positive impact on community and ICANN org resources.

b. **GNSO Council Policy Recommendations on EPDP Phase 2A**

Whereas, on 17 May 2018, the ICANN Board adopted the Temporary Specification for gTLD Registration Data (Temporary Specification) pursuant to the procedures in the Registry Agreement (RA) and Registrar Accreditation Agreement (RAA) concerning the establishment of temporary policies.

Whereas, following the adoption of the Temporary Specification, and per the procedure for Temporary Policies as outlined in the RA and RAA, a Consensus Policy development process as set forth in ICANN's Bylaws must be initiated immediately and completed within a one-year time period from the implementation effective date (25 May 2018) of the Temporary Specification.

Whereas, the GNSO Council approved the EPDP Initiation Request (**https://gnso.icann.org/sites/default/files/file/field-file-attach/temp-spec-gtld-rd-epdp-initiation-request-19jul18-en.pdf**) and the EPDP Team Charter (**https://gnso.icann.org/sites/default/files/file/field-file-attach/temp-spec-gtld-rd-epdp-19jul18-en.pdf**) on 19 July 2018.

Whereas, the EPDP Team divided the work into two phases. Phase 1 completed with the adoption of the **EPDP Phase 1 Final Report** on 4 March 2019, at which point the GNSO Council indicated its non-objection, as required per the EPDP Team Charter, for the EPDP Team to commence work on a System for Standardized Access/Disclosure to Non-Public Registration Data (SSAD) as well as other topics identified in Phase 2 of the Charter and/or carried over from Phase 1 (priority 2 items).

Whereas, the **Phase 2 Final Report** noted that "As a result of external dependencies and time constraints, this Final Report does not address all priority 2 items". It furthermore noted that the EPDP Team would "consult

with the GNSO Council on how to address the remaining priority 2 items".

Whereas, following these consultations, the GNSO Council adopted on 21 October 2020 **instructions** for the EPDP Phase 2A to address the remaining priority 2 items, namely 1) differentiation between legal and natural person registration data, and 2) feasibility of unique contacts to have a uniform anonymized email address.

Whereas, the EPDP Team commenced its deliberations on Phase 2A on **17 December 2020**.

Whereas, the EPDP has followed the prescribed EPDP steps as stated in the Bylaws, including the **publication of an Initial Report for public comment** on 3 June 2021, resulting in a Final Report delivered on 3 September 2021 with an updated version containing all minority statements submitted on 13 September 2021.

Whereas, all recommendations received the consensus support of the EPDP Phase 2A Team but the Chair's statement indicated that "it's important to note that some groups felt that the work did not go as far as needed, or did not include sufficient detail, while other groups felt that certain recommendations were not appropriate or necessary".

Whereas, the GNSO Council reviewed and discussed the recommendations of the EPDP Team and approved all Phase 2A on **27 October 2021** by a GNSO Supermajority vote.

Whereas, after the GNSO Council vote, **a public comment period** was held on the approved Recommendations, and the comments received (**see summary report**) are similar to comments provided by the EPDP Phase 2A Team members during its deliberations, the comments received in response to the EPDP Phase 2A Team's Initial Report, and the positions demonstrated in the minority statements to the Final Report, represent a clear divergence of views as also reflected in the Chair's statement referenced above.

Whereas, the Governmental Advisory Committee (GAC) was requested to raise any public policy concerns that might occur if the proposed policy is adopted by the Board (**https://www.icann.org/en/system/files/correspondence/botterman-to-ismail-09dec21-en.pdf**).

Whereas, the GAC responded to the Board's notice, and provided **its response** on 9 February 2022 requesting that the ICANN Board consider "the GAC Minority Statement in its entirety, as well as available options to address the outstanding public policy concerns expressed therein".

Whereas, ICANN org reviewed the Recommendations as well as the Minority Statements, and, based on current information and subject to further inputs from Data Protection Authorities and legal analysis, believes the EPDP Phase 2A recommendations do not appear to be in conflict with (a) the GDPR, (b) existing requirements for gTLD registry operators and registrars, or (c) ICANN's mandate to ensure the stability, security, and resiliency of the Internet's DNS.

Resolved (2022.03.10.04) the Board adopts the GNSO Council EPDP Phase 2A Policy Recommendations as set forth in section 3 of the **Final Report**.

Resolved (2022.03.10.05), the Board directs the President and CEO, or his designee(s), to develop and

execute an implementation plan for the adopted Recommendations that is consistent with the guidance provided by the GNSO Council and to continue communication with the community on such work.

Rationale for Resolutions 2022.03.10.04 – 2022.03.10.05

Why is the Board addressing this issue now?

The GNSO Council approved all of the final recommendations from the EPDP Working Group's **Final Report** dated 13 September 2021 at its meeting on **27 October 2021**, and **a Recommendations Report** from the Council to the Board on the topic on **16 December 2021**. In accordance with the ICANN Bylaws, a **public comment forum** was opened to facilitate public input on the adoption of the Phase 2A Recommendations. The public comment period closed on 13 January 2022. As outlined in Annex A of the ICANN Bylaws, the EPDP recommendations are now being forwarded to the Board for its review and action.

What are the proposals being considered?

The four Phase 2A recommendations relate to the topics of 1) the differentiation of legal vs. natural persons' registration data and 2) the feasibility of unique contacts to have a uniform anonymized email address. In short, the four recommendations recommend that:

1. A field or fields MUST be created to facilitate differentiation between legal and natural person registration data and/or if that registration data[1] contains personal or non-personal data. This field or fields MAY be used by those Contracted Parties that differentiate.
2. Contracted Parties who choose to differentiate based on person type SHOULD follow the guidance included in the Final Report.
3. If a GDPR Code of Conduct is developed within ICANN by the relevant controllers and processors, the guidance to facilitate differentiation between legal and natural person data SHOULD be considered within ICANN by the relevant controllers and processors.
4. Contracted Parties who choose to publish a registrant-based or registration-based email address in the publicly accessible RDDS SHOULD evaluate the legal guidance obtained by the EPDP Team on this topic.

The full list and scope of the final recommendations can be found in Annex B of the GNSO Council's Recommendations Report to the Board (see **https://gnso.icann.org/sites/default/files/file/field-file-attach/draft-epdp-phase-2a-report-06dec21-en.pdf**).

What significant materials did the Board review?

In taking this action, the Board considered:

- The **EPDP Team's Phase 2A Final Report**, dated 13 September 2021, including minority statements;
- The **GNSO Council's Recommendations Report to the Board**, dated 6 December 2021;
- The **comments** and the **summary of public comments** received in response to the public comment period that was opened following the GNSO Council's adoption of the recommendations contained in the Final Report, and GAC advice received on the topic;
- The **letter** from the GAC to the Board, dated 9 February 2022.

What factors did the Board find to be significant?

The EPDP Team's Phase 2A recommendations were developed following the GNSO Expedited Policy Development Process as set out in Annex A of the ICANN Bylaws and have received the support of the GNSO Council. As outlined in the ICANN Bylaws, the Council's Supermajority support obligates the Board to adopt the recommendations unless, by a vote of more than two-thirds, the Board determines that the recommended policy is not in the best interests of the ICANN community or ICANN. The Bylaws also allow input from the GAC in relation to public policy concerns that might be raised if a proposed policy is adopted by the Board. The GAC responded by requesting the ICANN Board to consider the GAC Minority Statement in its entirety, as well as available options to address the outstanding public policy concerns expressed therein. The Board has taken note of the comments received during the public comment period which seem to echo the sentiments of the minority statements, in which some are of the view that some of the recommendations do not go far enough while others question whether these are even necessary. The Board observes that these positions were also known to the EPDP Phase 2A Working Group as well as the GNSO Council who adopted the recommendations with the required GNSO Supermajority support.

Are there positive or negative community impacts?

Although the recommendations do not create new obligations for Contracted Parties, the recommendations are intended to facilitate differentiation between legal and natural person registration data as well as personal and non-personal data for those Contracted Parties that choose to differentiate, in line with the EPDP Phase 1 recommendations. In addition, Contracted Parties who choose to publish a registrant-based or registration-based email address may benefit from the guidance provided. Promotion of this guidance may furthermore help standardize the way in which Contracted Parties who choose to differentiate implement this in practice.

Are there fiscal impacts or ramifications on ICANN (strategic plan, operating plan, budget); the community; and/or the public?

There may be fiscal impacts on ICANN associated with the implementation of policy recommendations. These would be related to the use of ICANN org resources to implement the recommendations.

Implementation Considerations considered

The creation of a field or fields would require coordination and work through the Internet Engineering Task Force (IETF). ICANN org participates voluntarily and org staff act in their individual capacity in the IETF. Therefore, ICANN org staff can coordinate with the technical community/RDAP WG to put forward relevant proposals in IETF Working Groups to develop the necessary standards; however, it is ultimately up to the IETF to make the changes.

ICANN org estimates that implementing Recommendation 1 would require coordination through the IETF for (1) EPP extension and (2) support in RDAP (i.e., jCard and JSContact). ICANN org estimates that the EPP extension could take between 12-24 months, depending on the milestones and priorities of the IETF Registration Protocols Extensions (REGEXT) Working Group. The IETF REGEXT WG is the home of the coordination effort for standards track extensions. In the case of RDAP, (i) adding support in jCard may require adding properties or values (e.g., KIND). ICANN org estimates that this should take between 6 – 12 months. (ii) Adding support in JSContact could take between 12 – 24 months depending on whether the change could

make it into the current internet draft of JSContact or require an extension. The three lines of work: (a) EPP, (b) jCard, and (c) JSContact; could be done in parallel.

In relation to recommendation #2, ICANN org has reiterated its previous feedback[2] to the EPDP Phase 2A WG with regards to guidance for Contracted Parties. ICANN Contractual Compliance enforces requirements placed on contracted parties via the RA, RAA, and ICANN Consensus Policies, in furtherance of ICANN's mission, as recognized in the ICANN Bylaws. Guidance and best practices would exist outside these agreements and are not contractual requirements; thus, ICANN Contractual Compliance would not have contractual authority to take enforcement action against a contracted party related to its implementation of best practices or guidance, even if those best practices or guidance is developed through the EPDP Process.

Are there any Security, Stability or Resiliency issues relating to the DNS?

There are no security, stability, or resiliency issues relating to the DNS that can be directly attributable to the implementation of the EPDP recommendations.

Is this decision in the public interest and within ICANN's mission?

Consideration of community-developed policy recommendations is within ICANN's mission as defined at Article 1, section 1.1(i) of the ICANN Bylaws. This action serves the public interest, as ICANN has a core role as the "guardian" of the Domain Name System.

Is this either a defined policy process within ICANN's Supporting Organizations or ICANN's Organizational Administrative Function decision requiring public comment or not requiring public comment?

Public comment has taken place as required by the ICANN Bylaws and GNSO Operating Procedures in relation to GNSO policy development.

c. **Consideration of the *Afilias Domains No. 3 Ltd. v. ICANN* (.WEB) Independent Review Process Final Declaration**

Whereas, the Final Declaration in the *Afilias Domains No. 3 Ltd. (Afilias)*[3] *v. ICANN* Independent Review Process (IRP) regarding .WEB (.WEB IRP) was deemed "final" as of 21 December 2021 when the IRP Panel denied Afilias' subsequent challenge.

Whereas, **on 16 January 2022**, the Board considered the Final Declaration and, in part, resolved that further consideration is needed regarding the IRP Panel's non-binding recommendation that ICANN "stay any and all action or decision that would further the delegation of the .WEB gTLD until such time as the [ICANN] Board has considered the opinion of the Panel in this Final Decision, and, in particular (a) considered and pronounced upon the question of whether the DAA complied with the New gTLD Program Rules following [Afilias'] complaints that it violated the Guidebook and Auction Rules and, as the case may be, (b) determined whether by reason of any violation of the Guidebook and Auction Rules, NDC's application for .WEB should be rejected and its bids at the auction disqualified."

Whereas, pursuant to its **16 January 2022 resolution**, the Board asked the Board Accountability Mechanisms Committee (BAMC) to review, consider, and evaluate the IRP Panel's Final Declaration and recommendation, and to provide the Board with its findings to consider and act upon before the organization takes any further action toward contracting for or delegation of .WEB.

Whereas, the BAMC has reviewed, considered, and evaluated the IRP Panel's Final Declaration and recommendation, as well as other relevant materials. As a result, the BAMC has recommended that the Board take the following next steps relating to .WEB: (a) ask the BAMC to review, consider and evaluate the claims relating to the Domain Acquisition Agreement (DAA) between Nu Dotco LLC (NDC) and Verisign, Inc. and the claims relating to Afilias' conduct during the Auction Blackout Period; (b) ask the BAMC to provide the Board with its findings and recommendations as to whether the alleged actions of NDC and/or Afilias warrant disqualification or other consequences, if any, related to any relevant .WEB application; and (c) direct ICANN org to continue refraining from contracting for or delegation of .WEB until ICANN has made its determination regarding the .WEB application(s).

Resolved (2022.03.10.06), the Board hereby: (a) asks the BAMC to review, consider and evaluate the allegations relating to the Domain Acquisition Agreement (DAA) between NDC and Verisign and the allegations relating to Afilias' conduct during the Auction Blackout Period; (b) asks the BAMC to provide the Board with its findings and recommendations as to whether the alleged actions of NDC and/or Afilias warrant disqualification or other consequences, if any, related to any relevant .WEB application; and (c) directs ICANN org to continue refraining from contracting for or delegation of the .WEB gTLD until ICANN has made its determination regarding the .WEB application(s).

Rationale for Resolution 2022.03.10.06

Seven applicants submitted applications for the right to operate .WEB, including Afilias Domains No. 3 Ltd. (Afilias)[4] and Nu Dotco LLC (NDC), and, as the members of the .WEB contention set did not privately resolve contention, the applicants went to an ICANN auction of last resort. An auction was held on 27-28 July 2016, which concluded with NDC prevailing with a bid of US$135 million. Shortly thereafter, Verisign Inc. (Verisign) publicly disclosed that, pursuant to an agreement it had entered with NDC, Verisign provided the funds for NDC's bid in exchange for, among other things, NDC's future assignment of the .WEB registry agreement to Verisign, subject to ICANN's consent.

Afilias initiated an Independent Review Process regarding .WEB (.WEB IRP) in November 2018, alleging that NDC had violated the Guidebook and/or Auction Rules as a result of its arrangement with Verisign and that ICANN had violated the Bylaws by failing to disqualify NDC. NDC and Verisign asked to participate as *amici curiae* in the IRP, which the Panel granted. The merits hearing took place on 3-11 August 2020, and the IRP Panel issued its Final Declaration on 20 May 2021, which the Panel later corrected for certain typographical errors, effective 15 July 2021.

In the Final Declaration, the IRP Panel, among other things, specifically denied Afilias' requests for: (a) a binding declaration that ICANN must disqualify NDC's bid for .WEB for violating the Guidebook and Auction Rules; and (b) an order directing ICANN to proceed with contracting for .WEB with Afilias. The Panel noted that: "it is for [ICANN], that has the requisite knowledge, expertise, and experience, to pronounce in the first instance on the propriety of the [Domain Acquisition Agreement (DAA)] under the New gTLD Program Rules,

and on the question of whether NDC's application should be rejected and its bids at the auction disqualified by reason of its alleged violations of the Guidebook and Auction Rules."

The Panel further declared, among other things, that ICANN had violated its Articles of Incorporation (Articles) and Bylaws by not applying documented policies objectively and fairly in that: (a) ICANN staff did not decide whether the DAA between NDC and Verisign relating to .WEB violated the Guidebook and Auction Rules, and moved forward toward contracting with NDC in June 2018 without first having made that decision; and (b) the ICANN Board did not prevent staff from moving toward contracting in June 2018 or decide whether the DAA violated the Guidebook and Auction Rules once accountability mechanisms had been resolved.

In addition, the Panel issued a non-binding recommendation that ICANN "stay any and all action or decision that would further the delegation of the .WEB gTLD until such time as the [ICANN] Board has considered the opinion of the Panel in this Final Decision, and, in particular (a) considered and pronounced upon the question of whether the DAA complied with the New gTLD Program Rules following [Afilias'] complaints that it violated the Guidebook and Auction Rules and, as the case may be, (b) determined whether by reason of any violation of the Guidebook and Auction Rules, NDC's application for .WEB should be rejected and its bids at the auction disqualified."

Once the Final Declaration became "final," after resolution of Afilias' request for "interpretation and correction" (which the Panel determined was a "frivolous" request) on 21 December 2021, the Board considered the Final Declaration at its **16 January 2022 meeting** and adopted the following resolutions:

- "[T]he Board acknowledges that the Panel declared the following: (i) Afilias is the prevailing party in the Afilias Domains No. 3 Ltd. v. ICANN Independent Review Process; (ii) ICANN violated its Articles of Incorporation and Bylaws in the manner set forth in the Final Declaration; and (iii) ICANN shall reimburse Afilias the sum of US$450,000 for its legal costs relating to the Emergency Interim Relief proceedings; and (iv) ICANN shall reimburse Afilias the sum of US$479,458.27 for its share of the IRP costs."
- "[T]he Board directs the President and CEO, or his designee(s), to take all steps necessary to reimburse Afilias in the amount of US$450,000 in legal fees and US$479,458.27 for its share of the IRP costs in furtherance of the Panel's Final Declaration."
- "[F]urther consideration is needed regarding the IRP Panel's non-binding recommendation that ICANN 'stay any and all action or decision that would further the delegation of the .WEB gTLD until such time as the [ICANN] Board has considered the opinion of the Panel in this Final Decision, and, in particular (a) considered and pronounced upon the question of whether the DAA complied with the New gTLD Program Rules following [Afilias'] complaints that it violated the Guidebook and Auction Rules and, as the case may be, (b) determined whether by reason of any violation of the Guidebook and Auction Rules, NDC's application for .WEB should be rejected and its bids at the auction disqualified.'"
- "[T]he Board asks the Board Accountability Mechanisms Committee (BAMC) to review, consider, and evaluate the IRP Panel's Final Declaration and recommendation, and to provide the Board with its findings to consider and act upon before the organization takes any further action toward the processing of the .WEB application(s)."

In accordance with the Board's 16 January 2022 resolutions, the BAMC reviewed and considered the IRP Panel's Final Declaration and recommendation, as well as correspondence to the ICANN Board from NDC and Verisign and from Altanovo Domains Limited (formerly Afilias) submitted since the Final Declaration was issued and other relevant materials. The Board also reviewed and considered these same materials, as well as

additional correspondence from Altanovo and from NDC and Verisign, as identified in the accompanying Reference Materials.

In the course of the .WEB IRP and through additional correspondence, Afilias has made numerous allegations regarding the DAA between NDC and Verisign, and requested that ICANN disqualify NDC's .WEB application, reject its winning bid, and then recognize Afilias as the winning bidder (which had the second highest bid in the auction). In addition, NDC and Verisign have made numerous allegations through the .WEB IRP and additional correspondence that Afilias violated the Auction Blackout Period, and requested that ICANN therefore disqualify Afilias' .WEB application.

After reviewing the various allegations, IRP materials, and correspondence, the BAMC recommended that the Board take the following next steps relating to the .WEB applications: (a) ask the BAMC to review, consider and evaluate the claims relating to the DAA between NDC and Verisign and the claims relating to Afilias' conduct during the Auction Blackout Period; (b) ask the BAMC to provide the Board with its findings and recommendations as to whether the alleged actions of NDC and/or Afilias warrant disqualification or other consequences, if any, related to any relevant .WEB application; and (c) direct ICANN to continue refraining from contracting for or delegation of .WEB until ICANN has made its determination regarding the .WEB application(s).

The Board agrees with the BAMC's recommendation and notes that, in light of certain of the IRP Panel's determination, it is appropriate and prudent for ICANN to undertake an analysis of the allegations regarding the DAA as well as the allegations regarding the Auction Blackout Period in order to determine if any consequences are warranted with respect to any of the .WEB applications before moving forward with processing NDC's .WEB application, as the prevailing bidder at the auction.

The Board recognizes the importance of this decision and wants to make clear that it takes the results of all ICANN accountability mechanisms very seriously, which is why the BAMC and the Board are carefully considering and formulating the various next steps with regard to the .WEB applications. It is important that ICANN take sufficient time to consider all factors before taking any further action regarding .WEB.

This action is within ICANN's Mission and is in the public interest as it is important to ensure that, in carrying out its Mission, ICANN is accountable to the community for operating within the Articles of Incorporation, Bylaws, and other established procedures. This accountability includes having a process in place by which a person or entity materially and adversely affected by a Board or organization action or inaction may challenge that action or inaction.

Taking this decision is not expected to have a direct financial impact on ICANN. Further review and analysis of the allegations regarding NDC's and Afilias' actions will not have any direct impact on the security, stability or resiliency of the domain name system.

This is an Organizational Administrative function that does not require public comment.

d. **AOB**

No Resolutions taken.

Published on 10 March 2022

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[1] Registration data includes both domain data and contact data. The EPDP Team did not directly specify whether the new field(s) would be considered a domain object or a contact object. The Team's discussions, however, seem to imply that this field would be contact-related data. ICANN org will work with the dedicated Implementation Review Team to further clarify the technical details regarding the implementation of this recommendation.

[2] Please note that the ICANN org liaisons provided the EPDP Team with the following feedback on how this guidance would be implemented once adopted: **https://mm.icann.org/pipermail/gnso-epdp-team/2021-May/003904.html**

[3] Afilias Domains No. 3 Ltd. is now known as Altanovo Domains Limited. For consistency and ease of reference, we will continue to use "Afilias" to refer to the Claimant in this IRP.

[4] Afilias Domains No. 3 Ltd. is now known as Altanovo Domains Limited. For consistency and ease of reference, we will continue to use "Afilias" to refer to the Claimant in this IRP.

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RESPONDENT'S EXHIBIT

Board Activities and Meetings

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Minutes | Board Accountability Mechanisms Committee (BAMC) Meeting |

BAMC Attendees: Alan Barrett, Becky Burr, Edmon Chung, Sarah Deutsch, Patricio Poblete, León Sánchez, and Katrina Sataki

Other Board Member Attendees: Manal Ismail

ICANN organization Attendees: Michelle Bright (Board Operations Content Coordination Director), Franco Carrasco (Board Operations Specialist), Casandra Furey (Associate General Counsel), John Jeffrey (General Counsel and Secretary), Elizabeth Le (Associate General Counsel), Wendy Profit (Board Operations Senior Manager), and Amy Stathos (Deputy General Counsel)

The following is a summary of discussions, actions taken, and actions identified:

---

1. **Consideration of the Procedural Evaluation of Reconsideration Request 22-1** – The BAMC received a briefing on a reconsideration request (Request 22-1) seeking reconsideration of alleged ICANN Board and staff action and inaction regarding the redaction of certain information from Resolutions 2022.01.16.01 – 2022.2016.04 that the ICANN Board approved on 16 January 2022 (Resolutions). The Resolutions authorized the ICANN President and CEO, or his designee(s), to renew the contracts with two vendors to provide support services to augment ICANN organization Engineering and Information Technology's (E&IT) capacity. The Requestor asserts that the redactions violate Article 3.1 of the ICANN Bylaws on openness and transparency and preclude the public from determining whether the requirements for the direct contracting selection process under Section 3.3 of the ICANN Procurement Guidelines were met. The Requestor explicitly states, however, that he is not challenging the Board's underlying decision to approve the renewal of the contracts. Article 4, Section 4.2(k) of the ICANN Bylaws provides that upon receipt of a reconsideration request, the BAMC is to

review the request to determine if it is sufficiently stated. The BAMC may summarily dismiss a reconsideration request if the BAMC determines the request: (i) does not meet the requirements for filing reconsideration requests under the Bylaws; or (ii) it is frivolous. In evaluating whether a reconsideration request is sufficiently stated, the BAMC considered the following factors: (1) whether the reconsideration request is timely; and (2) whether the requestor met the requirements for bringing a reconsideration request. Following discussion, the BAMC requested that additional clarification regarding the sufficiently stated standard be added to the summary dismissal.

- Action: ICANN org to have summary dismissal updated per the BAMC's request and to circulate the clarification for the Committee's consideration and approval.

2. **Consideration of the *Afilias Domains No. 3 Ltd. (Afilias) v. ICANN* Independent Review Process (.WEB IRP) Final Declaration** – Edmon Chung recused himself from the discussion noting potential conflicts of interest. The BAMC discussed the Board's request at its 10 March 2022 meeting that: (1) the BAMC review, consider and evaluate the allegations relating to the Domain Acquisition Agreement (DAA) between Nu DotCo LLC (NDC) and Verisign and the allegations relating to Afilias' conduct during the Auction Blackout Period; and (b) the BAMC provide the Board with its findings and recommendations as to whether the alleged actions of NDC and/or Afilias warrant disqualification or other consequences, if any, related to any relevant .WEB application. The BAMC discussed that the interested parties (Afilias, NDC and Verisign) have made numerous allegations through lengthy extensive briefing within the .WEB IRP and through various correspondence to the Board and ICANN's outside counsel. The BAMC noted that in order to review, consider, and evaluate these allegations as directed by the Board 10 March 2022 resolution, it would be helpful to request that the interested parties provide a comprehensive summary of their allegations to the BAMC. The BAMC further discussed timing, page limitations, and the procedures of the submission process. The BAMC requested ICANN org to prepare a communication to the interested parties regarding the BAMC's request.

   - Action: ICANN org to prepare a communication to the interested parties regarding the BAMC's request and distribute to the BAMC for review before sending.

3. **Update re Independent Review Process (IRP) Standing Panel Selection and Implementation Oversight Team (IRP-IOT)** – The BAMC received a status update on the composition of the omnibus IRP Standing Panel. The org reported that on 17 February 2022, the names of the IRP Community Representatives Group were announced (Group). The Group members, which were selected by their respective Supporting Organizations and Advisory Committees, are responsible for proposing a slate of nominees, for confirmation by the ICANN Board of Directors, to constitute the omnibus Standing Panel that will preside over disputes filed under the IRP described in the ICANN Bylaws. The IRP Standing Panel candidates (Candidates) have been informed of the Group membership and have been asked to identify if they know any of the Group members. The Rules of Engagement, which govern how the parties involved in the selection process should conduct themselves, have been finalized and shared with the Candidates and the Group members. The Group has held four meetings to date. They have selected David McAuley as the Group Chair. The Group is in the process of assessing the possible firms that will consult and lend expertise to the Gorup in selecting a slate of panelist to nonimate to the Board for approval. The BAMC also received an update on the work of the IRP-IOT in updating the IRP to align with post-transition Bylaws. The BAMC Chair informed the Committee that León Sánchez has been selected by the Board Governance Committee to fill the vacant seat as a member on the IRP-IOT.
4. **Litigation Update** – The BAMC received a litigation update.

Published on 30 May 2022

Related Documents

Agenda | Board Accountability Mechanisms Committee (BAMC) (/en/board-activities-and-meetings/materials/agenda-meeting-of-the-board-accountability-mechanisms-committee-12-04-2022-en)

R-16

RESPONDENT'S EXHIBIT

19 May 2022

Via Email

Altanovo Domains Limited
c/o Counsel for Altanovo Domains Limited
Mr. Arif Hyder Ali (arif.ali@dechert.com)
Dechert LLP

Nu Dotco, LLC
c/o Counsel for Nu Dotco, LLC
Mr. Steven A. Marenberg (stevenmarenberg@paulhastings.com)
Paul Hastings LLP

Verisign, Inc.
c/o Counsel for Verisign, Inc.
Mr. Ronald L. Johnston (Ronald.Johnston@arnoldporter.com)
Arnold & Porter Kaye Scholer LLP

Dear Altanovo Domains Limited, Nu Dotco, LLC and Verisign, Inc.,

Pursuant to Board Resolution 2022.03.10.06, the Board Accountability Mechanisms Committee (BAMC) will "review, consider, and evaluate the allegations relating to the Domain Acquisition Agreement (DAA) between" Nu Dotco LLC (NDC) and Verisign, Inc., "and the allegations relating to [Afilias Domains No. 3 Ltd.'s (now Altanovo Domains Limited)] conduct during the Auction Blackout Period" of the .WEB Auction.

In order to ensure that the BAMC is reviewing a complete picture of the parties' positions, as well as the supporting materials regarding each issue (the DAA and the Auction Blackout Period), the BAMC hereby requests that Altanovo, NDC and Verisign provide a comprehensive written summary of their claims and the materials supporting their claims. These submissions are meant to supersede both the submissions in the .WEB Independent Review Process (IRP) as well as the correspondence on these topics; and these submissions will represent the basis upon which the BAMC will review, consider, and evaluate the allegations relating to the DAA and the allegations relating to the Auction Blackout Period.

The BAMC strongly encourages the parties to be as succinct as possible in their submissions. Along those lines, the initial submissions of each set of parties will be limited to 75 pages inclusive of any footnotes or endnotes, meaning that Afilias/Altanovo's submission is limited to 75 pages and NDC/Verisign's submission is limited to 75 pages collectively. The parties will also have an opportunity to provide reply submissions, which will be limited to 30 pages inclusive of any footnotes or endnotes for each set of parties. The BAMC further requests that

the submissions include an Executive Summary, as well as a Table of Contents. Also, in an effort to be conscious of the volume of supporting materials, the BAMC requests that the parties' submission of supporting materials contain an index and, where possible, include a link/URL address for the location of the document instead of attaching the document itself.[1]

These submissions and supporting materials will be publicly posted on ICANN's website. However, consideration will be provided to suggested redactions before posting. Accordingly, when you provide your submissions (initial and reply), please also provide a separate version with proposed redactions for consideration in our public posting.

If Altanovo, NDC, and Verisign choose to provide the above-described submissions, the BAMC requests that the parties provide their initial submissions and supporting materials to ICANN via email at independentreview@icann.org by 15 July 2022. Reply submissions are due on 15 August 2022. If the parties feel as though additional time is needed, the BAMC asks that the parties confer and provide ICANN with new proposed submission dates, via email at independentreview@icann.org.

Best regards,

J. Beckwith Burr
Chair, Board Accountability Mechanisms Committee (BAMC)
ICANN

[1] For instance, reference to the Bylaws should be a link to the applicable Bylaws, not an attachment of the full Bylaws. Similarly, if there are materials that have been previously submitted in the IRP, the party should provide a link and specific identification (e.g., exhibit number) of the operative exhibit. If the posted exhibit is redacted, the party may attach the unredacted version to its BAMC submission.

R-17

RESPONDENT'S EXHIBIT

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Minutes | Meeting of the Board Accountability Mechanisms Committee (BAMC) | 10 November 2022

BAMC Attendees: Alan Barrett, Becky Burr, Edmon Chung, Sarah Deutsch, Patricio Poblete, León Sánchez (Chair), and Katrina Sataki

ICANN organization Attendees: Franco Carrasco (Board Operations Specialist), Casandra Furey (Associate General Counsel), John Jeffrey (General Counsel and Secretary), Elizabeth Le (Associate General Counsel), and Amy Stathos (Deputy General Counsel)

The following is a summary of discussions, actions taken, and actions identified:

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1. **Discussion re .WEB** – At the Board's request, the Committee discussed and evaluated the briefing materials submitted by the interested parties and the claims and merits of the parties' arguments concerning the allegations relating to the Domain Acquisition Agreement between Nu Dotco LLC and Verisign, Inc. and the allegations relating to Afilias Domains No. 3 Ltd.'s (now Altanovo Domains Limited) conduct during the Auction Blackout Period of the .WEB Auction. Edmon Chung recused himself from consideration of the matter due to a conflict of interest and left the meeting.

    - Action: ICANN to consider the Committee's discussion and questions and bring back to the Committee for further consideration.

2. **AOB**

    - The BAMC received an update on Reconsideration Request 22-5 on the merits. The Committee noted that it has approved online a recommendation on the merits subject to some revisions. Once revised, the recommendation will be published, and the

requestor will be notified of the BAMC's recommendation. The requestor will then have 15 days to submit a rebuttal under the reconsideration process before the matter is submitted to the Board for consideration.

- The BAMC received an update on the .HOTEL independent review process matter.

Published on 10 January 2023

Related Documents

Agenda | Meeting of the Board Accountability Mechanisms Committee (BAMC) | 10 November 2022 (/en/board-activities-and-meetings/materials/agenda-meeting-of-the-board-accountability-mechanisms-committee-bamc-10-11-2022-en)

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RESPONDENT'S EXHIBIT

Board Activities and Meetings

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Minutes | Meeting of the Board Accountability Mechanisms Committee (BAMC) | 13 December 2022

BAMC Attendees: Alan Barrett, Becky Burr, Sarah Deutsch, Patricio Poblete, León Sánchez (Chair), and Katrina Sataki

BAMC Member Apologies: Edmon Chung

Other Board Member Attendees: Manal Ismail

ICANN organization Attendees: Franco Carrasco (Board Operations Specialist), Casandra Furey (Associate General Counsel), John Jeffrey (General Counsel and Secretary), Elizabeth Le (Associate General Counsel), and Amy Stathos (Deputy General Counsel)

The following is a summary of discussions, actions taken, and actions identified:

1. **Discussion re .WEB** – The Committee continued its discussion and evaluation of the merits of the interested parties' arguments concerning the allegations relating to the Domain Acquisition Agreement between Nu Dotco LLC and Verisign, Inc. and the allegations relating to Afilias Domains No. 3 Ltd.'s (now Altanovo Domains Limited) conduct during the Auction Blackout Period of the .WEB Auction. The Committee also discussed possible options for next steps in its evaluation and asked ICANN org to provide additional information regarding the options.

    - Action: ICANN org to provide additional information regarding the options for next steps in the BAMC's evaluation.

2. **Revisions to the ICANN Documentary Information Disclosure Policy (DIDP)** – The Committee considered the proposed revisions to the DIDP as part of the implementation work of the Board-approved Cross-Community Working Group on Enhancing ICANN Accountability Work Stream 2's recommendations on revisions to the DIDP, including the revisions made by ICANN org to reflect the Committee's discussion at the last meeting. Following discussion, the Committee approved a recommendation to the Board to approve the revised DIDP.

    - Action: ICANN org to prepare the relevant materials for Board consideration.

3. **Update re Establishment of the Independent Review Process (IRP) Standing Panel** – The BAMC received a status update on the work to establish the IRP Standing Panel.

Published on 10 January 2023

Related Documents

Agenda | Meeting of the Board Accountability Mechanisms Committee (BAMC) | 13 December 2022 (/en/board-activities-and-meetings/materials/agenda-meeting-of-the-board-accountability-mechanisms-committee-bamc-13-12-2022-en)

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RESPONDENT'S EXHIBIT

Board Activities and Meetings

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Minutes | Meeting of the Board Accountability Mechanisms Committee (BAMC) | 31 January 2023

BAMC Attendees: Alan Barrett, Becky Burr, Edmon Chung, Sarah Deutsch, León Sánchez (Chair), and Katrina Sataki

BAMC Member Apologies: Patricio Poblete

ICANN organization Attendees: Franco Carrasco (Board Operations Specialist), Samantha Eisner (Deputy General Counsel), Casandra Furey (Associate General Counsel), John Jeffrey (General Counsel and Secretary), Elizabeth Le (Associate General Counsel), and Amy Stathos (Deputy General Counsel)

The following is a summary of discussions, actions taken, and actions identified:

1. **Discussion re .GCC Independent Review Process (IRP)** – The Committee considered a draft recommendation to the Board regarding next steps relating to the .GCC application. The Committee discussed several revisions to the materials and requested that ICANN organization update the materials to reflect the Committee's discussion and to bring the matter back for further consideration by the Committee.

    - Actions: ICANN org to revise Board materials to reflect the Committee's discussion.

2. **Discussion re .WEB** – The Committee considered a draft recommendation to the Board regarding next steps relating to .WEB. Edmon Chung recused himself from the discussion due to potential conflicts of interest. The Committee discussed several revisions to the materials and requested that ICANN organization update the materials to reflect the Committee's discussion and to bring the matter back for further consideration by the Committee.

- Action: ICANN org to revise Board materials to reflect the Committee's discussion.

Published on 26 April 2023

Related Documents

Agenda | Meeting of the Board Accountability Mechanisms Committee (BAMC) | 31 January 2023 (/en/board-activities-and-meetings/materials/agenda-meeting-of-the-board-accountability-mechanisms-committee-bamc-31-01-2023-en)

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RESPONDENT'S EXHIBIT

Board Activities and Meetings

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Minutes | Meeting of the Board Accountability Mechanisms Committee (BAMC) | 2 March 2023

BAMC Attendees: Alan Barrett, Becky Burr, Edmon Chung, Sarah Deutsch, Patricio Poblete, León Sánchez (Chair), and Katrina Sataki

ICANN organization Attendees: Franco Carrasco (Board Operations Specialist), Samantha Eisner (Deputy General Counsel), Casandra Furey (Associate General Counsel), John Jeffrey (General Counsel and Secretary), Elizabeth Le (Associate General Counsel), and Amy Stathos (Deputy General Counsel)

The following is a summary of discussions, actions taken, and actions identified:

1. **Discussion re Namecheap Independent Review Process (IRP) Final Declaration** – Pursuant to Board Resolution 2023.01.21.09 (/en/board-activities-and-meetings/materials/approved-resolutions-regular-meeting-of-the-icann-board-21-01-2023-en#section2.b), the Committee reviewed, considered and began its evaluation of the Namecheap IRP Panel's Final Declaration and recommendations, with the goal of developing one or more recommendations regarding next steps for the Board's consideration. The Committee discussed the Panel's findings and recommendations, as well as background information regarding price control provisions relating to domain name registrations. Following and in accordance with the Committee's discussion, the Committee requested that ICANN org provide the Committee with additional factual information to assist the Committee in developing options regarding next steps.

    - Action: ICANN org to revert as requested for the Committee's consideration.

2. **Discussion re .WEB** – The Committee considered the revised draft of its proposed recommendations to the Board regarding next steps relating to .WEB, which had been updated to reflect the Committee's detailed discussion at the previous meeting (/en/board-activities-and-meetings/materials/minutes-meeting-of-the-board-accountability-mechanisms-committee-bamc-31-01-2023-en). After careful consideration and further discussion, the Committee approved the recommendations regarding next steps and requested that ICANN org provide those recommendations to the Board for its consideration. Edmon Chung recused himself from the discussion due to potential conflicts of interest.

    - Action: ICANN org to prepare relevant Board materials.

3. **Any Other Business –** It was reported that following the last Committee meeting, the BAMC unanimously approved online the revised materials related to the .GCC IRP.

Published on 26 April 2023

Related Documents

Agenda | Meeting of the Board Accountability Mechanisms Committee (BAMC) | 2 March 2023 (/en/board-activities-and-meetings/materials/agenda-meeting-of-the-board-accountability-mechanisms-committee-bamc-02-03-2023-en)

R-21

RESPONDENT'S EXHIBIT

Donuts to Acquire Afilias

By **CircleID Reporter**

November 19, 2020, 6:00 pm PST | Views: 16,990 | Add Comment

Donuts and Afilias announced today that Donuts is acquiring Afilias in a deal that is expected to close in December 2020 for an undisclosed amount. The combined entities will support over 25 million domain names spanning well over 400 TLDs. The deal will not include certain Afilias businesses, such as the mobile software and registrar businesses, which will remain with Afilias' original group of investors.

What it means for Donuts: The acquisition will enhance its portfolio of TLDs and expand its ability to provide digital identity services.

What it means for clients: Afilias' registry customers will now have the opportunity to adopt Donuts' innovations such as TrueName, Relevant Name Search and other services that help registrants secure their ideal online identities.

Afilias and Donuts report that there will be no changes to the seamless delivery of their services in the short run. "The Afilias and Donuts teams share a commitment to security, stability and reliability," Donuts CEO Akram Atallah commented. "This will only grow stronger as we implement the best technologies and services from each organization while maintaining seamless delivery to our registry and registrar partners as well as our end registrants."

Donuts owns and operates 242 gTLDs to suit a broad diversity of human and business interests, from .academy to .zone. This move will add over 200 Afilias-supported TLDs, including many managed on behalf of other operators. The Afilias registry business features a proven back-end registry platform and DNS solutions expertise that has a stellar 20-year record of enabling authoritative TLD directories and DNS. Afilias' TLDs include an impressive array of top-level domains such as .info, .global, and .mobi, as well as country codes, dotBrands and other generic TLDs.

Commenting on the acquisition, Afilias CEO, Hal Lubsen said, "We are thrilled to choose Donuts as the steward for Afilias' next phase. As a proven leader and innovator, we know that the combined services delivered to registry clients,

registrars and employees will foster a healthier, more competitive market to the benefit of the entire domain community."

By **CircleID Reporter**

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R-22

RESPONDENT'S EXHIBIT

User Documentation on Delegating and Redelegating a Generic Top-Level Domain (gTLD)

Table of Contents

Delegating a generic top-level domain

This document provides a guide to the generic top-level domain (gTLD) delegation process.

What is a delegation request?

As part of the responsibilities for managing the root zone, ICANN's IANA department is responsible for receiving requests to delegate domains in the DNS root zone. Note that this process is distinct from the process used to apply to be eligible for a new gTLD.

The delegation process results in the "NS" records being placed in the DNS root zone to make the domain active in the domain name system. This then facilitates the registry operator to commence the process to bring the registry service into production.

Submitting a delegation request

At the conclusion of the evaluation process for a new gTLD, i.e. following contract execution and pre-delegation testing by ICANN, a the registry operator will be provided with a unique delegation token and URL to ICANN's IANA Root Zone Management (RZM) site for new gTLD delegations.

Registry operators that are ready to commence a request for delegation must visit the RZM site and enter their token in order to commence the procedure.

At the start of the procedure, the registry operator or its agent (requestor) is asked to provide an email address to serve as a contact point for the life of the request. This email address will be validated to ensure it works correctly.

Following this, the requestor will be asked to provide details on the sponsoring organisation (i.e. contracted party), its designated administrative and technical contacts, and its technical configuration. The requirements for these elements are the same as for other types of root zone changes. The request will follow the routine change processing steps as defined below. In addition to following the routine steps, a delegation report will be sent to the ICANN Board and the Root Zone Administrator.

Tracking status

Once a request has been lodged, an applicant can revisit the delegation page with their token in order to be provided with a view of the current status of their requests. Any questions regarding the process can be directed to root-mgmt@iana.org.

Review of Delegation Steps

Step 1	After Pre-Delegation testing has been successfully completed, the requester receives unique, secure credentials to initiate a request within the automated Root Zone Management (RZM) System.
Step 2	Requester uses provided credentials and URL to login to the RZM System.

Step 3	Requester provides a contact email address for use with the request. In order to confirm the email address works, a link will be emailed to it, and the requestor should follow the link to proceed.
Step 4	Requester completes form in RZMS including the fields for the following: Manager: Also known as the "Registry" or "Sponsoring Organization", this is the organization to which responsibility for the domain is delegated. Administrative and Technical Contacts: These are contact points for the domain, responsible for responding to pubic enquiries concerning the domain, and also for authorising routine updates to the domain. Name servers/DS Records: This is the list of authoritative name servers maintained by the registry to serve the top-level domain, along with the delegation signer records for DNSSEC. Registration Information: Additional information pertaining to the domain, such as the location of its WHOIS server, and a web address where registration can be found.
Step 5	The request will go through the steps described in the "Routine Root Zone Change Request" described below.

Redelegating a generic top-level domain

This is a guide to the generic top-level domain (gTLD) redelegation process. This process is used when the IANA Root Zone Database must be updated to reflect a change in the management of a gTLD. The primary requirement of this process is to have an existing contract with ICANN, which reflects the changes related to the management of the gTLD.

To update the Root Zone Database to reflect a change to the registry operator for a gTLD, the registry must first secure an executed amendment to its Registry Agreement in accordance with its contractual obligations with ICANN. Once completed, a root zone change request should be filed according to the routine change process defined below.

During processing of the change request, ICANN's IANA department will confirm with ICANN's new gTLD team that the request accurately reflects the currently contracted party for the given gTLD. (Note that this process differs from the redelegation process for a country-code top-level domain.) The request will follow the routine change processing steps as defined below. In addition to following the routine steps, a delegation report will be sent to the ICANN Board and the Root Zone Administrator.

Review of Redelegation Steps

Step 1	Complete necessary contract amendments reflecting the change with ICANN
Step 2	Requester submits a root zone change request changing the relevant fields for the TLD in the Root Zone Database with new information. These include: Manager: Also known as the "Registry" or "Sponsoring Organization", this is the organization to which responsibility for the domain is delegated. Administrative and Technical Contacts: These are contact points for the domain, responsible for responding to pubic inquiries concerning the domain, and also for authorising routine updates to the domain. Name servers/DS Records: This is the list of authoritative name servers maintained by the registry to serve the top-level domain, along with the delegation signer records for domains that are DNSSEC secured. Registration Information: Additional information pertaining to the domain, such as the location of its WHOIS server, and a web address where registration can be found, can also be listed for a top-level domain. The root zone change request can be initiated through the RZM System if the requester has credentials. If not, the Delegation Request Form (link to form in document) can be used.
Step 3	The request will go through the steps described in the "Routine Root Zone Change Request" described below. During processing, Root Zone Management staff will verify that the proposed changes match the current contractual language for the TLD.

Routine Root Zone Change Request Process

Methods for submitting a routine request

An online interface is provided at https://rzm.iana.org for TLD managers to submit change requests. ICANN recommends that all TLD managers use this method if possible, as it will guide you through the process, provide immediate online feedback of potential issues, and offer the fastest processing time.

Processing a routine request

Once a request is received, it will go through the following processing steps:

Pre-review	The request is reviewed to ensure it is complete and clear. If it is not clear, clarification is sought from the requestor.
Technical testing	Any changes that are technical in nature will be validated against the relevant technical requirements. Any deficiencies are reported back to the requestor to fix. See: Technical requirements for root zone changes
Contact confirmation	The contact persons for the domain will be asked to agree to the changes.
Manual review	ICANN staff will review the request to ensure it is in accordance with any special obligations and other known regulatory requirements.
Delegation evaluation	If the request is deemed to represent a substantial change of control of the TLD, it is considered a redelegation request, and must be assessed according to the criteria of that process.
Supplemental technical testing	The technical tests are performed a second time, to ensure no new technical issues have arisen during the time the request was being processed
Authorisation	The details of the request are transmitted to the U.S. Department of Commerce for authorisation.

Implementation	Once implementation of a change request is authorised, the changes are implemented in the Root Zone and the Root Zone Database.

During processing of the request, the requestor will receive email updates relating to the status of the request. At any time, the contacts for the domain can log in to our web interface to check the status of the request.

Delegation Request Form

This is to be used as part of submitting a delegation or redelegation of a country-code top-level domain.

IANA TLD MODIFICATION TEMPLATE 2010-02-17

** This should be completed and submitted to root-mgmt@iana.org.
** In most cases, this can be completed online. For more information
** visit http://www.iana.org/domains/root/ or contact IANA for
** assistance.

1. Top-Level Domain Name.....:

2. Purpose of change.....:

Manager
3a. Organisation Name.....:
3b. Street Address.....:
3c. City.....:
3d. State.....:
3e. Postal Code.....:
3f. Country Code (2 letter).....:

Administrative Contact
4a. Contact Person's Name.....:
4b. Job Title.....:
4c. Organisation Name.....:
4d. Street Address.....:
4e. City.....:
4f. State.....:
4g. Postal Code.....:
4h. Country Code (2 letter).....:
4i. Phone Number.....:
4j. Fax Number.....:
4k. Email Address.....:
4l. Treat as role acct? (y/n).....:

Technical Contact
5a. Contact Person's Name.....:
5b. Job Title.....:
5c. Organisation Name.....:
5d. Street Address.....:
5e. City.....:
5f. State.....:
5g. Postal Code.....:
5h. Country Code (2 letter).....:
5i. Phone Number.....:
5j. Fax Number.....:
5k. Email Address.....:
5l. Treat as role acct? (y/n).....:

Authoritative Name Server
6a. Hostname.....:
6b. IP Address(es).....:

Authoritative Name Server (duplicate for additional name servers)
6a. Hostname.....:
6b. IP Address(es).....:

Delegation Signer Record (for DNSSEC signed zones only)
7a. Key Digest.....:
7b. Key Tag.....:
7c. Key Algorithm.....:
7d. Key Digest Type.....:

Delegation Signer Record (duplicate for additional DS records)
7a. Key Digest.....:
7b. Key Tag.....:
7c. Key Algorithm.....:
7d. Key Digest Type.....:

Domain Information
8a. URL for Registration Services...:
8b. WHOIS Server.....:

Special notes (for staff processing change, does not appear publicly)

9. Notes.....:

Technical requirements for authoritative name servers

This article describes the baseline technical conformance criteria for authoritative name servers. These are evaluated by ICANN as the IANA functions operator for changes to delegations in the DNS root zone.

Definitions

1. For purposes of this document, an authoritative name server is a DNS server that has been designated to answer authoritatively for the designated zone, and is being requested to be listed in the delegation. It is recorded by its fully-qualified domain name, potentially along with its IP addresses.

2. Name server tests are completed against each unique tuple of a hostname, an IP address, and a protocol. If a hostname has multiple IP addresses, for example, the tests will be conducted against each IP address.

Detailed requirements

Minimum number of name servers

There must be at least two NS records listed in a delegation, and the hosts must not resolve to the same IP address.

Valid hostnames

The hostnames used for the name servers must comply with the requirements for valid hostnames described in RFC 1123, section 2.1.

Name server reachability

The name servers must answer DNS queries over both the UDP and TCP protocols on port 53. Tests will be conducted from multiple network locations to verify the name server is responding.

Answer authoritatively

The name servers must answer authoritatively for the designated zone. Responses to queries to the name servers for the designated zone must have the “AA”-bit set.

This will be tested by querying for the SOA record of the designated zone with no “RD”-bit set.

Network diversity

The name servers must be in at least two topologically separate networks. A network is defined as an origin autonomous system in the BGP routing table. The requirement is assessed through inspection of views of the BGP routing table.

Consistency between glue and authoritative data

For name servers that have IP addresses listed as glue, the IP addresses must match the authoritative A and AAAA records for that host.

Consistency between delegation and zone

The set of NS records served by the authoritative name servers must match those proposed for the delegation in the parent zone.

Consistency between authoritative name servers

The data served by the authoritative name servers for the designated zone must be consistent.

All authoritative name servers must serve the same NS record set for the designated domain.

All authoritative name servers must serve the same SOA record for the designated domain.

If for operational reasons the zone content fluctuates rapidly, the serial numbers need only be loosely coherent.

No truncation of referrals

Referrals from the parent zone's name servers must fit into a non-EDNS0 UDP DNS packet and therefore the DNS payload must not exceed 512 octets.

The required delegation information in the referral is a complete set of NS records, and the minimal set of requisite glue records. The response size is assessed as a response to a query with a maximum-sized QNAME.

The minimal set of requisite glue records is considered to be:

> One A record, if all authoritative name servers are in-bailiwick of the parent zone; and,
>
> One AAAA record, if there are any IPv6-capable authoritative name servers and all IPv6-capable authoritative name servers are in-bailiwick of the parent zone.

Prohibited networks

The authoritative name server IP addresses must not be in specially designated networks that are either not globally routable, or are otherwise unsuited for authoritative name service.

0.0.0.0/8	Not globally routable	RFC 5735
10.0.0.0/8	Not globally routable	RFC 5735
100.64.0.0/10	Not globally routable	RFC 6598
127.0.0.0/8	Not globally routable	RFC 5735

169.254.0.0/16	Not globally routable	RFC 5735
172.16.0.0/12	Not globally routable	RFC 5735
192.0.2.0/24	Not globally routable	RFC 5735
192.88.99.0/24	6to4	RFC 3068
192.168.0.0/16	Not globally routable	RFC 5735
198.18.0.0/15	Not globally routable	RFC 5735
198.51.100.0/24	Not globally routable	RFC 5737
203.0.113.0/24	Not globally routable	RFC 5737
224.0.0.0/3	Not globally routable	RFC 5735
::/128	Not globally routable	RFC 5156
::1/128	Not globally routable	RFC 5156
::FFFF:0:0/96	IPv4 mapped addresses	RFC 4291
2001:2::/48	Not globally routable	RFC 5156

2001::/32	Teredo	RFC 4380
2001:10::/28	Not globally routable	RFC 5156
2001:DB8::/32	Not globally routable	RFC 5156
2002::/16	6to4	RFC 3056
FC00::/7	Not globally routable	RFC 5156
FE80::/10	Not globally routable	RFC 5156

No open recursive name service

The authoritative name servers must not provide recursive name service. This requirement is tested by sending a query outside the jurisdiction of the authority with the “RD”-bit set.

Same source address

Responses from the authoritative name servers must contain the same source IP address as the destination IP address of the initial query.

DS record format

Trust anchors must be provided each with the four attributes of a DS record — the key tag, the key algorithm, the digest hash type, and the digest hash. They must be provided with legal values for each of the DS record fields. For the hash digest, ICANN supports two types — SHA1 (value 1), and SHA256 (value 2).

Matching DNSKEY

At the time of the listing request, there must be a DNSKEY that matches the DS record present in the child zone. This will be tested for as part of the implementation of the record. As with most technical conformance criteria for the root zone, if a top-level domain operator has a situation where this is not the case, but this is by design and can be demonstrated not to affect the stability of the TLD or the root zone, it is possible to request that the DS records be listed regardless.

Validation of RRSIG

ICANN must be able to validate the RRSIG records returned for the zone based upon the DS record set that has been provided for the root zone. We test this by querying the apex SOA for the top-level domain with the DO bit set, and validating the SOA record against the proposed DS resource set.

Useful References

For more information on some of the key DNS technical concepts referenced by these technical tests, please look at the following references:

Domain Names — Concepts and Facilities (RFC 1034)

Domain Names — Implementation and Specification (RFC 1035)

Preventing Use of Recursive Nameservers in Reflector Attacks (RFC 5358)

Operational Considerations and Issues with IPv6 DNS (RFC 4472)

Extension Mechanisms for DNS (EDNS0) (RFC 2671)

DNS Referral Response Size Issues

DNS Transport over TCP - Implementation Requirements (RFC 5966)

IANA IPv6 Special Purpose Address Registry

Special-use IPv6 Addresses (RFC 5156)

Special-use IPv4 Addresses (RFC 5735)

R-LA-1

RESPONDENT'S EXHIBIT

21 Cal.4th 249, 980 P.2d 940, 87 Cal.Rptr.2d 237, 99 Cal. Daily Op. Serv. 6358, 1999 Daily Journal D.A.R. 8073
Supreme Court of California

GERTRUDE M. LAMDEN,
Plaintiff and Appellant,
v.
LA JOLLA SHORES CLUBDOMINIUM HOMEOWNERS ASSOCIATION,
Defendant and Respondent.

No. S070296.
Aug. 9, 1999.

SUMMARY

The board of directors of a condominium community association elected to spot-treat termite infestation rather than to fumigate. The owner of a condominium unit brought an action for an injunction and declaratory relief, alleging that the she had suffered diminution in the value of her unit as the result of the association's decision. The trial court found for the association, applying a deferential business judgment test. (Superior Court of San Diego County, No. 677082, Mack P. Lovett, Judge. *) The Court of Appeal, Fourth Dist., Div. One, No. D025485, reversed. It held that the trial court should have analyzed the association's actions under an objective standard of reasonableness test, and that had it done so, an outcome more favorable to the homeowner would have resulted.

The Supreme Court reversed the judgment of the Court of Appeal. The court held that the business judgment rule did not directly apply to this case, but that the trial court correctly deferred to the board's decision. The court further held that a court should defer to a community association board's authority and presumed expertise, regardless of the association's corporate status, when a duly constituted board, upon reasonable investigation, in good faith, and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants, and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas. (Opinion by Werdegar, J., expressing the unanimous view of the court.) ***250**

* Retired Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c, 1d, 1e, 1f)
Condominiums and Cooperative Apartments § 2--Condominiums--Associations--Treatment of Termite Infestation-- Owner's Legal Challenge--Judicial Standard of Review.
In an action for an injunction and declaratory relief brought by a condominium owner against the condominium community association, alleging that the association's election of spot treatment rather than fumigation to remedy termite infestation diminished the value of her unit, the trial court did not err in deferring

to the decisions of the association's board of directors. Although the business judgment rule, on which the court relied, did not directly apply, a court should defer to a community association board's authority and presumed expertise, regardless of the association's corporate status, when a duly constituted board, upon reasonable investigation, in good faith, and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants, and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas. Judicial deference is appropriate, since owners and directors of common interest developments are more competent than the courts to make the detailed and peculiar economic decisions necessary to maintain their developments.

[See 4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, §§ 322, 328. See also 7 Miller & Starr, Cal. Real Estate (2d ed. 1990) §§ 20:11, 20:12.]

(2a, 2b)
Corporations § 39--Directors, Officers, and Agents--Liability-- Business Judgment Rule.
The common law business judgment rule has two components, one that immunizes corporate directors from personal liability if they act in accordance with its requirements, and another that insulates from court intervention those management decisions that are made by directors in good faith in what they believe is the organization's best interest. A hallmark of the business judgment rule is that, when the rule's requirements are met, a court will not substitute its judgment for that of the corporation's board of directors. The business judgment rule has been justified primarily on two grounds. First, directors should be given wide latitude in their handling of corporate affairs because the hindsight of the judicial process is an imperfect device for evaluating business decisions. Second, the rule ***251** recognizes that shareholders to a very real degree voluntarily undertake the risk of bad business judgment; investors need not buy stock, for investment markets offer an array of opportunities less vulnerable to mistakes in judgment by corporate officers.

(3a, 3b)
Condominiums and Cooperative Apartments § 2--Condominiums-- Associations--Standard of Care--Residents' Safety in Common Areas.
A community association may be held to a landlord's standard of care as to residents' safety in the common areas. The association is, for all practical purposes, the development project's landlord. Traditional tort principles impose on landlords, no less than on homeowner associations that function as landlords in maintaining the common areas of large condominium complexes, a duty to exercise due care for the residents' safety in those areas under their control. This general duty includes the duty to take reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures.

(4)
Condominiums and Cooperative Apartments § 2--Condominiums-- Associations--Enforcement of Use Restrictions.

An equitable servitude will be enforced unless it violates public policy, it bears no rational relationship to the protection, preservation, operation, or purpose of the affected land, or it otherwise imposes burdens on the affected land that are so disproportionate to the restriction's beneficial effects that the restriction should not be enforced. A common interest development's recorded use restrictions are enforceable equitable servitudes, unless unreasonable (Civ. Code, § 1354, subd. (a)). Hence, those restrictions should be enforced unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit. When an association determines that a unit owner has violated a use restriction, the association must do so in good faith, not in an arbitrary or capricious manner, and its enforcement procedures must be fair and applied uniformly. Generally, courts will uphold decisions made by the governing board of an owners association so long as they represent good faith efforts to further the purposes of the common interest development, are consistent with the development's governing documents, and comply with public policy.

(5)
Condominiums and Cooperative Apartments § 2--Condominiums--Legal Action by Homeowner--Enforcement of Use Restrictions. Under well-accepted principles of condominium law, a homeowner can sue the association for damages and an injunction to compel ***252** the association to enforce the provisions of the governing declaration of restrictions. The homeowner can also sue directly to enforce the declaration.

COUNSEL
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June Babiracki Barlow and Neil D. Kalin for California Association of Realtors as Amicus Curiae on behalf of Defendant and Respondent.

WERDEGAR, J.

A building in a condominium development suffered from termite infestation. The board

of directors of the development's community association [1] decided to treat the infestation locally ("spot-treat"), rather than fumigate. Alleging the board's decision diminished the value of ***253** her unit, the owner of a condominium in the development sued the community association. In adjudicating her claims, under what standard should a court evaluate the board's decision?

As will appear, we conclude as follows: Where a duly constituted community association board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise. Thus, we adopt today for California courts a rule of judicial deference to community association board decisionmaking that applies, regardless of an association's corporate status, when owners in common interest developments seek to litigate ordinary maintenance decisions entrusted to the discretion of their associations' boards of directors. (Cf. *Levandusky v. One Fifth Ave. Apt. Corp.* (1990) 75 N.Y.2d 530, 537-538 [554 N.Y.S.2d 807, 811, 557 N.E.2d 1317, 1321] [analogizing a similarly deferential rule to the common law "business judgment rule"].)

Accordingly, we reverse the judgment of the Court of Appeal.

Background

Plaintiff Gertrude M. Lamden owns a condominium unit in one of three buildings comprising the La Jolla Shores Clubdominium condominium development (Development). [2] Over some years, the board of governors (Board) of defendant La Jolla Shores Clubdominium Homeowners Association (Association), an unincorporated community association, elected to spot treat (secondary treatment), rather than fumigate (primary treatment), for termites the building in which Lamden's unit is located (Building Three).

2 The Development was built, and its governing declaration of restrictions recorded, in 1971. In 1973 Lamden and her husband bought unit 375, one of 42 units in the complex's largest building. Until 1977 the Lamdens used their unit only as a rental. From 1977 until 1988 they lived in the unit; since 1988 the unit has again been used only as a rental.

In the late 1980's, attempting to remedy water intrusion and mildew damage, the Association hired a contractor to renovate exterior siding on all three buildings in the Development. The contractor replaced the siding on ***254** the southern exposure of Building Three and removed damaged drywall and framing. Where the contractor encountered termites, a termite extermination company provided spot treatment and replaced damaged material.

Lamden remodeled the interior of her condominium in 1990. At that time, the Association's manager arranged for a termite extermination company to spot-treat areas where Lamden had encountered termites.

The following year, both Lamden and the Association obtained termite inspection reports recommending fumigation, but the Association's Board decided against that approach. As the Court of Appeal explained, the Board based its decision not to fumigate on concerns about the cost of fumigation, logistical problems with temporarily relocating residents, concern that fumigation residue could affect residents' health and safety, awareness that upcoming walkway renovations would include replacement of damaged areas, pet moving expenses, anticipated breakage by the termite company, lost rental income and the likelihood that termite infestation would recur even if primary treatment were utilized. The Board decided to continue to rely on secondary treatment until a more widespread problem was demonstrated.

In 1991 and 1992, the Association engaged a company to repair water intrusion damage to four units in Building Three. The company removed siding in the balcony area, repaired and waterproofed the decks, and repaired joints between the decks and the walls of the units. The siding of the unit below Lamden's and one of its walls were repaired. Where termite infestation or damage became apparent during this project, spot treatment was applied and damaged material removed.

In 1993 and 1994, the Association commissioned major renovation of the Development's walkway system, the underpinnings of which had suffered water and termite damage. The $1.6 million walkway project was monitored by a structural engineer and an on-site architect.

In 1994, Lamden brought this action for damages, an injunction and declaratory relief. She purported to state numerous causes of action based on the Association's refusal to fumigate for termites, naming as defendants certain individual members of the Board as well as the Association. Her amended complaint included claims sounding in breach of contract (viz., the governing declaration of restrictions [Declaration]), breach of fiduciary duty and negligence. She alleged that the Association, in opting for secondary over primary treatment, had breached ***255** Civil Code section 1364, subdivision (b)(1) [3] and the Declaration [4] in failing adequately to repair, replace and maintain the common areas of the Development.

3 As discussed more fully *post*, "In a community apartment project, condominium project, or stock cooperative ... unless otherwise provided in the declaration, the association is responsible for the repair and maintenance of the common area occasioned by the presence of wood-destroying pests or organisms." (Civ. Code, § 1364, subd. (b)(1).)

4 The Declaration, which contained the Development's governing covenants, conditions, and restrictions (CC&R's), stated that the Association was to provide for the management, maintenance, repair and preservation of the complex's common areas for the enhancement of the value of the project

> and each unit and for the benefit of the owners.

Lamden further alleged that, as a proximate result of the Association's breaching its responsibilities, she had suffered diminution in the value of her condominium unit, repair expenses, and fees and costs in connection with this litigation. She also alleged that the Association's continued breach had caused and would continue to cause her irreparable harm by damaging the structural integrity and soundness of her unit, and that she has no adequate remedy at law. At trial, Lamden waived any damages claims and dismissed with prejudice the individual defendants. Presently, she seeks only an injunction and declaratory relief.

After both sides had presented evidence and argument, the trial court rendered findings related to the termite infestation affecting plaintiff's condominium unit, its causes, and the remedial steps taken by the Association. The trial court found there was "no question from all the evidence that Mrs. Lamden's unit ... has had a serious problem with termites." In fact, the trial court found, "The evidence ... was overwhelming that termites had been a problem over the past several years." The court concluded, however, that while "there may be active infestation" that would require "steps [to be] taken within the future years," there was no evidence that the condominium units were in imminent structural danger or "that these units are about to fall or something is about to happen."

The trial court also found that, "starting in the late '80's," the Association had arranged for "some work" addressing the termite problem to be done. Remedial and investigative work ordered by the Association included, according to the trial court, removal of siding to reveal the extent of damage, a "big project ... in the early '90's," and an architect's report on building design factors. According to the court, the Board "did at one point seriously consider" primary treatment; "they got a bid for this fumigation, and there was discussion." The court found that the Board also considered possible problems entailed by fumigation, including relocation costs, lost rent, concerns about pets and plants, human health issues and eventual termite reinfestation. ***256**

As to the causes of the Development's termite infestation, the trial court concluded that "the key problem came about from you might say a poor design" and resulting "water intrusion." In short, the trial court stated, "the real culprit is not so much the Board, but it's the poor design and the water damage that is conducive to bringing the termites in."

As to the Association's actions, the trial court stated, "the Board did take appropriate action." The court noted the Board "did come up with a plan," viz., to engage a pest control service to "come out and [spot] treat [termite infestation] when it was found." The trial judge opined he might, "from a personal relations standpoint," have acted sooner or differently under the circumstances than did the Association, but nevertheless concluded "the Board did have a rational basis for their decision to reject fumigation, and do ... what they did." Ultimately, the court gave judgment for the Association, applying what it called a "business judgment test." Lamden appealed.

Citing *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490 [229 Cal.Rptr. 456, 723 P.2d 573, 59 A.L.R.4th 447] (*Frances T.*), the Court of Appeal agreed with Lamden that the trial court had applied the wrong standard of care in assessing the Association's actions. In the Court of Appeal's view, relevant statutes, the governing Declaration and principles of common law imposed on the Association an objective duty of reasonable care in repairing and maintaining the Development's common areas near Lamden's unit as occasioned by the presence of termites. The court also concluded that, had the trial court analyzed the Association's actions under an objective standard of reasonableness, an outcome more favorable to Lamden likely would have resulted. Accordingly, the Court of Appeal reversed the judgment of the trial court.

We granted the Association's petition for review.

Discussion

"In a community apartment project, condominium project, or stock cooperative ... unless otherwise provided in the declaration, the association is responsible for the repair and maintenance of the common area occasioned by the presence of wood-destroying pests or organisms." (Civ. Code, § 1364, subd. (b)(1).) The Declaration in this case charges the Association with "management, maintenance and preservation" of the Development's common areas. Further, the Declaration confers upon the Board power and authority to maintain and repair the common areas. Finally, the Declaration provides that "limitations, restrictions, conditions and covenants set forth in this Declaration constitute a general scheme for (i) the maintenance, protection and enhancement of value of the Project and all Condominiums and (ii) the benefit of all Owners." ***257**

(1a) In light of the foregoing, the parties agree the Association is responsible for the repair and maintenance of the Development's common areas occasioned by the presence of termites. They differ only as to the standard against which the Association's performance in discharging this obligation properly should be assessed: a deferential "business judgment" standard or a more intrusive one of "objective reasonableness."

The Association would have us decide this case through application of "the business judgment rule." As we have observed, that rule of judicial deference to corporate decisionmaking "exists in one form or another in every American jurisdiction." (*Frances T.*, *supra*, 42 Cal.3d at p. 507, fn. 14.)

(2a) "The common law business judgment rule has two components—one which immunizes [corporate] directors from personal liability if they act in accordance with its requirements, and another which insulates from court intervention those management decisions which are made by directors in good faith in what the directors believe is the organization's best interest." (*Lee v. Interinsurance Exchange* (1996) 50 Cal.App.4th 694, 714 [57 Cal.Rptr.2d 798], citing 2 Marsh & Finkle, Marsh's Cal. Corporation Law (3d ed., 1996 supp.) § 11.3, pp. 796-797.) A hallmark of the business judgment rule is that, when the rule's requirements are met, a court will not substitute its judgment for that of the corporation's board

of directors. (See generally, *Katz v. Chevron Corp.* (1994) 22 Cal.App.4th 1352, 1366 [27 Cal.Rptr.2d 681].) As discussed more fully below, in California the component of the common law rule relating to directors' personal liability is defined by statute. (See Corp. Code, §§ 309 [profit corporations], 7231 [nonprofit corporations].)

(1b) According to the Association, uniformly applying a business judgment standard in judicial review of community association board decisions would promote certainty, stability and predictability in common interest development governance. Plaintiff, on the other hand, contends general application of a business judgment standard to board decisions would undermine individual owners' ability, under Civil Code section 1354, to enforce, as equitable servitudes, the CC&R's in a common interest development's declaration. [5] Stressing residents' interest in a stable and predictable living environment, as embodied in a given development's particular CC&R's, ***258** plaintiff encourages us to impose on community associations an objective standard of reasonableness in carrying out their duties under governing CC&R's or public policy.

5 Civil Code section 1354, subdivision (a) provides: "The covenants and restrictions in the declaration shall be enforceable equitable servitudes, unless unreasonable, and shall inure to the benefit of and bind all owners of separate interests in the development. Unless the declaration states otherwise, these servitudes may be enforced by any owner of a separate interest or by the association, or by both."

For at least two reasons, what we previously have identified as the "business judgment rule" (see *Frances T., supra*, 42 Cal.3d at p. 507 [discussing Corporations Code section 7231] and fn. 14 [general discussion of common law rule]; *United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.* (1970) 1 Cal.3d 586, 594 [83 Cal.Rptr. 418, 463 P.2d 770] [reference to common law rule]) does not directly apply to this case. First, the statutory protections for individual directors (Corp. Code, §§ 309, subd. (c), 7231, subd. (c)) do not apply, as no individual directors are defendants here.

Corporations Code sections 309 and 7231 (section 7231) are found in the General Corporation Law (Corp. Code, § 100 et seq.) and the Nonprofit Corporation Law (*id.*, § 5000 et seq.), respectively; the latter incorporates the standard of care defined in the former (*Frances T., supra*, 42 Cal.3d at p. 506, fn. 13, citing legis. committee com., Deering's Ann. Corp. Code (1979 ed.) foll. § 7231, p. 205; 1B Ballantine & Sterling, Cal. Corporation Laws (4th ed. 1984) § 406.01, p. 19-192). Section 7231 provides, in relevant part: "A director shall perform the duties of a director ... in good faith, in a manner such 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." (§ 7231, subd. (a); cf. Corp. Code, § 309, subd. (a).) "A person who performs the duties of a director in accordance with [the stated standards] shall have no liability based upon any alleged failure to discharge the person's

obligations as a director ....” (§ 7231, subd. (c); cf. Corp. Code, § 309, subd. (c).)

Thus, by its terms, section 7231 protects only “[a] person who performs the duties of a director” (§ 7231, subd. (c), italics added); it contains no reference to the component of the common law business judgment rule that somewhat insulates ordinary corporate business decisions, per se, from judicial review. (See generally, *Lee v. Interinsurance Exchange*, *supra*, 50 Cal.App.4th at p. 714, citing 2 Marsh & Finkle, Marsh's Cal. Corporation Law, *supra*, § 11.3, pp. 796-797.) Moreover, plaintiff here is seeking only injunctive and declaratory relief, and it is not clear that such a prayer implicates section 7231. The statute speaks only of protection against “liability based upon any alleged failure to discharge the person's obligations ....” (§ 7231, subd. (c), italics added.)

As no compelling reason for departing therefrom appears, we must construe section 7231 in accordance with its plain language. (*Rossi v. Brown* ***259** (1995) 9 Cal.4th 688, 694 [38 Cal.Rptr.2d 363, 889 P.2d 557]; *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 826 [4 Cal.Rptr.2d 615, 823 P.2d 1216]; *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798 [268 Cal.Rptr. 753, 789 P.2d 934].) It follows that section 7231 cannot govern for present purposes.

Second, neither the California statute nor the common law business judgment rule, strictly speaking, protects noncorporate entities, and the defendant in this case, the Association, is not incorporated. [6]

6 The parties do not dispute that the component of the common law business judgment rule calling for deference to corporate decisions survives the Legislature's codification, in section 7231, of the component shielding individual directors from liability. (See also *Lee v. Interinsurance Exchange*, *supra*, 50 Cal.App.4th at p. 714; see generally, *California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297 [65 Cal.Rptr.2d 872, 940 P.2d 323] [unless expressly provided, statutes should not be interpreted to alter the common law]; *Rojo v. Kliger* (1990) 52 Cal.3d 65, 80 [276 Cal.Rptr. 130, 801 P.2d 373] [“statutes do not supplant the common law unless it appears that the Legislature intended to cover the entire subject”].)

(2b) Traditionally, our courts have applied the common law “business judgment rule” to shield from scrutiny qualifying decisions made by a corporation's board of directors. (See, e.g., *Marsili v. Pacific Gas & Elec. Co.* (1975) 51 Cal.App.3d 313, 324 [124 Cal.Rptr. 313, 79 A.L.R.3d 477]; *Fairchild v. Bank of America* (1961) 192 Cal.App.2d 252, 256-257 [13 Cal.Rptr. 491]; *Findley v. Garrett* (1952) 109 Cal.App.2d 166, 174-175 [240 P.2d 421]; *Duffey v. Superior Court* (1992) 3 Cal.App.4th 425, 429 [4 Cal.Rptr.2d 334] [rule applied to decision by board of incorporated community association]; *Beehan v. Lido Isle Community Assn.* (1977) 70 Cal.App.3d 858, 865 [137 Cal.Rptr. 528] [same].) The policies underlying judicial creation of the common law rule derive from the realities of business in the corporate context. As we previously have observed:

"The business judgment rule has been justified primarily on two grounds. First, that directors should be given wide latitude in their handling of corporate affairs because the hindsight of the judicial process is an imperfect device for evaluating business decisions. Second, '[t]he rule recognizes that shareholders to a very real degree voluntarily undertake the risk of bad business judgment; investors need not buy stock, for investment markets offer an array of opportunities less vulnerable to mistakes in judgment by corporate officers.' " (*Frances T.*, *supra*, 42 Cal.3d at p. 507, fn. 14, quoting 18B Am.Jur.2d (1985) Corporations, § 1704, pp. 556-557; see also *Findley v. Garrett*, *supra*, 109 Cal.App.2d at p. 174.)

(1c) California's statutory business judgment rule contains no express language extending its protection to noncorporate entities or actors. ***260** Section 7231, as noted, is part of our Corporations Code and, by its terms, protects only "director[s]." In the Corporations Code, except where otherwise expressly provided, "directors" means "natural persons" designated, elected or appointed "to act as members of the governing body of the corporation." (Corp. Code, § 5047.)

Despite this absence of textual support, the Association invites us for policy reasons to construe section 7231 as applying both to incorporated and unincorporated community associations. (See generally, Civ. Code, § 1363, subd. (a) [providing that a common interest development "shall be managed by an association which may be incorporated or unincorporated"]; *id.*, subd. (c) ["Unless the governing documents provide otherwise," the association, whether incorporated or unincorporated, "may exercise the powers granted to a nonprofit mutual benefit corporation, as enumerated in Section 7140 of the Corporations Code."]; *Oil Workers Intl. Union v. Superior Court* (1951) 103 Cal.App.2d 512, 571 [230 P.2d 71], quoting *Otto v. Tailors' P. & B. Union* (1888) 75 Cal. 308, 313 [17 P. 217] [observing that when courts take jurisdiction over unincorporated associations for the purpose of protecting members' property rights, they " 'will follow and enforce, so far as applicable, the rules applying to incorporated bodies of the same character' "]; *White v. Cox* (1971) 17 Cal.App.3d 824, 828 [95 Cal.Rptr. 259, 45 A.L.R.3d 1161] [noting "unincorporated associations are now entitled to general recognition as separate legal entities"].) Since other aspects of this case—apart from the Association's corporate status—render section 7231 inapplicable, anything we might say on the question of the statute's broader application would, however, be dictum. Accordingly, we decline the Association's invitation to address the issue.

For the foregoing reasons, the "business judgment rule" of deference to corporate decisionmaking, at least as we previously have understood it, has no direct application to the instant controversy. The precise question presented, then, is whether we should in this case adopt for California courts a rule—analogous perhaps to the business judgment rule—of judicial deference to community association board decisionmaking that would apply, regardless of an association's corporate status, when owners in common interest developments seek to litigate ordinary maintenance decisions entrusted to the

discretion of their associations' boards of directors. (Cf. *Levandusky v. One Fifth Ave. Apt. Corp.*, *supra*, 75 N.Y.2d at p. 538 [554 N.Y.S.2d at p. 811] [referring "for the purpose of analogy only" to the business judgment rule in adopting a rule of deference].)

Our existing jurisprudence specifically addressing the governance of common interest developments is not voluminous. While we have not previously ***261** examined the question of what standard or test generally governs judicial review of decisions made by the board of directors of a community association, we have examined related questions.

Fifty years ago, in *Hannula v. Hacienda Homes* (1949) 34 Cal.2d 442 [211 P.2d 302, 19 A.L.R.2d 1268], we held that the decision by the board of directors of a real estate development company to deny, under a restrictive covenant in a deed, the owner of a fractional part of a lot permission to build a dwelling thereon "must be a reasonable determination made in good faith." (*Id.* at p. 447, citing *Parsons v. Duryea* (1927) 261 Mass. 314, 316 [158 N.E. 761, 762]; *Jones v. Northwest Real Estate Co.* (1925) 149 Md. 271, 278 [131 A. 446, 449]; *Harmon v. Burow* (1919) 263 Pa. 188, 190 [106 A. 310, 311].) Sixteen years ago, we held that a condominium owners association is a "business establishment" within the meaning of the Unruh Civil Rights Act, section 51 of the Civil Code. (*O'Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790, 796 [191 Cal.Rptr. 320, 662 P.2d 427]; but see *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1175 [278 Cal.Rptr. 614, 805 P.2d 873] [declining to extend *O'Connor*]; *Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal.4th 670, 697 [72 Cal.Rptr.2d 410, 952 P.2d 218] [same].) And 10 years ago, in *Frances T.*, *supra*, 42 Cal.3d 490, we considered "whether a condominium owners association and the individual members of its board of directors may be held liable for injuries to a unit owner caused by third-party criminal conduct." (*Id.* at p. 495.)

(3a) In *Frances T.*, a condominium owner who resided in her unit brought an action against the community association, a nonprofit corporation, and the individual members of its board of directors after she was raped and robbed in her dwelling. She alleged negligence, breach of contract and breach of fiduciary duty, based on the association's failure to install sufficient exterior lighting and its requiring her to remove additional lighting that she had installed herself. The trial court sustained the defendants' general demurrers to all three causes of action. (*Frances T.*, *supra*, 42 Cal.3d at p. 495.) We reversed. A community association, we concluded, may be held to a landlord's standard of care as to residents' safety in the common areas (*id.* at pp. 499-500), and the plaintiff had alleged particularized facts stating a cause of action against both the association and the individual members of the board (*id.* at p. 498). The plaintiff failed, however, to state a cause of action for breach of contract, as neither the development's governing CC&R's nor the association's bylaws obligated the defendants to install additional lighting. The plaintiff failed likewise to state a cause of action for breach of fiduciary duties, as the defendants had fulfilled their duty to the plaintiff as a shareholder, and the plaintiff

had alleged no facts to show that ***262** the association's board members had a fiduciary duty to serve as the condominium project's landlord. (*Id.* at pp. 512-514.)

In discussing the scope of a condominium owners association's common law duty to a unit owner, we observed in *Frances T.* that "the Association is, for all practical purposes, the Project's 'landlord.' " (*Frances T., supra*, 42 Cal.3d at p. 499, fn. omitted.) And, we noted, "traditional tort principles impose on landlords, no less than on homeowner associations that function as a landlord in maintaining the common areas of a large condominium complex, a duty to exercise due care for the residents' safety in those areas under their control." (*Ibid.*, citing *Kwaitkowski v. Superior Trading Co.* (1981) 123 Cal.App.3d 324, 328 [176 Cal.Rptr. 494]; *O'Hara v. Western Seven Trees Corp.* (1977) 75 Cal.App.3d 798, 802-803 [142 Cal.Rptr. 487]; *Kline v. 1500 Massachusetts Avenue Apartment Corp.* (1970) 439 F.2d 477, 480-481 [141 App.D.C. 370, 43 A.L.R.3d 311]; *Scott v. Watson* (1976) 278 Md. 160 [359 A.2d 548, 552].) We concluded that "under the circumstances of this case the Association should be held to the same standard of care as a landlord" (*Frances T., supra*, 42 Cal.3d at p. 499; see also *id.* at pp. 499-501, relying on *O'Connor v. Village Green Owners Assn., supra*, 33 Cal.3d at p. 796 ["association performs all the customary business functions which in the traditional landlord-tenant relationship rest on the landlord's shoulders"] and *White v. Cox, supra*, 17 Cal.App.3d at p. 830 [association, as management body over which individual owner has no effective control, may be sued for negligence in maintaining sprinkler].)

More recently, in *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 375 [33 Cal.Rptr.2d 63, 878 P.2d 1275] (*Nahrstedt*), we confronted the question, "When restrictions limiting the use of property within a common interest development satisfy the requirements of covenants running with the land or of equitable servitudes, what standard or test governs their enforceability?" [7]

7 Our opinion in *Nahrstedt* also contains extensive background discussion, which need not be reproduced here. *Nahrstedt*'s background materials discuss the origin and development of condominiums, cooperatives and planned unit developments as widely accepted forms of real property ownership (*Nahrstedt, supra*, 8 Cal.4th at pp. 370-375, citing numerous authorities); California's statutory scheme governing condominiums and other common interest developments (*id.* at pp. 377-379 [describing the Davis-Stirling Act]); and general property law principles respecting equitable servitudes and their enforcement (*Nahrstedt*, *supra*, at pp. 380-382).

(4) In *Nahrstedt*, an owner of a condominium unit who had three cats sued the community association, its officers and two of its employees for declaratory relief, seeking to prevent the defendants from enforcing against ***263** her a prohibition on keeping pets that was contained in the community association's recorded CC&R's. In resolving the dispute, we distilled from numerous authorities the

principle that "[a]n equitable servitude will be enforced unless it violates public policy; it bears no rational relationship to the protection, preservation, operation or purpose of the affected land; or it otherwise imposes burdens on the affected land that are so disproportionate to the restriction's beneficial effects that the restriction should not be enforced." (*Nahrstedt*, *supra*, 8 Cal.4th at p. 382.) Applying this principle, and noting that a common interest development's recorded use restrictions are "enforceable equitable servitudes, unless unreasonable" (Civ. Code, § 1354, subd. (a)), we held that "such restrictions should be enforced unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit" (*Nahrstedt*, *supra*, at p. 382). (See also *Citizens for Covenant Compliance v. Anderson* (1995) 12 Cal.4th 345, 349 [47 Cal.Rptr.2d 898, 906 P.2d 1314] [previously recorded restriction on property use in common plan for ownership of subdivision property enforceable even if not cited in deed at time of sale].)

In deciding *Nahrstedt*, we noted that ownership of a unit in a common interest development ordinarily "entails mandatory membership in an owners association, which, through an elected board of directors, is empowered to enforce any use restrictions contained in the project's declaration or master deed and to enact new rules governing the use and occupancy of property within the project." (*Nahrstedt*, *supra*, 8 Cal.4th at p. 373, citing Cal. Condominium and Planned Development Practice (Cont.Ed.Bar 1984) § 1.7, p. 13; Note, *Community Association Use Restrictions: Applying the Business Judgment Doctrine* (1988) 64 Chi.-Kent L.Rev. 653; Natelson, Law of Property Owners Associations (1989) § 3.2.2, p. 71 et seq.) "Because of its considerable power in managing and regulating a common interest development," we observed, "the governing board of an owners association must guard against the potential for the abuse of that power." (*Nahrstedt*, *supra*, at pp. 373-374, fn. omitted.) We also noted that a community association's governing board's power to regulate "pertains to a 'wide spectrum of activities,' such as the volume of playing music, hours of social gatherings, use of patio furniture and barbecues, and rental of units." (*Id.* at p. 374, fn. 6.)

We declared in *Nahrstedt* that, "when an association determines that a unit owner has violated a use restriction, the association must do so in good faith, not in an arbitrary or capricious manner, and its enforcement procedures must be fair and applied uniformly." (*Nahrstedt*, *supra*, 8 Cal.4th at p. 383, ***264** citing *Ironwood Owners Assn. IX v. Solomon* (1986) 178 Cal.App.3d 766, 772 [224 Cal.Rptr. 18]; *Cohen v. Kite Hill Community Assn.* (1983) 142 Cal.App.3d 642, 650 [191 Cal.Rptr. 209].) Nevertheless, we stated, "Generally, courts will uphold decisions made by the governing board of an owners association so long as they represent good faith efforts to further the purposes of the common interest development, are consistent with the development's governing documents, and comply with public policy." (*Nahrstedt*, *supra*, at p. 374, citing Natelson, *Consent, Coercion, and "Reasonableness" in Private Law: The Special Case of the Property Owners Association* (1990) 51 Ohio State L.J. 41, 43.)

The plaintiff in this case, like the plaintiff in *Nahrstedt*, owns a unit in a common interest development and disagrees with a particular aspect of the development's overall governance as it has impacted her. Whereas the restriction at issue in *Nahrstedt* (a ban on pets), however, was promulgated at the development's inception and enshrined in its founding CC&R's, the decision plaintiff challenges in this case (the choice of secondary over primary termite treatment) was promulgated by the Association's Board long after the Development's inception and after plaintiff had acquired her unit. Our holding in *Nahrstedt*, which established the standard for judicial review of recorded use restrictions that satisfy the requirements of covenants running with the land or equitable servitudes (see *Nahrstedt*, *supra*, 8 Cal.4th at p. 375), therefore, does not directly govern this case, which concerns the standard for judicial review of discretionary economic decisions made by the governing boards of community associations.

In *Nahrstedt*, moreover, some of our reasoning arguably suggested a distinction between originating CC&R's and subsequently promulgated use restrictions. Specifically, we reasoned in *Nahrstedt* that giving deference to a development's originating CC&R's "protects the general expectations of condominium owners 'that restrictions in place at the time they purchase their units will be enforceable.' " (*Nahrstedt*, *supra*, 8 Cal.4th at p. 377, quoting Note, *Judicial Review of Condominium Rulemaking* (1981) 94 Harv. L.Rev. 647, 653.) Thus, our conclusion that judicial review of a common interest development's founding CC&R's should proceed under a deferential standard was, as plaintiff points out, at least partly derived from our understanding (invoked there by way of contrast) that the factors justifying such deference will not necessarily be present when a court considers subsequent, unrecorded community association board decisions. (See *Nahrstedt*, *supra*, at pp. 376-377, discussing *Hidden Harbour Estates v. Basso* (Fla.Dist.Ct.App. 1981) 393 So.2d 637, 639-640.)

(1d) Nevertheless, having reviewed the record in this case, and in light of the foregoing authorities, we conclude that the Board's decision here to ***265** use secondary, rather than primary, treatment in addressing the Development's termite problem, a matter entrusted to its discretion under the Declaration and Civil Code section 1364, falls within *Nahrstedt*'s pronouncement that, "Generally, courts will uphold decisions made by the governing board of an owners association so long as they represent good faith efforts to further the purposes of the common interest development, are consistent with the development's governing documents, and comply with public policy." (*Nahrstedt*, *supra*, 8 Cal.4th at p. 374.) Moreover, our deferring to the Board's discretion in this matter, which, as previously noted, is broadly conferred in the Development's CC&R's, is consistent with *Nahrstedt*' s holding that CC&R's "should be enforced unless they are wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of affected land that far outweighs any benefit." (*Id.* at p. 382.)

Here, the Board exercised discretion clearly within the scope of its authority under the Declaration and governing statutes to select

among means for discharging its obligation to maintain and repair the Development's common areas occasioned by the presence of wood-destroying pests or organisms. The trial court found that the Board acted upon reasonable investigation, in good faith, and in a manner the Board believed was in the best interests of the Association and its members. (See generally, *Nahrstedt*, *supra*, 8 Cal.4th at p. 374; *Frances T.*, *supra*, 42 Cal.3d at pp. 512-514 [association's refusal to install lighting breached no contractual or fiduciary duties]; *Hannula v. Hacienda Homes*, *supra*, 34 Cal.2d at p. 447 ["refusal to approve plans must be a reasonable determination made in good faith"].)

Contrary to the Court of Appeal, we conclude the trial court was correct to defer to the Board's decision. We hold that, where a duly constituted community association board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise.

The foregoing conclusion is consistent with our previous pronouncements, as reviewed above, and also with those of California courts, generally, respecting various aspects of association decisionmaking. (See *Pinsker v. Pacific Coast Society of Orthodontists* (1974) 12 Cal.3d 541, 550 [116 Cal.Rptr. 245, 526 P.2d 253] [holding "whenever a private association is legally required to refrain from arbitrary action, the association's action must be substantively rational and procedurally fair"]; *Ironwood Owners Assn. IX* ***266** v. *Solomon*, *supra*, 178 Cal.App.3d at p. 772 [holding homeowners association seeking to enforce CC&R's to compel act by member owner must "show that it has followed its own standards and procedures prior to pursuing such a remedy, that those procedures were fair and reasonable and that its substantive decision was made in good faith, and is reasonable, not arbitrary or capricious"]; *Cohen v. Kite Hill Community Assn.*, *supra*, 142 Cal.App.3d at p. 650 [noting "a settled rule of law that homeowners associations must exercise their authority to approve or disapprove an individual homeowner's construction or improvement plans in conformity with the declaration of covenants and restrictions, and in good faith"]; *Laguna Royale Owners Assn. v. Darger* (1981) 119 Cal.App.3d 670, 683-684 [174 Cal.Rptr. 136] [in purporting to test "reasonableness" of owners association's refusal to permit transfer of interest, court considered "whether the reason for withholding approval is rationally related to the protection, preservation or proper operation of the property and the purposes of the Association as set forth in its governing instruments" and "whether the power was exercised in a fair and nondiscriminatory manner"].) [8]

8 Courts in other jurisdictions have adopted similarly deferential rules. (See, e.g., *Levandusky v. One Fifth Ave. Apt. Corp.*, *supra*, 75 N.Y.2d at p. 538 [554 N.Y.S.2d at p. 812, 553 N.E.2d at pp. 1321-1322] [comparing benefits of a "reasonableness" standard with those of a "business judgment rule" and

holding that, when "the board acts for the purposes of the cooperative, within the scope of its authority and in good faith, courts will not substitute their judgment for the board's"]; see also authorities cited there and *id*. at p. 545 [554 N.Y.S.2d at p. 816, 553 N.E.2d at p. 1326] (conc. opn. of Titone, J.) [standard analogous to business judgment rule is appropriate where "the challenged action was, in essence, a business judgment, i.e., a choice between competing and equally valid economic options" (italics omitted)].)

Our conclusion also accords with our recognition in *Frances T.* that the relationship between the individual owners and the managing association of a common interest development is complex. (*Frances T.*, *supra*, 42 Cal.3d at pp. 507-509; see also *Duffey v. Superior Court*, *supra*, 3 Cal.App.4th at pp. 428-429 [noting courts "analyze homeowner associations in different ways, depending on the function the association is fulfilling under the facts of each case" and citing examples]; *Laguna Publishing Co. v. Golden Rain Foundation* (1982) 131 Cal.App.3d 816, 844 [182 Cal.Rptr. 813]; *O'Connor v. Village Green Owners Assn.*, *supra*, 33 Cal.3d at p. 796; *Beehan v. Lido Isle Community Assn.*, *supra*, 70 Cal.App.3d at pp. 865-867.) On the one hand, each individual owner has an economic interest in the proper business management of the development as a whole for the sake of maximizing the value of his or her investment. In this aspect, the relationship between homeowner and association is somewhat analogous to that between shareholder and corporation. On the other hand, each individual owner, at least while residing in the development, has a personal, not strictly economic, ***267** interest in the appropriate management of the development for the sake of maintaining its security against criminal conduct and other foreseeable risks of physical injury. In this aspect, the relationship between owner and association is somewhat analogous to that between tenant and landlord. (See generally, *Frances T.*, *supra*, 42 Cal.3d at p. 507 [business judgment rule "applies to parties (particularly shareholders and creditors) to whom the directors owe a fiduciary obligation," but "does not abrogate the common law duty which every person owes to others—that is, a duty to refrain from conduct that imposes an unreasonable risk of injury on third parties"].)

Relying on *Frances T.*, the Court of Appeal held that a landlord-like common law duty required Association, in discharging its responsibility to maintain and repair the common areas occasioned by the presence of termites, to exercise reasonable care in order to protect plaintiff's unit from undue damage. (3b) As noted, "It is now well established that California law requires landowners to maintain land in their possession and control in a reasonably safe condition. [Citations.] In the case of a landlord, this general duty of maintenance, which is owed to tenants and patrons, has been held to include the duty to take reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674 [25 Cal.Rptr.2d 137, 863 P.2d 207], citing, inter alia, *Frances T.*, *supra*, 42 Cal.3d at pp. 499-501.) (1e)

Contrary to the Court of Appeal, however, we do not believe this case implicates such duties. *Frances T.* involved a common interest development resident who suffered " 'physical injury, not pecuniary harm ....' " (*Frances T.*, *supra*, 42 Cal.3d at p. 505, quoting *United States Liab. Ins. Co. v. Haidinger-Hayes, Inc.*, *supra*, 1 Cal.3d at p. 595; see also *id.* at p. 507, fn. 14.) Plaintiff here, by contrast, has not resided in the Development since the time that significant termite infestation was discovered, and she alleges neither a failure by the Association to maintain the common areas in a reasonably safe condition, nor knowledge on the Board's part of any unreasonable risk of physical injury stemming from its failure to do so. Plaintiff alleges simply that the Association failed to effect necessary pest control and repairs, thereby causing her pecuniary damages, including diminution in the value of her unit. Accordingly, *Frances T.* is inapplicable.

Plaintiff warns that judicial deference to the Board's decision in this case would not be appropriate, lest every community association be free to do as little or as much as it pleases in satisfying its obligations to its members. We do not agree. Our respecting the Association's discretion, under this Declaration, to choose among modes of termite treatment does not foreclose the ***268** possibility that more restrictive provisions relating to the same or other topics might be "otherwise provided in the declaration[s]" (Civ. Code, § 1364, subd. (b)(1)) of other common interest developments. As discussed, we have before us today a declaration constituting a general scheme for maintenance, protection and enhancement of value of the Development, one that entrusts to the Association the management, maintenance and preservation of the Development's common areas and confers on the Board the power and authority to maintain and repair those areas.

Thus, the Association's obligation at issue in this case is broadly cast, plainly conferring on the Association the discretion to select, as it did, among available means for addressing the Development's termite infestation. Under the circumstances, our respecting that discretion obviously does not foreclose community association governance provisions that, within the bounds of the law, might more narrowly circumscribe association or board discretion.

Citing Restatement Third of Property, Servitudes, Tentative Draft No. 7,[9] plaintiff suggests that deference to community association discretion will undermine individual owners' previously discussed right, under Civil Code section 1354 and *Nahrstedt*, *supra*, 8 Cal.4th at page 382, to enforce recorded CC&R's as equitable servitudes, but we think not. (5) "Under well-accepted principles of condominium law, a homeowner can sue the association for damages and an injunction to compel the association to enforce the provisions of the declaration. [Citation.] More importantly here, the homeowner can sue directly to enforce the declaration." (*Posey v. Leavitt* (1991) 229 Cal.App.3d 1236, 1246-1247 [280 Cal.Rptr. 568], citing *Cohen* ***269** v. *Kite Hill Community Assn.*, *supra*, 142 Cal.App.3d 642.) Nothing we say here departs from those principles.

9 The Restatement tentative draft proposes that "In addition to duties

> imposed by statute and the governing documents, the association has the following duties to the members of the common interest community: [¶] (a) to use ordinary care and prudence in managing the property and financial affairs of the community that are subject to its control." (Rest.3d Property, Servitudes (Tent. Draft No. 7, Apr. 15, 1998) ch. 6, § 6.13, p. 325.) "The business judgment rule is not adopted, because the fit between community associations and other types of corporations is not very close, and it provides too little protection against careless or risky management of community property and financial affairs." (*Id.*, com. b at p. 330.) It is not clear to what extent the Restatement tentative draft supports plaintiff's position. As the Association points out, a "member challenging an action of the association under this section has the burden of proving a breach of duty by the association" and, when the action is one within association discretion, "the additional burden of proving that the breach has caused, or threatens to cause, injury to the member individually or to the interests of the common interest community." (Rest.3d Property (Tent. Draft No. 7), *supra*, § 6.13, p. 325.) Depending upon how it is interpreted, such a standard might be inconsistent with the standard we announced in *Nahrstedt*, viz., that a use restriction is enforceable "*not* by reference to facts that are specific to the objecting homeowner, but by reference to the common interest development as a whole." (*Nahrstedt*, *supra*, 8 Cal.4th at p. 386, italics in original.)

(1f) Finally, plaintiff contends a rule of judicial deference will insulate community association boards' decisions from judicial review. We disagree. As illustrated by *Fountain Valley Chateau Blanc Homeowner's Assn. v. Department of Veterans Affairs* (1998) 67 Cal.App.4th 743, 754-755 [79 Cal.Rptr.2d 248] (*Fountain Valley*), judicial oversight affords significant protection against overreaching by such boards.

In *Fountain Valley*, a homeowners association, threatening litigation against an elderly homeowner with Hodgkin's disease, gained access to the interior of his residence and demanded he remove a number of personal items, including books and papers not constituting "standard reading material," claiming the items posed a fire hazard. (*Fountain Valley*, *supra*, 67 Cal.App.4th at p. 748.) The homeowner settled the original complaint (*id.* at p. 746), but cross-complained for violation of privacy, trespass, negligence and breach of contract (*id.* at p. 748). The jury returned a verdict in his favor, finding specifically that the association had acted unreasonably. (*Id.* at p. 749.)

Putting aside the question whether the jury, rather than the court, should have determined the ultimate question of the reasonableness *vel non* of the association's actions, the Court of Appeal held that, in light of the operative facts found by the jury, it was "virtually impossible" to say the association had acted reasonably. (*Fountain Valley*, *supra*, 67 Cal.App.4th at p. 754.) The city fire department had found no

fire hazard, and the association "did not have a good faith, albeit mistaken, belief in that danger." (*Ibid.*) In the absence of such good faith belief, the court determined the jury's verdict must stand (*id.* at p. 756), thus impliedly finding no basis for judicial deference to the association's decision.

Plaintiff suggests that our previous pronouncements establish that when, as here, a community association is charged generally with maintaining the common areas, any member of the association may obtain judicial review of the reasonableness of its choice of means for doing so. To the contrary, in *Nahrstedt* we emphasized that "anyone who buys a unit in a common interest development with knowledge of its owners association's discretionary power accepts 'the risk that the power may be used in a way that benefits the commonality but harms the individual.' " (*Nahrstedt*, *supra*, 8 Cal.4th at p. 374, quoting Natelson, *Consent, Coercion, and "Reasonableness" in Private* ***270** *Law: The Special Case of the Property Owners Association*, *supra*, 51 Ohio State L.J. at p. 67.) [10]

10 In this connection we note that, insofar as the record discloses, plaintiff is the only condominium owner who has challenged the Association's decision not to fumigate her building. To permit one owner to impose her will on all others and in contravention of the governing board's good faith decision would turn the principle of benefit to " 'the commonality but harm[to] the individual' " (*Nahrstedt*, *supra*, 8 Cal.4th at p. 374) on its head.

Nor did we in *Nahrstedt* impose on community associations strict liability for the consequences of their ordinary discretionary economic decisions. As the Association points out, unlike the categorical ban on pets at issue in *Nahrstedt*—which arguably is either valid or not—the Declaration here, in assigning the Association a duty to maintain and repair the common areas, does not specify how the Association is to act, just that it should. Neither the Declaration nor Civil Code section 1364 reasonably can be construed to mandate any particular mode of termite treatment.

Still less do the governing provisions require that the Association render the Development constantly or absolutely termite-free. Plainly, we must reject any per se rule "requiring a condominium association and its individual members to indemnify any individual homeowner for any reduction in value to an individual unit caused by damage.... Under this theory the association and individual members would not only have the duty to repair as required by the CC&Rs, but the responsibility to reimburse an individual homeowner for the diminution in value of such unit regardless if the repairs had been made or the success of such repairs." (*Kaye v. Mount La Jolla Homeowners Assn.* (1988) 204 Cal.App.3d 1476, 1487 [252 Cal.Rptr. 67] [disapproving cause of action for lateral and subjacent support based on association's failure, despite efforts, to remedy subsidence problem].)

The formulation we have articulated affords homeowners, community associations, courts

and advocates a clear standard for judicial review of discretionary economic decisions by community association boards, mandating a degree of deference to the latter's business judgments sufficient to discourage meritless litigation, yet at the same time without either eviscerating the long-established duty to guard against unreasonable risks to residents' personal safety owed by associations that "function as a landlord in maintaining the common areas" (*Frances T.*, *supra*, 42 Cal.3d at p. 499) or modifying the enforceability of a common interest development's CC&R's (Civ. Code, § 1354, subd. (a); *Nahrstedt*, *supra*, 8 Cal.4th at p. 374).

Common sense suggests that judicial deference in such cases as this is appropriate, in view of the relative competence, over that of courts, possessed by owners and directors of common interest developments to make ***271** the detailed and peculiar economic decisions necessary in the maintenance of those developments. A deferential standard will, by minimizing the likelihood of unproductive litigation over their governing associations' discretionary economic decisions, foster stability, certainty and predictability in the governance and management of common interest developments. Beneficial corollaries include enhancement of the incentives for essential voluntary owner participation in common interest development governance and conservation of scarce judicial resources.

Disposition

For the foregoing reasons, the judgment of the Court of Appeal is reversed.

George, C. J., Mosk, J., Kennard, J., Baxter, J., Chin, J., and Brown, J., concurred. ***272**

Footnotes

FN1 In 1985, the Legislature enacted the Davis-Stirling Common Interest Development Act (Davis-Stirling Act) as division 2, part 4, title 6 of the Civil Code, "Common Interest Developments" (Civ. Code, §§ 1350-1376; Stats. 1985, ch. 874, § 14, pp. 2774-2787), which encompasses community apartment projects, condominium projects, planned developments and stock cooperatives (Civ. Code, § 1351, subd. (c)). "A common interest development shall be managed by an association which may be incorporated or unincorporated. The association may be referred to as a community association." (Civ. Code, § 1363, subd. (a).)

R-LA-2

RESPONDENT'S EXHIBIT

50 Cal.App.4th 694, 57 Cal.Rptr.2d 798, 96 Cal. Daily Op. Serv. 8021, 96 Daily Journal D.A.R. 13,278

WOO CHUL LEE et al., Plaintiffs and Appellants, v. INTERINSURANCE EXCHANGE OF THE AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA et al., Defendants and Respondents.

No. B089335.
Court of Appeal, Second District, Division 3, California.
Oct 31, 1996.

SUMMARY

Subscribers and former subscribers of an interinsurance exchange (a reciprocal insurer) brought an action against the exchange, its board of governors, the exchange's parent organization, and the exchange's corporate attorney-in-fact, to compel defendants to deposit into subscriber savings accounts all surplus funds that exceeded legally required amounts. The trial court entered a judgment of dismissal after sustaining defendants' demurrer to plaintiffs' third amended complaint without leave to amend. (Superior Court of Los Angeles County, No. BC062630, Barnet M. Cooperman, Judge.)

The Court of Appeal affirmed. The court held that the trial court properly sustained defendants' demurrer. Decisions for managing surplus funds of an insurer are exercises of business judgment, and courts are unqualified to second-guess determinations made by an insurer as to the amount of funds necessary to assure adequate funds to cover catastrophic losses, or as to the optimal form in which the funds should be held. The business judgment rule applies to reciprocal insurers, just as it applies to other business concerns. The court also held that Ins. Code, § 1282, did not preclude the exchange's board from the protection of the business judgment rule. The court further held that plaintiffs failed to allege facts that established an exception to the business judgment rule. More was needed than conclusory allegations of improper motives and conflict of interest. The court held that the trial court properly sustained defendants' demurrer, since plaintiffs, in executing the subscriber's agreement, contractually agreed to grant the exchange's board discretion concerning the maintenance and use of surplus funds. Although plaintiffs asserted that they were fraudulently induced to enter into the agreement, based on misrepresentations regarding subscribers' personal liability for the exchange's debts, there were no such misrepresentations, nor did the agreement conceal material facts. (Opinion by Croskey, Acting P. J., with Kitching and Aldrich, JJ., concurring.) ***695**

HEADNOTES

Classified to California Digest of Official Reports

(1)
Appellate Review § 128--Scope of Review--Function of Appellate Court-- Rulings on Demurrers.

In matters coming to the appellate court on a judgment of dismissal following the trial court's order sustaining a defendant's demurrer without leave to amend, the appellate court assumes the truth of all properly pleaded facts, but not contentions, deductions, or conclusions of fact or law. Assuming the truth of the plaintiff's factual allegations, the appellate court then independently determines whether the plaintiff has alleged cognizable claims.

(2a, 2b)
Insurance Companies § 12--Actions Against Interinsurance Exchange--Subscribers' Action to Compel Exchange to Deposit Surplus Funds Into Subscriber Savings Accounts--Business Judgment Rule.
The trial court properly sustained the demurrer of an interinsurance exchange (a reciprocal insurer) to an action by subscribers of the exchange that sought to compel it to deposit into subscriber savings accounts all surplus funds that exceeded legally required amounts. Decisions for managing surplus funds of an insurer are exercises of business judgment, and courts are unqualified to second-guess determinations made by an insurer as to the amount of funds necessary to assure adequate funds to cover catastrophic losses, or as to the optimal form in which the funds should be held. Assuring availability of funds to cover losses is a rational business purpose for an insurer. Moreover, the business judgment rule applies to reciprocal insurers, just as it applies to other business concerns; the relationship between the directors of a reciprocal insurer and its subscribers is identical in all significant ways to the relationship between the directors of any business organization and the organization's investors or other nonmanaging participants. Where the reason is the same, the rule should be the same (Civ. Code, § 3511). Moreover, management of the exchange's funds did not constitute an unlawful business practice (Bus. & Prof. Code, § 17200). Actions that are reasonable exercises of business judgment, that are not forbidden by law, and that fall within the discretion of the directors of a business under the business judgment rule cannot constitute unlawful business practices.

(3)
Corporations § 39--Officers and Agents--Liability--Business Judgment Rule:Words, Phrases, and Maxims--Business Judgment Rule.
The business judgment rule is a judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions. The rule is based on the ***696** premise that those to whom the management of a business organization has been entrusted, and not the courts, are best able to judge whether a particular act or transaction is helpful to the conduct of the organization's affairs or expedient for the attainment of its purposes. The rule establishes a presumption that directors' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions made by the directors in good faith and in the absence of a conflict of interest.

[See 9 **Witkin,** Summary of Cal. Law (9th ed. 1989) Corporations, § 110.]

(4)

Insurance Companies § 12--Actions Against Interinsurance Exchange-- Subscribers' Action to Compel Exchange to Deposit Surplus Funds Into Subscriber Savings Accounts--Business Judgment Rule--Applicability of Common Law Rule.

In an action by interinsurance exchange subscribers to compel the exchange (a reciprocal insurer) to deposit into subscriber savings accounts all surplus funds that exceeded legally required amounts, the trial court properly sustained defendants' demurrer. Ins. Code, § 1282, did not preclude the exchange's board from the protection of the business judgment rule. Although Ins. Code, § 1282, provides that certain provisions of the Insurance Code do not apply to reciprocal insurers, and while that section apparently precludes application of the statutory business judgment rule (Corp. Code, § 309) to reciprocal insurers, it does not preclude application of the common law business judgment rule. The common law business judgment rule has two components-one that immunizes directors from personal liability if they act in accordance with its requirements and another that insulates from court intervention those management decisions that are made by directors in good faith in what the directors believe is the organization's best interest. Only the first component is embodied in Corp. Code, § 309. Thus, even if Ins. Code, § 1282, makes Corp. Code, § 309, inapplicable to reciprocal insurers, the second component of the common law rule was unaffected, and it was the second component of the rule that applied to reciprocal insurers.

(5a, 5b)

Insurance Companies § 12--Actions Against Interinsurance Exchange--Subscribers' Action to Compel Exchange to Deposit Surplus Funds Into Subscriber Savings Accounts--Business Judgment Rule--Failure to Allege Exceptions to Rule.

In an action by interinsurance exchange subscribers to compel the exchange to deposit into subscriber savings accounts all surplus funds that exceeded legally ***697** required amounts, the trial court properly declined to interfere with the decisions of the exchange's board respecting management of surplus funds, where plaintiffs failed to allege facts that established an exception to the business judgment rule. More was needed to establish an exception to the business judgment rule than conclusory allegations of improper motives and conflict of interest. Nor was it sufficient to generally allege the failure to conduct an active investigation, in the absence of allegations of facts that reasonably called for such an investigation, or allegations of facts that would have been discovered by a reasonable investigation and would have been material to the questioned exercise of business judgment. While the interlocking boards of the exchange, its parent organization, and its attorney-in-fact may have created an opportunity for the parent organization to exercise undue influence over the exchange, that bare opportunity did not establish that fraud, bad faith, or gross overreaching had actually occurred. The parent organization's contingent future interest in the surplus remaining upon dissolution of the exchange was too remote and speculative to create a conflict of interest as to the disposition of present surplus in the absence of any showing or allegation the exchange was at all likely to be dissolved within the foreseeable future.

(6)
Corporations § 39--Officers and Agents--Liability--Business Judgment Rule--Presumption of Good Faith Decisions--Exceptions.
The business judgment rule sets up a presumption that directors' decisions are made in good faith and are based upon sound and informed business judgment. An exception to this presumption exists in circumstances that inherently raise an inference of conflict of interest. Such circumstances include those in which directors, particularly inside directors, take defensive action against a takeover by another entity, which may be advantageous to the corporation, but threatening to existing corporate officers. Similarly, a conflict of interest is inferable where the directors of a corporation that is being taken over approve generous termination agreements-"golden parachutes"-for existing inside directors. In situations of this kind, directors may reasonably be allocated the burden of showing good faith and reasonable investigation. But in most cases, the presumption created by the business judgment rule can be rebutted only by affirmative allegations of facts which, if proven, would establish fraud, bad faith, overreaching, or an unreasonable failure to investigate material facts. Interference with the discretion of directors is not warranted in doubtful cases.

(7)
Insurance Companies § 12--Actions Against Interinsurance Exchange-- Subscribers' Challenge Concerning Entitlement to Surplus Funds Upon Dissolution of Exchange--Ripeness.
In an action ***698** by interinsurance exchange subscribers to compel the exchange to deposit into subscriber savings accounts all surplus funds that exceeded legally required amounts, the trial court properly found that the issue was not ripe for decision as to whether, upon dissolution of the exchange, the exchange's parent organization or the subscribers would be entitled to the exchange's assets. There had been no showing or any allegation of a likelihood that the exchange would be dissolved within the foreseeable future. Moreover, if the exchange was dissolved, the disposition of its assets would necessarily be overseen by the Commissioner of Insurance (Ins. Code, § 1070 et seq.), and persons claiming an interest in the assets would have the chance to challenge the parent organization's claims in the administrative proceedings.

(8)
Insurance Companies § 12--Actions Against Interinsurance Exchange-- Subscribers' Challenge Concerning Entitlement to Surplus Funds Upon Dissolution of Exchange--Subscribers' Agreement to Grant Exchange Discretion to Handle Surplus--Misrepresentations.
In an action by interinsurance exchange subscribers to compel the exchange to deposit into subscriber savings accounts all surplus funds that exceeded legally required amounts, the trial court properly sustained the exchange's demurrer, since the subscribers agreed in the subscriber's agreement to grant the exchange's board discretion concerning the maintenance and use of surplus. Although the subscribers asserted that they were fraudulently induced to enter into the agreement, based on misrepresentations regarding subscribers'

personal liability for the exchange's debts, there were no such misrepresentations. The agreement stated, "No present or future subscriber of the Exchange shall be liable in excess of the amount of his or her premium for any portion of the debts or liabilities of the Exchange." This statement was true since the Commissioner of Insurance had granted the exchange a certificate of perpetual nonassessability under Ins. Code, § 1401.5. A subscriber's liability to a judgment creditor is limited to "such proportion as his interest may appear" (Ins. Code, § 1450). This limitation means that a subscriber is liable for the amount for which each subscriber could be assessed by the exchange's attorney-in-fact or the Commissioner of Insurance. For subscribers of exchanges that are exempt from assessments under Ins. Code, § 1401 or 1401.5, there is no liability beyond the subscriber's paid premium for any debts of the exchange, including judgment debts.

(9a, 9b)
Insurance Companies § 12--Actions Against Interinsurance Exchange--Subscribers' Challenge Concerning Entitlement to Surplus Funds Upon Dissolution of Exchange--Subscribers' ***699** Agreement to Grant Exchange Discretion to Handle Surplus--Concealment of Material Facts.
In an action by interinsurance exchange subscribers to compel the exchange to deposit into subscriber savings accounts all surplus funds that exceeded legally required amounts, the trial court properly sustained the exchange's demurrer, since the subscribers agreed in the subscriber's agreement to grant the exchange's board discretion concerning the maintenance and use of surplus, and the agreement did not conceal material facts. Disbursements and withdrawal rights are entirely at the discretion of the insurers' directors (Ins. Code, § 1420). Thus, the subscribers could have no reasonable expectation of such rights, and there was no basis for claiming they were fraudulently induced to waive them. Nor could plaintiffs legitimately claim rights based upon the representative's manual of the parent organization; the manual was an internal document, was not intended to be communicated to potential subscribers, and made no promises to them. Plaintiffs failed to establish either that the agreement was fraudulent, or that the exchange's management of surplus was an unlawful business practice under Bus. & Prof. Code, § 17200.

(10)
Insurance Contracts and Coverage § 34--Avoidance of Policy-- Limitations Upon Enforcement.
There are two limitations upon the enforcement of insurance contracts, adhesion contracts generally, or provisions thereof. First, a contract or provision that does not fall within the reasonable expectations of the weaker or adhering party will not be enforced against him or her. Secondly, even if the contract or provision is consistent with the reasonable expectations of the parties, it will not be enforced if it is unduly oppressive or unconscionable.

(11)
Pleading § 67--Amendment--Sustaining Demurrer Without Leave to Amend-- Action Against Interinsurance Exchange--Subscribers'

Challenge Concerning Entitlement to Surplus Funds Upon Dissolution of Exchange.

In an action by interinsurance exchange subscribers to compel the exchange to deposit into subscriber savings accounts all surplus funds that exceeded legally required amounts, the trial court properly sustained the exchange's demurrer without leave to amend. An order sustaining a demurrer without leave to amend is unwarranted and constitutes an abuse of discretion if there is a reasonable possibility that the defect can be cured by amendment, but it is proper to sustain a demurrer without leave to amend if it is probable from the nature of the defects and previous unsuccessful attempts to plead that the plaintiff cannot state a cause of action. Plaintiffs had three opportunities to amend their complaint and were ***700** unable to successfully state a cause of action. Moreover, the defects in the complaints were not defects of form. Rather, the problem was that plaintiffs sought judicial intervention in management decisions as to the level and form of surplus funds of the exchange, even though such matters were within the discretion of the exchange's board and management, provided that those institutions acted in good faith. Since plaintiffs failed to allege facts that tended to establish an absence of good faith and reasonable inquiry, no cause of action existed by which the exchange's actions could be challenged.

COUNSEL

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CROSKEY, Acting P. J.

Three years ago, in *Barnes v. State Farm Mut. Auto. Ins. Co.* (1993) 16 Cal.App.4th 365 [20 Cal.Rptr.2d 87] (hereafter, *Barnes*), this court considered, among other issues, the question of whether a policyholder of a mutual insurance company can object to, or seek judicial assistance to control, the insurer's maintenance, management and disbursement of surplus funds. We answered that question in the negative. (*Id.* at pp. 378-380.)

The present action, brought by subscribers and former subscribers of the Interinsurance Exchange of the Automobile Club of Southern California (hereafter, the Exchange), raises essentially the same question.[1] However, unlike the defendant mutual insurer in *Barnes*, the Exchange is a reciprocal ***701** insurer, organized under chapter 3 (§ 1280 et seq., "Reciprocal Insurers,") of division 1, part 2 of the Insurance Code.[2]

1 Plaintiffs Woo Chul Lee and Rosemarie Flocken are current subscribers; plaintiff Jeung Sook Han, a subscriber for 10 years, withdrew in 1992. The lawsuit is designated in the complaint and in plaintiff-appellants' opening brief on appeal as a class action. However, it does not appear that a class has been certified.

2 All statutory references are to the Insurance Code unless otherwise indicated.

Reciprocal insurers, alternatively called interinsurance exchanges, differ from mutual insurers in some details of structure and legal status. However, as we shall explain, the differences between mutual and reciprocal insurers are not of a kind which justifies different rules respecting their insured's right to control business decisions of the insurer's governing board. We thus conclude that a reciprocal insurer, like a mutual insurer, is subject to the common law business judgment rule, which we relied upon in *Barnes*, and which protects the good faith business decisions of a business organization's directors, including decisions concerning the maintenance, management and disbursement of an insurer's surplus funds, from interference by the courts.

This action is against the Exchange; its board of governors and 11 of its members and former members (hereafter, collectively, the Board); the Automobile Club of Southern California (the Club); and ACSC Management Services, Inc. (ACSC). The plaintiffs appeal from a judgment of dismissal after the defendants' demurrer to the third amended complaint was sustained without leave to amend. We agree with the trial court's conclusion that plaintiffs failed to allege facts sufficient to constitute a cause of action against the defendants on any theory, because (1) the business judgment rule precludes judicial interference with the Board's good faith management of Exchange assets, (2) the plaintiffs have not alleged facts which establish a lack of good faith or a conflict of interest in the Board's management of Exchange assets, and (3) the plaintiffs, in executing subscriber's agreements with the Exchange, have contractually agreed to delegate control over Exchange assets to the Board, and such agreement is neither unconscionable nor unenforceable. We therefore affirm the judgment.

Factual and Procedural Background

1. *Introduction*

The Exchange is a reciprocal insurer, organized by the Club to provide insurance to Club members. The Club is a nonprofit corporation. In addition to the Exchange, the Club also organized, and is the parent organization of, ***702** codefendant ACSC. Section 1305 provides for a reciprocal insurer's insurance contracts to be executed by an attorney-in-fact, which may be a corporation. ACSC is the attorney-in-fact for the Exchange. [3]

3 Section 1305 provides that the contracts of insurance that are exchanged by subscribers of a reciprocal insurer "may be executed by an attorney-in-fact, agent or other representative duly authorized and acting for such subscribers under powers of attorney. Such authorized person is termed the attorney, and may be a corporation."

ACSC derives its management authority from powers of attorney which are included in the subscriber's agreements executed by subscribers when they purchase insurance from the Exchange. The subscriber's agreements also (1) delegate to the Board the subscribers' rights

of supervision over the attorney-in-fact; (2) provide that the subscriber agrees to be bound by the bylaws and rules and regulations adopted by the Board; (3) warrant that subscribers shall not be liable in excess of their premiums for any debts or liabilities of the Exchange; and (4) provide that dividends or credits may, by resolution of the Board, be returned to subscribers.

The plaintiffs' theories of recovery have shifted somewhat over the course of this litigation. However, the lawsuit's primary aim throughout the litigation has been to alter the Exchange's practice of maintaining large amounts of unallocated surplus. The plaintiffs claim, in effect, that it is inherent in the concept of interinsurance that subscribers have a greater ownership interest in the funds of an exchange and greater rights of control over the funds than are recognized by the operating rules and practices of the Exchange. They also claim it would be in the best interests of the Exchange and its subscribers if surplus funds were maintained, not as unallocated surplus, but in subscriber savings accounts, from which subscribers may withdraw their accumulated funds upon withdrawal from membership in the Exchange.

2. *The Historical and Current Nature of Reciprocal Insurance*

The first interinsurance exchanges were formed in the 1880's by groups of merchants and manufacturers. These exchanges were a form of organization by which individuals, partnerships or corporations, which were engaged in a similar line of business, undertook to indemnify each other against certain kinds of losses by means of a mutual exchange of insurance contracts, usually through the medium of a common attorney-in-fact, who was appointed for that purpose by each of the underwriters, or "subscribers." (Reinmuth, The Regulation Of Reciprocal Insurance Exchanges (1967) ch. I, The Development and Classification of Reciprocal Exchanges, pp. 1-2 (hereafter, Reinmuth); see also ***703** *Delos v. Farmers Insurance Group* (1979) 93 Cal.App.3d 642, 652 [155 Cal.Rptr. 843].) In the early 20th century, the concept of reciprocal insurance spread to consumer lines. The Exchange, organized by the Club in 1912, was the first reciprocal to offer automobile insurance. (Reinmuth, *supra*, ch. I, p. 3.)

Under the historical form of interinsurance contracts, each subscriber became both an insured and an insurer, and had several, not joint, liability on all obligations of the exchange. (*Delos v. Farmers Insurance Group, Inc.*, *supra*, 93 Cal.App.3d at p. 652; 2 Couch on Insurance 2d (rev. ed. 1984) § 18.11, p. 613) (hereafter, Couch); Reinmuth, *supra*, ch. II, The Legal Status Of Reciprocal Exchanges, pp. 10-20.) Accordingly, reciprocal insurers originally had no stock and no capital. The subscribers' contingent liability stood in place of capital stock. (*Mitchell v. Pacific Greyhound Lines* (1939) 33 Cal.App.2d 53, 59-60 [91 P.2d 176]; Couch, *supra*, § 18.11, pp. 614-615; Reinmuth, *supra*, ch. I, p. 2.) Originally, funds for the payment of losses and other debts were collected from subscribers as they occurred. However, this system resulted in frequent delays, hence subscribers later agreed to pay annual "premium deposits." (Reinmuth, *supra*, ch. I, p. 2.) These deposits remained to the credit of each subscriber in a separate account. (*Ibid.*; see also *Cal. State Auto. etc. Bureau v.*

Downey (1950) 96 Cal.App.2d 876, 879-880 [216 P.2d 882].) Subscribers' pro rata shares of losses and expenses, including a commission to the attorney-in-fact, were deducted as they occurred. Any balance remaining in a subscriber's account at the end of the year reverted to the subscriber as his or her "savings" or "surplus" and was distributed to the subscriber or was available to the subscriber upon withdrawal from the exchange. (Reinmuth, *supra*, ch. I, p. 2, ch. II, pp. 30-31.) On the other hand, if the subscriber's share of losses and expenses was greater than his deposit, the subscriber could be assessed for a specified maximum amount beyond the deposit. (Couch, *supra*, §§ 18:26-18:30, pp. 633-641; Reinmuth, *supra*, ch. I, p. 2.) By approximately the 1960's, this amount, in a number of states, came to be specified by statute and was commonly limited to an amount equal to one additional premium deposit. (Reinmuth, *supra*, ch. II, pp. 17-19; see, e.g., §§ 1397, 1398.)

The original concept of reciprocal insurance contemplated the allocation of all surplus to the individual subscribers. (Reinmuth, *supra*, ch. II, pp. 30-31.) Over time, however, it became customary for reciprocals to accumulate unallocated surplus, which was not subject to withdrawal by departing subscribers, but was held perpetually in anticipation of catastrophic losses. (Reinmuth, *supra*, ch. II, pp. 32-37; ch. X, Conclusions and Policy Alternatives, pp. 186-187.) By maintaining substantial surpluses of this kind, many reciprocals eventually obtained statutory rights to issue nonassessable policies, ***704** under which subscribers had no contingent liability for claims, expenses or losses of the exchange. The practice of issuing nonassessable policies is now common both in California and elsewhere. (Reinmuth, *supra*, ch. II, p. 18.) This, together with other lesser differences between today's reciprocals and those of the past, has led one commentator to conclude that the only remaining substantive difference between a reciprocal exchange and a mutual company is that some exchanges are managed by corporate proprietary attorneys-in-fact. (Reinmuth, *supra*, ch. II, p. 39.)

The reciprocal form of insurance organization as it now exists in California has been characterized by both parties to this action as difficult to define. However, the trial court gave an apt definition of this kind of enterprise: "This is what it is: it's an interinsurance exchange defined by the Insurance Code." As defined by the Code, a California reciprocal insurer retains little similarity to the reciprocals of the 19th century. The defining statutory characteristics of an interinsurance exchange which are relevant to the present controversy are as follows.

First, section 1303 now provides that reciprocals are no longer truly reciprocal enterprises, i.e., it is no longer true that each subscriber is both an insurer and an insured. Rather, section 1303 provides that a reciprocal insurance company, or interinsurance exchange, "shall be deemed the insurer while each subscriber shall be deemed an insured."

As in historical times, a present-day interinsurance exchange is managed by an attorney-in-fact, who is appointed pursuant to powers-of-attorney executed by the exchange's subscribers. (§ 1305.) The attorney-in-fact may

be a corporation (*ibid.*); the code does not require an exchange's attorney-in-fact to be a nonprofit corporation. An exchange's power of attorney and contracts may provide for the exercise of the subscribers' rights by a board. (§ 1307, subd. (d).) The board must be selected under rules adopted by the subscribers and is required to supervise the exchange's finances and operations to assure conformity with the subscriber's agreement and power of attorney. (§ 1308.) The board must be composed of subscribers or agents of subscribers; not more than one-third of the board members may be agents, employees or shareholders of the attorney-in-fact. (§ 1310.)

In accord with the modern trend toward accumulating unallocated reserves rather than distributing surplus to the subscribers, the directors of a modern ***705** California exchange may, but are not required to, return savings or credits to the subscribers. (§ 1420.) However, such distributions are permissible only if there is no impairment of the assets required to be maintained by sections 1370 and following. (*Ibid.*) [4]

4 Section 1370 provides for the forms of investment in which a reciprocal's surplus must be maintained. Section 1370.2 requires most reciprocal insurers to maintain minimum surplus governed by the same standards for minimum paid-in capital and surplus applicable to capital stock insurers. Section 1370.4 provides that reciprocal insurers established before October 1, 1961, were initially exempt from section 1370.2 and establishes a schedule of the dates after which such reciprocals became progressively subject to section 1370.2. Under the schedule in section 1370.4, all reciprocals were fully subject to section 1370.2 by 1976.
The minimum surplus requirements do not apply to all exchanges. An exchange formed by a local hospital district and its staff physicians under section 32000 et seq., of the Health and Safety Code is not subject to the above requirements if it meets alternative requirements. (§ 1284.)

In accord with the modern trend away from subscriber liability for a reciprocal's debts, section 1401 provides that, if an exchange maintains surpluses that are sufficiently beyond the legal minimum, it may obtain a certificate from the Insurance Commissioner authorizing the issuance of nonassessable policies. While such a certificate is in effect, subscribers have no contingent liability for claims, expenses or losses of the exchange. Under section 1401.5, an exchange which maintains surpluses of more than $3 million for five successive years may obtain a certificate of perpetual nonassessability. [5]

5 The Exchange obtained such a perpetual certificate in 1987.

If an exchange issues assessable policies, each subscriber is liable, beyond his or her annual premium, for assessments levied by the attorney-in-fact or the commissioner to satisfy claims against the exchange which exceed the exchange's surplus. (§§ 1391, 1392, 1398.) An exchange's power of attorney may limit the amount of assessments (§ 1397), but each subscriber's contingent liability must be at least

equal to one additional premium (§ 1398). The personal liability of subscribers can be asserted by the attorney-in-fact or the commissioner. (§ 1391.) However, if a debtor of the exchange obtains a judgment against the exchange, and it remains unsatisfied for 30 days, such debtor may proceed directly against the subscribers for any amount for which each subscriber could be assessed by the attorney-in-fact or the commissioner. (§§ 1450, 1451.) An individual subscriber can avoid liability for assessments, even if the exchange issues assessable policies, if the subscriber, in addition to his or her annual premium, maintains a surplus deposit in an amount equal to the annual premium. (§§ 1399, 1400.) ***706**

3. *Procedural History of This Action*

This action began as a challenge to the composition of the Board, which the plaintiffs claimed was in violation of section 1310.[6] On August 5, 1992, plaintiffs' attorney wrote a letter to the defendants' attorney, in which counsel said he had recently discovered that the Exchange was being operated in violation of section 1310, in that, of eight Board members listed in the letter, all were also directors or officers of the Club, and three were also directors or officers of ACSC. Counsel demanded that the entire Board resign and that control of the Exchange be vested in the subscribers. Counsel also expressed the view, among others, that the Exchange's policyholders should be the ones to determine the amount of surplus retained by the Exchange, and that the amount then retained appeared excessive. Counsel threatened a lawsuit if an agreement concerning the matters raised by his letter were not reached by August 14..

6 Section 1310 provides that: "Such body shall be composed of subscribers or agents of subscribers. Not more than one-third of the members serving on such body shall be agents, employees or shareholders of the attorney."

On August 21, 1992, the plaintiffs filed their original complaint. The defendants generally demurred, and on October 30, before the date set for the hearing on the demurrer, the plaintiffs filed a first amended complaint, in which they alleged that more than one-third of the Board members were agents, employees or shareholders of the attorney-in-fact, ACSC, in violation of section 1310. The plaintiffs also alleged that the Board's unlawful composition violated Business and Professions Code section 17200.[7] Plaintiffs prayed that the defendants be enjoined from continuing to allow the Board to be so constituted. They further alleged that, because of the unlawful constitution of the Board, its actions were not protected by the business judgment rule, respecting directors' discretion over the management of a company's funds, and consequently, the subscribers were entitled to an accounting and distribution of improperly retained surplus.

7 Business and Professions Code section 17200 provides that any "unlawful," "unfair," or "fraudulent" business act or practice is deemed to be unfair competition. Business and Professions Code section 17203 authorizes injunctive relief to prevent such conduct and/or restitution of

money or property wrongfully obtained "by means of such unfair competition."

A demurrer to the first amended complaint was sustained with leave to amend, and plaintiffs thereafter filed a second amended complaint, in which it was alleged that (1) the Board was not selected by subscribers, in what the plaintiffs now claimed was a violation of section 1308[8] ; (2) the subscribers were unlawfully deprived of control over the conduct of the Exchange; (3) ***707** the subscriber's agreement was a contract of adhesion; (4) the Board was a fiduciary of the subscribers; and (5) the Board had breached its fiduciary duties by failing to provide insurance at cost and by mismanaging and misappropriating surplus funds which rightfully belonged to the subscribers. The second amended complaint prayed for declaratory and injunctive relief, an accounting, a constructive trust over improperly held surplus and compensatory and punitive damages.

8 Section 1308 provides that: "The body exercising the subscribers' rights shall be selected under such rules as the subscribers adopt. It shall supervise the finances of the exchange and shall supervise its operations to such extent as to assure conformity with the subscriber's agreement and power of attorney."

After the filing of a demurrer to the second amended complaint, the action was referred to the Commissioner of Insurance pursuant to the "primary jurisdiction doctrine." (*Farmers Insurance Exchange v. Superior Court* (1992) 2 Cal.4th 377, 386-392 [6 Cal.Rptr.2d 487, 826 P.2d 730].) However, the commissioner refused to assume jurisdiction and also declined a request by the plaintiffs to intervene.[9] The trial court then sustained the defendants' demurrer to the second amended complaint with leave to amend and issued a detailed explanation of its ruling.

9 In an apparent effort to provide guidance to both the trial court and the parties, the commissioner did express the following comments: (1) The Exchange has no duty to limit its surplus funds to the statutory minimum surplus amount; (2) the Exchange has no duty to pay dividends; (3) Exchange subscribers do have ownership rights in surplus funds; (4) the Exchange has no duty to provide insurance coverage "at cost," but has a duty to exercise sound accounting principles in managing surplus; (5) the manner in which the Board is selected appears to violate section 1308 (see fn. 10, *post*); (6) the plaintiffs' challenge to the structure of the Board reflects inadequacies in the statutes governing reciprocals, which, in the commissioner's view, do not provide for sufficient accountability of reciprocal governing boards to subscribers; and (7) the question of how surplus funds of the Exchange should be disposed of upon any dissolution of the Exchange is not ripe for decision.

The court held, as a general matter, that the common law business judgment rule applies to the directors of a reciprocal insurer and precludes the courts from interfering with the management of such an insurer's surplus funds.

The court further held that the plaintiffs: (1) did not allege that the delegation of authority and waiver of the right of control over the Exchange, which is included in the subscriber's agreement, is contrary to section 1308; (2) did not allege sufficient facts to render the subscriber's agreement unenforceable under the doctrine of unconscionability set out in *Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 Cal.App.3d 758 [259 Cal.Rptr. 789]; (3) cited no legal authority for their claim that a reciprocal insurer must provide insurance at cost; (4) did not plead facts showing that the Exchange maintained more than a reasonably necessary level of surplus; (5) did not allege facts which establish an exception to the business judgment rule; (6) cited no authority for their claim that, upon expiration of their policies, they have a legal right to repayment of sums paid by them and ***708** placed in surplus; (7) failed to state a presently cognizable claim of entitlement to a distribution of surplus upon dissolution of the Exchange; and (8) did not state facts sufficient to give the defendants notice of claimed misconduct by ACSC, for which expenses were allegedly incurred and then allegedly defrayed with funds properly belonging to the subscribers.

The plaintiffs' third amended complaint, the one before us, is substantially similar to the second. However, the plaintiffs have deleted their previous allegations that ACSC has committed misconduct for which the Exchange has incurred expenses and that the Board is illegally constituted.[10] The third amended complaint adds to the plaintiffs' previous allegations the further claims that: (1) an interinsurance exchange is similar to a joint venture, in which the general partners have fiduciary duties to the limited partners; and (2) the defendants have engaged in unlawful and fraudulent business practices, as defined in Business and Professions Code section 17200 by: (a) mismanaging Exchange funds; (b) failing to inform potential subscribers of all provisions of the Exchange's bylaws and rules and regulations; and (c) affirmatively representing in the subscriber's agreement that subscribers are not personally liable on judgments against the Exchange, a representation that plaintiffs claim is false.

10 For reasons not appearing in the record, the plaintiffs deleted the latter allegation despite the fact that the commissioner, in his letter to the trial court declining jurisdiction over the case, expressed the view that the manner of selecting the Exchange's Board appeared to violate section 1308. (See fns. 8 & 9, *ante*.) Inasmuch as the plaintiffs have apparently abandoned their claims respecting the selection and composition of the Board, and the trial court therefore did not take such claim into account, we shall give no further consideration to this issue.

The defendants again demurred, and this time the trial court sustained the demurrer without leave to amend. The trial court ruled essentially as it did on the previous demurrer, with additional findings that (1) there is no basis for the claim that an interinsurance exchange is a kind of joint venture, although an exchange's board and attorney-in-fact do have fiduciary duties to the subscribers; (2) subscribers of the Exchange are not liable beyond their premium deposits for judgments against the Exchange; and (3) neither the Exchange's failure to fully

spell out its rules in the subscriber's agreement nor the rules themselves are unconscionable.

A judgment of dismissal was then entered, and the plaintiffs filed this timely appeal.

Contentions

The plaintiffs challenge the practices of the Exchange, the Board and ACSC in managing surplus funds of the Exchange; they challenge the ***709** practices of the Club in marketing subscriptions to the Exchange. They contend that (1) the Exchange, the Board and ACSC mismanage Exchange funds by maintaining funds as unallocated surplus, rather than in subscriber savings accounts; (2) the Club misinformed them, when they became subscribers, as to the structure and rules of the Exchange, and consequently the plaintiffs are not bound by the subscriber's agreement, by which they delegated to the Board the authority to manage Exchange assets; (3) the defendants' mismanagement of Exchange assets and misrepresentations when marketing Exchange subscriptions constitute unlawful and fraudulent business practices under Business and Professions Code section 17200.

The plaintiffs further contend the Exchange should be compelled to (1) maintain surplus funds in subscriber savings accounts, and (2) expunge from its rules and regulations certain rules which limit subscribers' rights respecting surplus funds. They contend the Club should be compelled to disclose all material facts about the Exchange to future subscribers and make restitution to the Exchange's present and former subscribers of funds that were unlawfully and fraudulently obtained. Finally, plaintiffs claim the trial court abused its discretion in denying leave to amend the complaint.

Discussion

1. *Standard of Review*

(1) As this matter comes to us on a judgment of dismissal following the trial court's order sustaining the defendants' demurrer without leave to amend, we assume the truth of all properly pleaded facts, but not contentions, deductions or conclusions of fact or law. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967 [9 Cal.Rptr.2d 92, 831 P.2d 317].) Assuming the truth of the plaintiffs' factual allegations, we then independently determine whether they have alleged cognizable claims. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 [216 Cal.Rptr. 718, 703 P.2d 58].) As we shall explain, they have not.

2. *Issues Concerning the Ownership and Management of Surplus*

a. *Decisions as to the Manner of Maintaining Surplus Constitute Exercises of Business Judgment*

(2a) Plaintiffs make a point of distinguishing their claim—that the Exchange has a duty to maintain a substantial surplus in subscriber savings accounts—from claims like that made in *Barnes*, *supra*, 16 Cal.App.4th 365—that a corporation or other organization has a duty to pay a dividend or ***710** other distribution. In 1993, according to the plaintiffs, the Exchange had approximately $787 million in unallocated surplus funds, a surplus which is significantly greater than is required by law. The plaintiffs do not ask us to compel a distribution or otherwise

dictate actions affecting the *level* of surplus. Instead, they ask us to make orders respecting the *form* in which surplus is held. Specifically, the plaintiffs pray for an order requiring the Exchange to deposit into subscriber savings accounts all surplus that exceeds the legally required amounts.

The plaintiffs argue that the use of subscriber savings accounts will bring about substantial savings in federal taxes for the Exchange, because, under section 832(f) of the Internal Revenue Code (26 U.S.C. § 832(f)), surplus funds deposited by a reciprocal insurer into such accounts is not taxable income to the insurer, and under section 172(a) and (b) of the Internal Revenue Code (26 U.S.C. § 172(a), (b)), up to three years of prior taxes can be recaptured by depositing into subscriber accounts funds which were previously maintained as general surplus. The plaintiffs also argue that the use of subscriber savings accounts will protect subscribers' legitimate interests in surplus funds. Finally, they argue that subscriber savings accounts are successfully used by other reciprocal insurers.

The defendants and amici curiae respond with several arguments tending to show that deposits of surplus into subscriber saving accounts would reduce the funds which the Exchange could rely upon in the event of catastrophic losses, and thus would not be advantageous to the Exchange or its subscribers. However, the defendants do not ask us to resolve the question of whether the use of subscriber savings accounts would be beneficial. To the contrary. The defendants and amici contend the resolution of that question depends upon how one weighs the potential tax advantages of subscriber savings accounts against the risks entailed if large amounts of surplus are held in a form which can be withdrawn by subscribers. The defendants contend, and the trial court so held, that such a weighing of benefits against costs and risks is a prototypical application of business judgment. The defendants thus argue, and the trial court also so held, that, as is the case with other forms of business organization, courts may not interfere with such decisions of a reciprocal insurer if the decision made by the directors can be attributed to a rational business purpose. The defendants rely primarily on our decision in *Barnes*, *supra*, 16 Cal.App.4th 365 for this proposition.

We can hardly disagree with the proposition that decisions as to strategies for managing the surplus funds of an insurer are quintessential exercises of business judgment. Likewise, there can be no doubt that the courts are ***711** unqualified to second-guess the determinations made by an insurer, based upon actuarial analysis, as to the amount of funds that are reasonably necessary to assure adequate funds to cover catastrophic losses, or as to the optimal form in which the funds should be held. (*Barnes*, *supra*, 16 Cal.App.4th at p. 378; *Gaillard v. Natomas Co.* (1989) 208 Cal.App.3d 1250, 1263 [256 Cal.Rptr. 702].) Finally, assuring the availability of adequate funds to cover losses is plainly a rational business purpose for an insurer. Thus, if the business judgment rule applies to reciprocal insurers, it would preclude plaintiffs' efforts to dictate the form in which the Exchange maintains its surplus. (*Barnes*, *supra*, 16 Cal.App.4th at p. 378.)

(3) The business judgment rule is " 'a judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions.' " (*Barnes*, *supra*, 16 Cal.App.4th at p. 378; *Gaillard v. Natomas Co.*, *supra*, 208 Cal.App.3d at p. 1263.) The rule is based on the premise that those to whom the management of a business organization has been entrusted, and not the courts, are best able to judge whether a particular act or transaction is helpful to the conduct of the organization's affairs or expedient for the attainment of its purposes. (*Barnes*, *supra*, 16 Cal.App.4th at p. 378; *Eldridge v. Tymshare, Inc.* (1986) 186 Cal.App.3d 767, 776 [230 Cal.Rptr. 815].) The rule establishes a presumption that directors' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions made by the directors in good faith and in the absence of a conflict of interest. (*Katz v. Chevron Corp.* (1994) 22 Cal.App.4th 1352, 1366 [27 Cal.Rptr.2d 681]; *Barnes*, *supra*, 16 Cal.App.4th at pp. 379-380.)

(2b) In *Barnes*, we concluded that the rule applies to mutual insurance companies and that it precluded Barnes's effort to compel the defendant insurance company to pay a dividend. (16 Cal.App.4th at p. 378.) We now must consider whether the rule applies to reciprocals.

b. *The Governing Board of a Reciprocal Insurer Is Entitled to the Protection of the Business Judgment Rule*

The trial court in this case recognized that the business judgment rule is most commonly applied to corporations, but nevertheless held that "practical experience and common sense suggest that the rule is appropriately extended to members of the Board of Governors of the Exchange." We agree.

The plaintiffs contend that, for two reasons, the business judgment rule does not and should not apply to an interinsurance exchange. First, they contend there are significant differences between reciprocal insurers on the ***712** one hand and corporate and mutual insurers on the other, which make it inappropriate to apply the business judgment rule to reciprocals. In particular, the plaintiffs argue that, unlike the policyholders of a mutual insurer, subscribers to a reciprocal insurer execute subscriber's agreements and powers-of-attorney, which create contractual and fiduciary duties that are not subject to the business judgment rule. Secondly, they argue that section 1282, subdivision (a)(7) and (a)(20), preclude application to reciprocal insurers of the statutes governing corporations and mutual insurers, including the statutory business judgment rule stated in Corporations Code section 309.

The contention that the business judgment rule should not apply to reciprocal insurers because the boards and attorneys-in-fact of reciprocals are the agents of the subscribers and have fiduciary duties to them is without a legal basis. The existence of a fiduciary relationship between the board and the participants in an enterprise has never precluded application of the rule. For example, the courts have applied the business judgment rule to limited partnerships, although general partners are held to be agents and fiduciaries of the limited partners. (*Wallner v. Parry Professional*

Bldg., Ltd. (1994) 22 Cal.App.4th 1446, 1453-1454 [27 Cal.Rptr.2d 834]; *Wyler v. Feuer* (1978) 85 Cal.App.3d 392, 402 [149 Cal.Rptr. 626].) Similarly, the directors and controlling shareholders of for-profit corporations and the directors of nonprofit corporations and mutual insurance companies are deemed to be agents and fiduciaries of the shareholders and members (*Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 114-115 [81 Cal.Rptr. 592, 460 P.2d 464]; *Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 505, 507 [229 Cal.Rptr. 456, 723 P.2d 573, 59 A.L.R.4th 447]; *Tenzer v. Superscope, Inc.* (1985) 39 Cal.3d 18, 31 [216 Cal.Rptr. 130, 702 P.2d 212]; *Barnes*, *supra*, 16 Cal.App.4th at p. 375), yet their management decisions are shielded by the business judgment rule. (*Frances T. v. Village Green Owners Assn.*, *supra*, 42 Cal.3d at pp. 507-509; *Katz v. Chevron Corp.*, *supra*, 22 Cal.App.4th at p. 1366; *Barnes*, *supra*, 16 Cal.App.4th at p. 379.)

Courts which have considered the relationship between a reciprocal insurer's board, its attorney-in-fact and its subscribers have concluded the relationship is analogous to the relationship between the directors, management and participants in other kinds of organizations. For example, at least one court has held that "[t]he position of the attorney-in-fact of a reciprocal insurance exchange, who manages the business of the exchange under powers of attorney of the subscribers ... is fiduciary in character *to the same extent as that of the management of an incorporated mutual insurance company* ...." (*Industrial Indem. Co. v. Golden State Co.* (1953) 117 Cal.App.2d 519, 533 [256 P.2d 677], italics added.) Another court has ***713** observed that a reciprocal insurer's "basic differences from [a mutual insurance company] are in mechanics of operation and in legal theory, rather than in substance." (*Cal. State Auto. etc. Bureau v. Downey* (1950) 96 Cal.App.2d 876, 880 [216 P.2d 882].)

If we look to the substance of the matter, it is clear that the relationship between the directors of a reciprocal insurer and its subscribers is identical in all significant ways to the relationship between the directors of any business organization and the organization's investors or other nonmanaging participants—*the directors are entrusted with the governance and management of the organization's affairs*. This being the case, the directors of a reciprocal exchange should be entitled to the protection of the business judgment rule to the same extent as the directors of other concerns. For reasons which have been fully discussed in numerous judicial authorities, California courts have consistently refused to interfere with directors' exercise of business judgment in making business decisions. (See, e.g., *Mutual Life Insurance v. City of Los Angeles* (1990) 50 Cal.3d 402, 417 [267 Cal.Rptr. 589, 787 P.2d 996] [declining to constrain insurers' business judgment as to how to maximize return on investment]; *Barnes*, *supra*, 16 Cal.App.4th at p. 378 [declining to interfere with insurer's business judgment as to level of surplus]; *Beehan v. Lido Isle Community Assn.* (1977) 70 Cal.App.3d 858, 865-867 [137 Cal.Rptr. 528] [refusing to compel homeowners association to pay attorney fees incurred by member in enforcing "CC & R's"]; *Findley v. Garrett* (1952) 109 Cal.App.2d 166, 174-175 [240 P.2d 421]

[refusing to overturn directors' decision not to commence a lawsuit].)

Where the reason is the same, the rule should be the same. (Civ. Code, § 3511.) The boards of reciprocal insurers, based upon recommendations by the attorneys-in-fact, must make substantive financial decisions, such as setting and investing premiums and arriving at appropriate surplus levels, which are no different from those required of corporate and mutual insurers, and courts are no better qualified to second-guess the directors of reciprocal insurers than we are to second-guess the directors of other organizations as to similar decisions. Thus, for the same reasons that apply to other organizations, the courts may not interfere with the reasonable business decisions of reciprocal insurers. We therefore fully agree with the trial court's conclusion that practical experience and common sense require application of the business judgment rule to reciprocal insurers.

For the same reasons, we also reject the plaintiffs' claims that the defendants' management of Exchange funds constitutes an unlawful business practice. (Bus. & Prof. Code, § 17200.) Obviously, actions which are reasonable ***714** exercises of business judgment, are not forbidden by law, and fall within the discretion of the directors of a business under the business judgment rule cannot constitute unlawful business practices. (Cf. *Farmers' Ins. Exchange v. Superior Court*, *supra*, 2 Cal.4th at pp. 383-384.)

c. *Section 1282* Does Not Affect the Common Law Business Judgment Rule

(4) The plaintiffs claim section 1282 precludes application of the business judgment rule to reciprocal insurers. We disagree. The most that can be said for plaintiffs' argument is that it suggests reciprocal insurers are not subject to the *statutory* business judgment rule. (Corp. Code, § 309.) Section 1282 provides that certain provisions of the Insurance Code do not apply to reciprocal insurers. Among these are section 1140 and all of chapter 4 of part I, division 2, which relates to general mutual insurers. (§ 1282, subd. (a)(7) & (a)(20).) Section 1140 provides that incorporated insurers are subject to general corporation law; the statutes in chapter 4 of part I of division 2 set forth the special characteristics of mutual insurance plans. While section 1282 would seem to preclude application of Corporations Code section 309 to reciprocal insurers, it by no means precludes application of the common law business judgment rule.

The common law business judgment rule has two components—one which immunizes directors from personal liability if they act in accordance with its requirements, and another which insulates from court intervention those management decisions which are made by directors in good faith in what the directors believe is the organization's best interest. (2 Marsh & Finkle, Marsh's Cal. Corporation Law (3d ed., 1996 supp.) § 11.3, pp. 796-797.) Only the first component is embodied in Corporations Code section 309. Thus, even if Insurance Code section 1282 makes Corporations Code section 309 inapplicable to reciprocals, the second component of the common law rule is unaffected. It was, of course, the second component of the rule which we applied to mutual insurers in *Barnes*, *supra*,

16 Cal.App.4th 365, 378-379, and which we here apply to reciprocals.

d. *The Plaintiffs Have Not Alleged Facts Which Establish an Exception to the Business Judgment Rule*

(5a) The plaintiffs contend that even if the business judgment rule applies to reciprocal insurers, they have alleged facts constituting exceptions to the rule. Specifically, they allege that (1) the Exchange and the Board did not make a reasonable inquiry concerning the advisability of maintaining surplus in subscriber savings accounts, and (2) in managing surplus funds, ***715** the Exchange has acted for improper motives and as a result of a conflict of interest. It is, of course, true that the business judgment rule does not shield actions taken without reasonable inquiry, with improper motives, or as a result of a conflict of interest. (*Gaillard v. Natomas Co.*, *supra*, 208 Cal.App.3d at pp. 1263-1264; *Eldridge v. Tymshare, Inc.*, *supra*, 186 Cal.App.3d at pp. 776-777.) However, the plaintiffs have not alleged sufficient facts to establish such exceptions in this case. More is needed to establish an exception to the rule than conclusory allegations of improper motives and conflict of interest. Neither is it sufficient to generally allege the failure to conduct an active investigation, in the absence of (1) allegations of facts which would reasonably call for such an investigation, or (2) allegations of facts which would have been discovered by a reasonable investigation and would have been material to the questioned exercise of business judgment.

(6) The business judgment rule sets up a *presumption* that directors' decisions are made in good faith and are based upon sound and informed business judgment. (*Barnes*, *supra*, 16 Cal.App.4th at p. 378; *Katz v. Chevron Corp.*, *supra*, 22 Cal.App.4th at pp. 1366-1367.) An exception to this presumption exists in circumstances which inherently raise an inference of conflict of interest. (*Id.* at p. 1367.) Such circumstances include those in which directors, particularly inside directors, take defensive action against a take-over by another entity, which may be advantageous to the corpor ation, but threatening to existing corporate officers. (*Ibid.*) Similarly, a conflict of interest is inferrable where the directors of a corporation which is being taken over approve generous termination agreements —"golden parachutes"—for existing inside directors. (*Gaillard v. Natomas Co.*, *supra*, 208 Cal.App.3d at pp. 1268-1271.) In situations of this kind, directors may reasonably be allocated the burden of showing good faith and reasonable investigation. (*Katz v. Chevron Corp.*, *supra*, 22 Cal.App.4th at p. 1367; cf. *Gaillard v. Natomas Co.*, *supra*, 208 Cal.App.3d at p. 1271 [under circumstances raising an inference that corporate interests were not served, trier of fact could find that directors should have independently reviewed the terms of challenged "golden parachutes"].) But in most cases, the presumption created by the business judgment rule can be rebutted only by affirmative allegations of facts which, if proven, would establish fraud, bad faith, overreaching or an unreasonable failure to investigate material facts. (*Eldridge v. Tymshare, Inc.*, *supra*, 186 Cal.App.3d at p. 776-777.) Interference with the discretion of directors is not warranted in doubtful cases. (*Beehan v. Lido Isle Community Assn.*, *supra*, 70 Cal.App.3d 858, 865.)

(5b) The plaintiffs do not claim that the defendants failed to ascertain that federal tax savings could result from depositing surplus funds in subscriber savings accounts. The true thrust of their argument is that the ***716** defendants have refused to avail the Exchange of such savings. In effect, the argument is that the defendants' inquiry into the use of subscriber saving accounts was not a reasonable inquiry because the defendants reached a conclusion with which the plaintiffs disagree. However, it is the essence of the business judgment rule that the conclusions of an entity's directors concerning business strategy will not be scrutinized by the courts absent allegations of facts tending to show that the conclusions were based upon inadequate information or were made in bad faith.

The plaintiffs contend bad faith and overreaching are established by the facts that (1) the Club, the Exchange and ACSC have interlocking boards, (2) the Club appoints the Exchange's Board, and (3) the Exchange makes certain payments to the Club. Plaintiffs contend that, through the interlocking boards and the Club's power to appoint the Exchange's Board, the Club is able to exert undue influence on the Exchange's Board, resulting in the Exchange's (1) having a conflict of interest between the Club and its subscribers, (2) operating for the benefit of the Club and adverse to the interests of the subscribers, and (3) paying allegedly "secret profits" to the Club.

Plaintiffs claim that two categories of secret profits are paid to the Club: (1) current distributions to the Club and ACSC and (2) a contingent future interest retained by the Club in Exchange assets upon dissolution of the Exchange. The challenged current distributions consist of the following: (1) ACSC is compensated for its services to the Exchange at the actual cost of the services plus 1 percent of annual earned premiums; (2) ACSC, a wholly owned subsidiary of the Club, pays dividends to the Club; and (3) the Club receives directly from the Exchange 1 percent of the net annual premium deposits, a payment which the plaintiffs allege has exceeded $48 million since 1989.

The Club's contingent future interest in Exchange assets arises from rules 24 through 27 of the Exchange's rules and regulations. Rule 24 authorizes, but does not require, the Board to declare dividends and return savings to subscribers upon expiration of their policies; rule 25 declares that subscribers have no entitlement to a repayment of any sums upon expiration of their policies; rule 26 provides that, upon dissolution of the Exchange, all of its assets remaining after the repayment of debts are to become the property of the Club; rule 27 provides that rule 26 shall operate to the same effect and purpose as if each subscriber made an individual assignment to the Club of his or her interest in Exchange upon its dissolution. The plaintiffs claim the above rules effect a forfeiture of subscriber rights in Exchange assets.

The plaintiffs allege that the Exchange's decision to forfeit subscriber rights in favor of the Club is motivated by a desire to perpetuate the current ***717** and future transfers of Exchange assets to the Club and ACSC, not by the defendants' avowed purpose of funding adequate reserves against

contingencies. However, it is the very essence of the business judgment rule that, where a reasonable business purpose is asserted, the motives of directors will not be scrutinized, absent a basis for overcoming the presumption of good faith embodied by the business judgment rule. (*Katz v. Chevron Corp.*, *supra*, 22 Cal.App.4th at pp. 1366-1367.) Examples of such a basis include actions (1) which are inconsistent with the business purpose that is asserted (*Gaillard v. Natomas Co.*, *supra*, 208 Cal.App.3d at pp. 1269-1271 ["golden parachutes," which were challenged by the plaintiffs, encouraged officers of a taken-over corporation to leave the company, an effect inconsistent with the asserted corporate purpose of ensuring continuity of management]), (2) or which are so clearly against the interests of the affected organization that the challenged actions must have been the result of undue influence or a conflict of interest. (*Findley v. Garrett*, *supra*, 109 Cal.App.2d at p. 177.)

Here, the defendants assert they have determined it is prudent for the Exchange to maintain large unallocated surpluses in order to ensure that adequate funds will be available to cover the risks the Exchange insures. The plaintiffs have not alleged conduct which would establish that the defendants have acted for any other purpose. While the interlocking boards of the Club, the Exchange and ACSC may create an opportunity for the Club to exercise undue influence over the Exchange, that bare opportunity does not establish that fraud, bad faith or gross overreaching has actually occurred. Moreover, no facts are alleged which establish that the ongoing payments to ACSC of the actual costs of its services plus 1 percent of annual earned premiums, and to the Club of an additional 1 percent of annual earned premiums, are either inconsistent with the asserted goal of maintaining adequate reserves or so clearly against the interests of the Exchange and its subscribers that the payments must be the result of undue influence or a conflict of interest. The Club's contingent future interest in the surplus remaining upon dissolution of the Exchange is simply too remote and speculative to create a conflict of interest as to the disposition of present surplus in the absence of any showing or allegation the Exchange is at all likely to be dissolved within the foreseeable future.

In sum, the plaintiffs have not alleged facts which establish an exception to the business judgment rule. The trial court thus properly declined to interfere with the decisions of the Board respecting the management of surplus funds of the Exchange.

e. *Issues Respecting the Disposition of Accumulated Surplus Upon Dissolution of the Exchange Are Not Ripe for Decision*

(7) Little discussion need be devoted to the plaintiffs' claim that the Exchange must be compelled to expunge from its rules and regulations rules ***718** 26 and 27, which assign to the Club a contingent future interest in Exchange assets in the event of its dissolution. As we have observed above, there has been no showing nor any allegation of a likelihood that the Exchange will be dissolved within the foreseeable future. Moreover, if the Exchange is dissolved, the disposition of its assets will necessarily be overseen by the commissioner. (§ 1070 et seq.) Persons claiming an interest in the assets will have

the chance to challenge the Club's claims in the administrative proceedings. Under these circumstances, the trial court correctly held that the issue of whether the Club or the subscribers are entitled to Exchange assets upon dissolution is not now ripe for decision.

3. *Issues Concerning the Marketing of Subscriptions*

a. *Introduction*

(8) The business judgment rule was not the sole basis for the court's determination not to interfere with the Exchange's management of its surplus. The court also observed that Exchange subscribers agreed in the subscriber's agreement to grant the Board discretion concerning the maintenance and use of surplus, and they are bound by that agreement.

The plaintiffs claim they are not bound by limitations in the subscriber's agreement upon their claimed rights respecting surplus funds, because they were fraudulently induced to enter into the agreement. The plaintiffs contend the subscriber's agreement affirmatively and falsely represents to potential subscribers that subscribers have no personal liability for losses and debts of the Exchange, although sections 1450, 1451 and 1453 provide that a judgment creditor of a reciprocal insurance company can proceed directly against the subscribers if the judgment remains unsatisfied after 30 days. They also contend the subscriber's agreement fails to disclose the material facts that (1) an exchange's subscribers have inherent rights in the exchange's assets; (2) the representative's manual, which is provided to sales personnel of the Club, states that the Exchange is "organized as a not-for-profit reciprocal insurer" and that premium deposits which are not used to assure the adequacy of reserves against contingencies "are returned to subscribers as policyholder's dividends"; and (3) the ownership and distribution rights which subscribers have under general law and the Club's internal operating rules are limited by the rules and regulations of the Exchange. They contend the subscriber's agreement is an insurance contract of adhesion, requiring that any limitations upon subscriber rights must be plain and conspicuous, or will be denied enforcement. They cite *Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 808 [180 Cal.Rptr. 628, 640 P.2d 764]; *Ponder v. Blue Cross of Southern California* (1983) 145 Cal.App.3d 709, 719 [***719** 193 Cal.Rptr. 632]; and *Westrick v. State Farm Ins.* (1982) 137 Cal.App.3d 685, 692 [187 Cal.Rptr. 214] for this proposition.

The plaintiffs also contend that, by making the foregoing misrepresentations and failing to fully inform potential subscribers of the rules and regulations which govern the Exchange and the subscriber rights which are limited by the rules, the defendants have fraudulently induced subscribers to execute the subscriber's agreement, and therein have engaged in a fraudulent business practice within the meaning of Business and Professions Code section 17200.[11] The plaintiffs contend the defendants must make restitution to the Exchange's subscribers for all funds obtained through the misrepresentations and nondisclosures complained of.

11 We have recently held that an insured can maintain an action under section 17200 and following for acts by an

insurer amounting to fraud. (*State Farm Fire Casualty Co. v. Superior Court* (1996) 45 Cal.App.4th 1093, 1110-1111 [53 Cal.Rptr.2d 229].)

There is no merit in the above claims. As we shall explain, all material representations in the subscriber's agreement are true, and no material facts are concealed.

b. *The Subscriber's Agreement Contains No Misrepresentations*

It is simply not true that the subscriber's agreement includes misrepresentations regarding subscribers' personal liability for the Exchange's debts. The truth is that, just as the subscriber's agreement states, "No present or future subscriber of the Exchange shall be liable in excess of the amount of his or her premium for any portion of the debts or liabilities of the Exchange." This is so, because, in 1987, the commissioner granted the Exchange a certificate of perpetual nonassessability pursuant to section 1401.5.

The plaintiffs insist that a certificate under section 1401.5 eliminates only a subscriber's liability for assessments by an exchange's attorney-in-fact or the commissioner; they contend the certificate has no effect upon subscribers' contingent liability to unpaid judgment creditors of an exchange. However, a fair reading of the statutes governing assessments (§ 1390 et seq.) and those governing lawsuits against reciprocal insurers (§ 1450 et seq.) demonstrates that this contention is not correct.

In the absence of a certificate of nonassessability, the subscribers of a reciprocal insurer are liable for "all liabilities" of the exchange, including claims, debts and any deficiency in required surplus. (§§ 1391-1392.) Subscriber liability is subject to certain limits which are stated in the statutes and other limits which may be stated in an exchange's power of attorney. ***720** (§§ 1397-1400.) Whenever the assets of an exchange are insufficient to meet *all* of its liabilities of every kind and maintain the required surplus, an assessment must be made by the attorney-in-fact or by the commissioner. (§ 1391.) Subscribers are required to pay their proportionate share of assessments, except as provided by statute. (§ 1392.)

Contrary to the plaintiffs' argument, nothing in sections 1391, 1392 or the statutes governing lawsuits against reciprocals suggests that liabilities to judgment creditors are not among the liabilities for which assessments must be made. It is quite correct that, if a judgment is obtained against an exchange, and it is not paid within 30 days either out of the exchange's surplus or through an assessment, the judgment creditor is entitled to proceed directly against the subscribers. (§ 1451.) However, a subscriber's liability to a judgment creditor is limited to "such proportion as his interest may appear." (§ 1450.) This limitation logically means that a subscriber is liable for the amount for which each subscriber could be assessed by the attorney-in-fact or the commissioner. For subscribers of exchanges which issue assessable policies, that amount is limited to an amount equal and in addition to one annual premium, or any greater amount which is provided in the exchange's power of attorney. (§§ 1397, 1398; cf. *Mitchell v. Pacific Greyhound Lines* (1939) 33 Cal.App.2d

53, 66-68 [91 P.2d 176] [Upon liquidation of the California Highway Indemnity Exchange, subscribers' liability to creditors was limited to the amount agreed upon in the subscribers' agreement, namely an amount in addition and equal to each subscriber's annual premium].) [12] For subscribers of exchanges that are exempt from assessments under section 1401 or 1401.5, there is *no liability* beyond the ***721** subscriber's paid premium for any debts of the exchange, including judgment debts.

12 *Mitchell* is the only case of which we are aware, which considers the manner in which subscriber liability may be enforced by judgment creditors of an exchange. The defendants, who were subscribers of the exchange, contended that any personal liability which they might have to the exchange's creditors *must* be enforced by actions brought by the creditors directly against each subscriber, and could not be enforced through an assessment. (33 Cal.App.2d at pp. 61, 64.) The Court of Appeal rejected this contention and ruled that, under the exchange's subscriber agreement, the then existing statutes governing reciprocals and the then existing liquidation statutes, subscriber liability to exchange creditors, like other obligations, was enforceable through an assessment. (*Id.* at pp. 64-65.) It is even more clear today than it was when *Mitchell* was decided that subscriber liability to an exchange's judgment creditors is one of the obligations covered by subscriber liability for assessments, and is not, as the plaintiffs contend, a distinct obligation unaffected by a certificate of nonassessability. The *Mitchell* court observed that the statute then governing subscribers' contingent liability gave exchanges "the right to limit 'the contingent liability for the payment of losses' but not for other expenses." (*Id.* at p. 60.) The present statutes are more inclusive. Section 1391 provides that assessments must be made when an exchange is not possessed of admitted assets sufficient to discharge "all liabilities" and maintain required surplus. Section 1397 allows an exchange to limit liability for "assessments *under this article* [i.e.. article 6 (§§ 1391-1400.5) of chapter 3 ("Reciprocal Insurers") of part 2 of division 1 of the Insurance Code)]...."

The Exchange has obtained a certificate of perpetual nonassessability under section 1401.5. The representation in subscriber agreements executed since 1987, that "no present or future subscriber of the Exchange shall be liable in excess of the amount of his or her premium for any portion of the debts or liabilities of the Exchange," is thus true. [13]

13 In their reply, plaintiffs assert that the existence of the Exchange's certificate under section 1401.5 *establishes* the *falsity* of the representation that subscribers are not personally liable for Exchange debts. They base this assertion upon language in section 1401.5, subdivision (b), which states that an exchange which obtains an order of perpetual nonassessability

"shall no longer be subject to or entitled to the benefits of: subdivision (c) of Section 1307 ... and Article 6 (commencing with Section 1390) of this chapter." Article 6 provides for assessments; section 1307, subdivision (c) authorizes limits upon assessments. We disagree with the plaintiffs' reading of the provision in section 1401.5, subdivision (b), that article 6 and section 1307, subdivision (c), do not apply to a holder of a perpetual nonassessability certificate. That provision can only sensibly mean that an exchange whose subscribers have *no* personal liability for its debts will have no need to provide in its power of attorney for *limits* to such liability.

c. *The Subscriber's Agreement Does Not Conceal Material Facts*

(9a) The plaintiffs contend that, because the subscriber's agreement is an insurance contract of adhesion, any limitations upon subscriber rights must be plain and conspicuous, or such limitations will be denied enforcement. (See *Reserve Insurance Co. v. Pisciotta*, *supra*, 30 Cal.3d at p. 808; *Ponder v. Blue Cross of Southern California*, *supra*, 145 Cal.App.3d at p. 719; *Westrick v. State Farm Ins.*, *supra*, 137 Cal.App.3d at p. 692; see also *Shepard v. Cal. Life Ins. Co., Inc.* (1992) 5 Cal.App.4th 1067, 1077 [7 Cal.Rptr.2d 428].) Plaintiffs claim that the limitations which the subscriber's agreement places upon their rights of ownership and control of surplus are not plain and conspicuous, hence the subscriber's agreement is not binding upon them.

Initially, we note that the plaintiffs are relying upon principles stated in *Reserve Insurance*, *Ponder*, and related cases, which exist to protect an insured's reasonable expectations of *coverage.* The rights which plaintiffs assert here are of a different character, being more analogous to rights held by a shareholder in a corporation, and it is not clear that the principles stated in *Reserve Insurance* and *Ponder* should apply with the same force and effect to rights other than coverage. However, assuming arguendo that they do, we nevertheless are unable to conclude that the reasonable expectations of Exchange subscribers are frustrated by the matters complained of in this lawsuit. ***722**

(10) There are two limitations upon the enforcement of insurance contracts, adhesion contracts generally, or provisions thereof. First, a contract or provision which does not fall within the reasonable expectations of the weaker or adhering party will not be enforced against him or her. (*Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 669-670 [42 Cal.Rptr.2d 324, 897 P.2d 1]; *California Grocers Assn. v. Bank of America* (1994) 22 Cal.App.4th 205, 213 [27 Cal.Rptr.2d 396].) Secondly, even if the contract or provision is consistent with the reasonable expectations of the parties, it will not be enforced if it is unduly oppressive or unconscionable. (*California Grocers Assn. v. Bank of America*, *supra*, 22 Cal.App.4th at p. 213; *Dean Witter Reynolds, Inc. v. Superior Court*, *supra*, 211 Cal.App.3d at pp. 767-768.)

(9b) Here, we have already concluded that the challenged provisions of the subscriber's agreement are in accord with well-established

principles of law under which the directors of an insurance concern have discretion in the management of surplus funds. It follows that, as the trial court found, the provisions are not unduly oppressive or unconscionable. However, we must consider whether they are within the reasonable expectations of the parties.

The plaintiffs claim that, as subscribers of the Exchange, they have reasonable expectations of distributions of surplus, either as dividends, withdrawal rights upon expiration of their policies, or an interest in Exchange assets upon its dissolution. It is axiomatic that the reasonable expectations of the parties to a contract are defined in the first instance by the provisions of the contract. In this case, that would be the subscriber's agreement. However, the plaintiffs base their claims not upon the subscriber's agreement, but upon matters outside of it. Specifically, they base their claim upon (1) supposed obligations of reciprocal insurers in general, and (2) statements in the Club's representative's manual to the effect that the Exchange is organized as a not-for-profit reciprocal insurer, that premium deposits collected from subscribers are to be at the lowest level necessary to pay losses and expenses and to fund adequate reserves, and that deposits not used for these purposes are returned to subscribers as dividends.

The plaintiffs claim that the subscriber's agreement conceals from potential subscribers that (1) the subscribers of an interinsurance exchange have property interests in the exchange's surplus funds and (2) such property interests of Exchange subscribers are purportedly waived by provisions in the subscriber's agreement by which subscribers agree to give the Board discretion over the management of surplus. The plaintiffs further contend that the nondisclosures in the subscriber's agreement are exacerbated by the ***723** fact that the Exchange's rules and regulations are not provided to prospective subscribers except upon request, and the Club's sales personnel do not discuss them. Thus, unless a subscriber makes extraordinary efforts, he or she is kept unaware of ownership rights of subscribers in the Exchange's assets and is likewise kept unaware of rules 26 and 27 in the Exchanges rules and regulations, by which subscribers' ownership rights are allegedly forfeited. Finally, the plaintiffs contend that potential subscribers are misled and confused by the placement of the signature line on the form which serves both as the Exchange's application for insurance and as its subscriber's agreement. The plaintiffs complain that the text of the subscriber's agreement and the signature line appear on separate pages, with the result that many potential subscribers do not read the subscriber's agreement or even notice that they are executing such an agreement. The plaintiffs claim that, through the combined impacts of the material nondisclosures in the subscriber's agreement, the failure of Club personnel to inform potential subscribers of Exchange rules and regulations, and the misleading placement of the subscriber's agreement signature line, consumers are deceived into believing they are only purchasing insurance and never realize they are in truth becoming participants in an insurance enterprise in which they have an interest as owners as well as insureds.

The above contentions are without merit. First, the claims based upon general law are

mistaken. As we have observed, the plaintiffs' claim that reciprocal insurers generally have an obligation to return surplus to their subscribers is based upon a misunderstanding of the nature of a California reciprocal insurer, as presently defined in the Insurance Code. Whatever may have been the case in the past, California reciprocal insurers of the present day have no obligation to disburse accumulated surplus to subscribers or to maintain it in a form which can be withdrawn by subscribers upon departure from the exchange. Under the Insurance Code, disbursements and withdrawal rights are entirely at the discretion of the insurers' directors. (§ 1420.) Where the plaintiffs have no withdrawal rights or rights to disbursements of Exchange surplus under general laws governing reciprocal insurers, they can have no reasonable expectation of such rights, and there is no basis for claiming they were fraudulently induced to waive them. Secondly, the plaintiffs cannot legitimately claim rights based upon the Club's representative's manual, which describes the Exchange's vision of itself as a not-for-profit enterprise and its aspirations to distribute to subscribers surplus that is not needed to maintain adequate reserves. The manual is an internal document, is not intended to be communicated to potential subscribers, and makes no promises to them.

In truth, the reasonable expectation of one who executes a subscriber's agreement with the Exchange is that he or she is purchasing insurance and ***724** *may*, in the discretion of the Board, receive dividends or other distributions. Plaintiffs do not complain that they have not obtained the coverage for which they bargained. [14] Instead, they contend that, in addition to the bargained-for coverage, they are entitled to the distributions which are plainly designated in the subscriber's agreement as discretionary. However, they allege no factual or legal basis for such entitlement.

14 Nor, as the trial court observed, do the plaintiffs complain that they are charged an unreasonable rate for their coverage.

In sum, under the law governing reciprocal insurance companies, all representations in the subscriber's agreement are truthful, and the plaintiffs' objectively reasonable expectations of insurance coverage based upon the agreement have been met. There is thus no basis for the plaintiffs' argument that they were fraudulently induced to execute the agreement and are therefore not bound by it. For the same reasons, the plaintiffs have not established either that the subscriber's agreement is fraudulent, or that the Exchange's management of surplus is unlawful within the meaning of Business and Professions Code section 17200. The trial court thus correctly sustained the defendants' demurrers.

4. *Leave to Amend*

(11) Finally, the trial court properly sustained the defendants' demurrer without leave to amend. An order sustaining a demurrer without leave to amend is unwarranted and constitutes an abuse of discretion if there is a reasonable possibility that the defect can be cured by amendment (*Aubry v. Tri-City Hospital Dist.*, *supra*, 2 Cal.4th at p. 967), but it is proper to sustain a demurrer without leave to amend if it is probable from the nature of the defects and previous unsuccessful attempts to plead that plaintiff cannot state a cause of action.

(*Krawitz v. Rusch* (1989) 209 Cal.App.3d 957, 967 [257 Cal.Rptr. 610].) Plaintiffs have had three opportunities to amend their complaint and have been unable to successfully state a cause of action against the defendants. Moreover, the defects in the complaints have not been defects of form. Rather, the problem is that plaintiffs seek judicial intervention in management decisions as to the level and form of surplus funds of the Exchange. Under well-established rules devised in enterprises to which the Exchange is sufficiently analogous, these matters lie within the discretion of the Board and management of the Exchange, where these institutions act in good faith. The plaintiffs having failed to allege facts which tend to establish an absence of good faith and reasonable inquiry, no cause of action exists by which the defendants' actions can be challenged. ***725**

Disposition

The judgment of dismissal is affirmed. Costs on appeal are awarded to the defendants.

Kitching, J., and Aldrich, J., concurred.

A petition for a rehearing was denied December 2, 1996, and appellants' petition for review by the Supreme Court was denied January 22, 1997. ***726**

Negative Treatment

Negative Citing References (4)

The KeyCited document has been negatively referenced by the following events or decisions in other litigation or proceedings:

Treatment	Title	Date	Type	Depth	Headnote(s)
Disagreed With by	1. Coley v. Eskaton MOST NEGATIVE 264 Cal.Rptr.3d 740 , Cal.App. 3 Dist. REAL PROPERTY — Homeowners Associations. Directors failed to establish homeowners association (HOA) transactions were fair and reasonable under common law business judgment rule.	June 11, 2020	Case		5 Cal.App.4th
Distinguished by	2. Notrica v. State Compensation Ins. Fund 83 Cal.Rptr.2d 89 , Cal.App. 2 Dist. LABOR AND EMPLOYMENT - Workers' Compensation. Punitive damages of $20 million against state workers' compensation fund was excessive, $5 million was not.	Mar. 17, 1999	Case		—
Distinguished by	3. Lee v. Pacific Knolls Homeowners Ass'n 2002 WL 57420 , Cal.App. 4 Dist. REAL PROPERTY - Covenants and Restrictions. Surplus in operating fund could not finance capital expense for common area of planned development.	Jan. 16, 2002	Case		—
Distinguished by	4. F.D.I.C. v. Perry 2012 WL 589569 , C.D.Cal. Currently before the Court is Defendant Matthew Perry's ("Perry" or "Defendant") Motion to Dismiss Plaintiff Federal Deposit Insurance Corporation ("FDIC"), as Receiver for...	Feb. 21, 2012	Case		9 10 Cal.App.4th

History (1)

Direct History (1)

1. Lee v. Interinsurance Exchange
50 Cal.App.4th 694 , Cal.App. 2 Dist. , Oct. 31, 1996 , review denied (Jan 22, 1997)

Filings

There are no Filings for this citation.

R-LA-3

RESPONDENT'S EXHIBIT

West's Annotated California Codes
Corporations Code (Refs & Annos)
Title 1. Corporations
Division 1. General Corporation Law (Refs & Annos)
Chapter 3. Directors and Management (Refs & Annos)

West's Ann.Cal.Corp.Code § 309

§ 309. Performance of duties by director; liability

Currentness

(a) 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 such director believes to be in the best interests of the corporation and its shareholders and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.

(b) In performing the duties of a director, a director shall be entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by any of the following:

(1) One or more officers or employees of the corporation whom the director believes to be reliable and competent in the matters presented.

(2) Counsel, independent accountants or other persons as to matters which the director believes to be within such person's professional or expert competence.

(3) A committee of the board upon which the director does not serve, as to matters within its designated authority, which committee the director believes to merit confidence,

so long as, in any such case, the director acts in good faith, after reasonable inquiry when the need therefor is indicated by the circumstances and without knowledge that would cause such reliance to be unwarranted.

(c) A person who performs the duties of a director in accordance with subdivisions (a) and (b) shall have no liability based upon any alleged failure to discharge the person's obligations as a director. In addition, the liability of a director for monetary damages may be eliminated or limited in a corporation's articles to the extent provided in paragraph (10) of subdivision (a) of Section 204.

Credits

(Added by Stats.1975, c. 682, § 7, eff. Jan. 1, 1977. Amended by Stats.1976, c. 641, § 9.5, eff. Jan. 1, 1977; Stats.1987, c. 1201, § 7; Stats.1987, c. 1203, § 2, eff. Sept. 27, 1987.)

West's Ann. Cal. Corp. Code § 309, CA CORP § 309
Current with Ch. 1 of 2023-24 1st Ex.Sess, and urgency legislation through Ch. 101 of 2023 Reg.Sess. Some statute sections may be more current, see credits for details.

End of Document

Editor's and Revisor's Notes (4)

LEGISLATIVE COMMITTEE COMMENTS--ASSEMBLY

1975 [Corrected]

Source: ABA § 35 (proposed revision). The duties of a director are specified in subdivision (a) of § 300 . The purpose of this section is to establish a standard by which the performance of a director in the exercise of his duties shall be judged. It is intended that a person who performs his duties as a director in accordance with this standard shall have no liability by reason of being or having been a director.

(a) This subdivision provides a standard of care applicable to directors. Comments to the proposed revision of ABA § 35 indicate that it is the intent of the draftsmen of this provision, by combining the requirement of good faith within the standard of care, to incorporate “the familiar concept that, these criteria being satisfied, a director should not be liable for an honest mistake of business judgment” [Committee on Corporate Laws, Changes in the Model Business Corporation Act, 29 Bus. Lawyer 951 (1974)].

The Committee on Corporate Laws of the Section of Corporation, Banking and Business Law of the American Bar Association arrived at a number of decisions in formulating the standard of care:

(1) The reference to “ordinarily prudent person” emphasizes long traditions of the common law, in contrast to standards that might call for some undefined degree of expertise, like “ordinarily prudent business man”; the phrase is not intended to establish the preservation of assets as a priority for the corporate director, but, rather, to recognize the need for innovation as an essential of profit orientation and, in short, to focus on the basic director attributes of common sense, practical wisdom and informed judgment.

(2) The phrase “under similar circumstances” is intended both to recognize that the nature and extent of oversight will vary, depending upon such factors as the size, complexity and location of activities carried on by the particular corporation and to limit the critical assessment of a director's performance to the time of action or nonaction and thus prevent the harsher judgments which can invariably be made with the benefit of hindsight ###

(3) The phrase “in a like position” simply recognizes that the “care” under consideration is that which would be used by the “ordinarily prudent person” if he were director of the particular corporation [Committee on Corporate Laws, Changes in the Model Business Corporation Act, 29 Bus. Lawyer 954 (1974)].

While the new law adopted in general the language of ABA § 35, in subdivision (a) of Section 309 of the new law the words “including reasonable inquiry” were inserted

in the phrase “with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.”

This change was made because some members of the State Bar Committee desired to make explicit what the majority of members considered to be implicit in the original language, i.e., that reasonable care under some circumstances could include a duty of inquiry. In other words, a director may not close his eyes to what is going on about him in the conduct of the corporate business and, if he is put on notice by the presence of suspicious circumstances, he may be required to make such “reasonable inquiry” as an ordinarily prudent person in his position would make under similar circumstances. There was no intention of imposing upon any director a duty to make an inquiry regardless of the circumstances, such as the duty imposed by Section 11 of the United States Securities Act of 1933 in connection with a public offering of securities, or to add a separate requirement of inquiry apart from a director's general duty of care.

Also, in subdivision (b) of this same section, the word “reasonably” was deleted in three places where it appeared in the ABA § 35 language before the word “believes.” The reason for this deletion was the concern expressed by some members of the State Bar Committee that the phrase “reasonably believes” to be competent or reliable would impose upon each director the duty in all cases of making an investigation or inquiry regarding the competence and reliability of the employees and advisers of the company. In lieu of the phrase “reasonably believes”, there was inserted in this subdivision (b) the language towards the end: “after reasonable inquiry when the need therefor is indicated by the circumstances.”

The phrase “including reasonable inquiry” in subdivision (a) was intended to mean precisely the same thing as the language substituted in subdivision (b), i.e., that the duty of inquiry only arises if the circumstances indicate the need therefor.

The standard of care does not include officers. The Committee on Corporate Laws concluded that:

it was not appropriate in connection with a revision of Section 35 to deal with those officers who were not also directors of the corporation. Although a non-director officer may have a duty of care similar to that of a director as set forth in Section 35, his ability to rely on factual information, reports or statements may, depending upon the circumstances of the particular case, be more limited than in the case of a director in view of the greater obligation he may have to be familiar with the affairs of the corporation [Committee on Corporate Laws, Changes in the Model Business Corporation Act, 29 Bus. Lawyer 953 (1974)].

Section 300 (also derived from the proposed revision of ABA § 35) provides that the business and affairs of the corporations shall be exercised by or under the direction of the board. In formulating a proper standard of care for a director in the performance of

his duties, the Committee on Corporate Laws considered the nature of the duties of a director.

It is generally recognized that the board of directors may delegate to appropriate officers of the corporation the authority to exercise those powers not required by law to be exercised by the board itself. While such a delegation will not serve to relieve the board from its responsibilities of oversight, it is believed appropriate that the directors not be held personally responsible for actions or omissions of officers, employees or agents of the corporation so long as the directors, complying with the enunciated standard of care, have relied reasonably upon such officers, employees or agents [Committee on Corporate Laws, Changes in the Model Business Corporation Act, 29 Bus. Lawyer 952 (1974)].

(b) Under prior law, a director has the right to rely in limited situations upon certain materials [Cal. § 829]. This subdivision, due to the number and complexity of the matters considered by directors, enlarges the right of reliance to encompass all matters for which the board is responsible and broadens the range of materials upon which a director may rely. The statutory right of reliance is not intended to be exclusive.

The purpose of these provisions were the subject of comment by the Committee on Corporate Laws. A director will be entitled to rely:

upon factual information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by (a) one or more officers or employees of the corporation whom he reasonably believes to be reliable and competent in the matters presented, (b) counsel, public accountants or other persons as to matters which he reasonably believes to be within such person's professional or expert competence, or (c) a board committee (upon which he does not serve), provided that he reasonably believes confidence therein is merited, so long as in any such case he shall be without knowledge concerning the matter in question which would cause such reliance to be unwarranted. Inherent in the good faith standard is the requirement that, in order to be entitled to rely on such reports, statements, opinions and other matters, the director must have read, or been present at the meeting at which is orally presented, the report or statement in question and must not have any pertinent knowledge which would cause him to conclude that he should not rely thereon [Committee on Corporate Laws, Changes in the Model Business Corporation Act, 29 Bus. Lawyer *supra* 954 (1974)].

The provision permitting reliance upon a committee of the board is intended to permit reliance upon the work product of a board committee resulting from a more detailed investigation undertaken by that committee and which forms the basis for action by the board [Committee on Corporate Laws, Changes in the Model Business Corporation Act, 29 Bus. Lawyer 955 (1974)]. Additionally, the provisions contemplate reliance upon a committee where only a supervisory responsibility is exercised (e.g. a corporate audit committee with respect to is role of oversight concerning accounting and audit

functions) [Committee Corporate Laws, Changes in the Model Business Corporation Act, 29 Bus. Lawyer 955 (1974)].

See the discussion above regarding the changes made in this subdivision from the language in ABA § 35 to make crystal clear that no duty of inquiry comparable to that contained in Section 11 of the United States Securities Act of 1933 was intended to be imposed upon directors in judging the competence and reliability of the persons on whom they rely, unless there are circumstances which would cause any reasonable man in a like position to make such an inquiry. As Lord Halsbury stated in Dovey v. Cory [(1901) A.C. 477]:

"I cannot think that it can be expected of a director that he should be watching either the inferior officers of the bank or verifying the calculations of the auditors himself. The business of life could not go on if people could not trust those who are put into a position of trust for the express purpose of attending to details of management."

(c) The purpose of this subdivision is to relieve a person from any liability by reason of being or having been a director of a corporation, if that person has exercised his duties in the manner contemplated by this section.

HISTORICAL AND STATUTORY NOTES

2014 Main Volume

The 1976 amendment deleted the word "the" in subd. (a), first sentence, following the word "including".

The 1987 amendment by c. 1203 inserted, in subd. (a), "and its shareholders" following "best interests of the corporation"; added the second sentence of subd. (c); and made non-substantive changes in subd. (b).

Legislative intent of Stats.1987, c. 1201, §§ 5 to 8 regarding duty of loyalty of a director, see Historical and Statutory Notes under Corporations Code § 204 .

Operation of Stats.1987, c. 1203 , see Historical and Statutory Notes under Corporations Code § 204 .

Effect of amendment of section by two or more acts at the same session of the legislature, see Government Code § 9605 .

Former Notes

Former § 309, enacted by Stats.1947, c. 1038, § 309, requiring a certificate of approval of the Superintendent of banks in order to file articles with a corporate name containing "bank," "trust," or "trustee," was repealed by Stats.1975, c. 682, § 6. See Corporations Code § 201 .