

Afilias Domains No. 3 Limited Reconsideration Request (“RR”)

1. Requestor Information

Requestor:

Name: Afilias Domains No. 3 Limited

Address: Contact Information Redacted

Email: Scott Hemphill, Contact Information Redacted

Requestor is represented by:

Counsel: Dechert LLP

Address: Contact Information Redacted

Email: Arif Hyder Ali, Contact Information Redacted

2. Request for Reconsideration of:

Board action/inaction

Staff action/inaction

3. Description of specific action you are seeking to have reconsidered.

Afilias Domains No. 3 Limited (“**Afilias**” or “**Requestor**”) seeks reconsideration of ICANN’s 24 March 2018 response to Requestor’s Documentary Information Disclosure Policy (“**DIDP**”) request, which denied disclosure of certain categories of documents pursuant to ICANN’s DIDP.

On 23 February 2018, Requestor submitted to ICANN a DIDP request seeking the disclosure of certain documentary information related to the .WEB contention set (the “**DIDP**”

Request¹).¹ Specifically, the Requestor submitted 10 requests as follows:

Request 01: All documents received from Ruby Glen, NDC, and Verisign in response to ICANN's 16 September 2016 request for additional information;

Request 02: Ruby Glen's Notice of Independent Review, filed on 22 July 2016;

Request 03: All documents filed in relation to the Independent Review Process between ICANN and Ruby Glen, initiated on 22 July 2016;

Request 04: All applications, and all documents submitted with applications, for the rights to .WEB;

Request 05: All documents discussing the importance of .WEB to bringing competition to the provision of registry services;

Request 06: 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;

Request 07: Documents sufficient to show the current status of NDC's request to assign .WEB to Verisign;

Request 08: Documents sufficient to show the current status of the delegation of .WEB;

Request 09: 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

Request 10: All joint defense or common interest agreements between ICANN and Verisign and/or NDC relating to the DOJ

¹ Exhibit 1, DIDP Request No. 20180223-1 (23 Feb. 2018), <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-request-23feb18-en.pdf>.

Investigation.²

Subsequently, on 24 March 2018, ICANN responded to the DIDP Request by issuing a response (the “**DIDP Response**”).³ ICANN’s DIDP Response is the basis for this reconsideration request. Of Requestor’s ten requests, ICANN stated that it was fully disclosing requested documents for only two requests (Requests 07, 08), and asked Requestor to revise an additional two requests (Requests 05, 06(a, b)).⁴ ICANN denied one request in whole (Request 01) and three requests in part (Requests 04, 06(c, d), and 09(a-c, e)) based on its assertion that the requested documents are subject to the DIDP’s Nondisclosure Conditions.⁵ ICANN stated that it has no documents responsive to four requests (Requests 02, 03, 09(d), 10).⁶

Requestor subsequently submitted to ICANN a letter addressing and responding to ICANN’s stated concerns in the DIDP Response on 23 April 2018 (the “**DIDP Reply**”) in order to facilitate the timely disclosure of responsive documents.⁷ The DIDP Reply proposes that Requestor will limit the disclosure of any material identified by ICANN as “highly confidential” to only Requestor’s outside counsel pursuant to a confidentiality agreement.⁸ It also proposed modified document requests based on the DIDP Response. In accordance with the DIDP Reply, Requestor’s outstanding and amended document requests are as follows:

Request 01: All documents received from Ruby Glen, NDC, and Verisign in response to ICANN’s 16 September 2016 request for additional information, and their email responses to ICANN that indicate whether they consent to the public disclosure of their responses to ICANN’s 16 September 2016 request for information.

Request 04: NDC’s responses to Items 12 and 45 through 50 in

² *Id.* at pp. 3-5 (emphasis added).

³ Exhibit 2, Response to DIDP Request No. 20180223-1 (24 Mar. 2018), <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-response-24mar18-en.pdf>.

⁴ *Id.* at pp. 7-11.

⁵ *Id.* at pp. 5-7, 9-15.

⁶ *Id.* at pp. 6, 15.

⁷ Exhibit 3, Letter from A. Ali to ICANN Board (23 Apr. 2018).

⁸ *Id.* at p. 2.

its .WEB application, as well as any amendments, changes, revisions, supplements, or correspondence concerning those Items.

Request 05: All documents discussing the importance of .WEB to bringing competition to the provision of registry services.

Request 06(a): Documents sufficient to show (1) the date on which ICANN first learned that Verisign was going to or had in fact funded NDC's bids for the .WEB gTLD at the 27-28 July 2016 auction, and (2) the date on which ICANN first learned that NDC did not intend to operate the .WEB registry itself, but rather intended to assign the rights it acquired related to .WEB to a third party.

Request 6(b): All documents (1) reflecting NDC's board structure and any changes thereto since NDC submitted its .WEB application on 13 June 2012, and (2) concerning any investigation or discussion related to NDC's board structure and any changes thereto since NDC submitted its .WEB application on 13 June 2012.

Request 6(c): All documents concerning any investigation or discussion related to Verisign's agreement with NDC to assign the rights to .WEB to Verisign.

Request 6(d): All documents concerning Verisign's involvement in the .WEB contention set, including all communications with NDC or Verisign.

Request 09: All documents relating to the DOJ Investigation, excluding those documents that ICANN has reasonably identified as already being in Afilias' possession, 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.⁹

Each of these requests plainly seek documents relevant to Requestor's concerns, including: the impact on competition if Verisign obtains the .WEB license; whether Verisign and NDC violated, *inter alia*, provisions of the New gTLD Applicant Guidebook ("AGB") and ICANN's

⁹ See *id.* at 2-5; Exhibit 1, DIDP Request No. 20180223-1 (23 Feb. 2018), pp. 3-5, <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-request-23feb18-en.pdf>.

Auction Rules; and whether ICANN's handling of these matters has been consistent with its Bylaws and Articles of Incorporation (“**Articles**”).

We recognize that ICANN has not yet responded to the DIDP Reply. Requestor acknowledges that, to the extent it can reach an agreement with ICANN pursuant to the DIDP Reply, this request for reconsideration may become moot in full or in part. Requestor nonetheless submits this request to preserve its rights to contest the DIDP Response should ICANN and Requestor fail to reach an agreement based on the DIDP Reply.¹⁰ Requestor believes that the Board Accountability Mechanisms Committee need not and should not decide this Reconsideration Request until after the ICANN Board has considered and responded to the proposed compromise set forth in the DIDP Reply. Requestor is prepared to discuss an appropriate “tolling” agreement that would allow Requestor and ICANN to attempt to reach an agreement concerning the DIDP Request and the DIDP Reply.

4. Date of action/inaction:

ICANN acted on 24 March 2018 by issuing the DIDP Response.

5. On what date did you become aware of action or that action would not be taken?

Requestor became aware of the action on 24 March 2018, when it received the DIDP Response from ICANN.

¹⁰ Afilias believes that the 30-day period for submitting a reconsideration request is stayed until 30 days after ICANN responds in writing to the DIDP Reply. *See* Exhibit 4, ICANN Bylaws (22 Jul. 2017), Art. 4, § 4.2(g), <https://www.icann.org/resources/pages/governance/bylaws-en> (providing that a reconsideration request must be submitted within 30 days of the ICANN Staff action or inaction). However, in an abundance of caution, Afilias is submitting this Reconsideration Request now.

6. Describe how you believe you are materially affected by the action or inaction:

Requestor is materially affected by ICANN's refusal to disclose certain documentary information concerning the .WEB contention set, as requested in the DIDP Request and amended in the DIDP Reply.

As described with more detail in **Section 8** below, Requestor submitted to ICANN an application to operate the .WEB gTLD as part of ICANN's New gTLD Program. Requestor consequentially became a member of the .WEB contention set.¹¹ All of the members of the contention set agreed to resolve the contention set through a private auction. However, at the eleventh hour, one member—Nu Dot Co LLC (“**NDC**”)—suddenly withdrew from the private auction after having previously consented to that process. As a result of NDC's withdrawal, the .WEB contention set was resolved through an ICANN-administered auction (“**ICANN Auction**”) pursuant to the AGB. NDC won the auction, apparently after agreeing to assign all rights to the .WEB license to Verisign, Inc. (“**Verisign**”), upon whose behalf NDC placed the winning bid.¹²

After the ICANN Auction, Verisign, which had not applied for the .WEB license and was not part of the contention set, announced that it had entered into a secret agreement with NDC. Pursuant to the terms of that secret agreement, Verisign had agreed to fund NDC's bid in exchange for NDC's agreement to “assign the [.WEB] Registry Agreement to Verisign.”¹³ This secret agreement, and ICANN's failure to timely address it, violates ICANN's documented policies,

¹¹ Exhibit 5, “New gTLD Contention Set Status,” ICANN (last visited 16 Feb. 2018), <https://gtdresult.icann.org/applicationstatus/stringcontentionstatus> (listing all seven applicants for the .WEB gTLD).

¹² Exhibit 6, “ICANN New gTLD Contention Set Resolution Auction Final Results for WEB/WEBS” ICANN, <https://gtdresult.icann.org/applicationstatus/applicationdetails:downloadauctionreport/18?t:ac=692> (listing results of and bid amounts for the .WEB auction).

¹³ Exhibit 7, Verisign, “Verisign Statement Regarding .Web Auction Results” (1 Aug. 2016), <https://investor.verisign.com/news-releases/news-release-details/verisign-statement-regarding-web-auction-results>.

including, without limitation, the AGB, ICANN’s Auction Rules, and ICANN’s mandate to promote competition. ICANN consequently cannot permit the delegation of .WEB to NDC or to Verisign.¹⁴

ICANN’s investigation of the matter, if any, has been entirely nontransparent. After Requestor raised concerns about the manner in which NDC had secretly acted as Verisign’s agent to obtain the .WEB license for the benefit of Verisign, ICANN sent Requestor a lengthy list of questions, purporting to seek information about Requestor’s concerns.¹⁵ Although Requestor provided detailed responses to ICANN on 7 October 2016, Requestor has received no meaningful information about ICANN’s investigation or how ICANN intends to address the subterfuge by which NDC acquired the .WEB license on Verisign’s behalf. Indeed, Requestor still has no information about what ICANN currently plans to do with respect to the delegation of .WEB.

6.1 ICANN Violated its own Bylaws in Refusing to Disclose the Requested Documents

In response to the lack of information from ICANN, Requestor filed the DIDP Request to obtain documents relevant to ICANN’s investigation of the .WEB contention set. ICANN, however, did not produce documents in response to certain requests—specifically Requests 01, 04-06, and 09.¹⁶ ICANN thereby failed to “operate in a manner consistent with [its] Bylaws,” which require that it operate with transparency and openness.¹⁷

The DIDP is intended to promote transparency in accordance with ICANN’s Bylaws and Articles. ICANN implemented the DIDP as part of its “approach to transparency and information disclosure,” as codified in both ICANN’s Bylaws and Articles.¹⁸ These governing documents require

¹⁴ See, e.g., Exhibit 8, Letter from S. Hemphill to A. Atallah (8 Aug. 2016), <https://www.icann.org/en/system/files/correspondence/hemphill-to-atallah-08aug16-en.pdf> (listing problems with Verisign’s involvement in the .WEB auction).

¹⁵ Exhibit 9, Letter from C. Willett to J. Kane (16 Sep. 2016).

¹⁶ See Exhibit 2, Response to DIDP Request No. 20180223-1 (24 Mar. 2018), <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-response-24mar18-en.pdf>.

¹⁷ Exhibit 4, ICANN Bylaws (22 Jul. 2017), Art. 1, § 1.2(a), <https://www.icann.org/resources/pages/governance/bylaws-en>.

¹⁸ Exhibit 10, “ICANN Documentary Information Disclosure Policy” ICANN (last visited 27 Feb. 2018), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

that ICANN operate “through open and transparent processes”¹⁹ and “to the maximum extent feasible in an open and transparent manner.”²⁰ More specifically, they state that ICANN must:

- “operate in a manner consistent with [its] Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities . . . ***through open and transparent processes that enable competition*** and open entry in Internet-related markets;”²¹
- “operate to the maximum extent feasible in an open and transparent manner and consistency with procedures designed to ensure fairness;”²²
- “[e]mploy open, transparent and bottom-up, multistakeholder policy development processes that are led by the private sector;”²³ and
- “operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole.”²⁴

Yet, ICANN did not operate with openness or transparency in the DIDP Response. Requestor asked for information on ICANN’s investigation of NDC, Verisign, and the .WEB contention set.²⁵ ICANN denied the requests for documentary information, choosing instead to maintain a veil of secrecy over its investigation, by unreasonably and illegitimately applying the DIDP’s Nondisclosure Conditions and asserting that the requests are “overbroad and vague.”²⁶ These actions are not consistent with ICANN’s obligations to operate in “an open and transparent

¹⁹ Exhibit 4, ICANN Bylaws (22 Jul. 2017), Art. 1, § 1.2(a), (a)(iv), <https://www.icann.org/resources/pages/governance/bylaws-en>; Exhibit 11, Amended and Restated Articles of Incorporation (3 Oct. 2016), Section 4, <https://www.icann.org/resources/pages/governance/articles-en>.

²⁰ Exhibit 4, ICANN Bylaws (22 Jul. 2017), Art. 3, § 3.1, <https://www.icann.org/resources/pages/governance/bylaws-en>.

²¹ Exhibit 11, Amended and Restated Articles of Incorporation (3 Oct. 2016), Section 2(III), <https://www.icann.org/resources/pages/governance/articles-en> (emphasis added).

²² Exhibit 4, ICANN Bylaws (22 Jul. 2017), Art. 3, § 3.1, <https://www.icann.org/resources/pages/governance/bylaws-en>.

²³ *Id.* at Art. 1, § 1.2 (a)(iv).

²⁴ *Id.* at Art. 1, § 1.2(a).

²⁵ Exhibit 1, DIDP Request No. 20180223-1 (23 Feb. 2018), <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-request-23feb18-en.pdf>.

²⁶ Exhibit 2, Response to DIDP Request No. 20180223-1 (24 Mar. 2018), pp. 5, 8-15, <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-response-24mar18-en.pdf>. ICANN disclosed only one ‘new’ document pursuant to the DIDP Request, which simply listed the public documents that ICANN provided the DOJ. *See id.* at Attachment A.

manner.”²⁷ Resultantly, ICANN is not operating “in a manner consistent with [its] Bylaws for the benefit of the Internet community as a whole.”²⁸

Furthermore, Verisign exercises substantial market power through its exclusive licenses to operate the .COM and .NET registries, as evinced by ICANN’s continued subjugation of those registries to price caps.²⁹ The .WEB gTLD, however, can threaten Verisign’s long-entrenched monopoly, obviating the need for continued regulation.³⁰ In order to maintain its monopoly, Verisign entered into a secret arrangement with NDC to obtain the right to operate the .WEB gTLD and further diminish competition at the heart of the domain name system (“DNS”).

Allowing Verisign to carry out this subterfuge and acquire the .WEB license will harm the Internet community by stifling competition in the DNS. It will also allow applicants to obtain gTLD rights through secretive, unfair, and deceptive means that are inconsistent with ICANN’s stated rules and policies. Given ICANN’s mandate to operate openly and transparently and to “promote and sustain” competition in the DNS,³¹ and Requestor’s stated plan to contest Verisign’s acquisition of the .WEB gTLD in order to protect competition in the DNS,³² it is vitally important that ICANN disclose the requested documents—either publicly or pursuant to a confidentiality

²⁷ Exhibit 4, ICANN Bylaws (22 Jul. 2017), Art. 3, § 3.1, <https://www.icann.org/resources/pages/governance/bylaws-en>. Moreover, even assuming *arguendo* that ICANN’s objections have any validity (and they do not), Requestor has proposed reasonable compromises in the DIDP Reply.

²⁸ *Id.* at Art. 1, § 1.2(a).

²⁹ See Exhibit 12, Letter from the United State Senate to the Honorable Renata B. Hesse (12 Aug. 2016), p. 2, https://www.cruz.senate.gov/files/documents/Letters/20160812_DOJ-ICANNLetter.pdf (“Verisign’s government-approved control of the .com registry allows it to operate as a monopoly.”).

³⁰ Exhibit 13, Kevin Murphy, “Verisign likely \$135 million winner of .web gTLD,” DOMAININCITE (1 Aug. 2016), <http://domainincite.com/20820-verisign-likely-135-million-winner-of-web-gtld/> (“.web has been seen, over the years, as the string that is both most sufficiently generic, sufficiently catchy, sufficiently short and of sufficient semantic value to provide a real challenge to .com.”); Exhibit 14, Andrew Allann, “Why Verisign paid \$135 million for the .web top level domain,” DOMAIN NAME WIRE (29 Jul. 2016), <https://domainnamewire.com/2016/07/29/verisign-paid-135-million-web-top-level-domain/> (“It views it as competitive to .com – a handful of industry watchers and top level domain name companies have said that .web is the one domain that could unseat .com.”); Exhibit 15, Derek Vaughan, “Inside the High Stakes Auction for .Web,” THEHOSTINGFINDERS (25 Jul. 2016), <https://www.inetservices.com/blog/inside-the-high-stakes-auction-for-web/> (explaining how .WEB could become the new .COM).

³¹ Exhibit 4, ICANN Bylaws (22 Jul. 2017), Art. 1, § 1.2(b), <https://www.icann.org/resources/pages/governance/bylaws-en>.

³² See Exhibit 16, Letter from A. Ali to ICANN Board (16 Apr. 2018) (informing ICANN that Requestor will initiate the cooperative engagement process and file a Request for an Independent Review Process against ICANN should it proceed to delegate the .WEB gTLD to NDC).

agreement—to Requestor.³³ Disclosure will benefit the entire Internet community by providing Requestor with information necessary to contest Verisign’s underhanded attempt to protect its competition-stifling monopoly.

6.2 The Public Interest Warrants Disclosure of the Requested Documents

Furthermore, pursuant to the DIDP, ICANN can disclose documents that are governed by the DIDP’s Nondisclosure Conditions. Indeed, ICANN must disclose a document covered by a Nondisclosure Condition if “the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.”³⁴ Here, there is a significant public interest in ensuring a competitive market in the DNS that outweighs any harm in disclosure, especially given the proposed confidentiality agreement in the DIDP Reply.

First of all, the subterfuge by which Verisign secretly obtained its asserted rights to the .WEB license seriously undermines core ICANN principles, including “open and fair processes that enable competition and open entry in Internet-related markets” and the application of documented policies in a consistent, neutral, objective, fair, and transparent manner.³⁵ Verisign hid behind NDC in order to secretly compete for and obtain the .WEB license. Investigating and rectifying such unfair and deceptive conduct is plainly in the public interest.

Second, Verisign’s secretive scheme to obtain the .WEB license for itself was not only unfair, deceptive, and lacking in transparency; Verisign’s conduct was also carried out specifically to harm competition. Competition is vital to the maintenance of the DNS and the promotion of competition is one of ICANN’s core values. Indeed, ICANN emphasizes its mandate to promote

³³ Exhibit 3, Letter from A. Ali to ICANN Board (23 Apr. 2018), p. 2 (proposing that ICANN disclose the requested documents to Requestor pursuant to a confidentiality agreement).

³⁴ Exhibit 10, “ICANN Documentary Information Disclosure Policy” ICANN (last visited 27 Feb. 2018), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

³⁵ Exhibit 11, Amended and Restated Articles of Incorporation (3 Oct. 2016), Section 2(III), <https://www.icann.org/resources/pages/governance/articles-en> (emphasis added).

competition several times in its Bylaws—and has even expressly granted itself permission to discriminate against a party in order to “promot[e] effective competition.”³⁶ ICANN further implemented the New gTLD Program to “encourage competition” in the DNS³⁷ because a more competitive environment in the DNS will “result in greater innovation, consumer choice, and satisfaction in the long run.”³⁸ As explained in Requestor’s 16 April 2018 letter to ICANN, allowing Verisign to obtain the .WEB license based on its subterfuge and collusion with NDC would not only seriously undermine competition in the DNS, contrary to ICANN’s mandate, but would also constitute a serious and illegitimate distortion of the fundamental principles of fair play and transparency that underlie ICANN’s Bylaws. Clearly, the public’s interest in competition outweighs any compelling reason for ICANN to refuse documentary disclosure to Requestor—especially since Requestor is willing to protect the disclosed documents through a confidentiality agreement.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

The entire Internet community is materially affected by ICANN’s refusal to disclose the requested documents.

Requestor submitted the DIDP Request in order to gain information to protect the legitimacy by which ICANN awards gTLD licensing rights, as well as to protect competition in

³⁶ Exhibit 4, ICANN Bylaws (22 Jul. 2017), Art. 2, § 2.3, <https://www.icann.org/resources/pages/governance/bylaws-en> (“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.”). ICANN has identified a core value as “introducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest,” and committed to operating “through open and transparent processes that enable competition.” *Id.* at Art. 1, § 1.2.

³⁷ Exhibit 17, gTLD Applicant Guidebook (4 Jun. 2012), Preamble, <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf>.

³⁸ Exhibit 18, United States Department of Commerce, “Statement of Policy on the Management of Internet Names and Addresses” (5 Jun. 1998), <https://www.ntia.doc.gov/federal-register-notice/1998/statement-policy-management-internet-names-and-addresses>.

the DNS by contesting the delegation of .WEB to NDC and, consequentially, Verisign. If Verisign obtains the rights to operate .WEB, then, as described in **Section 6.2** above, the entire Internet community will be affected by the further destruction of competition in the DNS. Verisign will stifle innovation, restrict consumer choice, and ensure that it maintains its monopoly.³⁹ Moreover, Verisign will have extended its monopoly in a manner that shatters ICANN's stated principles, including (without limitation) fairness, transparency, and the neutral, objective, and consistent application of documented policies. The deception and subterfuge deployed by Verisign and NDC have made a mockery of those principles.

If ICANN allows NDC and/or Verisign to succeed in obtaining the .WEB license through such deceptive means, ICANN will have established a disastrous precedent. Any person or company seeking a gTLD will be able to disguise its true identity by secretly funding a putative applicant to obtain gTLD rights on its behalf. Basic requirements for applicants—*e.g.*, that they disclose their parent companies and affiliates; that they provide true, accurate, and complete background information; and that they disclose their funding sources and how they intend to finance the operation of the gTLD—will be rendered meaningless. The dangers posed by such a precedent are readily apparent in this case, where Verisign, the entrenched monopolist, has attempted to maintain its substantial market power even further by hiding behind a relatively small company such as NDC.

There can be no mincing of words concerning the dishonest scheme carried out by Verisign and NDC. They affirmatively concealed the identity of the true party seeking the .WEB license from ICANN, the rest of the contention set, and, indeed, every person with any interest in

³⁹ Exhibit 19, United States Department of Commerce, "Improvement of Technical Management of Internet Names and Addresses" (20 Feb. 1998), <https://www.ntia.doc.gov/federal-register-notice/1998/improvement-technical-management-internet-names-and-addresses-proposed->.

the .WEB gTLD. They intentionally deceived all stakeholders. Of course, the mere fact that Verisign and NDC were willing to engage in such a deceptive scheme should in itself be disqualifying. That ICANN does not appear to have taken any serious action to address the deception and subterfuge carried out by Verisign and NDC—which took place in mid-2016 (nearly two years ago)—adversely affects the entire Internet community. Allowing such underhanded conduct to succeed would seriously undermine the legitimacy and integrity of ICANN. Given the principles at stake, ICANN’s refusal to provide the documents sought by the DIDP will adversely affect numerous other stakeholders—including, in particular, the numerous consumers of gTLD registry services.

8. Detail of Staff/Board Action/Inaction – Required Information

8.1 The .WEB Contention Set

Requestor submitted its application for the .WEB gTLD on 13 June 2012 pursuant to the policies and rules set forth in the AGB.⁴⁰ Six other entities also applied to become the registry operator for .WEB: NDC; Google, through Charleston Road Registry Inc.; Web.com Group, Inc.; Radix FZC, through DotWeb Inc.; Ruby Glen, LLC (“**Ruby Glen**”), through Donuts, Inc.; and Schlund Technologies GmbH.⁴¹ Since ICANN encourages the private settlements of contention sets,⁴² all of the .WEB applicants agreed to resolve the contention set through a private auction. However, NDC

⁴⁰ Exhibit 20, Afilias Domains No. 3 Limited, “New gTLD Application Submitted to ICANN” (13 Jun. 2012), <https://gtdresult.icann.org/applicationstatus/applicationdetails/downloadapplication/292?t:ac=292>.

⁴¹ Exhibit 5, “New gTLD Contention Set Status,” ICANN (last visited 16 Feb. 2018), <https://gtdresult.icann.org/applicationstatus/stringcontentionstatus> (identifying members of the .WEB contention set).

⁴² Exhibit 17, gTLD Applicant Guidebook (4 Jun. 2012), p. 4-6, <https://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf> (“Applicants that are identified as being in contention are encouraged to reach a settlement or agreement among themselves that resolves the contention.”).

suddenly withdrew its support for the private auction, thereby forcing all of the .WEB applicants to participate in an ICANN Auction.⁴³

NDC's withdrawal concerned Ruby Glen. In subsequent discussions, NDC implied to Ruby Glen that it underwent a change in ownership, which might explain NDC's withdrawal from the private auction.⁴⁴ Ruby Glen raised with ICANN its belief that NDC underwent a change in control without having notified ICANN of such change, as required by the AGB.⁴⁵ However, both ICANN and its Ombudsman claimed that they investigated Ruby Glen's concern and found that there was no change in control.⁴⁶ In fact, it appears that ICANN and its Ombudsman did little more than ask NDC if it had undergone a change in ownership or corporate control, to which NDC answered 'no.'⁴⁷ Taking NDC's answer at face value, and apparently asking no further questions, ICANN decided to proceed with the ICANN auction. Ruby Glen protested this decision by initiating both the IRP process and a lawsuit against ICANN, but neither delayed the ICANN Auction.⁴⁸

⁴³ *Id.* at p. 4-19 ("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.")

⁴⁴ Exhibit 21, Email exchange between J. Nevett and J. Rasco (6 Jun. 2016); Exhibit 22, NU DOT CO LLC, "New gTLD Application Submitted to ICANN" (13 Jun. 2012), p. 2, <https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadapplication/1053?t:ac=1053>.

⁴⁵ Exhibit 23, Email exchange between J. Nevett and ICANN (June 2016), <https://www.icann.org/en/system/files/files/litigation-ruby-glen-declaration-willett-exhibits-a-h-25jul16-en.pdf>; Exhibit 24, Amended Compl., *Ruby Glen, LLC v. ICANN*, Civil Action No. 2:16-cv-05505 (C.D. Ca. 8 Aug. 2016), <https://www.icann.org/en/system/files/files/litigation-ruby-glen-amended-complaint-08aug16-en.pdf>. Other applicants expressed their support for Ruby Glenn's request that ICANN investigate. Exhibit 25, Email from B. Joshi to ICANN (11 Jul. 2016), <https://www.icann.org/en/system/files/correspondence/joshi-to-atallah-et-al-11jul16-en.pdf> (supporting postponement of .WEB auction to permit ICANN to investigate NDC); Exhibit 26, Email from T. Moerz to ICANN (11 Jul. 2016), <https://www.icann.org/en/system/files/correspondence/moerz-to-atallah-et-al-11jul16-en.pdf> (same).

⁴⁶ Exhibit 27, Email exchange between NDC and ICANN (June 2016), <https://www.icann.org/en/system/files/files/litigation-ruby-glen-declaration-willett-exhibits-a-h-25jul16-en.pdf> (documenting ICANN's inquiry regarding NDC's change in ownership or control); Exhibit 28, Letter from ICANN to Members of the .WEB/.WEBS Contention Set (13 Jul. 2016), p. 1, <https://www.icann.org/en/system/files/correspondence/willett-to-web-webs-members-13jul16-en.pdf>.

⁴⁷ Exhibit 27, Email exchange between NDC and ICANN (June 2016), <https://www.icann.org/en/system/files/files/litigation-ruby-glen-declaration-willett-exhibits-a-h-25jul16-en.pdf>.

⁴⁸ Exhibit 24, Amended Compl., *Ruby Glen, LLC v. ICANN*, Civil Action No. 2:16-cv-05505 (C.D. Ca. 8 Aug. 2016), ¶ 55, <https://www.icann.org/en/system/files/files/litigation-ruby-glen-amended-complaint-08aug16-en.pdf> ("On July 22, 2016, Plaintiff initiated ICANN's Independent Review Process by filing ICANN's Notice of Independent Review. The IRP remains pending."); see Exhibit 29, Compl., *Ruby Glen, LLC v. ICANN*, Civil Action No. 2:16-cv-05505 (C.D. Ca. 22 Jul. 2016), <https://www.icann.org/en/system/files/files/litigation-ruby-glen-amended-complaint-08aug16-en.pdf>.

Requestor, along with the other .WEB applicants, participated in the ICANN Auction on 27 July 2016. NDC prevailed at the auction with an unexpectedly high bid of \$142 million.⁴⁹ The source of NDC's funding was revealed four days later: Verisign.⁵⁰ NDC had entered into an agreement with Verisign where, in exchange for Verisign funding NDC's bid for .WEB, NDC agreed to assign the .WEB Registry Agreement to Verisign.⁵¹

Verisign had failed to apply for the gTLD in 2012 and was therefore not part of the contention set. Instead of publicly applying for the rights to the .WEB registry, Verisign secretly arranged with NDC to obtain the .WEB license through stealth. As a result of Verisign's secret funding, NDC was able to make an unexpectedly high bid and win the .WEB license. By virtue of its secret arrangement with NDC, Verisign is now poised to take on the .WEB license and further consolidate its dominant position within the DNS.⁵²

ICANN did nothing in response to Verisign's announcement about its agreement with NDC. Requestor voiced its concerns about Verisign's involvement in the ICANN Auction to ICANN on both 8 August 2016 and 9 September 2016.⁵³ It received no response from ICANN until 16 September 2016, when ICANN asked for "additional information" from Requestor, Ruby Glen, Verisign, and NDC to "help facilitate informed resolution" of Requestor's "questions regarding,

⁴⁹ Exhibit 6, "ICANN New gTLD Contention Set Resolution Auction Final Results for WEB/WEBS" ICANN, <https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadauctionreport/18?t:ac=692> (listing results of and bid amounts for the .WEB auction).

⁵⁰ Exhibit 7, Verisign, "Verisign Statement Regarding .Web Auction Results" (1 Aug. 2016), <https://investor.verisign.com/news-releases/news-release-details/verisign-statement-regarding-web-auction-results>.

⁵¹ Exhibit 7, Verisign, "Verisign Statement Regarding .Web Auction Results" (1 Aug. 2016), <https://investor.verisign.com/news-releases/news-release-details/verisign-statement-regarding-web-auction-results>.

⁵² Exhibit 12, Letter from the United State Senate to the Honorable Renata B. Hesse (12 Aug. 2016), p. 4, https://www.cruz.senate.gov/files/documents/Letters/20160812_DOJ-ICANNLetter.pdf ("Verisign's bid to secure the .web registry may have been undertaken to protect its position in the .com market from additional competition.").

⁵³ See Exhibit 8, Letter from S. Hemphill to A. Atallah (8 Aug. 2016), <https://www.icann.org/en/system/files/correspondence/hemphill-to-atallah-08aug16-en.pdf> (listing problems with Verisign's involvement in the .WEB auction); Exhibit 30, Letter from S. Hemphill to A. Atallah (9 Sep. 2016), <https://www.icann.org/en/system/files/correspondence/hemphill-to-atallah-09sep16-en.pdf> (reiterating concerns about the .WEB auction to ICANN). The next communication from ICANN occurred over a week after Requestor's 8 August 2016 letter to ICANN, and it simply notified Requestor that the .WEB contention set was placed "on-hold" because of "a pending ICANN Accountability Mechanism initiated by another member of the contention set." Exhibit 31, Letter from A. Atallah to S. Hemphill (30 Sep. 2016), <https://www.icann.org/en/system/files/correspondence/atallah-to-hemphill-30sep16-en.pdf>.

among other things, whether [NDC] should have participated in the 27-28 July 2016 auction for the .WEB contention set and whether NDC's application for the .WEB gTLD should be rejected."⁵⁴ Requestor submitted a detailed response to ICANN's inquiries within the requested timeframe that further articulated Requestor's concerns about Verisign and NDC.⁵⁵ ICANN, though, did not respond until nearly a year and a half later. When ICANN finally contacted Requestor on 31 March 2018, it simply requested permission to disclose Requestor's response to the 16 September 2016 letter.⁵⁶ ICANN has still provided no substantive response or meaningful information to address Requestor's serious concerns. To the extent that ICANN has any position regarding Requestor's concerns, it has failed to make that position known.

8.2 The DIDP Request

Requestor has waited over a year and a half to learn from ICANN the results of its supposed investigation into NDC and Verisign. Given the significant delay, Requestor sought to obtain some information from ICANN regarding its investigation through the DIDP. As described in **Section 3** above, on 23 February 2018, Requestor submitted to ICANN the DIDP Request.⁵⁷

ICANN's response to the DIDP Request did not provide Requestor with any significant new information regarding NDC, Verisign, or the .WEB contention set. Rather, for the majority of the requests, ICANN either (1) refused to disclose the requested documents pursuant to the DIDP's Nondisclosure Conditions or (2) argued that there was some problem with the request itself.⁵⁸ ICANN's refusal to disclose documents in the DIDP Response is the basis for this reconsideration request, as described in **Section 6** above.

⁵⁴ Exhibit 9, Letter from C. Willett to J. Kane (16 Sep. 2016).

⁵⁵ See Exhibit 32, Letter from J. Kane to C. Willett (7 Oct. 2016) (providing responses to ICANN's request for information).

⁵⁶ Exhibit 33, Email from C. Willett to J. Kane (31 Mar. 2018).

⁵⁷ Exhibit 1, DIDP Request No. 20180223-1 (23 Feb. 2018), <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-request-23feb18-en.pdf>.

⁵⁸ See Exhibit 2, Response to DIDP Request No. 20180223-1 (24 Mar. 2018), <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-response-24mar18-en.pdf>.

Requestor has since offered to resolve ICANN's problems with its DIDP Request through the DIDP Reply.⁵⁹ As stated above, if Requestor and ICANN agree to the disclosure of the requested documents pursuant to the proposed compromise set forth in the DIDP Reply, this reconsideration request will be moot and Requestor will withdraw the request. However, if Requestor and ICANN fail to reach an agreement, Requestor will pursue this reconsideration request in order to obtain the denied document requests as amended in the DIDP Reply.

9. What are you asking ICANN to do now?

Requestor asks ICANN to disclose the documents requested in the DIDP Request, as amended by the DIDP Reply.

10. Please state specifically grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.

A described in **Section 8** above, Requestor is a member of the .WEB contention set and the entity that submitted both the DIDP Request and the DIDP Reply to ICANN. It is therefore materially affected by ICANN's decision to deny its requests for documentary information, which directly relate to the .WEB contention set.

11a. Are you bringing this Reconsideration Request on behalf of multiple persons or entities?

No, Requestor is not bringing this Reconsideration Request on behalf of multiple persons or entities.

⁵⁹ See Exhibit 3, Letter from A. Ali to ICANN Board (23 Apr. 2018).

11b. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties?

This is not applicable.

12. Do you have any documents you want to provide to ICANN?

Yes, these documents are attached as Exhibits.

Terms and Conditions for Submission of Reconsideration Requests:

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious. Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.



Arif Hyder Ali

April 23, 2018

Date