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 RESPONSE TO THE *AMICUS CURIAE* BRIEFS

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I. INTRODUCTION

1. Throughout this IRP process, the *Amici* have sought to enjoy all the benefits of participation as parties while bearing none of the responsibilities. The *Amici*'s recent submissions confirm that this approach is reflective of their general view of due process: as a right to which they alone—and no one else—are entitled. Having refused to join this IRP as parties, the *Amici* now bemoan what they view as the curtailment of their due process rights as *amici curiae*. The *Amici*'s position in this regard is curious, as their conception of due process for Afilias—and any other prospective IRP claimants—apparently entails eliminating any meaningful independent review of conduct by ICANN's Board and Staff, even when such conduct plainly violates the letter and spirit of ICANN's governing documents.

2. It is common ground that in keeping with ICANN's core function to promote competition, the New gTLD Program was designed to challenge Verisign's monopoly over the DNS. As such, Verisign's failure to pursue the most promising strings emerging from the New gTLD Program, including .WEB, was perhaps unsurprising. Years later, however, Verisign sought to eliminate the sole remaining threat to its monopoly—.WEB—circumventing the New gTLD Program Rules. Verisign acted surreptitiously, selecting an ideal puppet in *Amicus* NDC—an entity that had no chance of success in the .WEB contention set—and purchasing the relevant control rights in NDC's application, something that is without precedent. ICANN has been all too happy to enable Verisign's efforts to preserve its monopoly, abdicating its mandate to promote competition on the DNS in the hopes of retaining the $135 million that Verisign paid for what was supposedly NDC's auction bid. ICANN violated numerous other requirements of its Articles and Bylaws to assist Verisign acquire .WEB—including its decision to take the .WEB contention set "off-hold" in June 2018 and proceed to contract for .WEB with NDC (and hence Verisign).

3. In their attempts to subvert the very purpose of the New gTLD Program by eliminating the one viable competitor to Verisign's monopoly that could emerge therefrom, the *Amici* now attempt to eviscerate the Bylaws' requirement of "meaningful" independent review and to deprive ICANN of any

accountability. The *Amici* submit that the Panel is powerless to redress Afilias' claim; instead, they would require the Panel to remand the matter to the very ICANN Board that sought to rubber-stamp Verisign's acquisition of .WEB, in violation of the New gTLD Program Rules and ICANN's Bylaws and Articles of Incorporation. The *Amici*'s dim view of this Panel's powers would cripple the IRP process, rendering panels incapable of providing redress to aggrieved parties and ensuring adequate remedies for ICANN's breach of its constitutive documents. To endorse this view would bring no finality to the dispute over who is entitled to .WEB, and it would undermine the global Internet community's policy and procedural intentions as reflected in the New gTLD Program Rules, Articles, and Bylaws. To the contrary, it would permit ICANN to delegate a string after the applicant sold control rights in its application in a secret agreement, and allegedly addressed by ICANN for secret reasons at an undocumented meeting. Further, it would leave prospective registrars in the dark and at the mercy of ICANN's unfettered discretion.

4. Accordingly, for the reasons described below, this Panel must reject the arguments of ICANN and the *Amici* and order the relief requested in Afilias' Amended Request.

II. THE OMISSIONS AND MISREPRESENTATIONS OF KEY FACTS IN THE *AMICI* SUBMISSIONS

5. In seeking to participate as *Amici* in this case, Verisign and NDC have represented, including in their most recent letter, that they have important information and evidence that is "critical to the proper evaluation of Afilias' claims."[1] Unfortunately, the *Amici* submissions are most notable for their omissions and misrepresentations of key facts, as well as blind endorsement of ICANN's submissions.[2]

6. As we have explained elsewhere,[3] the Panel's task in deciding Afilias' claims is straightforward. By reviewing the terms of the DAA against the New gTLD Program Rules[4]—applied, as they

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1 *See, e.g.*, VeriSign's Supplemental Brief in Support of Its Request to Participate as *Amicus Curiae* in Independent Review Process (27 Sep. 2019), ¶ 31.

2 Nor has ICANN made any effort to fill these obvious lacunae in its submissions.

3 See Section IX below.

4 The "New gTLD Program Rules" refer to the gTLD Applicant Guidebook, the Auction Rules for New gTLDs: Indirect Contention Edition, the New gTLD Auctions Bidder Agreement, "and other rules related to the New gTLD Program." Amended Request

must be, in accordance with ICANN's Articles and Bylaws—there is no question 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.[5] The *Amici* and their two fact witnesses—Mr. Paul Livesay of Verisign and Mr. Jose Ignacio Rasco III of NDC—do not dispute that they adhered to the terms of the DAA. The terms of the DAA are clear—as are the requirements of the ICANN's New gTLD Program Rules, Articles, and Bylaws. Given the terms of the DAA and the requirements of the New gTLD Program Rules, Articles, and Bylaws, no proper exercise of ICANN's discretion could have yielded any other result than the disqualification of NDC's application and/or auction bids and the award of .WEB to the next highest bidder, which was indisputably Afilias.[6]

7. However, to clear up the confusion that the *Amici* have tried to create, we will address the most significant of the *Amici*'s omissions and misrepresentations in this section of our Response, proceeding in chronological order from the commencement of the .WEB application process in 2012 through ICANN's decision to take the .WEB contention set off-hold in June 2018 and to proceed to contract with NDC (and hence with Verisign). The *Amici*'s omissions and misrepresentations serve only to advance Afilias' claims and undermine ICANN's defenses.

A. Verisign's Failure to Apply for .WEB in 2012

8. ICANN's New gTLD Program, as fully implemented in 2012, promised to expand the Domain Name System ("DNS") in a manner that was unprecedented in size and scope. As ICANN itself has stated in this IRP, the New gTLD Program is by far its "most ambitious expansion of the Internet's naming system."[7] ICANN's New gTLD Program Rules arose from many years of work, with broad input from across the ICANN

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by Afilias for Independent Review Process (21 Mar. 2019) ("**Afilias' Amended IRP Request**"), p. i; Reply Memorial in Support of Amended Request by Afilias Domains No. 3 Limited for Independent Review (4 May 2020) (Revised, 6 May 2020) ("**Afilias' Reply Memorial**"), ¶ 8, fn. 22.

5 *See, e.g.*, Afilias' Amended IRP Request, ¶¶ 76-78.

6 *See* Afilias' Amended IRP Request, ¶¶ 76-78; Afilias' Reply Memorial, ¶ 101; *see also* Sections III, IX below.

7 ICANN's Response to Amended IRP Request, ¶ 18.

community, designed to further the principles set forth in ICANN's Articles and Bylaws.[8] Put simply, for TLD registry companies, there has been no event more significant in ICANN's history than the launch of the New gTLD Program.

9. As set forth in our prior submissions, .WEB has long been seen as representing the last best hope to provide meaningful competition against .COM, the TLD that has historically dominated the DNS, and that Verisign and its predecessors have controlled (along with .NET, the #2 gTLD) since the 1990s.[9] Seven applicants—including major players in the Internet space (such as Google, Donuts, and Afilias)—submitted applications for the .WEB gTLD by the 13 June 2012 deadline. Verisign was not among them. Nor did any of the seven applicants have any known affiliation with Verisign.[10]

10. Both of the *Amici*'s fact witnesses acknowledge the commercial significance of .WEB in their testimony. Mr. Rasco of NDC states that his company applied for .WEB because NDC was "focused on those potential gTLDs that could occupy a corporate space similar to .CO and ***had the greatest potential for commercial success***."[11]

11. Mr. Livesay of Verisign testifies that in 2014—*i.e.*, ***two years after the deadline for submitting new gTLD applications had passed***—Verisign put him "in charge of identifying potential business opportunities for Verisign in ICANN's New gTLD Program."[12] Mr. Livesay does not mention any involvement in Verisign's strategy regarding the New gTLD Program prior to 2014, and Verisign provides no information on that topic. According to Mr. Livesay, out of the thousands of gTLDs that *bona fide* applicants had applied for in 2012, Verisign decided to pursue .WEB and, apparently, ***only .WEB***.

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8 *See* ICANN's Response to Amended IRP Request, ¶ 19; Afilias' Reply Memorial, ¶¶ 22, 24.

9 *See* Afilias' Amended IRP Request, ¶¶ 82-83; Afilias' Reply Memorial, ¶¶ 124, 130.

10 As previously identified, the seven applicants, in alphabetical order, are: (1) Afilias; (2) Donuts, Inc. (through Ruby Glen LLC); (3) Google, Inc. (through Charleston Road Registry Inc.); (4) InterNetX GmbH (through Schlund Technologies GmbH); (5) NDC; (6) Radix FZC (through DotWeb Inc.); and (7) Web.com Group, Inc. *See* Afilias' Amended IRP Request, ¶ 27; ICANN's Response to Amended IRP Request, ¶ 30.

11 Witness Statement of Jose Ignacio Rasco III (1 June 2020) ("Rasco Decl."), ¶ 4 (emphasis added).

12 Witness Statement of Paul Livesay (1 June 2020) ("Livesay WS"), ¶ 4.

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12. *Verisign offers no explanation as to why Verisign chose not to apply for .WEB itself by 13 June 2012*—which, under the New gTLD Program Rules, was a threshold requirement for participating in the .WEB contention set, and which was met by all of the seven actual applicants for .WEB.[14] Mr. Livesay acknowledges that Verisign had timely applied for *other* TLDs "that were variants of its company name (*i.e.*, '.Verisign') or internationalized versions of Verisign's existing TLDs …."[15] Verisign was therefore certainly aware of the deadline and was able to meet it in applying for variants of Verisign's existing TLDs.

13. However, Mr. Livesay states without further explanation that in 2012, "***Verisign had not sought to acquire the rights to a new gTLD not already associated with Verisign***."[16]

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[t]he period for filing new applications as part of the New gTLD Program had ended."[17] Verisign provides no explanation of what had changed between 2012 and 2014 that led it to decide pursue .WEB—let alone to pursue it ***secretly***.[18] The only hint is found in

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13 Livesay WS, ¶11. Mr. Livesay is incorrect in this statement. He made no efforts to contact Afilias.

14 The AGB provides that "[a]n application will not be considered, in the absence of exceptional circumstances, if … [i]t is received after close of the application submission period." ICANN, gTLD Applicant Guidebook (4 June 2012) ("AGB"), [Ex. C-3], p. 1-3; *see also* Afilias' Reply Memorial, ¶ 43.

15 Livesay WS, ¶ 4.

16 Livesay WS, ¶ 4 (emphasis added).

17 Livesay WS, ¶ 4 (emphasis added).

18 Mr. Livesay asserts in his witness statement that Redacted - Third Party Designated Confidential Information

Verisign provides no evidence of any "decrease" in the inventory for domain names that would justify Verisign's failure to apply for the .WEB gTLD in 2012 but suddenly decide to seek it in 2014. Nor does this assertion explain why Verisign decided to pursue .WEB *in secret*. Redacted - Third Party Designated Confidential Information

Mr. Livesay's Witness Statement, where he attempts to explain why Verisign did not want anyone to know of Verisign's plan to pursue the rights to .WEB:

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>
> [19]

14. Of course, if Verisign had applied for .WEB in 2012, its status as an applicant for .WEB would have been known to the public and governments. Among other things, the public portions of its .WEB application would have been available to the public and governments and would have been posted as part of the same notice and comment process to which all of the actual .WEB applicants were subject. Indeed, as ICANN states in its 18 July 2020 letter to the Panel—setting forth the portions of Livesay and Rasco testimony that it does not endorse (even though it submitted the statements with its Rejoinder)—the public portion of a gTLD application (including the Mission/Purpose Section) is "relevant to the Program" because:

> [I]t allows the [Internet] community to comment on the application (during the public comment period) based on the applicant's statement of how the mission and purpose and how the gTLD is intended to be operated.[20]

The public notice and comment are of course key components of ICANN's governing principles of transparency and accountability.[21]

15. If—as Verisign contends—there is nothing about its efforts to obtain the rights to .WEB that run afoul of the New gTLD Program Rules, or of ICANN's Articles and Bylaws, the Panel should ask why Verisign simply did not submit an application for .WEB in its own name. The Panel might also wonder why—

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[19] Livesay WS, ¶ 5 (emphasis added).

[20] Letter from ICANN to Panel (18 July 2020) (revised), p. 3. It is possible that Verisign sought to keep ICANN's Government Advisory Committee ("GAC") in the dark about its intentions regarding .WEB, since the GAC had filed dozens of "early warning notices" regarding competition-related concerns raised by certain applications.

[21] As stated in the AGB, ICANN's "[p]ublic comment mechanisms are part of ICANN's policy development, implementation, and operational processes." AGB, [Ex. C-3], p. 1-5. They are critical to ICANN's mission, including in "promoting competition, achieving broad representation of global Internet communities, and developing policy appropriate to its mission through bottom-up, consensus based processes." *Id*.

after deciding after the application deadline passed to pursue .WEB—Verisign went to such lengths to conceal that Verisign was (in Verisign's own words) Redacted - Third Party Designated Confidential Information

"[23] Surely, the mere prospect of "criticism by its competitors" was not what led Verisign to undertake its efforts to acquire the rights to .WEB and to do so in total secrecy.

16. There is, therefore, no explanation for why Verisign did not apply for .WEB itself in 2012—other than that it did not want anyone to know that Verisign was seeking the .WEB registry. Verisign was either worried about the reaction that its pursuit of .WEB would cause throughout the Internet community (and beyond) and/or wanted to act as a stealth bidder—acting under the cloak of a much smaller special purpose TLD acquisition company—so that bidders would not know that the industry behemoth was seeking .WEB and develop their bidding strategy to account for that fact.

B. The Circumstances Surrounding the Negotiation and Execution of the DAA

17. The testimony of Messrs. Livesay and Rasco is also remarkably vague about the circumstances under which Verisign and NDC negotiated and executed the DAA. Redacted - Third Party Designated Confidential Information

.[24] Redacted - Third Party Designated Confidential Information

."[25]

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[22] Domain Acquisition Agreement between VeriSign, Inc. and Nu Dotco LLC (25 Aug. 2015) ("DAA"), [Ex. C-69], Sec. 10(a) (emphasis added).

[23] DAA, [Ex. C-69], Ex. A, Sec. 1 (emphasis added).

[24] Livesay WS, ¶ 12.

[25] Livesay WS, ¶ 12.

18. We know from Mr. Rasco's testimony that NDC "received confirmation from ICANN that [NDC's] .WEB Application had been accepted—meaning that the Application had satisfied all applicable ICANN criteria and evaluations—in June 2013."[26] Thus, by June 2013, the notice and comment period had closed and NDC's application had passed all of the evaluation criteria set forth in the AGB. According to Mr. Rasco, after the identity of other applicants became publicly known, NDC realized that it was competing against larger and better-financed companies. Redacted - Third Party Designated Confidential Information

.[27]

19. Redacted - Third Party Designated Confidential Information

[28] Accordingly, NDC decided to explore other ways to "monetize" its .WEB application, and to make a profit over the $185,000 application fee and the costs involved in preparing the application. Mr. Rasco states in his witness statement:

> In or around May 2015, I received a phone call from Verisign expressing interest in working with NDC to acquire the rights to .WEB. As noted above, by that date ICANN had formed the Contention Set for .WEB (***meaning no new applicants could join***) and Redacted - Third Party Designated Confidential Information
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> In addition, as also noted above, by that date ICANN had yet to schedule a public auction for .WEB., and thus the domain was still on hold, so there was no clarity as to a resolution by either a public *or* private auction. Consequently, Redacted - Third Party Designated Confidential Information

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[26] Rasco Decl., ¶ 24.

[27] Rasco Decl., ¶ 40.

[28] Rasco Decl., ¶ 41.

[29] Rasco Decl., ¶ 41 (emphasis added). It should be noted that in ICANN's letter to the Panel dated 18 July 2020, ICANN states that Mr. Rasco's use of the term "public auction" is a misnomer; the correct term is an "ICANN auction." Letter from ICANN to Panel (18 July 2020) (revised), pp. 5, 10.

20. From Verisign's perspective, therefore, NDC was the ideal candidate to serve as cover for Verisign's efforts to secretly obtain the rights to .WEB for itself. *First*, NDC was not only willing but eager to sell its rights in its .WEB Application, given that Redacted - Third Party Designated Confidential Information *Second*, because NDC was a small company with limited funding, the other .WEB applicants would not base their bidding strategies on the assumption that NDC would be able to make a substantial bid. NDC was thus the perfect vehicle to allow Verisign to fly "under the radar." NDC not only allowed Verisign to conceal its "indirect" participation in the contention set; it also allowed Verisign to blindside the *bona fide* applicants with a high bid that none of the other applicants could have seen coming—not knowing that Verisign was hiding behind NDC.

21. Neither Mr. Livesay nor Mr. Rasco provide any details of how the DAA was drafted or negotiated. We know from Mr. Rasco's witness statement that someone at Verisign contacted him "[i]n or around May 2015."[30] We have virtually no information as to what transpired between Verisign and NDC between that time and the execution of the DAA on 25 August 2015. The *Amici* provide no information concerning who drafted the DAA, how many drafts (if any) were exchanged, or if there was any negotiation of its terms. Redacted - Third Party Designated Confidential Information

which are attached as Exhibits B and C to his witness statement. We address the terms of the DAA—and the various transactions to which the *Amici* try to compare the DAA—in detail in Section IV below. Redacted - Third Party Designated Confidential Information .[31] Indeed,

[30] Rasco Decl., ¶ 41.

[31] Redacted - Third Party Designated Confidential Information

Mr. Livesay does not even claim that the terms of the DAA are based on the templates; nor does he identify any actual model for those terms.

22. Both the *Amici* and their witnesses attempt at length to explain why the provisions of the DAA were consistent with the New gTLD Program Rules and what they call "industry practice" (which, given that ICANN had never undertaken anything like the New gTLD Program, was in fact non-existent).[32] As we explain in detail in Section IV.D. below, their legal arguments and factual assertions do not withstand scrutiny. Indeed, many of the arguments are frivolous and many of the assertions are demonstrably false. And again, as discussed further below, if Verisign and NDC believed that their arrangement did not violate the New gTLD Program Rules, one must wonder why they went to such lengths to conceal it—including not only from Verisign's competitors, but from ICANN itself.

C. Verisign's Post-DAA Inquiry to ICANN

23. Redacted - Third Party Designated Confidential Information

. As detailed in Section IV.D. below, the involvement of Donuts in these applications was not only announced to the public prior to the application deadline; Donuts was specifically identified in the applications at issue.[34] Again, none of the other transactions identified by the *Amici* are roughly analogous to the DAA. Nor do the *Amici* attempt

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[32] As ICANN states in its 18 July 2018 letter to the Panel, ICANN has "not formally endorsed" any of the particular arrangements that Messrs. Livesay and Rasco identify as analogous to the DAA. *See, e.g.*, Letter from ICANN to Panel (18 July 2020) (revised), p. 6.

[33] Livesay WS, ¶ 8.

[34] *See* Section IV below.

to explain how other transactions entered into by other entities during the New gTLD Program would constitute any sort of precedent to establish that such transactions did not violate the New gTLD Program Rules, or why they would not have required disclosure to ICANN and the Internet community.[35]

24. Notably, the *Amici* never approached ICANN about their arrangement prior to executing the DAA on 25 August 2015. Instead, in early September 2015, Verisign contacted ICANN asking about the assignment of a hypothetical gTLD registry agreement ***after*** a contention set has been resolved, a qualified applicant has been designated to enter into a registry agreement with ICANN, and ICANN and the qualified applicant have executed the registry agreement. Verisign did not pose *any* questions about the DAA or even about the New gTLD Program Rules. Again, Verisign's inquiry asked solely about ***post-registry agreement assignments***—which, as ICANN has stated, are governed by an entirely different set of rules that are not at issue in this IRP.[36]

25. The only information in the record about Verisign's communications with ICANN in September 2015 appears in two emails, which were submitted by Verisign's outside counsel (Mr. Ronald Johnston of Arnold & Porter) in his 23 August 2016 letter to ICANN's outside counsel (which also enclosed the DAA).[37] Redacted - Third Party Designated Confidential Information

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[35] *See* Section IV below. As stated in its 18 July 2018 letter to the Panel, ICANN has "not formally endorsed" any of the particular arrangements that Messrs. Livesay and Rasco identify as analogous to the DAA. *See, e.g.*, Letter from ICANN to Panel (18 July 2020) (revised), p. 6.

[36] *See* ICANN's Response to Amended IRP Request, ¶ 26 ("Assignments and transfers of Registry Agreements to operate gTLDs must be approved by ICANN, and ICANN follows a known procedure in evaluating such requests.")

[37] Neither Mr. Livesay in his witness statement nor Verisign in its *Amicus* submission mentions this exchange of emails. Although Afilias requested ICANN to produce documents "concerning or discussing" these two emails—and although the Panel ordered ICANN to produce them (*see* Procedural Order No. 2 (27 Mar. 2020), Attachment A, Request No. 5, p. 20)—ICANN claimed it was unable to locate any responsive documents.

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?[38]

26. This is a remarkable communication. Written barely a week after Verisign executed the DAA, it does not mention .WEB. Nor did Verisign ask any of the numerous other obvious questions that arise from the DAA, such as whether a non-applicant (like Verisign) could enter a confidential agreement with an Applicant (like NDC), under which the non-applicant would pay the Applicant millions of dollars to enable the non-applicant, *inter alia*, to:

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[38] Letter and attachments from Ronald Johnston (Counsel for Verisign) and Brian Leventhal (Counsel for NDC) to Eric Enson (Counsel for ICANN) (23 Aug. 2016) [ICANN-WEB_000001 - ICANN-WEB_000073], **[Ex. R-18]**, pp. 44-45 (emphasis added).

[39] DAA, **[Ex. C-69]**, Sec. 10(a).

[40] DAA, **[Ex. C-69]**, Sec. 4(f).

[41] DAA, **[Ex. C-69]**, Secs. 4(i), 4(j), 8; *id.*, Ex. A, Sec. 1(i).

[42] DAA, **[Ex. C-69]**, Ex. A, Sec. 1.

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[44]

27. Nor did Verisign ask ICANN any questions about obviously applicable provisions of the New gTLD Program Rules, such as the rule that an "[a]pplicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application;"[45] the requirement that an Applicant "warrants that the statements and representations contained in the application (including any documents submitted and oral statements made and confirmed in writing with the application) are true and accurate and complete in all material respects;[46] or the rules that only an Applicant can participate in an ICANN auction and that it can place bids only on its own behalf, unless it designates and specifies an agent to enter bids on its behalf.

28. Redacted - Third Party Designated Confidential Information

[43] DAA, [Ex. C-69], Ex. A, Sec. 3.

[44] DAA, [Ex. C-69], Ex. A, Sec. 3(c).

[45] AGB, [Ex. C-3], p. 6-6.

[46] AGB, [Ex. C-3], p. 6-2.

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29. Verisign plainly did not want ICANN to know about the terms of the DAA—which is why Verisign's September 2015 communications with ICANN contained no reference to them. Verisign sought only to confirm that—if NDC (under the complete control of Verisign and acting only for Verisign's behalf) prevailed in the .WEB contention set and executed a registry agreement with ICANN—Verisign could then direct NDC to ask ICANN to assign the registry agreement to Verisign, with no obstacles posed and no questions asked.

D. Verisign/NDC's Pre-Auction Conduct

30. As explained in Afilias' Amended Request for IRP, most contention sets are resolved through private auctions.[48] The *Amici* do not dispute that assertion.[49] The reason is simple. In a private auction, the winning bid is distributed among the losing bidders. To apply for a gTLD is an expensive proposition. It requires an application fee of $185,000. The preparation of an application can be a labor-intensive, expensive exercise. Private auctions and other private resolutions of contention sets—which ICANN says it favors[50]—provided a means for applicants to recoup their initial investments and sometimes make a significant profit.[51]

31. As also explained in Afilias' Amended Request, by mid-May 2016, it appeared that all of the .WEB contention set members had agreed to participate in a private auction.[52] As Mr. Rasco acknowledges, NDC was a relatively small company, without any apparent means of funding a significant bid. It therefore

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47 Letter and attachments from Ronald Johnston (Counsel for Verisign) and Brian Leventhal (Counsel for NDC) to Eric Enson (Counsel for ICANN) (23 Aug. 2016) [ICANN-WEB_000001 - ICANN-WEB_000073], **[Ex. R-18]**, p. 44.

48 Afilias' Amended IRP Request, ¶ 21.

49 *See* Rasco Decl., ¶ 31; Livesay WS, ¶ 16.

50 *See* AGB, **[Ex. C-3]**, p. 4-6 ("Applicants that are identified as being in contention are encouraged to reach as settlement or agreement among themselves that resolves the contention.").

51 Afilias' Reply Memorial, ¶ 48.

52 *See* Afilias' Amended IRP Request, ¶ 29 (and evidence cited therein).

caught the attention of other applicants when NDC failed to meet the deadline to submit an application to participate in the private auction—and led to speculation that a non-applicant (including, possibly Verisign)—was somehow involved in NDC's application.[53] Of course, as we now know, Redacted - Third Party Designated Confidential Information

32. The *Amici* are evasive at best in describing when, how, and why Verisign determined that NDC would not participate in a private auction. Redacted - Third Party Designated Confidential Information

[54]

33. Redacted - Third Party Designated Confidential Information

[55] But he fails to provide even an approximate time frame for when he gave Mr. Rasco this instruction. Nor does Mr. Rasco indicate when Verisign provided NDC with such instructions.

34. We have set forth in detail in our Amended IRP Request and Reply the misleading and evasive responses that Mr. Rasco provided to executives from other applicants when they asked him if he

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[53] *See* Afilias' Amended IRP Request, ¶¶ 29-32.

[54] DAA, [Ex. C-69], Ex. A, Sec. 1(i).

[55] Livesay WS, ¶ 16.

and the other listed "managers" of NDC (Messrs. Calle and Bezsonoff) were still "the Board members" of NDC—in other words, whether they still had decision-making authority for NDC's .WEB application.[56] In response, Mr. Rasco says only that he "was under no obligation to be completely forthcoming about our internal operations or plans with parties who were competing for the same gTLD."[57] Of course, Verisign was not a "party" who was legitimately "competing for the same gTLD." It was a non-applicant who had taken over compete and secret control of NDC's Redacted - Third Party Designated Confidential Information

35. Regardless of whether Mr. Rasco had an obligation to be "completely forthcoming" with other applicants, there is no question that he had such obligation with respect to ICANN. As set forth in our Reply, on 27 June 2016, Mr. Jared Erwin wrote to Mr. Rasco:

> We would like to confirm that there have not been ***changes to your application or the [NDC] organization that need to be reported to ICANN. This may include any information that is no longer true and accurate in the application***, including changes that occur as part of regular business operations (e.g., changes to officers or directors, application contacts)."[58]

Mr. Rasco wrote in response:

> I can confirm that there have been no changes to the [NDC] organization that would need to be reported to ICANN."[59]

36. In attempting to explain the partial (and misleading) answer that Mr. Rasco provided to Mr. Erwin, Mr. Rasco testifies in his witness statement that he thought Mr. Erwin's inquiry—notwithstanding its broad language (*i.e.*, changes to the "application or the [NDC organization]" or "any information that is no longer true and accurate in the application")—was strictly limited to "whether the identifying information set

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56 *See, e.g.*, Afilias' Reply Memorial, ¶ 71 (and exhibits cited therein).

57 Rasco Decl., ¶ 87.

58 Emails from Jared Erwin (ICANN) to Jose Ignacio Rasco (NDC) (27 June 2016), **[Ex. C-96]**, p. 1 (emphasis added).

59 Emails from Jared Erwin (ICANN) to Jose Ignacio Rasco (NDC) (27 June 2016), **[Ex. C-96]**, p. 1.

forth in NDC's application (*e.g.,* management, ownership, and contacts) had changed."[60] According to Mr. Rasco, "it never occurred to me that ICANN's routine inquiry might require disclosure of" the terms of the DAA.[61] We leave it to the Panel to assess the credibility of Mr. Rasco's testimony under these circumstances.

37. Similarly, in a conversation with Ms. Christine Willett of ICANN, Mr. Rasco told her that although he had suggested to a competitor (*i.e*., Mr. Jon Nevett of Donuts Inc.) that the "decision to not resolve contention privately was not entirely his …, this decision was in fact his."[62] That representation by Mr. Rasco to Ms. Willett simply cannot be reconciled with the terms of the DAA or with the testimony he has provided in his witness statement, where Mr. Rasco acknowledges that Redacted - Third Party Designated Confidential Information

38. As for Mr. Livesay, he asserts in his witness statement that shortly before the ICANN auction for .WEB took place on July 27-28, 2016, Redacted - Third Party Designated Confidential Information

60 Rasco Decl., ¶ 78.

61 Rasco Decl., ¶ 78.

62 *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Ca.), Exhibit D to Declaration of Christine Willett in Support of ICANN's Opposition to Plaintiff's *Ex Parte* Application for Temporary Restraining Order (25 July 2016), **[Ex. C-75]**, p. 4.

63 Rasco Decl., ¶ 27.

64 Livesay WS, ¶ 27.

65 Livesay WS, ¶ 27.

Redacted - Third Party Designated Confidential Information We address the relevance of this document in Section IV.E. below.

39. Redacted - Third Party Designated Confidential Information

Again, we leave it to the Panel to assess the credibility of Mr. Livesay's testimony.

E. Verisign/NDC's Post-Auction Communications with ICANN

40. ICANN declared NDC to be the winner of the .WEB auction on 28 July 2016, based on the $142 million bid that Verisign directed NDC to make on Verisign's behalf. Verisign then arranged for NDC to pay to ICANN the USD 135 million "final price" on Verisign's behalf on or around 1 August 2016.[68] Verisign kept its arrangement with NDC secret, stating in a purposefully vague footnote in its 10-Q statement with the U.S. Securities and Exchange Commission that "[s]ubsequent to June 30, 2016, [Verisign] incurred a commitment to pay approximately $130.0 million for the future assignment of contractual rights, which are subject to third party consent."[69] However, after the disclosure in the 10-Q footnote caught the attention of the press—which speculated that Verisign was behind NDC's winning bid[70]—Verisign had no choice but to issue its 1 August 2016 press release (which even then was incomplete and misleading).[71]

41. Verisign and NDC are remarkably silent in their *Amici* submissions about their activities in the wake of the 1 August 2016 press release. We know from documents produced by ICANN that on the night prior to the press release, Redacted - Third Party Designated Confidential Information

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66 Livesay WS, ¶¶ 27-28 (quoting Letter from Paul Livesay (Verisign) to Jose Rasco (NDC) (6 July 2016) (Confirmation of Understandings) [Livesay WS (1 June 2020), Ex. H]).

67 Livesay WS, ¶ 27.

68 Rasco Decl., ¶ 103.

69 VeriSign, Inc., *Form 10-Q (Quarterly Report)* (28 July 2016), [Ex. C-45], p. 13; Afilias' Amended IRP Request, ¶ 37; Afilias' Reply Memorial, ¶ 103.

70 *See* Afilias' Reply Memorial, ¶¶ 103-104.

71 *See* Afilias' Reply Memorial, ¶ 106.

42. Mr. Livesay is similarly evasive about Verisign's communications with ICANN following the auction:

> I was responsible for this transaction. I did not have any communications with ICANN before or following the auction process. Redacted - Third Party Designated Confidential Information

43. Mr. Livesay does not refer to any further communications between representatives of Verisign and ICANN following the auction. On 8 August 2016, Mr. Scott Hemphill (Afilias' Vice President and General Counsel) wrote his first letter to Mr. Atallah to state Afilias' concerns in light of Verisign's press release and public reports concerning Verisign's involvement in NDC's application. Like ICANN, the *Amici* misrepresent Mr. Hemphill's 8 August 2016 and 9 September 2016 letters as asserting the same claims as in this IRP, apparently in an effort to help ICANN invoke its "limitations period" defense.[74] In fact, Mr. Hemphill specifically stated:

> *We have not been able to review a copy of the agreement(s) between NDC and VeriSign with respect to [their reported] arrangement*, but it appears likely, given the public statements of VeriSign, that [NDC] and VeriSign entered into an agreement in the form of an option or similar arrangement with respect to the rights and obligations of NDC regarding its .WEB application.[75]

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72 Emails from Jose Ignacio Rasco (NDC) to Christine Willett (ICANN) (*various dates*), [Ex. C-100], pp. 1-2.

73 Livesay WS, ¶ 38.

74 *See* Amicus Curiae Brief of Nu Dotco, LLC (26 June 2020) ("NDC Br."), ¶¶ 58-59, 64. *See also* ICANN's Response to Amended IRP Request, ¶¶ 75-76; ICANN's Rejoinder Memorial, ¶¶ 63-69.

75 Letter from S. Hemphill (Afilias) to A. Atallah (ICANN) (8 Aug. 2016), [Ex. C-49], p. 1.

Mr. Hemphill requested that ICANN "undertake an investigation of the matters set forth in this letter"[76]—which, as discussed below, ICANN specifically committed to do. Afilias did not request Mr. Hemphill's letter to be given confidential treatment, and accordingly, ICANN posted it on its website.

44. Like ICANN, the *Amici* fail to disclose any information as to how and why ICANN's outside litigation counsel at Jones Day, Mr. Eric Enson, subsequently contacted Verisign's outside litigation counsel, Mr. Johnston, by phone, to request (in Mr. Johnston's words) Redacted - Third Party Designated Confidential Information

On 23 August 2016, Mr. Johnston responded by not just submitting the DAA, but various other documents, along with detailed legal argumentation, specifically responding to Mr. Hemphill's 8 August 2016 letter. The only explanation as to what prompted Mr. Enson's request for this submission comes from Mr. Enson himself. At the hearing on Afilias' application to compel documents, Mr. Enson attempted to explain why ICANN apparently had no documents reflecting Mr. Enson's request to Mr. Johnston or what had prompted it:

> And I want to quickly respond to Mr. de Gramont's argument regarding the "request for information to Verisign" which is referred to at Slide 11 of his presentation. The request was made by me and it was done over the phone. The lawyers … – ICANN and Verisign had been adverse to one another on a number of occasions. The lawyers know each other well and there is nothing extraordinary or sinister about me picking up the phone to call Mr. Johnston about an issue like this.[78]

45. To the contrary, the complete lack of information about what led Mr. Enson to make this request orally to Mr. Johnson—and the complete secrecy in which the exchange took place—is indeed extraordinary, even sinister. Afilias had just raised serious concerns with ICANN about the manner in which NDC had just bid $142 million (by far the largest bid ever made for a TLD) to acquire .WEB—widely viewed as the last best hope to provide meaningful competition against Verisign's .COM—and had apparently done

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[76] Letter from S. Hemphill (Afilias) to A. Atallah (ICANN) (8 Aug. 2016), [Ex. C-49], p. 2.

[77] Letter and attachments from Ronald Johnston (Counsel for Verisign) and Brian Leventhal (Counsel for NDC) to Eric Enson (Counsel for ICANN) (23 Aug. 2016) [ICANN-WEB_000001 - ICANN-WEB_000073], [Ex. R-18], p. 1.

[78] Hearing on Afilias Application (11 May 2020), Tr., 20:9-15 (Enson).

so surreptitiously on behalf of Verisign, the industry monopolist who had not even applied for any TLDs other than foreign language equivalents of .COM, .NET, and .VERISIGN. We can only assume that as a result of Mr. Hemphill's letter, someone at ICANN contacted Mr. Enson at Jones Day, and in turn asked him to contact Mr. Johnston, and not to put anything in writing. Why was ICANN contacting Verisign rather than NDC for this information? Why was this suddenly being handled by outside litigation counsel? Why was Mr. Enson's request to Mr. Johnston made by phone rather than in writing, given ICANN's obligation to act transparently to the global Internet community? What was said in the call that led to such a detailed and defensive response from Verisign? And why were these communications kept completely secret from Afilias and the global Internet community?

46. Unlike Mr. Hemphill's 8 August 2016 letter (and his subsequent 9 September 2016 letter), Mr. Johnston's letter and its accompanying exhibits were never disclosed until the Emergency Arbitrator ordered them to be produced to Afilias in this IRP.[79] Even now, the Internet community knows almost nothing about the terms of NDC's and Verisign's deal.

47. Indeed, although Mr. Johnston's letter purports to be submitted Redacted - Third Party Designated Confidential Information Mr. Rasco appears not to have known that ICANN had requested any information from Verisign (in the form of Mr. Enson's call to Mr. Johnston or otherwise). Mr. Rasco testifies in his witness statement that he was surprised to receive Ms. Willett's 16 September 2016 letter and questionnaire, because he had not heard anything about .WEB since communicating with ICANN in early August 2016:

> On September 16, 2016, I received an email from Ms. Willett at ICANN stating that Ruby Glen and Afilias had continued to complain that NDC should not have participated in the .WEB public auction and that NDC's Application should be rejected. ***That letter was a surprise to me, as prior***

[79] While Verisign demanded that the DAA and Mr. Johnston's cover email be treated as "highly confidential," ICANN fails to explain what about either document is so "highly confidential" as to warrant extreme confidentiality or, otherwise, why ICANN did not demand that Verisign redact whatever confidential terms prevented ICANN from publicly disclosing the balance of the DAA to the public.

> *to receiving it I had not heard from or communicated with Ms. Willett or anyone else at ICANN about .WEB since confirming our payment for .WEB in August 2016*.[80]

It is inexplicable that Mr. Rasco would not have known about Mr. Enson's request for information to Mr. Johnston, and Mr. Johnston's response on behalf of both NDC and Verisign.

48. Mr. Hemphill's and Mr. Johnston's letters appear to have precipitated ICANN's 16 September 2016 letter and questionnaire to NDC, Verisign, Afilias, and Ruby Glen. Although the *Amici* claim in their submissions not to have coordinated with ICANN in the preparation of the questionnaire, it is evident that Ms. Christine Willett's (ICANN's Vice President of gTLD Operations) questions were based on arguments made in Mr. Johnston's 23 August 2016 letter rather than on ICANN's independent review of the DAA. Moreover, it must be recalled that in responding to the questionnaire, Verisign's and NDC's counsel had in their possession—and knew that ICANN had in its possession—Mr. Hemphill's 8 August and 9 September letters; Mr. Johnston's 23 August 2016 letter (specifically responding to Mr. Hemphill's 8 August letter); and the DAA and other documents that accompanied Mr. Johnston's letter. By comparison, Afilias was only aware of its own letters to ICANN—which were prepared without the benefit of having the DAA or other relevant documentation. No reasonable person could think that this was a remotely fair process given the complete imbalance of information. As Afilias stated in its Reply Memorial: "ICANN already knew in the main what Verisign's and NDC's responses would be. The questionnaire was thus a pure artifice intended to create the impression that ICANN was engaging in a fair and balanced process."[81] Neither of the *Amici* respond to this point in their submissions.

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[80] Rasco Decl., ¶ 104 (emphasis added). On 5 August 2016, Ms. Willett had written to Mr. Rasco that 'Redacted' - Third Party Designated Confidential Information . Emails from Jose Ignacio Rasco (NDC) to Christine Willett (ICANN) (*various dates*), [Ex. C-100], p. 1.

[81] Afilias' Reply Memorial, ¶ 114.

F. The *Amici*'s Reliance on ICANN's Decision Not To Decide

49. Both of the *Amici* have put heavy reliance on ICANN's alleged "decision not to decide," about which ICANN has always been exceptionally vague—failing to identify even when the alleged decision had been made prior to its Rejoinder. The *Amici*, again following ICANN's lead, have seized upon the "decision not to decide" in an effort to recast Afilias' principal claim as a claim for breach of fiduciary duty—which, they argue, would place the Panel's review of the alleged decision into the realm of the business judgment rule.[82] As discussed below in Section VI, the *Amici*'s (and ICANN's) legal arguments on this point are grossly misplaced. Afilias does not allege any breach of fiduciary duty in this IRP. Moreover, the business judgment rule does not even come into play where, as here, a Board has failed to act within the requirements of its constitutive documents. Nor could the business judgment rule apply where, as here, Afilias' claims are directed at ICANN's staff and officers as well as ICANN's Board.[83]

50. The arguments are not only misplaced as a matter of law; they are also misplaced as a matter of *fact*. The *Amici*'s reliance on the alleged "decision not to decide" rests on ICANN's assertion in its Rejoinder that:

> ICANN would not have disqualified NDC's application upon its receipt of the DAA in August 2016 because the .WEB contention set was on hold at that time due to a pending Accountability Mechanism filed by the parent of another .WEB applicant. Consistent with its well-known practices, ICANN did not take action on .WEB while that Accountability Mechanism was pending.[84]

ICANN further asserted in its Rejoinder that at a "November 2016 Board workshop session," the ICANN Board "chose to see if the results of such proceedings [*i.e.*, an Accountability Mechanism commenced by

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82 *See* Verisign, Inc.'s Pre-Hearing Brief (Phase II) (26 June 2020) ("**Verisign Br.**"), p. 1 ("the only question properly before the Panel here is whether ICANN violated its Bylaws when it decided to defer a decision on Afilias' objections"); NDC Br., ¶ 2 ("the Panel's jurisdiction is limited to determining whether ICANN violated [its] Bylaws when it decided to defer a decision on Afilias' objections to the .WEB auction award in 2016").

83 *See* Section VI below.

84 ICANN's Rejoinder Memorial, ¶ 4.

Ruby Glen] might require the Board to take any action related to the .WEB Contention Set."[85] According to the Witness Statement submitted by ICANN Board Member Christopher Disspain:

> At the November 2016 session, the Board chose not to take any action ***at that time*** regarding the claims arising from the .WEB auction, including the claim that, by virtue of the Agreement between Verisign and NDC, NDC had committed violations of the Applicant Guidebook which merited the disqualification of its application for .WEB and the rejection of its winning bid. Given the Accountability Mechanisms that had already been initiated over .WEB, and given the prospect of further Accountability Mechanisms and legal proceedings, the Board decided to await the results of such proceedings ***before considering and determining what action, if any, to take at that time***.[86]

51. None of these assertions is consistent with the factual record in this case. Nor are they consistent with ICANN's and the *Amici*'s conduct at the time.

52. First of all, contrary to ICANN's assertion that it has a "well-known practice" of not taking any action on a contention set while an Accountability Mechanism is pending, there is no such practice. Certainly, the practice is not among ICANN's "documented policies." Nor did ICANN's officers or staff seem to be aware of any such practice in August 2016, when Afilias first raised its concerns about .WEB and ICANN opened an investigation despite the pendency of Donut's triggering of an ICANN Accountability Mechanism.

53. According to ICANN's CEP and IRP Update Status, Ruby Glen and its parent Donuts Inc. had commenced a Cooperative Engagement Proceeding on .WEB on 2 August 2016.[87] Thus, as of 2 August 2016, there was an Accountability Mechanism with respect to .WEB. Redacted - Third Party Designated Confidential Information

[85] ICANN's Rejoinder Memorial, ¶¶ 40-41. Ruby Glen eventually never pursued an IRP.

[86] Witness Statement of Christopher Disspain (1 June 2020) ("Disspain WS"), ¶ 11 (emphasis added). Ruby Glen had also commenced U.S. federal court litigation against ICANN in July 2016. ICANN successfully defended this litigation on the basis that Ruby Glen had waived its right to pursue remedies against ICANN in any court of competent jurisdiction and that the only fora available to Ruby Glen were those provided under ICANN's accountability framework.

[87] ICANN, Cooperative Engagement and Independent Review Processes, Status Update (8 Aug. 2016), [Ex. C-108], p. 1.

54. In her 16 September 2016 letter forwarding the questionnaire, Ms. Willett asserted that "[i]n various fora, [Ruby Glen] and [Afilias] have raised questions regarding, 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."[89] Ms. Willett stated further that the "additional information" sought by ICANN would "help facilitate ***informed resolution of these questions*** …."[90] Thus, Ms. Willett was also apparently unfamiliar with ICANN's "well-known practice" that required ICANN to take no action on .WEB while the Ruby Glen CEP was pending.

55. Similarly, on 30 September, Mr. Atallah (the President of ICANN's Global Domains Division), finally responded to the 8 August and 9 September 2016 letters sent by Mr. Hemphill on behalf of Afilias. Mr. Atallah wrote to Mr. Hemphill on behalf of ICANN: "We will continue to take Afilias's comments, and other inputs that we have sought, into consideration as we consider this matter."[91] Like Ms. Willett, Mr. Atallah was also unaware of ICANN's well-known practice" to defer making decisions on contention sets while Accountability Mechanisms were pending.

56. Although the *Amici* are aware of Ms. Willett's letter (having received and responded to it), and presumably were aware of Mr. Atallah's letter (since it was posted on the ICANN website), they make no effort to reconcile ICANN's assertions concerning its "well-known practice" of not taking any action on contention sets while Accountability Mechanisms are pending. Nor is it clear when and how much ICANN told Verisign and NDC about its alleged decision to decide or defer deciding. It is, however, undisputed that

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88 Letter from Ronald Johnston (Counsel for Verisign) and Brian Leventhal (Counsel for NDC) to Eric Enson (Counsel for ICANN) (23 Aug. 2016), **[Ex. C-102]**, p. 1.

89 Letter and attachment from Christine A. Willett (ICANN) to John Kane (Afilias) (16 Sep. 2016), **[Ex. C-50]**, p. 1.

90 Letter and attachment from Christine A. Willett (ICANN) to John Kane (Afilias) (16 Sep. 2016), **[Ex. C-50]**, p. 1 (emphasis added).

91 Letter from Akram Atallah (ICANN) to Scott Hemphill (Afilias) (30 Sep. 2016), **[Ex. C-61]**, p. 1.

ICANN *never* informed Afilias of the alleged decision until during this IRP. Verisign, in its 21 July 2020 letter to the Panel, indicates that it also was unaware of ICANN's "well-known practice"—or even of ICANN's position that it had not considered Afilias' objections *at any level*:

> Prior to its receipt of ICANN's Rejoinder, *Amici* were not aware that ICANN had not, ***at any level***, considered Afilias' objections. Although ICANN stated in its Response to the Request for IRP that its Board had not made a decision on Afilias' objections, action by the Board itself is not required in all circumstances.[92]

57. As for NDC, Mr. Rasco in his Witness Statement states:

> Since submitting [NDC's] responses [to Ms. Willett's questionnaire] in October 2016, NDC has periodically made inquiries to ICANN through the ICANN customer service portal regarding the status of .WEB. ICANN has never responded beyond a statement that the resolution of .WEB is on hold due to the pendency of accountability mechanisms or similar processes.[93]

58. Although ICANN's Bylaws provided for broad disclosure of Board activities and decision—including the publication of "[a]ll minutes of meetings of the Board" to be "approved promptly … for posting on the [ICANN] Website"[94]—there is no indication in any public ICANN document (or for that matter, any document that ICANN has produced in this IRP) concerning ICANN's alleged decision not to decide.[95] The *Amici* do not address that fact in their submissions.

59. It is undisputed that in late 2016 or early 2017, the U.S. Department of Justice ("**DOJ**") commenced an antitrust investigation into the DAA and requested that ICANN take no action on .WEB during the pendency of the investigation.[96] The DOJ's investigation closed in January 2018.[97] Afilias believed that with the DOJ investigation closed, ICANN would resume the "informed resolution" of Afilias' concerns that it

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92 Letter from *Amici* to Panel (21 July 2020), p. 2, n.1 (emphasis added).

93 Rasco Decl., ¶ 104.

94 ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018) ("**Bylaws**"), Sec. 3.5(a).

95 *See* Section VI below; *see also* note 314 below.

96 *See, e.g.*, ICANN's Response to Amended IRP Request, ¶ 49.

97 ICANN's Response to Amended IRP Request, ¶ 50.

had promised in September 2016.[98] Afilias wrote to ICANN on 23 February 2018 to "request an update on ICANN's investigation of the .WEB contention set" and also to request documents on the investigation under ICANN's Documentary Disclosure Policy ("DIDP").[99] As detailed in Afilias' Reply, ICANN never provided Afilias with any substantive response.[100] But it is now clear that ICANN was communicating with NDC and Verisign.

60. While ICANN maintains that Afilias' DIDP Request and Request for Reconsideration of the Board's denial constituted Accountability Mechanisms—leading ICANN to take no action on .WEB while these mechanisms were pending (pursuant to the alleged decision not to decide)—the record, and, in particular, the actions of the *Amici*, indicate otherwise. Thus, according to an email included in ICANN's document production, on 17 January 2018, Ms. Jessica Hooper, the Senior Manager of New gTLD Strategic Accounts at Verisign, wrote to Ms. Karla Hakansson at ICANN: Redacted - Third Party Designated Confidential Information

61. On 8 February 2018, Mr. James Bidzos, Verisign's President and CEO, announced at an earnings conference that Verisign was "now engaged in ICANN's process to move the delegation of .web

98 In addition, according to ICANN's Response to Afilias' Amended Request for IRP, ICANN closed the Donuts/Ruby Glen CEP on 30 January 2018, giving Donuts until 14 February 2018 to file an IRP, which Donuts/Ruby Glen chose not to do. *See* ICANN's Response to Amended IRP Request, ¶ 51.

99 Letter from Arif H. Ali (Counsel for Afilias) to ICANN Board (23 Feb. 2018), [Ex. C-78], p. 1.

100 *See* Afilias' Reply Memorial, ¶ 139.

101 Email Jessica Hooper (Verisign) to Karla Hakansson (ICANN) (17 Jan. 2018), [Ex. C-115], p. 2.

102 Email Jessica Hooper (Verisign) to Karla Hakansson (ICANN) (17 Jan. 2018), [Ex. C-115], p. 1.

forward."[103] Roughly one week later, on 15 February 2018, Mr. Rasco wrote to Mr. Atallah and Mr. John Jeffrey (ICANN's General Counsel), indicating that Redacted - Third Party Designated Confidential Information

62. ICANN apparently did not move forward immediately on Mr. Rasco's request because Afilias submitted its DIDP request shortly afterwards. However, contrary to ICANN's suggestion that it would defer making any decision on Afilias' objections while Accountability Mechanisms were pending, ICANN staff moved toward contracting with NDC as soon as the ICANN Board rejected Afilias' request to reconsider the denial of its DIDP request. It is not at all clear what was discussed or disclosed to the Board in this regard, or what assessment ICANN staff had undertaken of the compatibility of the DAA with the New gTLD Program Rules to allow ICANN to proceed to contracting with NDC.

63. According to another email produced by ICANN in its document production, Mr. Russ Weinstein of ICANN sent his colleagues an email on 6 June 2018 that stated:

> Wanted to give you an update re; WEB/WEBS. The Request for Reconsideration from Afilias has been denied and the contention set has been taken off of "hold."[105]

On 6 June 2018, ICANN staff notified Afilias, without any explanation or in any way addressing Afilias' concerns, that the contention set had been taken off-hold; and on 14 June 2018, ICANN staff sent NDC the

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103 VeriSign, Inc., Edited Transcript of Earnings Conference Call or Presentation (8 Feb. 2018), **[Ex. C-47]**, p. 4.

104 Email from Jose Ignacio Rasco (NDC) to Peg Rettino (ICANN) (copy to John Jeffrey and Akram Atallah (ICANN)) (15 Dec. 2018) [ICANN-WEB_001061], **[Ex. C-182]**, p. 1 (emphasis added).

105 Email from Russ Weinstein (ICANN) to Lisa Carter *et al.* (6 June 2018) [ICAN-WEB_000458], **[Ex. C-166]**, p. 1.

.WEB registry agreement—which NDC signed and returned to ICANN.[106] With Afilias having commenced the CEP process on 18 June 2018, ICANN staff put the contention set back on-hold.[107]

64. And yet—as soon as Afilias filed its IRP request on 14 November 2018—ICANN threatened to take the contention set off-hold unless Afilias sought interim emergency relief. Thus, while ICANN now asserts that its "well-known" practice is to take no action regarding a contention while Accountability Mechanisms are pending, in November 2018, ICANN's lead counsel in this IRP, Mr. Jeffrey LeVee, wrote to Afilias' lead counsel, Mr. Arif Ali, rejecting Afilias' request that ICANN keep the contention set on-hold pending the IRP. According to Mr. LeVee:

> ICANN does not agree that Afilias' commencement of the Independent Review Process ("IRP") regarding the .WEB gTLD automatically requires ICANN to place the .WEB contention set "on hold," as your letters claim. Rather, as you well know, ***it has not been ICANN's historical practice upon the filing of an IRP to automatically place, or continue, a hold on a contention set or application***, and a number of IRP claimants have sought emergency relief from the ICDR requiring ICANN to place an application or a contention set on hold.[108]

65. Accordingly, on 27 November 2018, Afilias had no choice but to file a Request for Emergency Panelist and Interim Measures of Protection (the "Emergency Request"). In opposing Afilias' Emergency Request, ICANN took ***precisely*** the opposite position from that asserted in its Rejoinder. Rather than asserting that its Board had made a decision not to decide—pursuant to a "well-known practice" not to take decisions on contention sets that are the subject of Accountability Mechanisms—ICANN argued to the Emergency Arbitrator:

> After NDC prevailed in a public auction for .WEB, Afilias and other .WEB applicants cried foul, alleging that Verisign's agreement with NDC violated the Guidebook and raised competition concerns. ***ICANN has evaluated these complaints***, some of which also have been addressed in other fora,

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106 NDC's Supplemental Brief in Support of Its Request to Participate as *Amicus Curiae* (27 Sep. 2019), ¶ 18.

107 *See* Letter from Arif Ali (Counsel for Afilias) to ICANN (18 June 2018), **[Ex. C-52]**; Email from ICANN to Arif Ali (Counsel for Afilias) (20 June 2018), **[Ex. C-53]**, p. 2.

108 Letter from Jeffrey LeVee (Counsel for ICANN) to Arif Ali (Counsel for Afilias) (26 Nov. 2018), **[Ex. C-66]**, p. 1 (emphasis added).

> including federal court litigation, a Department of Justice Antitrust Division investigation of Verisign, and ***multiple invocations of ICANN's own accountability mechanisms***. The federal court litigation was resolved in ICANN's favor, and the Department of Justice investigation concluded without any action being taken by the federal government. The time has therefore come for the auction results to be finalized and for .WEB to be delegated so that it can be made available to consumers.[109]

Of course, ICANN's advocacy to the Emergency Arbitrator was every bit as dishonest as it is to this Panel. The federal court litigation and DOJ investigation involved entirely different issues; there were not multiple invocations of ICANN's Accountability Mechanisms (there was only the CEP amicable resolution process involving Donuts/Ruby Glen, which either ICANN or the claimant could terminate at any time); and—at least according to the sworn testimony of ICANN's Board Member, Mr. Disspain—ICANN had not "evaluated" Afilias' complaints. Rather, according to Mr. Disspain, the Board "decided to await the results" of pending and anticipated Accountability Mechanisms "before considering and determining what action, if any, to take at that time."[110] The *Amici* fail to address any of these matters in embracing ICANN's new allegations about its "deferral" decision, and in joining ICANN's argument that the only issue before the Panel is whether ICANN's supposed "decision not to decide" violated its Articles and Bylaws.[111] The schizophrenia and duplicity of ICANN's positions is truly head-reeling.

66. In sum, as stated at the outset, 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

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[109] ICANN's Opposition to Afilias' Request for Emergency Panelist and Interim Measures of Protection (17 Dec. 2018), ¶ 3 (emphasis added).

[110] Disspain WS, ¶ 11.

[111] With respect to the resolution of Afilias' Emergency Request, ICANN was unwilling to pursue those proceedings until the Procedures Officer decided the question of whether the *Amici* could participate in them. By the time the Procedures Officer issued his declaration, and the matter of the *Amici*'s participation came before this Panel, ICANN apparently decided simply to leave the contention set on-hold for the duration of the IRP.

next highest bidder. The misleading and contradictory assertions by ICANN and the *Amici* as to whether ICANN "evaluated" Afilias' complaints or decided to "defer" any decision on them are irrelevant to that task, though not to assessing the trustworthiness of the factual and legal assertions made by ICANN and the *Amici*. The available evidence raises serious questions regarding the veracity of ICANN's representations to the Panel about what took place or came out of the Board workshop meetings in November 2016. The available evidence also shows that, in spite of ICANN's supposed policy, discussions were taking place between ICANN, NDC and Verisign in early 2018 regarding the delegation of .WEB, and that in June 2018, ICANN Staff proceeded with the contracting process for .WEB, even though there is nothing to suggest that any sort of evaluation was conducted as to whether the DAA is compatible with the New gTLD Program Rules, or whether NDC's failure to disclose the DAA violated the AGB, or whether its bids violated the Auction Rules, or any of the other concerns that Afilias has raised—that is, other than ICANN's representation to the Emergency Arbitrator that it had evaluated all complaints.

III. THE *AMICI* MISREPRESENT THE NATURE OF THE DAA

67. The Panel should not allow itself to be misled by the *Amici* regarding the nature and effect of the DAA.

68. *First*, the *Amici* attempt to characterize the DAA as an "executory agreement," arguing that

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This is a gross misstatement.

The key provisions of the DAA relevant to this IRP are not "executory" at all.[113] This IRP does not concern

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[112] NDC Br., ¶ 28.

[113] Executory terms are those that are to be performed contingent upon some future event. The question of whether a contract is "executory" or "executed" holds little relevance outside of bankruptcy law, as the act of filing for bankruptcy has obvious consequences where debtors and counterparties have outstanding mutually underperformed contractual obligations to each other. Under U.S. law, remedies for breaches of "executory contracts" are limited to damages, rather than specific performance, *see In re Cho*, 581 B.R. 452, 467 (Bankr. D. Md. 2018), **[Ex. CA-45]** (noting that, any nonbankruptcy rights that the plaintiffs may retain do not include the right to request specific performance); *In re Spoverlook, LLC*, 560 B.R. 358, 363 (Bankr. D. N.M. 2016), **[Ex. CA-46]** (noting that the strong majority of courts have held that parties can be forced to accept claims for money damages in bankruptcy)*; In re Aslan*, 65 B.R. 826, 830-31 (Bankr. C.D. Cal. 1986), *rev'd in part on other*

NDC's unfulfilled commitment to assign the .WEB registry agreement to Verisign. Rather, it concerns NDC's transfer of rights and obligations it held as an applicant for .WEB to Verisign upon execution of the DAA. We have detailed these transfers in our prior submissions. Redacted - Third Party Designated Confidential Information

grounds, 909 F.2d 367 (9th Cir. 1990), [Ex. CA-47]. While NDC and Verisign have mutually unperformed obligations under the DAA, Afilias' complaints against ICANN do not implicate those sections of the DAA in this IRP.

114 Redacted - Third Party Designated Confidential Information

69. *Second*, the *Amici* attempt to characterize the DAA as a "loan"[123] from Verisign to NDC or otherwise as some form of "financing agreement."[124] Again, this is a gross mischaracterization of the DAA. This was no "financing agreement." Redacted - Third Party Designated Confidential Information

No financing agreement requires the lender to pay for the privilege of loaning money to a borrower. Verisign was not "funding NDC's bid"—NDC was being paid a flat fee to buy .WEB for Verisign.

70. Indeed, the normal indicia of a creditor-debtor relationship are entirely missing from the DAA altogether. The DAA does not contain the words "lend" or "loan" or anything remotely similar. The DAA does not specify the principal of the loan, does not provide for any accrual of interest, does not set a fixed maturity date, and does not contain any demand for repayment by NDC of any monies expended by Verisign. NDC did not execute a promissory note attesting to a debt owed to Verisign.

71. *Third*, Redacted - Third Party Designated Confidential Information

that is, for example, in the event that ICANN were to reject the assignment

123 The *Amici* repeatedly state that Verisign provided a "loan" to NDC. NDC Br., ¶ 106; Verisign Br., ¶¶ 29, 52, 56, 57, 59, 74.

124 The *Amici* also repeatedly characterize the DAA as a financing agreement. Rasco Decl., ¶ 66, 78, 99; Verisign Br., ¶¶ 8, 32, 45, 53, 58.

125 DAA, [Ex. C-69], Schedule 1, Preamble.

of .WEB to Verisign.[126] Redacted - Third Party Designated Confidential Information

IV. IT IS SELF-EVIDENT THAT THE DAA VIOLATES THE NEW GTLD PROGRAM RULES

72. Far from being an ordinary financing agreement that provided for Verisign's "loan of funds" to NDC, the DAA is self-evidently an attempt to circumvent the New gTLD Program's application procedures and rules. This should have been patently obvious to ICANN Staff and the Board based upon even a cursory review of the DAA, as demonstrated by the DAA provisions that we have reproduced in Annex A hereto. The DAA violates the New gTLD Program Rules in multiple ways, which we have previously discussed.[128] For present purposes, and in light of the *Amici*'s submissions, we focus on three:

- *First*, as we set out in Section IV.A, contrary to NDC's commitment not to "resell, assign, or transfer *any of applicant's rights or obligations* in connection with the application," by concluding the DAA, NDC transferred *numerous rights and obligations* to Verisign in exchange for several million dollars.[129]

- *Second*, contrary to NDC's obligation to "notify ICANN in writing of any change in circumstances that would render *any information* provided in the application false or misleading," NDC did not disclose to ICANN the existence or terms of the DAA for over a year and, then, only after Afilias had complained to ICANN about how the .WEB contention set had been resolved.[130] As discussed in Section IV.B below, the DAA rendered significant

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126 Verisign Br., ¶ 29 Redacted - Third Party Designated Confidential Information

127 DAA, [Ex. C-69], Exhibit A, Sec. 9.

128 *See* Afilias' Amended IRP Request, Sec. 3; Afilias' Reply Memorial, Sec. III(A).

129 The Guidebook provides: "Applicant *may not resell, assign, or transfer* any of *applicant's rights or obligations in connection with the application*." AGB, [Ex. C-3], Module 6.10 (Terms and Conditions) (emphasis added).

130 The Guidebook provides: "Applicant warrants that the statements and representations contained in the application (including any documents submitted and oral statements made and confirmed in writing in connection with the application) are ***true and***

parts of NDC's .WEB application misleading at best and outright false at worst, which should have been immediately evident to ICANN upon receipt of the DAA, especially taking in to consideration statements made by NDC to ICANN only several weeks earlier.

- *Third*, contrary to NDC's obligation to submit bids at the .WEB Auction on its own behalf, and in an amount that NDC itself was willing to pay for .WEB, the DAA Redacted - Third Party Designated Confidential Information

  As discussed at Section IV.C, each of NDC's bids *were clearly invalid under* the plain and unambiguous language of the New gTLD Program Rules.

73. The New gTLD Program Rules are based on a self-evident assumption that the applicant will act on its own behalf; that the decisions it is making regarding its application are being made to advance its own interests; that it is submitting bids in a contention set resolution auction based on its own financial capabilities; in short, that it is seeking to win the registry rights for itself. Instead, the DAA permitted Verisign to secretly pursue the acquisition of .WEB, avoiding scrutiny by governments, the public, and the global internet community. It could have submitted its own .WEB application, but chose not to do so. If NDC's and Verisign's conduct is allowed to stand, it will not only gut the very purposes for which the New gTLD Program was established, it will also eviscerate the multi-year, multi-stakeholder, bottom-up policy-making process that resulted in the New gTLD Program Rules.[131]

A. NDC Assigned Multiple Rights and Obligations in its .WEB Application to Verisign

1. The New gTLD Program Rules Prohibiting the Resale, Transfer, or Assignment of Applications

74. The Terms and Conditions agreed to by NDC when it filed its application provide that NDC "may not resell, assign, or transfer any of applicant's *rights or obligations in connection with" its .WEB*

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accurate and complete in all material respects, and that ICANN may rely on those statements and representations fully in evaluating this application. Applicant acknowledges that *any material misstatement or misrepresentation (or omission of material information)* may cause ICANN and the evaluators to reject the application without a refund of any fees paid by Applicant. *Applicant agrees to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading*." AGB, [Ex. C-3], Module 6.1 (Terms and Conditions) (emphasis added).

131 Afilias' Amended IRP Request, ¶ 12, Sec. 5; Afilias' Reply Memorial, Sec. IV; Report of Jonathan Zittrain (26 Sep. 2018) ("Zittrain Report"), Secs. 6-7; Report of George Sadowsky (20 Mar. 2019) ("Sadowsky Report"), Sec. VII.

application.[132] While the Guidebook sets forth the various rights and obligations of applicants across its three-hundred plus pages, the Terms and Conditions further provide that NDC would not "acquire ***rights in connection with [.WEB]*** [until] it enters into a registry agreement with ICANN."[133] The obvious and only legitimate interpretation of the anti-assignment provision of Section 10 is that:

- Applicants may not "resell, transfer, or assign" their rights acquired or obligations assumed as applicants.
- This provision is violated when an applicant "resells, transfer, or assigns" ***any*** such right or obligation; accordingly, the provision is violated even if the applicant does not "resell, transfer, or assign" ***all*** of its rights or obligations in its application.[134]
- The rights and obligations that are the subject of this anti-assignment clause are separate and distinct from any rights the applicant may eventually acquire in the gTLD that is the subject of the application, since the latter rights do not vest in the applicant until a registry agreement for that gTLD is concluded with ICANN.
- Accordingly, the rights and obligations that are the subject of the anti-assignment clause are those rights and obligations that are set forth elsewhere in the Guidebook, and which vest or are assumed by the applicant upon the submission of its application.

75. The *Amici* attempt to obfuscate this clear and obvious reading of Section 10's anti-assignment clause by changing the relevant standard, arguing alternatively that Afilias must show that Verisign "hold[s] ***all*** rights and obligations under the Application,"[135] that the DAA transferred "ownership, management or ***control of NDC*** to Verisign,"[136] or that NDC agreed to "assign or otherwise ***transfer its***

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132 AGB, **[Ex. C-3]**, Module 6.10 (emphasis added); *see also* note 129 above.

133 AGB, **[Ex. C-3]**, Module 6.10 (emphasis added).

134 Contrary to the *Amici*'s arguments, U.S. law clearly recognizes partial assignments of "rights or obligations under [a] contract." *See Vir2us, Inc. v. Sophos Inc.*, No. 2:19CV18, 2019 WL 8886440, at *9 (E.D. Va. Aug. 14, 2019), **[Ex. CA-48]**; *see also In re Hat*, 310 B.R. 752, 756, 759 (Bankr. E.D. Cal. 2004), **[Ex. CA-49]** (finding that debtor's ex-spouse had improperly transferred her right of first refusal and that, under the agreement, her "sole function was to exercise her [rights] for a fee"). A partial acquisition of rights may constitute the acquisition of beneficial ownership under U.S. law. *See U.S. v. Smithfield Foods, Inc.*, Case 1:10-cv-00120 (D.D.C.), Complaint (21 Jan. 2010), **[Ex. CA-50]**; U.S. Department of Justice, *Smithfield Foods and Premium Standards Farms Charged with Illegal Premerger Coordination: Company Required to Pay $900,000 Civil Penalty* (21 Jan. 2010), available at https://www.justice.gov/opa/pr/smithfield-foods-and-premium-standard-farms-charged-illegal-premerger-coordination (last accessed 23 July 2020), **[Ex. CA-51]**. The U.S. Department of Justice found that the partial assignment of the rights to approve hog procurement contracts had improperly granted Smithfield "operational control over a significant segment" of Premium Standard Farm's business. *Id.*, ¶ 20.

135 Verisign Br., ¶ 3 (emphasis added).

136 Livesay WS, ¶ 19 (emphasis added).

.WEB Application to Verisign."[137] The plain language of the Guidebook is to the contrary: ***any*** transfer of ***any*** individual right or obligation that NDC held as an applicant for .WEB violates the Terms and Conditions that govern NDC's application: "Applicant may not resell, assign or transfer ***any*** of applicants rights or obligations in connection with the application."

76. As yet a further alternative, Verisign argues that NDC could not have violated the anti-assignment clause, because the first part of Section 10 provides that NDC will not acquire any rights until such time as it executes a registry agreement. Verisign's interpretation is wrong because Section 10 clearly discusses ***two distinct sets of rights***.

- Specifically, Section 10 provides that an applicant will not "***acquire rights in connection with a gTLD***" until it enters into a registry agreement for that gTLD.
- That language does not have any relevance to the subsequent provision, which sets out an independent obligation that "***[a]pplicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application***."

These are, quite plainly, two separate sets of rights and obligations: one in the application (which the applicant possesses but may not assign) and one in the applied-for gTLD (which the applicant will not acquire until it signs a registry agreement).

77. Finally, Verisign argues that the Guidebook does not specify which of the several rights and obligations assumed by applicants upon submission of an application "could possibly be subject to a resale, assignment or transfer, at least prior to the execution of a registry agreement."[138] Verisign's argument is without merit because it simply ignores the plain language of Section 10 or otherwise suggests that it is meaningless.[139] ICANN's recent letter to the Panel refused to endorse this argument. In that letter, ICANN

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137 Rasco Decl., ¶ 47 (emphasis added); Livesay WS, ¶ 20.

138 Verisign Br., ¶¶ 12-13. This argument is based on Verisign's failure to distinguish between "rights in a gTLD" and "rights and obligations in an application."

139 The canons of contractual construction prohibit interpretations that render terms meaningless. *Principal Mut. Life Ins. Co. v. Vars, Pave, McCord & Freedman*, 65 Cal. App. 4th 1469, 1483 (1998), [Ex. CA-52].

categorically states: "it is clear under the Guidebook that ***applications*** cannot be transferred to any other party."[140]

2. NDC Violated the New gTLD Program Rules by "Selling, Transferring, or Assigning" Several Right and Obligations to Verisign

78. By agreeing to the DAA, NDC improperly "resold, transferred, or assigned" several of its rights and obligations it had acquired and assumed when it applied for .WEB, thereby violating the Terms and Conditions of its .WEB application. There is no question that these rights and obligations were resold, transferred and assigned to Verisign: Redacted - Third Party Designated Confidential Information

demonstrate that the DAA was not a financing arrangement. Verisign was not "funding NDC's bid"—NDC was being ***paid to buy*** .WEB ***for Verisign***.

79. For an assignment to be effective, it "must include manifestation to another person by the owner of his intention to transfer the right, without further action, to such other person or to a third person."[141] Courts look at the "substance and not the form of a transaction" to determine whether an "assignment was intended,"[142] and so also must this Panel. The DAA makes plain that NDC "resold, assigned or transferred" several rights and obligations in its application to Verisign. ***Each right or obligation so "resold, assigned or transferred" constitutes an independent violation of the Guidebook***. These rights and obligations include:

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[140] Letter from ICANN to Panel (18 July 2020) (revised), p. 6 (emphasis added). While ICANN confirms the distinction between two sets of rights set forth in Section 10, ICANN's shorthand that "applications cannot be transferred" misstates the actual language of Section 10, which provides that applicants may not resell, transfer or assign ***"any"*** rights or obligations in the application.

[141] *Mountain of Fire & Miracles Ministries v. Oyeyemi*, No. B218591, 2012 WL 2373003, at *6 (Cal. Ct. App. June 25, 2012), [Ex. CA-53].

[142] *Mountain of Fire & Miracles Ministries v. Oyeyemi*, No. B218591, 2012 WL 2373003, at *6 (Cal. Ct. App. June 25, 2012), [Ex. CA-53].

- Obligation to Timely Amend Application:

80. Section 1.2.7 of the Guidebook required NDC to "promptly notify ICANN" if any information in its application "becomes untrue or inaccurate." While this obligation "***includes***" situations where an applicant experiences "changes in financial position and changes in ownership or control" the obligation to amend is ***not limited*** to only those changes. The broad scope of this obligation to amend is underscored by the Terms and Conditions to which NDC agreed. These Terms and Conditions required NDC to "notify ICANN in writing of ***any change in circumstances that would render any information*** provided in the application false or misleading."

81. NDC transferred control over compliance with this obligation to Verisign in the DAA.

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82. Verisign's total control over NDC's ability to disclose ***the very "change in circumstance"*** that "render[ed] any information [NDC] provided in [its .WEB] application false or misleading" transferred NDC's obligations assumed pursuant to Section 1.2.7 of the Guidebook to promptly notify ICANN of such "untrue or inaccurate" statements now contained in its application. Indeed, Verisign's control over disclosure of the existence or terms of the DAA were made an ***express exception*** to the general rule that

143 DAA, [Ex. C-69], Sec. 4(f).

144 DAA, [Ex. C-69], Sec. 10(a).

145 DAA, [Ex. C-69], Sec. 10(a).

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83. To ensure that NDC kept the existence and terms of the DAA secret from ICANN, the DAA provides that Redacted - Third Party Designated Confidential Information

84. Mr. Rasco's statement that Redacted - Third Party Designated Confidential Information is wrong. Indeed, Mr. Rasco's observation that NDC did not need to obtain Verisign's consent to communicate with ICANN, if necessary to preserve its rights as an applicant, is entirely misleading, as it does not reveal the express exemption to this rule regarding disclosures of the existence or terms of the DAA.

85. Mr. Rasco's misleading declaration is merely the latest effort by the *Amici* to rewrite what they perceive to be troublesome terms in the DAA. In their 2016 Confirmation of Understandings ("Confirmations"), which the *Amici* drafted and signed ***after*** ICANN had initiated its investigation of NDC, Verisign and NDC specifically and misleadingly cite to Section 1(k) of the DAA. They do so in an effort to support the proposition that NDC did not require Verisign's consent to take actions or communicate with ICANN as necessary to preserve its rights in its Application.[149] But, even here, Verisign and NDC misrepresent the truth, by quoting Section 1(k), ***except for the prefatory*** clause that

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This prefatory clause required

146 DAA, [Ex. C-69], Exhibit A, Sec. 1(k).

147 DAA, [Ex. C-69], Secs. 14-15.

148 Rasco Decl., ¶ 48.

149 Letter from Paul Livesay (Verisign) to Jose Rasco (NDC) (26 July 2016) [ICANN-WEB_000041 - ICANN-WEB_000042] (Confirmation of Understandings), [Ex. C-97], ¶ D.

- Right to Resolve String Contention.

86. Contention set members have the right to "reach a settlement or agreement among themselves that resolves the contention."[150] For example, contention set members have the right to withdraw their application, establish joint ventures among multiple contention set members, or otherwise agree to a private auction to determine which applicant would acquire the contested gTLD. Mr. Livesay's observation that the Guidebook and Auction Rules encourage and expressly permit contention set members to resolve string contention[151] ignores the salient fact that the Guidebook restricts this right to contention set members who are applicants for the gTLD. Verisign, contrary to how it acted, was not a member of the .WEB contention set.

87. NDC transferred control over its right to resolve the contention set to Verisign by transferring to Verisign the right to choose whether to participate in a private auction, as well as its right to withdraw its application. Redacted - Third Party Designated Confidential Information

88. The *Amici*'s argument that Verisign instructed NDC not to participate in the proposed private auction because Verisign had concerns that such auctions may constitute criminal bid rigging are belied by

150 AGB, [Ex. C-3], Module 4.1.3 (String Contention Procedures).

151 Livesay WS, ¶¶ 6-7.

152 DAA, [Ex. C-69], Sec. 4(j).

153 DAA, [Ex. C-69], Exhibit A, Sec. 1(i) (emphasis added).

the plain and unambiguous language of the DAA. If Verisign truly believed that a private auction was illegal, let alone criminal, the DAA would have included a blanket prohibition on resolving the contention set by private auction under any circumstances. Redacted - Third Party Designated Confidential Information

Accordingly, the plain language of the DAA contradicts Mr. Rasco's statement that the parties agreed that NDC would ***only*** use Verisign's funds in a public auction administered by ICANN.

89. NDC also gave up its right to decide to withdraw its application, expressly transferring it to Verisign: Redacted - Third Party Designated Confidential Information

Underscoring NDC's new role as Verisign's agent in the acquisition of .WEB, if NDC were instructed to withdraw its application, NDC would still be entitled to Redacted - Third Party Designated Confidential Information

- <u>Right to Participate in the ICANN Auction.</u>

90. If the contention set cannot be resolved voluntarily by its members, ICANN conducts, as it did here, an "auction of last resort." Only applicants belonging to the contention set have a right to participate in that auction. There is no exception allowing for "indirect" third-party participation.

91. NDC transferred several of its rights regarding its participation in the ICANN auction of last resort to Verisign. Redacted - Third Party Designated Confidential Information

154 DAA, [Ex. C-69], Exhibit A, Sec. 1(i) and Schedule 1, Sec. 2(a)(ii)(b)(3).

155 DAA, [Ex. C-69], Ex. A, Sec. 8.

156 DAA, [Ex. C-69], Schedule 1, Sec. 2(a)(iv).

157 DAA, [Ex. C-69], Exhibit A, Secs. 1(a), 1(e), 1(i), 3(g), 13.

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Again, this is inconsistent with any financing agreement we are aware of, but entirely consistent with agency or vendor agreements. Redacted - Third Party Designated Confidential Information

- Right and Obligation to Negotiate and Enter Into the .WEB Registry Agreement.

92. Winning applicants have the right and obligation to negotiate and "enter into the prescribed registry agreement with ICANN" for the applied-for gTLD. NDC transferred several of its rights regarding the registry agreement for .WEB. Redacted - Third Party Designated Confidential Information

158 DAA, [Ex. C-69], Exhibit A, Sec. 1(b).

159 DAA, [Ex. C-69], Exhibit A, Sec. 1(c).

160 DAA, [Ex. C-69], Exhibit A, Sec. 1(h).

161 DAA, [Ex. C-69], Exhibit A, Sec. 2(e).

162 DAA, [Ex. C-69], Exhibit A, Sec. 3(b).

163 DAA, [Ex. C-69], Exhibit A, Sec. 3(b).

164 DAA, [Ex. C-69], Exhibit A, Sec. 3(b).

- Right to Operate the .WEB Registry.

93. As the applicant, NDC was applying for the right to operate the .WEB Registry. NDC transferred this fundamental right to Verisign. Contrary to the *Amici*'s protestations, there is no set of facts under the DAA that would have permitted NDC to operate .WEB, short of the DAA being terminated prior to the .WEB Auction.[165]

94. Redacted - Third Party Designated Confidential Information

[165] While NDC argues that it was not required to update its .WEB Application because Redacted - Third Party Designated Confidential Information (NDC Br., ¶¶ 104-107; Rasco Decl., ¶ 59), NDC concedes that the only set of facts under which an amendment to its application would not be required was if the DAA ceased to exist. This is a ludicrous position and Mr. Rasco's argument that "NDC was under no obligation to update its .WEB application upon execution of the DAA" because "ICANN had yet to even conclude whether or how the .WEB Contention Set would be resolved" (Rasco Decl., ¶ 59.), does not explain why NDC did not disclose the DAA to ICANN once ICANN had set the date for the .WEB Auction in April 2016. Mr. Rasco's further admission that "complete transparency with ICANN" was appropriate, Redacted - Third Party Designated Confidential Information is telling. *Id.*

[166] DAA, [Ex. C-69], Exhibit A, Sec. 3(h) (emphasis added).

[167] DAA, [Ex. C-69], Exhibit A, Sec. 9 (emphasis added).

[168] DAA, [Ex. C-69], Exhibit A, Sec. 10 (emphasis added).

95. Contrary to the *Amici*'s further misrepresentations of the plain terms of the DAA, NDC did not have a right, under the DAA, to obtain funding and repay "Verisign's loan."[169] This is because ***Verisign also acquired, in the DAA, all economic rights in .WEB, which controlled even if ICANN prohibited NDC from transferring .WEB to Verisign***. Redacted - Third Party Designated Confidential Information

96. Ignoring the plain language of the DAA, Mr. Livesay states that Verisign's rights were no different than a lender who takes a "security interest" in the borrower's property.[171] But lenders who force a sale of a secured asset are only entitled to recover the outstanding principal on the loan, plus any accrued interest—that is, "security" for the loan itself.[172] To the extent a surplus remains after a lender's security interest is discharged, the excess reverts to the debtor.

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169 NDC Br., ¶ 106 Redacted - Third Party Designated Confidential Information

170 DAA, [Ex. C-69], Schedule 1, Sec. 3(b).

171 Livesay WS, ¶ 33.

172 Under Virginia law, which governs the DAA, a lender discharges its security interest in real property when proceeds from a foreclosure sale of the asset exceeds the loan's value. *See, e.g., In re O'Neill Enterprises, Inc.*, 547 F.2d 812, 814 (4th Cir. 1977), [Ex. CA-54] ("The[] security interest in the insurance policies was discharged when the real estate was sold, by virtue of [the parties'] agreement, at foreclosure for a price in excess of the first lien debt.").

97. The DAA, in contrast, provided Verisign with considerably more than just a "security interest" in .WEB. Redacted - Third Party Designated Confidential Information

98. In sum, Verisign's right to all of the upside from any forced sale of .WEB, combined with the lack of any obligation by NDC to repay Verisign for even the Auction Deposit, puts the lie to the *Amici*'s argument that the DAA represented nothing more than a "financing deal" and the monies expended by Verisign nothing more than a "loan" to NDC.

B. NDC Violated the AGB by Failing to "Promptly Notify" ICANN About the Terms of the DAA.

99. Regardless of whether NDC improperly "resold, transferred or assigned" its obligation to update its application to reflect changed circumstances that rendered any information in its application "untrue or misleading," NDC, as the applicant, remained under an obligation to do so.

1. The New gTLD Program Rules Regarding Updating Applications

100. The rules regarding the obligation to update an application are clear on their face. ***First***, Section 1.2.7 required NDC to "promptly notify ICANN" if "***information previously submitted by [NDC] becomes untrue or inaccurate***."[174] ***Second***, the Terms and Conditions required NDC "to notify ICANN in writing of ***any change in circumstances*** that would render ***any information provided in the application*** false or misleading."[175] There are ***no exceptions*** to these rules, and a violation of these rules specifically gave ICANN the right to reject an application.[176]

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173 Given that a private equity investor recently offered $1 billion to acquire .ORG, a $500 million valuation for .WEB is conservative. *See* Andrew Allemann, "Ethos paid $1.135 billion for .Org," *Domain Name Wire* (29 Nov. 2019), available at https://domainnamewire.com/2019/11/29/ethos-paid-1-135-billion-for-org/ (last accessed 23 July 2020).

174 AGB, [Ex. C-3], Sec. 1.2.7 (emphasis added).

175 AGB, [Ex. C-3], Sec. 6.1 (emphasis added).

176 As discussed in Afilias' Reply, ICANN does not have unfettered discretion in exercising this right. Afilias' Reply Memorial, ¶ 83. ICANN's right to reject an application must be exercised consistently with its Bylaws. *See* Section V below.

2. NDC Violated the AGB by Failing to Update its Application to Account for the "Changed Circumstances" Created by the DAA

101. Following its execution of the DAA, several provisions of NDC's .WEB application were indisputably "inaccurate"[177] or "misleading,"[178] if not outright "untrue"[179] or "false."[180]

102. For example, Section 18, which describes NDC's business plan for .WEB, contains numerous false and misleading statements. Specifically, NDC wrote that "[p]rospective users benefit from the long-term commitment of a proven executive team that has a track-record of building and successfully marketing affinity TLD's (*e.g.*, .CO targeting innovative businesses and entrepreneurs)."[181] Section 18 contains multiple references to this "proven executive team" and .CO's track record, including the representation that "[w]e plan to implement a very similar strategy for .WEB in its launch, operation, promotion and growth."[182] This "proven executive team" would have no role, under any circumstances, for the operation of the .WEB registry. Accordingly, this statement is at best "misleading" if not outright "false."

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177 A statement is inaccurate if it is "not accurate"; "faulty." *Merriam-Webster Dictionary* (on-line version): inaccurate, available at https://www.merriam-webster.com/dictionary/inaccurate (last accessed 21 July 2020), **[Ex. CA-55]**.

178 A statement is "misleading" if it is deceptive, or tending to mislead or create a false impression. "Misleading" means "leading or tending to lead into error; causing to err; deceiving." *Merriam-Webster Dictionary* (on-line version): false & misleading, **[Ex. C-95]**.

179 A statement is "untrue" if it is not according with the facts. "Untrue" means "not faithful; disloyal; not according with a standard of correctness; not level or exact; not according with the facts; false." *Merriam-Webster Dictionary* (on-line version): untrue, available at https://www.merriam-webster.com/dictionary/untrue (last accessed 21 July 2020), **[Ex. CA-56]**.

180 A statement is "false" if it is untrue, not factual or factually incorrect. "False" means "not true; not conformable to truth; expressing what is contrary to fact or truth; incorrect; wrong; mistaken; as a false report." *Merriam-Webster Dictionary* (on-line version): false & misleading, **[Ex. C-95]**.

181 NDC .WEB Application, **[Ex. C-24]**, Sec. 18(2).

182 NDC .WEB Application, **[Ex. C-24]**, Sec. 18(2). Mr. Rasco states that in completing Section 18, NDC described how it envisioned that ".WEB might be successfully and productively introduced and used to the benefit of consumers." Rasco Decl., ¶ 14. At Section 18, NDC wrote: "The mission of .WEB is to provide the internet community at-large with ***an alternative "home domain"*** for their online presence." NDC .WEB Application, **[Ex. C-24]**, Sec. 18(1) (emphasis added). Further, NDC wrote: "The basic product (a domain) has not changed much, and until now, there have been ***few feasible alternatives to the commercial TLDs.***" *Id.*, Sec. 18(2) (emphasis added). The dominant, and only generic commercial TLD, of course, has always been .COM, which was shorthand for "COMMERCIAL". Zittrain Report, ¶ 18. Mr. Rasco's further statement—that "NDC's subjective views as to the 'mission/purpose' of gTLDs, including .WEB, and how .WEB might benefit consumers and others have not changed, irrespective of who operates .WEB"—rings hollow if that operator is Verisign. Rasco Decl., ¶ 16. Indeed, Verisign admits that its interest in .WEB was the result of "the inventory of available domain names for new registrations in .COM" decreasing, while demand for domain names has continued to increase. Livesay WS, ¶ 4. This suggests that contrary to Mr. Rasco's vision of .WEB as a competitor to .COM, Verisign views .WEB as a complement, which is consistent with how Verisign has marketed .NET. Sadowsky Report, n. 23.

103. Moreover, part of .CO's "strategy" had been to compete with Verisign's .COM. .CO's marketing materials state:

> .COM is the legacy domain extension with more than 100 million registrations. Stick with .com if you're OK with the status-quo. .CO on the other hand is fresh, shorter, social, and... it's available! With an increasing number of people web browsing on mobile devices, the need for short and memorable web addresses has never been so important. In essence, if you want something innovative and cutting edge, go with .CO.[183]

104. Any reasonable person reviewing Section 18 would necessarily conclude that the team that had been behind the launch and development of .CO would also be behind the launch and development of .WEB, and that .WEB would be positioned to compete with .COM. Following NDC's execution of the DAA, this was no longer true and, by the plain and unambiguous terms of the Guidebook, required NDC to "promptly notify ICANN" of the "changed circumstances" caused by the its agreement with Verisign.

105. In addition to Section 18, NDC represented in Section 23 that it had "partnered" with Neustar "to provide back-end services for the .WEB registry."[184] Indeed, much of the information provided in NDC's application was based on technical information provided by Neustar. Any reasonable person reviewing NDC's .WEB application would necessarily conclude that Neustar was going to provide the back end registry services for .WEB if NDC was awarded the gTLD. Following execution of the DAA, however, this was "untrue." If NDC prevailed at the .WEB auction, it was obligated to assign the registry agreement to Verisign or, in the event that it was unable to do so, sell it to a third party. As demonstrated above,[185] these options were mandatory and no exception was made for the possibility that NDC could simply repay Verisign the amounts expended on acquiring .WEB to keep the registry for itself. Accordingly, there were no circumstances under which Neustar would be providing back end registry services for .WEB and significant

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183 *.Co is Marketed as a "Fresh, Shorter, Social" and "Available" Alternative to .com*, .Co (Sep. 22, 2013), http://www.go.co/about/faq/ (last accessed May 6, 2020), [Ex. KM-10], p. 1.

184 NDC .WEB Application, [Ex. C-24], Secs. 18(3), 23(1), 25(1).

185 *See* Section IV(A) above.

portions of Sections 23 through 30, which are all admittedly based on information provided by Neustar, were thus rendered "inaccurate" or "misleading," if not outright "untrue" or "false." NDC was therefore obligated to "promptly notify ICANN" of the "changed circumstances" caused by its agreement with Verisign.

106. NDC, however, failed to do that. The DAA was executed on August 25, 2015. But the DAA was first provided to ICANN by Verisign only because ICANN asked for it in light of Afilias' complaints, ***a year later*** on August 23, 2016. Consequentially, the global internet community, including Afilias, was left to believe, going into the .WEB auction, that NDC intended to acquire .WEB for itself, to compete with .COM, with Neustar providing back-end registry services, when, in fact, that was no longer true.

107. NDC's defense of its conduct is premised on three false readings of the Guidebook. ***First***, NDC is wrong that the Guidebook required applicants to update their applications only if there are changes to the applicants' management or ownership.[186] The plain language of the Guidebook imposes an obligation to notify ICANN if "***any information***" contained in the application becomes "false or misleading."

108. ***Second***, NDC is wrong that ICANN does not require applicants to update Section 18 of the application that details the applicant's business plan for the gTLD.[187] The Guidebook does not exempt Section 18 from the obligations imposed on applicants to "promptly notify ICANN" of any changes needed to correct information in their applications that had become "untrue," "inaccurate," "false," or "misleading." Nor does the Guidebook restrict that obligation to the updating of only the information that is relevant to the formal evaluation criteria for applicants. Indeed, ICANN admits that the information provided in Section 18 is "relevant to the Program as ***it allows the community to comment on the application*** (during the public comment period) based on the applicant's statement of the mission and purpose and how the gTLD is intended to be operated."[188] For example, ICANN notes that "advice from ICANN's Government Advisory

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186 NDC Br., ¶ 25.

187 NDC Br., ¶¶ 17, 107; Rasco Decl., ¶¶ 18-20.

188 Letter from ICANN to Panel (18 July 2020) (revised), pp. 3-4 (emphasis added).

Committee [GAC] … may change the eligibility of an application."[189] The GAC has, in fact, issued several "early warning notices" regarding the New gTLD Program based on competition concerns.[190]

109. Despite the clarity of the Guidebook, as confirmed by ICANN, Mr. Rasco improperly reads an exemption into the Guidebook. Mr. Rasco testifies: "Section 18 responses are not a material part of evaluating a particular application and, moreover, are not subject to subsequent enforcement by ICANN in the event those responses differ from how or by whom a domain is ultimately operated."[191] Accordingly, ***NDC admits that its response to Section 18 was no longer true or misleading.*** But even if NDC were correct, and Section 18 was in fact exempt from the obligations imposed by Section 1.2.7 of the Guidebook and the Terms and Conditions, NDC also failed to update Sections 23-30 of its application, which provided detailed responses regarding the technical aspects of how NDC would operate the .WEB registry. ***There is no dispute that the technical disclosures in an application were one of the primary evaluation criteria*** and ***NDC offers no explanation for its uncontested failure to update this technical information*** once the DAA was signed and Verisign, not Neustar, would be providing the back end registry services for .WEB if NDC prevailed at the auction.

110. ***Third***, NDC is wrong that prior applicants have failed to update their applications in analogous situations. As discussed in Section IV.D below, there are no analogous prior applications and each of the examples cited by the *Amici* demonstrate how keeping the DAA secret from ICANN and the public fundamentally undermined the New gTLD Program Rules.

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189 Letter from ICANN to Panel (18 July 2020) (revised), p. 6.

190 *See* ICANN/GAC, *Activities: GAC Early Warnings* (last updated 19 Feb. 2019), available at https://gac.icann.org/activity/gac-early-warnings (last accessed 23 July 2020). In particular, the Government of Australia submitted several early warning notices based on competition concerns.

191 Rasco Decl., ¶ 20.

3. NDC Intentionally Failed to Disclose the DAA Prior to the Auction.

111. Compounding its failure to voluntarily disclose the terms of the DAA to ICANN as required by the Guidebook, NDC further intentionally misled ICANN as to the existence of any agreement with Verisign prior to the .WEB Auction. Mr. Rasco's attempts to finesse how he responded to ICANN's inquiries is telling.

112. On June 27, 2016, Mr. Erwin of ICANN's New gTLD Operations group emailed Mr. Rasco of NDC regarding complaints received from a member of the contention set,[192] requesting confirmation that there had not been any changed circumstances that needed to be reported to ICANN. Mr. Erwin's request was broadly stated, demanding NDC to confirm whether it needed to report to ICANN *any changes* to its application, expressly paraphrasing the language of Section 1.2.7 when he stated that NDC was obligated to report to ICANN "*any information that is no longer true and accurate*" in its .WEB application.

113. Mr. Erwin's request clearly required NDC to disclose the existence and terms of the DAA. We do not know what communications took place between NDC and Verisign regarding this inquiry from ICANN, but this is something that NDC could not do without Verisign's consent without breaching the DAA and incurring a potential liability of significant liquidated damages. Accordingly, Mr. Rasco chose (or was directed by Verisign) to reply only to the part of Mr. Erwin's request that did not require him to disclose the existence of the DAA:

> I can confirm that there have been no changes to the NU DOT CO LLC organization that would need to be reported to ICANN.[193]

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192 NDC states, without evidence, that Afilias joined in or otherwise furthered Donut's efforts to delay the ICANN .WEB Auction. NDC Br., ¶¶ 43, 49. This is untrue. While Donuts solicited Afilias' support in lobbying ICANN to delay the auction, Afilias, relying on the truthfulness of information in NDC's application, refused to do so. Thereafter, while Donuts sought to litigate its dispute with ICANN's handling of the .WEB Auction, Afilias sought to work with ICANN. Only when it became clear that ICANN had refused to even consider the merits of Afilias' complaints—which ICANN now admits is true—that Afilias began the process of commencing this IRP.

193 Emails from Jared Erwin (ICANN) to Jose Ignacio Rasco (NDC) (27 June 2016), [Ex. C-96].

114. Notably, Mr. Rasco declined to confirm whether or not there were any other changes to its .WEB application that were required to be notified to ICANN, as Mr. Erwin had requested.[194] Given the extreme lengths to which NDC and Verisign had gone to keep the terms of the DAA secret from ICANN, Afilias, the global internet community, and the public, Mr. Rasco's intentionally evasive answer is hardly surprising. Even after receiving a specific request from ICANN to disclose whether "*any information*" in its .WEB application had become "untrue or inaccurate," NDC intentionally declined to do so.

C. NDC Violated the AGB by Submitting Invalid Bids at the .WEB Auction

115. The Guidebook provides that "[o]nly bids that comply with *all aspects of the auction rules* will be considered valid."[195] Where an applicant fails to submit a valid bid, "the bid is taken to be an exit bid at the start-of-round price for the current auction round."[196] Accordingly, if an applicant submits an invalid bid, the bid is treated like an "exit bid" and the applicant may not proceed to the next round of bidding.[197]

116. The bids submitted by NDC at the .WEB auction violated Rules 12, 13 and 32 of the Auction Rules. Rule 12 provides: "Participation in an Auction is limited to Bidders." Rule 12 further provides that Bidders are either the Applicant or an entity designated to bid on behalf of the Applicant (a "Designated Bidder").[198] Rule 13 provides that "each Bidder shall nominate up to two people … to bid on ***its behalf*** in the Auction."[199] There are no provisions that allow a Bidder to bid on behalf of a third party, as third parties are not permitted to participate in an auction under Rule 12. Finally, Rule 32 provides that "[a] bid represents a price, which a Bidder is willing to pay to resolve string contention within a Contention Set in favor of its

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194 Mr. Rasco's statement that Redacted - Third Party Designated Confidential Information strains credulity, especially in light of Mr. Rasco's statement that he was aware that Dot Tech had submitted a change request and had amended its application immediately upon announcement of its deal to sell .TECH to Radix. Rasco Decl., ¶¶ 44, 78.

195 AGB, [Ex. C-3], Sec. 4.3.1(5) (emphasis added).

196 AGB, [Ex. C-3], Sec. 4.3.1(7).

197 AGB, [Ex. C-3], Sec. 4.3.1(7).

198 Power Auctions LLC, *Auction Rules for New gTLDs: Indirect Contentions Edition* (24 Feb. 2015) ("Auction Rules"), [Ex. C-4], Rule 12.

199 Auction Rules, [Ex. C-4], Rule 13 (emphasis added).

Application."[200] Since third parties are not permitted to participate in an auction under Rule 12, there are no provisions that permit a Bidder to submit a bid that reflects what a third party is willing to pay to resolve the string contention.

1. Each of NDC's Bids Were Invalid Because NDC Did Not Comply With "All Aspects of the Auction Rules"

117. The DAA provided for Verisign to exercise total and complete control over NDC's conduct during the .WEB Auction. Redacted - Third Party Designated Confidential Information

Mr. Livesay thereby concedes that the bids represented what Verisign, not the Bidder NDC, was willing to pay—a clear violation of the Auction Rules. Mr. Livesay further concedes that Redacted - Third Party Designated Confidential Information

200 Auction Rules, [Ex. C-4], Rule 32.

201 DAA, [Ex. C-69], Sec. 10.

202 DAA, [Ex. C-69], Exhibit A, Sec. 2(d).

203 DAA, [Ex. C-69], Exhibit A, Sec. 2(e).

204 DAA, [Ex. C-69], Exhibit A, Sec. 1(h).

205 Rasco Decl., ¶¶ 98-100; Livesay WS, ¶ 37.

206 Livesay WS, ¶ 37 (emphasis added).

207 Livesay WS, ¶ 37 (emphasis added).

118. The *Amici* claim that these control rights were of the sort that were "reasonably required to protect any lender in such a bidding process."[208] But, as discussed above, Verisign was not a "lender" any more than NDC was a "borrower."

119. The DAA fundamentally changed the nature of the bids NDC submitted at the .WEB Auction. Had NDC received a true loan, and was therefore obligated to repay it, NDC would still be in control of deciding when to bid and how much to bid, until it reached the limits of what it could afford to do. At the end of the day, NDC would have been obligated to repay the bank or whatever lender it was dealing with the principal and any accrued interest, regardless of whether NDC had prevailed or not at the auction. But at the .WEB Auction, NDC was not making any of those decisions, because it was not obligated to repay any of the amounts it was bidding. Verisign was making all these decisions, because Verisign was spending its money to acquire .WEB and had no recourse against anyone else to force repayment.

120. Redacted - Third Party Designated Confidential Information

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[208] Verisign Br., ¶ 60.

[209] Mr. Rasco's statement that he did not intend by this statement Redacted - Third Party Designated Confidential Information

Mr. Rasco's further explanation that he understood that by Redacted - Third Party Designated Confidential Information is not credible. *See* Rasco Decl., ¶ 62; *see also* Livesay WS, ¶ 34. Redacted - Third Party Designated Confidential Information

D. *Amici's* Examples of Market Practice Are Inapposite

121. The various "example of market practices" cited by the *Amici* do nothing to excuse the *Amici*'s conduct in entering into the DAA and keeping it secret from the global Internet community. To the contrary, the examples they cite confirm that disclosure to ICANN was required. Further, not a single one of the examples reflects the level of control that the DAA gave Verisign over NDC's application. Notably, ICANN has taken no position on the legitimacy of the examples cited by the *Amici* or whether they support the *Amici*'s contention of long-standing market practices that ICANN has found acceptable.

1. Donuts and Demand Media

122. As the *Amici* note, Demand Media entered into a partnership with Donuts with respect to 107 of the 307 gTLDs applied for by Donuts. But the *Amici* are wrong that this fact was not disclosed to ICANN or to the general public.

123. Donuts was founded by two former senior executives of Demand Media, so the relationship between Donuts and Demand Media was clear from the outset. Indeed, questions were raised in major media outlets ***in 2012*** as to whether Donuts had been established to secure gTLDs for Demand Media, which may have had trouble passing ICANN's evaluation as a result of its history of enforcing cybersquatting rules.[210]

124. Moreover, Donuts' various New gTLD applications—unlike NDC's .WEB application—***expressly disclosed its partnership with Demand Media***. For example, Donuts applied for .CITY through its subsidiary Snow Sky LLC. There was no question that Donuts was behind the application, since the contact persons listed in the application identified themselves as Donuts executives with Donuts email addresses. Moreover, in Section 23 of its .CITY application, Donuts stated:

> The following response describes our registry services, as implemented by Donuts and our partners. ***Such partners include Demand Media Europe***

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[210] *See* Craig Timberg and James Ball, "Donuts Inc.'s major play for new Web domain names raises eyebrows," *Washington Post* (24 Sep. 2012), available at https://www.washingtonpost.com/business/technology/donuts-incs-major-play-for-new-web-domain-names-raises-eyebrows/2012/09/24/c8745362-f782-11e1-8398-0327ab83ab91_story.html (last accessed 21 July 2020).

> *Limited (DMEL) for back-end registry services* … For simplicity, the term "company" and the use of the possessive pronouns "we", "us", "our", "ours", etc., all refer collectively to Donuts and our subcontracted service providers.
>
> DMEL is a wholly-owned subsidiary of DMIH Limited, a well-capitalized Irish corporation whose ultimate parent company is Demand Media, Inc., a leading content and social media company listed on the New York Stock Exchange (ticker: DMD).[211]

Accordingly, any reasonable person reading Donuts' .CITY application would have understood that Donuts had a partnership with Demand Media.[212] This disclosure allowed members of the global internet community to raise timely objections to Donuts' various applications. For example, one objector wrote to ICANN's Board, Staff and Government Advisory Committee ("GAC") in ***July 2012*** and petitioned ICANN to reject Donuts' applications because there was, in 2012:

> [S]trong evidence that Donuts is merely an alter ego of, and working in concert with, Demand Media; evidence should lead to the conclusion that Donuts should fail ICANN's Background Screening for the same reason Demand Media should fail.[213]

125. The Donuts/Demand Media example is therefore instructive. Donuts timely disclosed its partnership with Demand Media, a partnership that raised serious questions regarding whether Donuts' applications should have been allowed. That timely disclosure allowed interested parties to raise objections to ICANN so that they could be vetted before the gTLDs were awarded to Donuts.

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211 *See* New gTLD Application Submitted to ICANN by Snow Sky, LLC, Application ID 1-1389-12139 (13 June 2012) (emphasis added), available at https://gtldresult.icann.org/applicationstatus/applicationdetails:downloadapplication/842?t:ac=842 (last accessed 22 July 2020). Counsel has confirmed that at least several dozen Donuts New gTLD applications contain the same or substantially the same language as quoted from the .CITY application. The *Amici* therefore misrepresent to the Panel that Donuts did not disclose its partnership with Demand Media. That partnership was disclosed, as it should have been, right in the application itself.

212 Mr. Livesay's representation that he researched the details of the Donuts/Demand Media deal does not square with his belief that Verisign could permissibly conceal its partnership with NDC from ICANN and the public. Livesay WS, ¶ 8. Similarly, Mr. Livesay's representations notwithstanding, Donuts' ownership of its special purpose vehicles were expressly disclosed on each of its applications. Mr. Livesay identifies no applications where the acquiring party ***concealed*** its identity behind a special purpose vehicle, which would have violated the Guidebook by preventing ICANN from conducting an evaluation of the prospective registry operator.

213 *See* Letter from Jeffrey Stoler to Stephen Crocker *et al.* (ICANN) (28 July 2012), available at https://www.icann.org/en/system/files/correspondence/stoler-to-crocker-et-al-28jul12-en.pdf (last accessed 22 July 2020), p. 2.

126. In contrast, very likely at Verisign's behest, NDC kept its partnership with Verisign secret, depriving the public and the other members of the .WEB contention[214] set of the information necessary to raise timely and detailed objections regarding Verisign's proposed acquisition of .WEB.[215] NDC kept this information secret for a very good reason—if ICANN invalidated NDC's application prior to the .WEB Auction, Redacted - Third Party Designated Confidential Information

127. Verisign also had good reasons to keep the DAA secret until after the registry agreement had been signed. As the *Amici* allude to in their papers, ICANN, at the time the DAA was consummated, had never rejected an assignment of a registry agreement. There is a good reason for that: ICANN's authority to block a proposed assignment is extremely limited.[216] Verisign rightly believed that it would face greater scrutiny if its agreement with NDC became known prior to the .WEB Auction than at any time afterwards.

2. .BLOG

128. Tellingly, the *Amici* do not provide ***any*** details regarding the agreement between Primer Nivel and Automattic regarding .BLOG. In particular, we do not know the structure of Automattic's funding arrangement with Primer Nivel, whether Primer Nivel incurred any debt obligations, whether Premier Nivel transferred any of its rights or obligations in its application to Automattic, or whether Premier Nivel retained

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214 Redacted - Third Party Designated Confidential Information DAA, [Ex. C-69], Schedule 1, Sec. 2(ii)(b)(3). It is very unlikely that this arrangement would not have been highly relevant to the other .WEB contention set members in terms of deciding whether and how to participate in a private auction. When various contention set members sought to press NDC to participate in a private auction, it is likely that none of them knew that NDC no longer had the liberty to make its own decision whether or not to participate. Nor would they have known that some of the money they would have bid would potentially be on-paid to Verisign.

215 Two members of the .WEB contention set (not Afilias) complained to ICANN in advance of the .WEB auction, demanding that the auction be postponed to allow ICANN to conduct a thorough investigation: "To do otherwise would be unfair as we do not have transparency into who leads and controls that applicant as the auction approaches." NDC Br., ¶ 46.

216 In considering a request for assignment, ICANN focuses simply on "whether the transferee organization has the requisite financial and technical ability to operate a gTLD." Declaration of Christine A. Willett (17 Dec. 2018), ¶ 34; *see also* ICANN, Assignment: Change of Control of Registry Operator (29 Jan. 2016), available at https://www.icann.org/resources/change-of-control (last accessed 13 July 2020), [Ex. C-129].

full discretion to resolve the contention set and bid as it chose at the .BLOG auction. Absent those facts, it is impossible to determine whether Premier Nivel similarly violated the Guidebook.[217]

129. Moreover, even assuming, *arguendo*, that the Automattic-Primer Nivel agreement was identical to the DAA, Primer Nivel's conduct does not excuse NDC's violations. ICANN's failure to investigate and reveal the facts regarding .BLOG are further evidence of ICANN's dereliction of duty, not a free pass to violate the Guidebook: one possible example out of 1,200 does not constitute industry practice. Moreover, while Afilias was a member of the .BLOG contention set, Afilias was not the runner-up at the .BLOG auction. It therefore had no incentive to initiate an IRP, and incur substantial legal fees, simply to secure .BLOG for Google, the runner-up.

130. The facts regarding .BLOG demonstrate why Verisign chose to conceal its agreement with NDC until after NDC had secured the right to execute a registry agreement and why Google may not have sought to challenge the result of the .BLOG auction. Like Verisign, Google is a prominent entity in the Internet sector and, for this reason, its pursuit of a large number of gTLDs raised serious concerns about the competitive implications of its various applications, despite the fact that Google was not yet a major player in the registry business. The Australian Government, through the GAC, issued an Early Warning Notice regarding Google's .BLOG application. In relevant part, that notice provided:

> Charleston Road Registry Inc. is proposing to exclude any other entities, including potential competitors, from using the TLD. Restricting common generic strings for the exclusive use of a single entity could have unintended consequences, including a ***negative impact on competition***.

Like Verisign, Google could have "hidden in the weeds" and disguised its pursuit of .BLOG in any number of ways. But Google, unlike Verisign, was transparent about its intent and, perhaps due to the GAC's input,

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[217] We note that Primer Nivel first sought to assign .BLOG to Automattic nearly a year after the .BLOG auction had concluded. This suggests that the facts regarding .BLOG are substantially different from those concerning .WEB. Kevin Murphy, "WordPress reveals IT bought .blog for $19 million," *Domain Incite* (13 May 2016), available at http://domainincite.com/20440-wordpress-reveals-it-bought-blog-for-19-million (last accessed 22 July 2020); *see also* MATT MUELLENWEG, UNLUCKY IN CARDS: .BLOG (12 May 2016), https://ma.tt/2016/05/blog/.

ultimately abandoned its pursuit of many gTLDs. Verisign, however, avoided confronting any competitive concerns about its pursuit of .WEB by "hiding in the weeds" until such time as it could avoid scrutiny by the GAC.[218]

3. Radix and .TECH

131. The draft Radix/Dot Tech. agreement[219] reveals that Radix's deal with Dot Tech differed significantly and materially from the DAA, something that was known to Verisign at the time the DAA was drafted.[220] Radix contracted to acquire the applicant Dot Tech, in the event that the latter was successful at the .TECH auction. Dot Tech, however, was completely unrestrained in its dealings with the other members of the .TECH contention set: Dot Tech was free to enter into a private auction, could determine whether, when and how much to bid during any given round of any auction, could decide to withdraw its application, and could agree to enter into any form of settlement with any other contention set member.[221] More importantly, if Dot Tech succeeded in securing .TECH (the gTLD) for less than the sale price of Dot Tech (the company), Dot Tech's owners kept the balance, not Radix. Accordingly, Radix was not a lender to Dot Tech and did not fund Dot Tech's bids. Dot Tech's bids, unlike NDC's, properly reflected what Dot Tech was willing to bid for .TECH and were submitted solely on Dot Tech's behalf.

132. Moreover, as soon as the Radix/Dot Tech deal closed, and Radix acquired its interest in Dot Tech, Dot Tech filed a change request form with ICANN, allowing ICANN to conduct a reexamination of Dot

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218 We note that Automattic's acquisition of .BLOG did not raise any competitive concerns, since Automattic did not and does not control any other gTLD registries.

219 Dot Tech, Sale and Purchase Agreement (*undated*), [Livesay WS (1 June 2020), Ex. C].

220 Livesay WS, ¶ 14.

221 *See* Dot Tech, Sale and Purchase Agreement (*undated*), [Livesay WS (1 June 2020), Ex. C]. The Radix/Dot Tech agreement was a true "executory agreement" in all respects. In the event that Dot Tech acquired the rights to .TECH, Radix agreed that it would immediately close on its agreement to purchase Dot Tech. *Id*., p. 4. Until that time, the parties owed no obligations to each other. And in the event that the deal did close, Dot Tech's former owners would be paid the purchase price for their company, regardless of how much it had cost to acquire .TECH. As discussed above, NDC sold several rights and obligations in its application to Verisign the moment that the DAA was signed. Redacted - Third Party Designated Confidential Information while Dot Tech was not paid any fees under its agreement.

Tech's revised .TECH application, which was amended a second time in November 2014.[222] That change request was approved and Dot Tech's revised application passed ICANN's reexamination in January 2015. Accordingly, Dot Tech afforded ICANN a full opportunity to reconsider its application in full, after it had "promptly notified ICANN" of its sale to Radix, and prior to entry into any registry agreement. As required by the Guidebook, Radix filed a change request with ICANN and submitted two amended applications in October and November 2014.

133. NDC, in contrast, did not follow these rules. In sum, despite Mr. Livesay's admission that he had received and reviewed the .TECH agreement prior to drafting the DAA, Mr. Livesay chose to include terms that were materially different from the .TECH agreement and which clearly violated the Guidebook.[223]

4. Other Examples

134. The *Amici* note that the secondary market for gTLDs is robust, and that registry agreements are frequently assigned to third parties. This is not strictly true. Discounting the back and forth assignments that occurred between Donuts and Demand Media, there have been relatively few other assignments. That said, it is true that there have been other assignments of registry agreements and the *Amici* identify several that involved Afilias.[224] However, in each of these cases, the agreement to assign the registry agreement

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[222] The two amendments to Dot Tech's .TECH application suggest that the first had been submitted in some haste, which suggests that the deal between Radix and Dot Tech had been concluded post-auction. This second revised application contained all of the technical information needed for ICANN's reexamination. *See* New gTLD Application Submitted to ICANN by Dot Tech LLC, Application ID 1-1670-76346 (13 June 2012), [Rasco Decl. (1 June 2020), Ex. D]; New gTLD Application Submitted to ICANN by Dot Tech LLC, Application ID 1-1670-76346 (13 June 2012) (revised), [Rasco Decl. (1 June 2020), Ex. E]; *see also* New gTLD Application Submitted to ICANN by Dot Tech LLC, Application ID 1-1670-76346 (revised version 3, posted on 13 Nov. 2014), available at https://gtldresult.icann.org/applicationstatus/applicationchangehistory/548 (last accessed 23 July 2020).

[223] Mr. Livesay also attached to his Declaration a draft agreement from Google regarding .WEB. The terms of this agreement are also starkly different from the DAA. Importantly, the Google agreement provided that Google, ***in its sole discretion***, could provide ICANN and/or the other contention set members notice of its deal with Verisign. Google, Agreement to Withdraw a .TLD Application (*undated*), [Livesay WS (1 June 2020), Ex. B], Sec. 1.
Redacted - Third Party Designated Confidential Information
Redacted - Third Party Designated Confidential Information
. DAA, [Ex. C-69], Sec. 10.

[224] The *Amici* cite the transactions that concern .MEET, .PROMO, .ARCHI, and .SKI. The *Amici* also cite Afilias' "Buy Any Car" campaign, which specifically targeted existing registries, not applicants for gTLDs. There is no dispute in this IRP that Section 7.5 of ICANN's standard Registry Agreement provides that those agreements may be assigned to third parties.

was negotiated and concluded ***after*** the registry (wither Afilias or the target) had executed the registry agreement with ICANN.[225]

135. Accordingly, in each example cited by the *Amici*, including those that did not include Afilias, the assignments were negotiated and concluded pursuant to the express authorization provided by Section 7.5 of the Registry Agreement. As the *Amici* themselves note, the Terms and Conditions of the Guidebook provide that applicants do not acquire the assignment rights provided in the Registry Agreement until the applicant "enters into a registry agreement with ICANN."[226] For this reason, while Afilias (and the other post-delegation assignors identified by the *Amici*) were exercising rights they enjoyed under the Registry Agreement, the DAA enjoys no such immunity. Indeed, while neither Afilias nor any of the other post-delegation assignors were not assigning any rights or obligations in connection with their applications (which were now, after signing the registry agreements, moot), NDC, as shown above, did assign several such rights and obligations, thereby violating the Guidebook.

136. Finally, the *Amici* do not explain their argument that bankers and other financiers might also

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in the resolution of a contention set.[227] Bankers and other financiers extend loans

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Tellingly, the *Amici* focus exclusively on these permitted transactions, and do not (because they cannot) cite a single example where Afilias paid an applicant to acquire a gTLD for it, or otherwise was paid a fee in exchange for acquiring a gTLD for a third party.

225 Mr. Rasco declares that "based on my experience and discussions with others in the industry, it was common industry knowledge" that applicants sought to monetize their applications by "assigning interests in domain strings ***after securing the rights from ICANN***." Rasco Decl., ¶ 42 (emphasis added). While Mr. Rasco declares that he was aware "that Donuts and Rightside Media had entered into an agreement whereby certain gTLD applications were potentially financed by the other party in exchange for an interest in the domains in question," (*id*., ¶ 43.) Mr. Rasco does not explain why NDC did not publicly disclose its partnership with Verisign as Donuts did with Demand Media (Rightside's then-parent company) in its various gTLD applications. Mr. Rasco also fails to note that Dot Tech filed a change request with ICANN, permitting reexamination of its application as soon as its deal with Radix was announced. NDC, of course, has not done so.

It is notable that despite this "common knowledge," the *Amici* could only cite ***one possible example***, .BLOG, where the applicant received financial support from the eventual assignee. And, as demonstrated above, the lengthy delay between the auction and the announcement of the assignment to Automattic suggests that the Primer Nivel/Automattic relationship did not go as far as the DAA and may not have constituted a Guidebook violation. NDC has offered ***no evidence*** of the terms of the Primer Nivel/Automattic agreement to suggest otherwise.

226 *See* Verisign Br., ¶ 12 (*citing* AGB, **[**Ex. C-3**]**, Module 6.10).

227 Rasco Decl., ¶ 61.

based on the borrower's credit, subject to the borrower's obligation to repay the loan. Other than setting restrictions on the use of the funds extended under the loan, bankers and other financiers do not

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By comparison, investors instruct their agents in this way. For example, investors instruct their brokers on what stocks to buy, how much to pay for them, and, most importantly, those brokers are required to follow their principal's instructions Redacted - Third Party Designated Confidential I The DAA, as admitted by the *Amici* and their witnesses, transformed NDC from a principal in the .WEB contention set to Verisign's secret agent.

E. The 2016 Verisign-NDC Confirmation of Understandings is Self-Serving and Untrustworthy

137. In June 2016, several members of the .WEB contention set (but not including Afilias) petitioned ICANN to investigate allegations that there had been a change of control over NDC. ICANN investigated and closed its investigation on July 13, 2016 and ordered the .WEB Auction to proceed, as scheduled, on July 28, 2016. ICANN at the time was unaware of the existence or terms of the DAA, or even of Verisign's "indirect participation" in the .WEB contention set, and certainly had no reason to suspect that this might be the case in light of Mr. Rasco's multiple representations to ICANN.[228] Notwithstanding ICANN's decision to close its investigation (ignorant, as it was, of the DAA's terms or existence), Verisign caused NDC to execute a self-serving set of declarations, called the Confirmation of Understandings (the "Confirmation"), that purport to recast the plain terms of the DAA in a more favorable light. The Confirmation was drafted entirely by Verisign and dutifully countersigned by Mr. Rasco.

228 *See* Sections II(D)-(E) above.

138. Disingenuously described by the *Amici* as a "Supplement" to the DAA,[229] the Confirmation was drafted nearly a year after the DAA had been executed and by its plain language does not amend the DAA. Far from being drafted in the "ordinary course of business," the Confirmation was drafted ***specifically in response to complaints*** made to ICANN and for the purpose of creating a self-serving document to defend the *Amici*'s conduct in any future legal proceedings.[230] The Confirmation was made, days after Verisign had become aware of the allegations concerning its relationship with NDC, after Verisign had had an opportunity to reflect on these allegations, create a set of so-called understandings, share them with NDC, and arrange for Mr. Rasco to sign his name to them.[231] Statements offered to establish a party's own state of mind are intrinsically self-serving, they also inherently untrustworthy. For this reason, U.S. courts have routinely excluded statements introduced to provide intent based on concerns over the declarant's candor. This is especially true where, as here, the statements concern intentions regarding past acts, here the *Amici*'s intent when executing the DAA a year earlier.[232]

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229 Verisign Br., ¶ 2, ns. 4 & 6. The Confirmation is not a "supplemental agreement" because it does not, by its express terms, modify or amend the DAA. Redacted - Third Party Designated Confidential Information

230 "Proof that an interpretation of a contract is reasonable must come from ***objective facts***, and '[e]vidence is not objective when it is the self-serving testimony," *ex post facto*, statement NDC and Verisign, made in the face of an ICANN investigation, as to what the DAA, "clear on its face, 'really' means, contrary to what it seems to mean." *Boeing Co. v. March*, 656 F. Supp. 2d 837, 863 (N.D. Ill. 2009), [Ex. CA-58] (quoting *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 547 (7th Cir. 2000)) (emphasis added).

231 Indeed, several of the "confirmations" amply demonstrate that they are simply *ex post facto* self-serving declarations, rather than evidence of the parties' intent. For example, Verisign compelled NDC to confirm that "Redacted - Third Party Designated Confidential Information Letter from Paul Livesay (Verisign) to Jose Rasco (NDC) (26 July 2016) [ICANN-WEB_000041 - ICANN-WEB_000042], [Ex. C-97], ¶ A. Certainly, Verisign did not require NDC to represent to Verisign that Verisign had not acquired NDC: this representation was obviously created solely for use in future legal proceedings.

232 *See U.S v. Cianci*, 378 F.3d 71, 106 (1st Cir. 2004), [Ex. CA-59] (affirming trial court's decision to exclude defendant's statements because they were "to a large extent 'self-serving' attempts to cover tracks already made"). Redacted - Third Party Designated Confidential Information Letter from Paul Livesay (Verisign) to Jose Rasco (NDC) (26 July 2016) [ICANN-WEB_000041 - ICANN-WEB_000042], [Ex. C-97], ¶ D. This language clearly refers to actions taken a year earlier and, as such, is simply rank hearsay.

139. Far from establishing that NDC's agreement to the terms of the DAA did not violate the Guidebook, the Confirmation proves the converse. Betraying their proverbial guilty mind, Verisign sought to create a self-serving document to rebut the obvious violations of the New gTLD Program Rules created by the DAA. As of July 2016, no one had complained to ICANN that NDC had agreed to transfer or assign individual rights or obligations it held as an applicant for .WEB—yet the Confirmation devotes two paragraphs to this point. Moreover, as of July 2016, no one had complained to ICANN that the bidding procedures set forth in the still-secret DAA would cause NDC to submit invalid bids at the .WEB Auction. Nonetheless, the Confirmation reflects the *Amici*'s concern about the bidding procedures as well, characterizing them as necessary to aid Verisign's financing, provide security for Verisign funds, and provide for Redacted - Third Party Designated Confidential Information during the auction.

V. ICANN'S DISCRETION IS CIRCUMSCRIBED BY ITS ARTICLES OF INCORPORATION AND BYLAWS AS WELL AS PRINCIPLES OF INTERNATIONAL LAW

140. The *Amici*[233] echo ICANN's position[234] that ICANN has "significant discretion" in terms of its administration of the New gTLD Program. This is a "significant" exaggeration. Afilias does not dispute that the ICANN Board and Staff[235] have discretion in administering the New gTLD Program. Rather, our position

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233 NDC Br., ¶ 15; Verisign Br., ¶ 13, n. 19; *id.*, ¶ 67, n. 125.

234 ICANN's Response to Amended IRP Request, ¶¶ 21, 64; *id*., ¶ 64, fn. 101.

235 ICANN Staff's accountability is the same as that of the organization:

> As part of Work Stream 2, the CCWG-Accountability proposes that further enhancements be made to a number of designated mechanisms:
>
> - Staff Accountability
>
> Annex 12, which details Recommendation 12, also included the following recommendations with regards to Staff Accountability:
>
> > In general, management and staff work for the benefit of the community and in line with [ICANN's] purpose and Mission. While it is obvious that they report to and are held accountable by the Board and the President & CEO, ***the purpose of their accountability is the same as that of the organization***:
> >
> > - Complying with [ICANN's] rules and processes.
> > - Complying with applicable Bylaws.
> > - Achieving certain levels of performance, as well as security.
> > - Making their decisions for the benefit of the community and not in the interest of a particular stakeholder or set of stakeholders or [ICANN] the organization alone.
>
> ICANN, Recommendations to Improve ICANN Staff Accountability (13 Nov. 2017), **[Ex. C-84]**, pp. 2-3 (emphasis added).

is that their discretion is circumscribed—indeed, significantly circumscribed—by the requirements set out in ICANN's Articles and Bylaws,[236] a matter which the *Amici* fail to address in any manner in their hundred plus pages of briefing. ICANN's Articles and Bylaws are replete with obligations with which ICANN's Board and Staff are required to comply insofar as their activities—including administration of the New gTLD Program[237]—are concerned. These are found in the Commitments and the Core Values,[238] in other provisions of the Bylaws, in applicable local law, and in the principles of international law that govern ICANN's conduct per its Articles and Bylaws.

141. The Commitments and Core Values are of particular importance insofar as ICANN's discretion is concerned, requiring that, in administering the New gTLD Program, ICANN's Board and Staff must "act in a manner that complies with" and that "reflects" ICANN's Commitments and respects ICANN's Core Values.[239] The Panel will also recall the clear instruction stated in the Bylaws that the "[t]he Commitments and Core Values are intended to apply in the broadest possible range of circumstances."[240] This is so because the "Commitments reflect ICANN's ***fundamental compact*** with the global Internet community and are intended to apply consistently and comprehensively to ICANN's activities."[241] Whenever it is impossible for ICANN to simultaneously satisfy all core values, it must nevertheless balance them to serve "a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN's

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236 As this Panel is aware, this is the first IRP brought under the revised Bylaws that concerns the actions of ICANN's staff and officers as well as ICANN's Board. As other IRP Panels have recognized with respect to ICANN's Board, its "discretion is limited by the Articles and Bylaws, and it is against the provisions of these instruments that the Board's conduct must be measures." *Vistaprint Ltd. v. ICANN*, ICDR Case No. 01-14-0000-6505, Final Declaration of the Independent Review Panel (9 Oct. 2015), [Ex. CA-2], ¶ 123.

237 There is no dispute between the Parties, and nor is it questioned by the *Amici*, that the implementation and administration of the New gTLD Program fall squarely within ICANN's Mission.

238 Bylaws, [Ex. C-1], Sec. 1.2.

239 Bylaws, [Ex. C-1], Sec. 1.2 ("In performing its Mission, ICANN will act in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values….").

240 Bylaws, [Ex. C-1], Sec. 1.2(c).

241 Bylaws, [Ex. C-1], Sec. 1.2(c) (emphasis added).

Mission."[242] In the present context, this fundamental compact reflects ICANN's formal and "fundamental" agreement with the global Internet community that developed the New gTLD Program Rules that it will consistently, neutrally, objectively, fairly, and in good faith implement the principles, procedures and rules set out therein.

142. ICANN's Articles of Incorporation also require ICANN to carry out its activities "***in conformity with relevant principles of international law and applicable international conventions and local law***."[243] ICANN's Bylaws, as recently revised, restate the requirement that ICANN carry out "***its activities in conformity with relevant principles of international law and international conventions and applicable local law***…."[244]

143. The substantive and procedural requirements set forth in ICANN's Articles and Bylaws and the New gTLD Program Rules cannot be understood and given proper effect without reference to relevant legal standards. The requirement that ICANN comply with relevant principles of international law not only guides the interpretation of these terms, it provides independent (and generally overlapping) substantive and procedural safeguards appropriate for an entity that has oversight authority of a key global resource.[245] Despite incorporating this requirement into its Articles of Incorporation and Bylaws, ICANN has long-taken the position that there are essentially no "relevant principles of international law" that regulate its activities.[246] This is incorrect. It is contrary to the manifest intention behind its Articles of Incorporation—these would not

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242 Bylaws, [Ex. C-1], Sec. 1.2(c).

243 ICANN, Articles of Incorporation (approved on 9 Aug. 2016, filed on 3 Oct. 2016) ("Articles"), [Ex. C-2], Art. 2(III) (emphasis added).

244 Bylaws, [Ex. C-1], Sec. 1.2(a) (emphasis added).

245 *See ICM Registry, LLC v. ICANN*, ICDR Case No. 50-117-T-00224-08, Expert Report of Jack Goldsmith (22 Jan. 2009), [Ex. CA-60], ¶¶ 7-8, 16.

246 *ICM Registry, LLC v. ICANN*, ICDR Case No. 50-117-T-00224-08, ICANN's Response to ICM's Memorial on the Merits (8 May 2009), [Ex. CA-61], ¶ 167.

have vacuously referenced principles of international law—and to the decision of past IRP panels that ICANN must, at a minimum, "carry out its activities" in good faith.[247]

144. 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 faith, which is considered to be "the foundation of all law and all conventions."[248] As the International Court of Justice has stated, the principle of good faith is "[o]ne of the basic principles governing the creation and performance of

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[247] In *ICM Registry v. ICANN*, a Panel comprised of Judge Stephen Schwebel, Professor Jan Paulsson, and Judge Dickran Tevrizian received expert testimony on the relevant principles of international law from Professor Jack Goldsmith and the late Professor David Caron. The Panel concluded that:

> ICANN, ***in carrying out its activities "in conformity with the relevant principles of international law," is charged with acting consistently with relevant principles of international law, including the general principles of law recognized as a source of international law***. That follows from the terms of Article 4 of its Articles of Incorporation and from the intentions that animated their inclusion in the Articles, an intention that the Panel understands to have been to subject ICANN to relevant international legal principles because of its governance of an intrinsically international resource of immense importance to global communications and economies. Those intentions might not be realized were Article 4 interpreted to exclude the applicability of general principles of law.
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> ***
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> [T]he provision of Article 4 of ICANN's Articles of Incorporation prescribing that ICANN "shall 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," requires ICANN to operate in conformity with relevant general principles of law (such as good faith) as well as relevant principles of international law, applicable international conventions***, and the law of the State of California.

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**]**, ¶¶ 140, 152 (emphasis added). The obligation for ICANN to operate in good faith—and, indeed, to go beyond mere good faith in adhering to its Articles and Bylaws—is also reflected in the CCWG-Accountability's recommendations regarding the strengthening of ICANN's Independent Review Process: "A consultation process undertaken by ICANN produced numerous comments calling for overhaul and reform of ICANN's existing IRP. Commenters called for ICANN to be held to a substantive standard of behavior rather than just an evaluation of whether or not its action was taken in good faith." CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), **[**Ex. C-91**]**, ¶ 175 (at p. 33).

[248] Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1953), **[**Ex. CA-3(bis)**]**, p. 105 (quoting Megalidis Case, 8 T.A.M. 386, 395 (1928)). Similarly, Schwarzenberger and Brown list good faith as one of the seven fundamental principles of international law. Georg Schwarzenberger and Edward Brown, *A Manual of International Law* (6th ed. 1976), **[**Ex. CA-62**]**, p. 7.

legal obligations."[249] As the Panel in *ICM v. ICANN* observed, the principle of "good faith … is found in international law, in the general principles that are a source of international law, and in the corporate law of California."[250] At its most general level, it requires all actors to exercise their rights honestly, fairly, and loyally.[251] However, the principle of good faith also takes specific forms as recognized in ICANN's Articles and Bylaws as well as in international law. In other words, ICANN's exercise of good faith must be exercised in accordance with—and as circumscribed by—the additional principles stated in the Articles and the Bylaws. Given their omission from Amici's briefs, we lay out below the most relevant provisions of the Bylaws and Articles to the present dispute, as well as the supporting principles of international law, that limit ICANN's discretion in applying its documented policies—here the New gTLD Program Rules.

A. ICANN Must Provide Procedural Fairness and Due Process

145. ICANN's Bylaws require that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and ***consistent with procedures designed to ensure fairness***."[252] Its "Commitments" accordingly include that ICANN will "[m]ake decisions by applying documented policies ***consistently, neutrally, objectively, and fairly***…."[253]

146. The principle of procedural fairness and due process reflected in ICANN's Bylaws is multifaceted. It requires, *inter alia*, that ICANN adhere to established substantive and procedural rules, provide those affected by its decision with the opportunity to be heard, base its decisions and actions on

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249 *Nuclear Tests (Australia v. France)*, Judgment (20 Dec.), 1974 I.C.J. 253, [Ex. CA-63], ¶ 46; *see also Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Judgment (11 June), 1998 I.C.J. 275, [Ex. CA-64], ¶ 38 (good faith is a "well-established principle of international law").

250 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], ¶ 141.

251 *ICM Registry, LLC v. ICANN*, ICDR Case No. 50-117-T-00224-08, Expert Report of Jack Goldsmith (22 Jan. 2009), [Ex. CA-60], ¶ 33 (*citing* Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (2002), p. 119); Anthony D'Amato, "Good Faith" in *Encyclopedia of Public International Law* Vol. 2 (1995), [Ex. CA-65], p. 599.

252 Bylaws, [Ex. C-1], Sec. 3.1 (emphasis added).

253 Bylaws, [Ex. C-1], Sec. 1.2(a)(v) (emphasis added).

adequate information, and make decisions that are neither arbitrary nor unreasonable.[254] Accordingly, due process and procedural fairness require, among other procedural protections, that decisions be based on evidence and on appropriate further inquiry into the facts.[255] In other words, procedural fairness requires, *inter alia*, performing diligent investigation when making decisions, in accordance with the principle of due diligence.[256] Arbitrary or unreasonable decisions are also contrary to procedural fairness.[257] Decisions are arbitrary when they lack support from a rational policy, when they are not reasonably related to that policy, or when they are based on "caprice, prejudice or personal preference."[258]

147. ICANN repeatedly failed to comply with the principle of procedural fairness and due process in regards to Afilias' claims. Afilias first raised its concerns with ICANN in August 2016.[259] Even in this IRP, ICANN has taken diametrically opposed positions as to whether or not it evaluated those concerns. In opposing Afilias' Request for Emergency Relief and Interim Measures of Protection, ICANN claims that it "evaluated [Afilias'] complaints" and that it was therefore "time … for the auction results to be finalized and for .WEB to be delegated" to NDC (and hence Verisign).[260] In ICANN's Rejoinder, by contrast, ICANN asserts that its Board determined in November 2016 to await the results of pending and anticipated accountability mechanisms "before considering and determining what action, if any, to take at that time" concerning Afilias'

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254 Tribunals for the Court of Arbitration for Sport ("CAS") consider that private regulatory institutions like ICANN must observe the general principle of procedural fairness and due process. *See The Gibraltar Football Association (GFA) v. Union des Associations Européennes de Football (UEFA)*, CAS Case No. 2002/O/410, Award (7 Oct. 2003), [Ex. CA-66], ¶ 4.

255 *A. v. Fédération Internationale de Luttes Associées (FILA)*, CAS Case No. 2001/A/317, Award (9 July 2001), [Ex. CA-67], ¶¶ 5-6; *G. v. Fédération Equestre Internationale (FEI)*, CAS Case No. 1991/A/53, Award (15 Jan. 1992) in 1 *Digest of CAS Awards Series Set* 79 (1998), [Ex. CA-68], pp. 85-86.

256 *See* Section VI below.

257 *AEK Athens and SK Slavia Prague v. Union of European Football Associations (UEFA)*, CAS Case No. 98/200, Award (20 Aug. 1999), [Ex. CA-69], ¶ 156.

258 *Plama Consortium Ltd. v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 Aug. 2008), [Ex. CA-70], ¶ 184; *AES Summit Generation Ltd. and AES-Tisza Erömü Kft. v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award (23 Sep. 2010), [Ex. CA-71], ¶ 10.3.7; *Ronald S. Lauder v. Czech Republic*, UNCITRAL Arbitration, Final Award (3 Sep. 2001), [Ex. CA-72], ¶ 221 (quoting *Black's Law Dictionary* (7th ed. 1999), p. 100); *Filippo Volandri v. International Tennis Federation (ITF)*, CAS Case No. 2009/A/1782, Award (12 May 2009), [Ex. CA-73], ¶ 26.

259 *See* Letter from S. Hemphill (Afilias) to A. Atallah (ICANN) (8 Aug. 2016), [Ex. C-49].

260 ICANN's Opposition to Afilias' Request for Emergency Panelist and Interim Measures of Protection (17 Dec. 2018), ¶ 3.

complaints.[261] And yet, in June 2018, ICANN nonetheless proceeded to take .WEB off-hold and to contract with NDC (and hence Verisign) for .WEB, without providing Afilias any advance notice or explanation for why it was doing so. ICANN had determined that it was going to delegate .WEB to NDC/Verisign as long as there was no accountability mechanism to stop it from doing so. There is simply no way to resolve ICANN's conduct with basic notions of procedural fairness and due process.

B. ICANN Must Afford Impartial and Non-Discriminatory Treatment

148. Article 2.3 of the Bylaws require ICANN to act in a non-discriminatory manner. This provision of its Bylaws, entitled "Non-Discriminatory Treatment," states:

> 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.

The above obligation is underscored by ICANN's "Commitments," which include the principle that ICANN must make decisions "without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties)…."[262]

149. The obligation enshrined in ICANN's governing documents is consistent with the principles of impartiality and non-discrimination under international law. The principle has broad application,[263] particularly where, as here, a party has affirmatively assumed duties of impartiality and non-discrimination. Prohibited conduct may take the form of that committed with discriminatory or prejudicial intent (such conduct

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261 Disspain WS, ¶ 11.

262 Bylaws, [Ex. C-1], Sec. 1.2(a)(v).

263 The principle of non-discrimination is found in numerous legal systems. For the Court of Justice of the European Union, *see Albert Ruckdeschel & Co. and Hansa-Lagerhaus Ströh & Co. v. Hauptzollamt Hamburg-St. Annen* and *Diamalt AG v. Hauptzollamt Itzenhoe*, Joined Cases 117/76 and 16/77, Judgment (19 Oct. 1977), 1977 E.C.R. 1753, [Ex. CA-74], p. 1762; *see also Peter Überschär v. Bundesversicherungsanstalt für Angestellte*, Case 810/79, Judgment (8 Oct.), 1980 E.C.R. 2747, [Ex. CA-75], ¶ 16; *Bilka-Kaufhaus GmbH v. Karin Weber von Hartz*, Case 170/84, Judgment (13 May), 1986 E.C.R. 1620, [Ex. CA-76], ¶¶ 31, 37-43. For investment tribunals, *see Nykomb Synergetics Technology Holding AB v. Republic of Latvia*, SCC Arbitration, Award (16 Dec. 2003), [Ex. CA-77], p. 34; *Saluka Inves. BV v. Czech Republic*, UNCITRAL Arbitration, Partial Award (17 Mar. 2006), [Ex. CA-78], ¶ 347. For human rights courts, *see Kelly and Others v. United Kingdom*, ECHR, Case No. 30054/96, Final Judgment (4 Aug. 2001), [Ex. CA-79], ¶ 148; Advisory Opinion OC-18/03 of September 17, 2003, Inter-Am. Ct. H.R., *Juridical Condition and Rights of the Undocumented Migrants*, [Ex. CA-80], p. 103.

is also arbitrary and unreasonable);[264] international procurement standards require impartiality and equal treatment of all participants.[265] Prohibited conduct may also take the form of that which is discriminatory or prejudicial merely in effect, even when superficially neutral treatment.[266]

150. ICANN accepted the *Amici*'s position—as reflected, at a minimum, in their responses to the September 2016 questionnaire—at face value in a clearly biased and discriminatory manner. The ICANN Bylaws require that ICANN act in an objective, neutral, and fair manner.[267] ICANN, however, blatantly decided ***not*** to comply with these standards in regards to .WEB. Upon receipt of the *Amici*'s position on the DAA in August and October 2016,[268] and without conducting any investigation on the matter,[269] ICANN accepted the *Amici*'s positions at face value —incorporating their positions into a questionnaire that was designed to elicit answers to advance the *Amici*'s arguments. Moreover, ICANN based its questionnaire on information that ICANN and the *Amici* all had in their possession—but which they knew was unavailable to Afilias. It was apparently on the basis of this information that ICANN initially took the position in this IRP that it had "evaluated" and rejected Afilias' concerns about NDC's compliance with the New gTLD Program Rules, and, therefore proceeded to delegate the .WEB gTLD to NDC in June 2018. ICANN's clear bias in favor of the

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264 *S.D. Myers, Inc. v. Gov't of Canada*, UNCITRAL Arbitration, Partial Award (13 Nov. 2000), **[Ex. CA-81]**, ¶ 254; *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 Oct. 2011), **[Ex. CA-82]**, ¶ 305; *LG&E Energy Corp. et al. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability (3 Oct. 2006), **[Ex. CA-83]**, ¶ 146; *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (14 Jan. 2010), **[Ex. CA-84]**, ¶ 261.

265 United Nations Procurement Manual (30 June 2020), **[Ex. CA-85]**, Sec. 1.4.2; UNCITRAL Model Law on Public Procurement (2011), **[Ex. CA-86]**, Preamble; World Trade Organization, *Revised Agreement on Government Procurement and WTO related Legal Instruments* (in force 6 Apr. 2014), **[Ex. CA-87]**, Arts. IV(4); World Bank, *Bank Policy: Procurement in IPF and Other Operational Procurement Matters* (Nov. 2017), **[Ex. CA-88]**, p. 3; OECD, *Methodology for Assessing Procurement Systems (MAPS)* (2018), **[Ex. CA-89]**, p. 2.

266 *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award (17 Jan. 2007), **[Ex. CA-90]**, ¶ 321; *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award (11 Sep. 2007), **[Ex. CA-91]**, ¶ 368.

267 Bylaws, **[Ex. C-1]**, Sec. 1.2(a)(v).

268 Letter from Ronald Johnston (Counsel for Verisign) and Brian Leventhal (Counsel for NDC) to Eric Enson (Counsel for ICANN) (23 Aug. 2016), **[Ex. C-102]**; NDN's Responses to ICANN's Topics for Comment (10 Oct. 2016) in Emails and attachment between Jose Igancio Rasco (NDC) and ICANN (*various dates*), **[Rasco Decl. (1 June 2020), Ex. T]**; Verisign's Responses to ICANN's Topics for Comments (7 Oct. 2016) in Letter from Ronald Johnston (Counsel for Verisign) to Christine Willett (ICANN), **[Ex. C-109]**.

269 ICANN's Response to Amended IRP Request, ¶ 62.

Amici is further evident throughout its submissions in this IRP. Given ICANN's obvious favoritism of Verisign/NDC dating back to 2016, there can be no serious doubt that if this Panel were merely to issue a declaration that that the Board should now consider Afilias' complaints—as ICANN and the *Amici* urge the Panel to do—ICANN would once again proceed to delegate .WEB to NDC (and hence Verisign), which is why this Panel must exercise the jurisdiction it has been granted to finally resolve the Dispute that is before it. We address the Panel's jurisdiction in Section IX below.

C. ICANN Must Act Openly and Transparently

151. Article 2(III) of the Articles of Incorporation provides in relevant part that ICANN—

> [S]hall operate in a manner consistent with these Articles and its Bylaws for the benefit of the Internet community as a whole, carrying out its activities ***in conformity with relevant principles of international law and international conventions*** and applicable local law and ***through open and transparent processes*** that enable competition and open entry in Internet-related markets.[270]

152. These provisions are supplemented by "Commitments and Core Values" set forth in ICANN's Bylaws, which are to "guide the decisions and actions of ICANN" in the performance of its Mission.[271] The Commitments require that:

> ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities ***in conformity with relevant principles of international law and international conventions*** and applicable local law, ***through open and transparent processes*** that enable competition and open entry in Internet-related markets.[272]

153. The Commitments also require ICANN to:

> Employ ***open, transparent*** and bottom-up, multistakeholder policy development processes that are led by the private sector (including business stakeholders, civil society, the technical community, academia,

[270] Articles, [Ex. C-2], Art. 2(III) (emphasis added).

[271] Bylaws, [Ex. C-1], Sec. 1.2(b).

[272] Bylaws, [Ex. C-1], Sec. 1.2(a) (emphasis added).

> and end users), while duly taking into account the public policy advice of governments and public authorities.[273]

154. Similarly, ICANN's Bylaws state that:

> ICANN and its constituent bodies ***shall operate to the maximum extent feasible*** in an ***open and transparent manner*** and consistent with procedures designed to ensure fairness….[274]

155. The principle of transparency has "the position of a fundamental principle in the international economic field," especially in the regulatory and standard-setting space that ICANN occupies.[275] The core elements of transparency include clarity of procedures, the publication and notification of guidelines and applicable rules, and providing reasons for actions taken.[276] Investor-state arbitral tribunals have, for example, determined that it requires all applicable rules and regulations to be well established and knowable to those regulated by them.[277] The principle of transparency also requires active communication regarding the status of a decision and the reasons for the outcome of a decision-making process.[278]

156. Far from acting transparently, ICANN permitted NDC to enable Verisign to secretly participate in the .WEB Auction in flagrant disregard of the New gTLD Program Rules. ICANN, when faced

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273 Bylaws, **[Ex. C-1]**, Sec. 1.2(a)(iv) (emphasis added).

274 Bylaws, **[Ex. C-1]**, Sec. 3.1 (emphasis added).

275 Akira Kotera, "Regulatory Transparency" in *The Oxford Handbook of International Investment Law* 617 (Peter Muchlinski *et al.* eds., 2008), **[Ex. CA-92]**, p. 619. The obligation of "transparency" exists in virtually every well-developed procurement system. *See* United Nations Procurement Manual (30 June 2020), **[Ex. CA-85]**, Sec. 1.4.2; UNCITRAL Model Law on Public Procurement (2011), **[Ex. CA-86]**, Preamble; World Trade Organization, *Revised Agreement on Government Procurement and WTO related Legal Instruments* (in force 6 Apr. 2014), **[Ex. CA-87]**, Arts. IV(4), XVI; World Bank, *Bank Policy: Procurement in IPF and Other Operational Procurement Matters* (Nov. 2017), **[Ex. CA-88]**, p. 3; OECD, *Methodology for Assessing Procurement Systems (MAPS)* (2018), **[Ex. CA-89]**, p. 2. The transparency principle has been applied in courts in both Europe and the United States. *See* Case C-532/06, *Emm G. Lianakis AE et al. v. Dimos Alexandroupolis et al.*, Judgment (24 Jan. 2008), **[Ex. CA-93]**, p. 1.

276 Sacha Prechal and Madeleine de Leeuw, "Dimensions of Transparency: The Building Blocks for a New Legal Principle?"*, Rev. Eur. Admin. L.* Vol. O, No. 1 (2007), **[Ex. CA-94]**, p. 51.

277 *See, e.g.*, *Bosh Int'l, Inc. and B & P Ltd. Foreign Inves. Enter. v. Ukraine*, ICSID Case No. ARB/08/11, Award (25 Oct. 2012), **[Ex. CA-95]**, ¶ 212; *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award (7 Dec. 2011), **[Ex. CA-96]**, ¶¶ 314-316.

278 *See, e.g.*, *Ioan Micula et al. v. Romania*, ICSID Case No. ARB/05/20, Award (11 Dec. 2013), **[Ex. CA-97]**, ¶ 870. CAS tribunals have explained that private sports organizations—which share with ICANN private regulatory responsibility—must similarly establish transparent rules for those whom they regulate. *United States Olympic Committee (USOC) v. International Olympic Committee (IOC) and International Association of Athletics Federations (IAAF)*, CAS Case No. 2004/A/725, Award (20 July 2005), **[Ex. CA-98]**, ¶ 20.

with such underhanded tactics, did ***nothing***. It did not investigate NDC's conduct; it did not investigate the DAA; and it did not investigate claims related to the *Amici*'s secrecy.[279] 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.[280]

157. At the same time, ICANN purposefully left Afilias in the dark about the status of its investigation regarding the .WEB gTLD for nearly two years, despite Afilias' frequent attempts to obtain any information on ICANN's actions regarding .WEB.[281] When, in June 2018, ICANN proceeded to delegate the .WEB gTLD to NDC, ICANN began this process ***without providing Afilias with any update regarding the pending investigation of NDC***—which Afilias requested in 2016[282] and which ICANN told Afilias that it would perform.[283] Assuming *arguendo* that ICANN's Board in fact made a decision to defer consideration of Afilias' complaints in November 2016, ICANN not only failed to disclose that decision to Afilias prior to this IRP. ICANN kept the alleged "decision not to decide" in November 2016 secret from Afilias ***and this Panel*** until its Rejoinder—disclosing the existence of a secret, apparently significant ICANN Board meeting on the .WEB matter in its ***Rejoinder Memorial, over 19 months after Afilias initiated this IRP***. Nor has ICANN provided 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.

158. It is difficult to imagine conduct less transparent than what ICANN has engaged in here.

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279 ICANN's Response to Amended IRP Request, ¶¶ 61-62.

280 *See* Section IV above.

281 *See* Letter from Arif H. Ali (Counsel for Afilias) to ICANN Board (23 Feb. 2018), **[Ex. C-78]**; Letter from A. Ali (Counsel for Afilias) to ICANN Board (16 Apr. 2018), **[Ex. C-113]**; Letter from A. Ali (Counsel for Afilias) to J. LeVee (Counsel for ICANN) (1 May 20018), **[Ex. C-114]**.

282 Letter from S. Hemphill (Afilias) to A. Atallah (ICANN) (8 Aug. 2016), **[Ex. C-49]**.

283 Letter from Akram Atallah (ICANN) to Scott Hemphill (Afilias) (30 Sep. 2016), **[Ex. C-61]**, p. 1.

D. ICANN Must Respect Legitimate Expectations

159. ICANN's Bylaws specify that one of its Commitments is to "[m]ake decisions by applying *documented policies* consistently, neutrally, objectively, and fairly…."[284] The Bylaws further require that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and *consistent with procedures designed to ensure fairness,*"[285] as well as "ICANN's Mission, Commitments, Core Values and/or *established ICANN policy(ies)*…."[286]

160. The commitment to decision-making consistent with documented policies reflects the need to respect the legitimate expectations those policies create. It is uncontroversial that the conduct of one party in any legal relationship may establish reasonable and justifiable expectations on the part of the other party.[287] Legitimate expectation has been recognized as an important general principle—often considered a component of good faith—guiding the interpretation of obligations which may arise in any legal relationship. For example, World Bank administrative tribunals rely on the principle of legitimate expectations to ascertain the World Bank's obligations to individuals,[288] while CAS tribunals apply the principle of legitimate expectations to the actions of private regulatory organizations.[289] The starting point for determining whether legitimate expectations have been violated is the set of rules and regulations in place.[290]

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284 Bylaws, [Ex. C-1], Sec. 1.2(a)(v) (emphasis added).

285 Bylaws, [Ex. C-1], Sec. 3.1 (emphasis added).

286 Bylaws, [Ex. C-1], Sec. 4.1(c)(i) (emphasis added).

287 For investment tribunals, *see Técnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003), [Ex. CA-99], ¶¶ 154, 157, 164, 174. For the GATT/WTO, *see United States - Sections 301-310 of the Trade Act of 1974*, WTO Case No. WT/DS152/R, Report of the Panel (22 Dec. 1999), [Ex. CA-100], ¶ 7.77-7.81.

288 World Bank Administrative Tribunal, *Walter Prescott v. International Bank for Reconstruction and Development*, Decision No. 253 (4 Dec. 2001), [Ex. CA-101], ¶ 25.

289 *The Gibraltar Football Association (GFA) v. Union des Associations Européennes de Football (UEFA)*, CAS Case No. 2002/O/410, Award (7 Oct. 2003), [Ex. CA-66], ¶ 11; *Sullivan v. The Judo Federation of Australia Inc.*, CAS Case No. 2000/A/284, Award (14 Aug. 2000), [Ex. CA-102], ¶ 18.

290 *Técnicas Medioambientales TECMED S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003), [Ex. CA-99], ¶ 154; *Saluka Inves. BV v. Czech Republic*, UNCITRAL Arbitration, Partial Award (17 Mar. 2006), [Ex. CA-78], ¶ 301; *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL Arbitration, Partial Award (13 Sep. 2001), [Ex. CA-103], ¶ 611.

161. Afilias, as a participant in ICANN's New gTLD Program, legitimately expected ICANN to comply with its own rules, 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.[291] Had ICANN actually followed the New gTLD Program Rules, it would have disqualified NDC from the application and bidding process.[292] By allowing Verisign to use NDC as a stalking horse to obtain .WEB for itself, ICANN frustrated Afilias' legitimate expectations.

E. ICANN Must Act to Promote Competition

162. ICANN's Commitments in the Bylaws establish that the organization must enable competition through its actions and decisions:

> ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole . . . through open and transparent ***processes that enable competition and open entry in Internet-related markets***.[293]

163. ICANN's Core Values further reflect its obligation to promote competition through its policy development, in multiple domains:

> Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS market; …
>
> Introducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process....[294]

164. As discussed in Section VIII below, and in Afilias' prior submissions,[295] ICANN has entirely failed to comply with its mandate to promote competition in the domain name system. The .WEB gTLD is

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291 *See* Section IV above.

292 Afilias' Reply Memorial, ¶¶ 16, 97-101.

293 Bylaws, [Ex. C-1], Sec. 1.2(a) (emphasis added).

294 Bylaws, [Ex. C-1], Secs. 1.2(b)(iii), (iv):

295 *See* Afilias' Amended IRP Request, Sec. 5; Afilias' Reply Memorial, Sec. IV.

widely acknowledged as the only new gTLD capable of competing with .COM.[296] ICANN nonetheless is permitting Verisign, the registry operator for .COM and the resident monopolist of the DNS, to acquire the .WEB gTLD in a program specifically designed to challenge .COM's dominance through new gTLDs.[297] ICANN's own Bylaws preclude it from exercising its discretion in this way.

VI. THE *AMICI* CANNOT RELY ON THE BUSINESS JUDGMENT RULE TO EXCUSE THE ICANN BOARD'S CONDUCT REGARDING THE .WEB MATTER

165. The *Amici* support ICANN's reliance on the business judgment rule, which does not excuse whatever ICANN did or did not do regarding the .WEB matter in November 2016.[298] In their haste to assert that "the only issue properly before this Panel is whether ICANN's determination to defer the ultimate decision on Afilias' claims was within the Board's business judgment,"[299] the *Amici* erroneously rely on three assumptions—the same incorrect assumptions made by ICANN.

166. The *Amici* first assume that the ICANN Bylaws require this Panel to apply the business judgment rule in this IRP and therefore defer to the ICANN Board's "determination." They then assume that the ICANN Board's November 2016 conduct constitutes a decision protected by the business judgment rule. And they finally assume that ICANN provided the Panel with sufficient evidence to justify a determination on whether that conduct was a reasonable business judgment. All of these assumptions are incorrect. The business judgment rule, therefore, is wholly inapplicable to whatever it is the ICANN Board did in November 2016. Neither the *Amici* nor ICANN assert that the business judgment rule applies to the decision taken by ICANN in June 2018 to proceed with delegating .WEB to NDC.

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296 Afilias' Amended IRP Request, ¶ 82.

297 Afilias' Amended IRP Request, ¶ 80.

298 Verisign Br., p. 1.

299 NDC Br., ¶ 78; Verisign Br., p. 1 ("Thus, the only question properly before the Panel here is whether ICANN violated its Bylaws when it decided to defer a decision on Afilias' objections."). As discussed in Section V above, this IRP concerns far more issues than whether the ICANN Board violated its Bylaws in November 2016.

167. ***First***, the ICANN Bylaws require that this IRP Panel perform an objective, *de novo* analysis of the ICANN Board's actions and inactions. Pursuant to Section 4.3(i) of the ICANN Bylaws, "[e]ach IRP Panel ***should conduct an objective, de novo examination*** of the Dispute."[300] The ***only*** time an IRP Panel should "not replace the Board's reasonable judgment with its own" is "***[f]or Claims arising out of the Board's exercise of its fiduciary duties***…."[301] Afilias' claims, however, do not concern the ICANN Board's exercise of its fiduciary duties. How could they? When Afilias filed its Request for Independent Review and even when it subsequently filed its Amended Request for Independent Review, ICANN had never claimed that it had made its "decision not to decide"—*i.e.*, the decision that ICANN and the *Amici* now argue fall within the Board's exercise of its fiduciary duties (and should be assessed under the business judgment rule).

168. The *Amici* nonetheless attempt to transform this IRP into an arbitration solely about the ICANN Board's "fiduciary duties." In doing so, the *Amici* deliberately mischaracterize or ignore Afilias' actual claims. This IRP concerns the ICANN Staff's (1) failure to disqualify NDC for breaching the New gTLD Program Rules; (2) failure to offer Afilias the rights to the .WEB gTLD; and (3) decision to proceed with the delegation process for .WEB after a superficial investigation.[302] As expressly stated in ICANN's Bylaws, the business judgment rule only applies to the ICANN Board—***not*** to ICANN Staff.[303]

169. As part of this IRP, Afilias further alleges that the ICANN Board completely abdicated "its responsibility to ensure implementation of the New gTLD Program Rules in accordance with ICANN's Articles and Bylaws."[304] Afilias at no point claims that the ICANN Board failed to comply with its fiduciary duties to ICANN, which would require that Afilias allege (1) the existence of a fiduciary duty; (2) the breach of that

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

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

302 Afilias' Reply Memorial, ¶¶ 8, 155.

303 Bylaws, [Ex. C-1], Sec. 4.3(i)(iii) (applying business judgment rule to "Claims arising out of ***the Board***'s exercise of its fiduciary duties" (emphasis added)).

304 Afilias' Reply Memorial, ¶ 8 (emphasis added).

fiduciary duty; and (3) damages proximately caused by the breach.[305] Although neither the *Amici* nor ICANN can point to any instance where Afilias makes such explicit allegations, both persist in attempting to convince this Panel to ignore Afilias' actual claims in order justify the application of the business judgment rule in this IRP. ICANN and the *Amici*'s misrepresentation of Afilias' claims should not be endorsed by the Panel.

170. ***Second***, the ICANN Board's November 2016 conduct (even assuming *arguendo* that ICANN has accurately described what the Board purported to do) does not constitute a board decision that is protected by the business judgment rule. As ICANN admits in its Reply Memorial, the business judgment rule "provides a 'judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions.'"[306] But the ICANN Board did not and could not make any decisions during this alleged November 2016 Board workshop. It is simply not possible for the ICANN Board to take any "decision" during an informal Board workshop session. Pursuant to the ICANN Bylaws,

> Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board …. ***[E]xcept as otherwise provided in these Bylaws or by law, the Board may act by majority vote of the Directors present at any annual, regular, or special meeting of the Board.***[307]

171. The ICANN Board can only act outside of an annual, regular or special meeting "***if all of the Directors entitled to a vote thereat shall individually or collectively consent in writing to such action.***"[308] Further, ICANN must publically disclose all resolutions and "any actions" taken by the ICANN

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[305] *AlterG, Inc. v. Boost Treadmills LLC*, 388 F.Supp.3d 1133, 1148 (N.D. Cal. 2019), **[Ex. CA-104]**; *Coley v. Eskaton*, 2020 WL 3833018 (Cal. Ct. App. 2020), **[Ex. CA-105]** (applied to a nonprofit mutual benefit corporation).

[306] ICANN's Rejoinder Memorial in Response to Amended Request by Afilias Domains No. 3 Limited for Independent Review (1 June 2020), ¶ 59 (quoting *Lee v. Interinsurance Exch*., 50 Cal. App. 4th 694, 711 (1996), **[Ex. RLA-15]** (quoting *Barnes v. State Farm Mut. Auto. Ins. Co.*, 16 Cal. App. 4th 365, 378 (1993)).

[307] Bylaws, **[Ex. C-1]**, Secs. 2.19 (emphasis added).

[308] Bylaws, **[Ex. C-1]**, Sec. 7.19 (emphasis added).

Board.[309] ICANN's disclosure must provide "the rationale or any resolution adopted by ICANN"[310] and the "vote of each Director voting on the resolution…."[311] And, significantly, the agenda and meeting minutes for the ICANN Board meetings that involve such decision-making must be publically posted by ICANN—meaning that the ICANN Board cannot generally make a decision in secret.[312]

172. ICANN did not comply with any of these Bylaws-mandated requirements in regards to the November 2016 informal ICANN Board workshop.[313] There is no mention of any ICANN Board discussion of or any action taken by the Board in regards to the .WEB matter in any of the ICANN Board materials posted for November or December 2016.[314] ICANN did not even disclose the existence of the ICANN Board

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309 Bylaws, [Ex. C-1], Sec. 3.5(b) ("No later than 11:59 p.m. on the second business day after the conclusion of each meeting (as calculated by local time at the location of ICANN's principal office), any resolutions passed by the Board at that meeting shall be made publicly available on the Website[.]"); *id.*, Sec. 3.5(c) ("No later than 11:59 p.m. on the seventh business days after the conclusion of each meeting (as calculated by local time at the location of ICANN's principal office), any actions taken by the Board shall be made publicly available in a preliminary report on the Website…."). The exceptions to this requirement do not apply in this case. *Id.* ("[P]rovided, however, that any actions relating to personnel or employment matters, legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN), matters that ICANN is prohibited by law or contract from disclosing publicly, and other matters that the Board determines, by a three-quarters (3/4) vote of Directors present at the meeting and voting, are not appropriate for public distribution, shall not be included in the resolutions made publicly available."). The legal matters at issue in regards to .WEB (*i.e.*, the Accountability Mechanisms and the litigation) were a matter of public record. ICANN has further not alleged that the ICANN Board decided not to publish information about its choice by a 3/4 vote.

310 Bylaws, [Ex. C-1], Sec. 3.1 ("ICANN shall also implement procedures for the documentation and ***public disclosure of the rationale for decisions made by the Board and ICANN's constituent bodies*** (including the detailed explanations discussed above).") (emphasis added); *id*., Sec. 3.6(c) ("After taking action on any policy subject to this Section 3.6, ***the Board shall publish in the meeting minutes the rationale for any resolution adopted by the Board*** (including the possible material effects, if any, of its decision on the global public interest, including a discussion of the material impacts to the security, stability and resiliency of the DNS, financial impacts or other issues that were considered by the Board in approving such resolutions)[.]") (emphasis added).

311 Bylaws, [Ex. C-1], Sec. 3.6(c) ("After taking action on any policy subject to this Section 3.6, the Board shall publish in the meeting minutes … the vote of each Director voting on the resolution….").

312 Bylaws, [Ex. C-1], Sec. 3.4 (stating that ICANN must provide "[a]t least seven days in advance of the Board meeting … a notice of such meeting and, to the extent known, an agenda for the meeting shall be posted"); *id.*, Sec. 3.5(a) ("All minutes of meetings of the Board, the Advisory Committees and Supporting Organizations (and any councils thereof) shall be approved promptly by the originating body and provided to the ICANN Secretary ('Secretary') for posting on the Website."); *id*., Sec. 3.5(d) ("No later than the day after the date on which they are formally approved by the Board … the minutes of the Board shall be made publicly available on the Website[.]"). As stated in note 309 above, the exceptions to ICANN's public disclosure requirements do not apply in regards to the ICANN Board's November 2016 choice.

313 Bylaws, [Ex. C-1], Sec. 3.1.

314 *See* ICANN, Board of Governance Committee, Agenda (2 Nov. 2016), available at https://www.icann.org/resources/board-material/agenda-bgc-2016-11-02-en (last accessed 17 July 2020), [Ex. C-133] *through* ICANN, Board of Governance Committee, Meeting Minutes (16 Dec. 2016), available at https://www.icann.org/resources/board-material/minutes-bgc-2016-12-16-en (last accessed 17 July 2020), [Ex. C-162] (as listed in the List of Exhibits accompanying this submission).

workshop that the *Amici* allege serves as "the only issue"[315] before this Panel until its Rejoinder Memorial on 1 June 2020—nearly 19 months after Afilias initiated this IRP. And, yet, the *Amici* and ICANN contend that the Board's conduct at this workshop meeting—where a vote of the ICANN Board could not by definition have occurred—constitutes a proper decision worthy of protection by the business judgment rule.

173. The *Amici*'s support of ICANN's opaqueness regarding the November 2016 workshop further violates the very spirit of the Accountability Mechanisms provided for in ICANN's Bylaws. ICANN's Accountability Mechanisms are designed to hold ICANN "accountable to the community"[316] by permitting members of the Internet community to contest improper ICANN Board decisions.[317] However, in order to initiate such Accountability Mechanisms, ***Afilias (or any other Internet community member) must know about the ICANN Board action or inaction*** (or, under the new Bylaws, the actions or inactions of staff). That is certainly not the case in regards to whatever ICANN Staff and the ICANN Board claim to have done in November 2016. The *Amici* and ICANN nonetheless expect Afilias to have somehow learned about a secret informal ICANN Board workshop meeting in November 2016 and contested the ICANN Board's conduct in 2016. Such a position is inherently illogical.

174. Simply put, even if the ICANN Board had purported to take a decision at the November 2016 informal Board workshop to defer any consideration of Afilias' complaints during pending and anticipated accountability mechanisms, that decision does not comply with the ICANN Bylaws and thus does not constitute a decision or actions that can be protected by the business judgment rule. Given the terms of the DAA and the New gTLD Program Rules, no proper exercise of the Board's discretion consistent with its

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315 NDC Br., ¶ 78; Verisign Br., p. 1 ("Thus, the only question properly before the Panel here is whether ICANN violated its Bylaws when it decided to defer a decision on Afilias' objections."). As discussed in Section V above, this IRP concerns far more issues than whether the ICANN Board violated its Bylaws in November 2016.

316 Bylaws, [Ex. C-1], Sec. 4.1.

317 Bylaws, [Ex. C-1], Sec. 4.1. These Accountability Mechanisms are especially important in regards to the New gTLD Program, since the Applicant Guidebook contains a litigation waver that makes the Accountability Mechanisms the only non-contested means to contest ICANN decision-making. ICANN, gTLD Applicant Guidebook (4 June 2012) ("AGB"), [Ex. C-3], Module 6.

Articles and Bylaws could have yielded any other result other than disqualification of NDC's application and bid. The failure by ICANN's Board (as well as ICANN's staff) to act on Afilias' complaints and to disqualify NDC—and then to proceed to contract with NDC for .WEB in June 2018—violated ICANN's Articles and Bylaws.

175. California "case law is clear that conduct contrary to governing documents [(*i.e.*, corporate bylaws)] may fall outside the business judgment rule."[318] California courts do not assume, and neither should this IRP Panel, that "the business judgment rule would apply to [an] action that violated the governing documents."[319] As ICANN's Board has failed to comply with its Bylaws in regards to its alleged decision not to decide in November 2016, the business judgment rule does not protect its actions.[320]

176. *Last*, even assuming *arguendo* that the business judgment rule has any application to this case, ICANN's secrecy regarding the ICANN Board's November 2016 conduct renders it impossible for this Panel to evaluate the reasonableness of that conduct under the business judgment rule. NDC relies on Section 4.3(o) of the ICANN Bylaws to argue that this Panel should not "second-guess the reasonable business judgment of the ICANN Board."[321] But what, exactly, was the ICANN Board's judgment? As the Board is prevented by its Bylaws from taking any action or decision in an informal Board workshop, it is impossible to know given ICANN's scant disclosures in document production. The *Amici*, however, entreat this Panel to blindly rely on ICANN's vague descriptions of the ICANN Board's November 2016 workshop

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318 *Palm Springs Villas II Homeowners Assn., Inc. v. Parth*, 248 Cal.App.4th 268, 283 (Cal. Ct. App. 2016), **[Ex. CA-106]** (emphasis added) (considering causes of action against a nonprofit's President (and board members) for breach of fiduciary duty and violation of the nonprofit's governing documents); *Ekstrom v. Marquesa at Monarch Beach Homeowners Assn.*, 168 Cal.App.4th 1111, 1124 (Cal. Ct. App. 2008), **[Ex. CA-107]** ("Even if the Board was acting in good faith and in the best interests of the community as a whole, its policy of excepting all palm trees from the application of section 7.18 was not in accord with the CC & Rs, which require all trees be trimmed so as to not obscure views. The Board's interpretation of the CC & Rs was inconsistent with the plain meaning of the document and thus not entitled to judicial deference.").

319 *Palm Springs Villas II Homeowners Assn., Inc. v. Parth*, 248 Cal.App.4th 268, 283 (Cal. Ct. App. 2016), **[Ex. CA-106]**.

320 Bylaws, **[Ex. C-1]**, Sec. 1.2(a)(v).

321 NDC Br., ¶ 70.

session to establish that the ICANN Board's actions are reasonable and deserving of protection under the business judgment rule.

177. This Panel should not accept and adopt ICANN's conclusory statements as incontrovertible fact. ICANN does not provide support for the reasonableness of the ICANN Board's choice "not to address the issues surrounding .WEB while an Accountability Mechanism regarding .WEB was pending…."[322] The *only evidence* about ICANN's November 2016 workshop meeting is Mr. Disspain's Witness Statement, and his account of the workshop is frustratingly vague. Specifically, Mr. Disspain does not provide any specific information on:

- the "issues being raised regarding .WEB;"
- the "relevant information about the dispute" considered by the Board;
- the "parties'" whose "legal and factual contentions" were discussed, or information about those contentions;
- the "set of options" that the ICANN Board considered;
- the ICANN "Board members" that attended the meeting, and whether they voted on this choice not address the .WEB issue;
- the "questions" that members of the ICANN Board had about the .WEB matter;
- the "claims arising from the .WEB auction" that the ICANN Board chose not to act upon;
- the specific "Accountability Mechanisms that had already been initiated over .WEB;"
- the prospective "further Accountability Mechanisms and legal proceedings" considered by the ICANN Board; and
- any justification for the ICANN Board's choice "to await the results of such proceedings before considering and determining what action, if any, to take at that time.[323]

178. In so doing, ICANN (through Mr. Disspain) fails to provide the Panel with sufficient evidence to determine whether the ICANN Board acted reasonably in November 2016—even if the business judgment

[322] ICANN's Rejoinder Memorial, ¶ 3.

[323] Disspain WS, ¶¶ 10-11.

rule were applicable here. Given this significant deficiency in ICANN's defense, and for the reasons stated above, ICANN cannot—and should not—be granted protection under the business judgment rule.

VII. AFILIAS DID NOT VIOLATE THE BLACKOUT PERIOD

179. In an auction context, a "blackout period" is designed to prevent bid rigging by prohibiting bidders from coordinating in advance of the auction. Here, the relevant "Blackout Period" prohibited members of the .WEB contention set from collaborating, discussing bids or bidding strategies, or otherwise discussing or negotiating settlement agreements related to the upcoming ICANN-administered .WEB Auction "from the Deposit Deadline for the Auction until full payment had been received in the Auction Bank Account from the Winner of the Contention Set."[324] These "Blackout Period" rules do not prohibit any and all contact among the members of the contention set.

180. The weeks leading up to the ICANN .WEB Auction were not usual. Members of the contention set had complained to ICANN about the status of NDC's application and had petitioned ICANN to postpone the auction until a thorough investigation could be completed. Although Afilias had not joined the request to delay the auction, the pendency of that request introduced some uncertainty as to whether the ICANN auction would, in fact, go forward. In that context, Mr. John Kane of Afilias texted Mr. Jose Ignacio Rasco III of NDC to see whether NDC would be interested in pursuing a private auction if, in fact, the ICANN auction was delayed. Mr. Kane specifically requested only a "Y/N" answer to his question.[325] Of course, none of the contention set members had any idea that Mr. Rasco was unable to respond freely to any inquiries in light of NDC's commitments to Verisign.

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[324] The Blackout Period rules prohibit applicants "from cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other's, or any other competing applicants' bids or bidding strategies, or discussing or negotiating settlement agreements or post-Auction ownership transfer arrangements…." Auction Rules, [Ex. C-4], Sec. 2.6; Auction Rules, [Ex. C-4], ¶ 68(a).

[325] The full text of Mr. Kane's communication reads: "If ICANN delays the auction next week would you again consider a private auction? Y/N." NDC Br., ¶ 49.

181. If Mr. Rasco had replied in the affirmative, and if ICANN had delayed the auction, Mr. Kane was prepared to open discussions with NDC about the terms of a private auction. However, Mr. Rasco did not reply and ICANN did not delay the auction, so Mr. Kane's brief text was the only communication that was made between the parties.

182. The *Amici*'s argument that this single text constituted a violation of the Blackout Period is entirely without merit and is simply intended to serve as a distraction. *First,* it is clear that the plain language of Mr. Kane's text (a) did not discuss a bid for .WEB, (b) did not discuss bidding strategies for .WEB, and (c) did not discuss or negotiate a settlement agreement concerning .WEB. For this reason alone, Afilias did not violate the Blackout Period.

183. *Second*, the *Amici*'s argument that Mr. Kane's text referenced or otherwise incorporated a proposal that Afilias had made and that NDC had rejected in the context of discussions about a private auction *prior* to the Blackout Period is not only false, it is irrelevant. There is nothing in Mr. Kane's text that remotely suggests a renewal of any offer made in the context of the private auction discussions prior to the Blackout Period. Mr. Rasco's witness statement asserts that he "understood Afilias' text message to refer back to a proposal Afilias made to Mr. Calle in June 2016 …."[326] Mr. Rasco provides no basis for his "understanding" and there is no basis for it in Mr. Kane's text. Moreover, the offer that Afilias has previsouly made (and that NDC had rejected) was made in the context of the private auction; it could have no application to an ICANN Auction. Accordingly, even if Mr. Rasco had, in fact, misinterpreted Mr. Kane's brief text as a restatement of Afilias' prior offer,[327] those terms were not relevant to and, in fact, not applicable to an auction where ICANN would retain 100% of the auction proceeds.

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326 Rasco Decl., ¶ 97.

327 NDC Br., ¶ 118. NDC's statement that "Afilias sent these text messages after the commencement of the Blackout Period" is misleading and false. *Id.* (emphasis omitted). As NDC admits, the only communication between Afilias and NDC during the Blackout Period consisted of a single, innocuous 14-word text that hardly constitutes an attempt to rig the ICANN .WEB Auction.

184. In short, Mr. Kane's text—requesting nothing more than a Yes or No answer to the question on whether NDC would again consider a private auction if ICANN were to delay the ICANN Auction scheduled for the following week—did not discuss a bid for .WEB; did not discuss bidding strategies for .WEB; and did not discuss or negotiate a settlement agreement concerning .WEB. The allegation by the *Amici* that the text violated the prohibitions of the Blackout Period is entirely without merit.

VIII. THE *AMICI* MISREPRESENT THE SCOPE AND EFFECT OF ICANN'S COMPETITION MANDATE

185. Contrary to the *Amici*'s arguments that ICANN is *prohibited* from taking actions and making decisions to promote competition,[328] this is exactly what ICANN's Articles and Bylaws specifically authorize ICANN to do. *First*, the *Amici* ignore the express commands of ICANN's Articles of Incorporation:

> The Corporation ***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 and applicable local law and through open and transparent processes that ***enable competition*** and open entry in Internet-related markets.[329]

186. *Second*, the *Amici* ignore ICANN's Bylaws, which specifically authorize ICANN to take disparate and discriminatory actions and decisions, where justified by ICANN's mandate to promote competition:

> 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***.[330]

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328 NDC Br., ¶¶ 8-11 (arguing that ICANN lacks "legal or regulatory authority to police competition"); Verisign Br., ¶¶ 95-97.

329 Articles, [Ex. C-2], Sec. III.

330 Bylaws, [Ex. C-1], Sec. 2.3. Given the testimony of ICANN's first chairwoman that ICANN's "primary purpose" was to "break" the .COM monopoly it is reasonable to infer that Section 2.3 of the Bylaws was specifically drafted to enable ICANN to treat Verisign differently. Indeed, as of today, Verisign is treated differently from every other registry operator, since .COM and .NET are the only two registries subject to price regulation. It is also reasonable to infer, based on the fact that .NET is subject to price controls, despite being a fraction of the size of .COM and similar in size to other registries such as .ORG, that Verisign is being treated differently based on its market power, rather than simply as the registry operator of .COM.

187. For these reasons, the *Amici* misconstrue Afilias' arguments concerning ICANN's core value to promote competition.

188. ICANN contends in response to Afilias' claims that it retained "discretion to determine whether NDC committed a breach of the Guidebook or Auction Rules and, if so, the appropriate remedy or penalty, if any."[331] But the plain terms of its Bylaws restrain ICANN's exercise of its discretion by providing that "ICANN ***will act*** in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values."[332] To that end, ICANN's "Core Value" to "introduc[e] and promot[e] competition in the registration of domain names"[333] must "guide the decisions and actions of ICANN."[334] As discussed below in Section IX, it is Afilias' position that this Panel is authorized to make findings of fact as to whether ICANN's failure to act violated its Articles or Bylaws and, further, to render a decision that is binding and that "directs" ICANN's Board and Staff on the "appropriate action to remedy" for that violation.[335] That "appropriate action" must reflect, and in determining such action this Panel should be guided by, ICANN's Core Value to "introduce[e] and promot[e] competition."

A. The New gTLD Program Was Designed to Promote Competition

189. Neither the *Amici* nor their experts dispute the fact that the Guidebook makes clear that the New gTLD Program was intended to promote competition, fulfilling one of ICANN's key mandates:

> Since ICANN was founded in 1998[336] as a not-for-profit, multi-stakeholder organization, ***one of its key mandates has been to promote competition in the domain name market***. ICANN's mission specifically calls for the

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331 ICANN's Rejoinder Memorial, ¶ 4. This argument was adopted by the *Amici*. *See* NDC Br., ¶ 15.

332 Bylaws, [Ex. C-1], Sec. 1.2.

333 Bylaws, [Ex. C-1], Sec. 1.2(b)(iv).

334 Bylaws, [Ex. C-1], Sec. 1.2(b).

335 CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Annex 07 – Recommendation #7: Strengthening ICANN's Independent Review Process (23 Feb. 2016), [Ex. C-122], ¶ 57.

336 In November 1998, ICANN signed a Memorandum of Understanding ("MOU") with the U.S. Commerce Department, which mandated that ICANN "***support competition and consumer choice*** in the technical management of the DNS … [to] lower costs, promote innovation, and enhance user choice and satisfaction." ICANN, Memorandum of Understanding between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers (25 Nov. 1999), [Ex. C-57], Sec. II(c)(2) (emphasis added).

> corporation to maintain and build on processes that will ensure competition and consumer interests…. New gTLDs are viewed by ICANN as important to fostering choice, innovation and competition in domain registration services[.][337]

190. Indeed, in its resolution that approved the Guidebook, ICANN's Board wrote:

> The launch of the new gTLD program is in fulfillment of a core part of ICANN's Bylaws: the ***introduction of competition and consumer choice in the DNS***. … This decision represents ICANN's continued adherence to its ***mandate to introduce competition*** in the DNS, and also represents the culmination of an ICANN community policy recommendation of how this can be achieved.[338]

191. Contrary to ICANN's position that it fulfills its competition mandate exclusively through the policy development,[339] the new gTLD application form itself requires applicants to detail what the applied-for gTLD "will add to the current space, in terms of ***competition***, differentiation, or innovation."[340] If ICANN had already satisfied its competition mandate by developing the New gTLD Program, there would not have been any reason to enquire how applicants would promote competition in the DNS.[341]

192. In connection with its development of the New gTLD Program, ICANN retained Dr. Dennis Carlton to opine on the competitive benefits of introducing new gTLDs. Dr. Carlton opined in that context that:

> ICANN's plan to introduce new gTLDs is likely to benefit consumers by facilitating entry which ***would be expected to mitigate market power associated with .com*** and other major TLDs and increase innovation.[342]

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337 AGB, [Ex. C-3], Attachment to Module 2, p. A-1.

338 ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (20 June 2011), [Ex. C-9], p. 7.

339 Witness Statement of J. Beckwith Burr (31 May. 2019), ¶¶ 19, 22.

340 AGB, [Ex. C-3], Attachment to Module 2, Sec. 18(b) (Mission Purpose).

341 Further, Ms. J. Beckwith Burr's contention that the New gTLD Program was not intended to create competition for .COM is flatly contracted by the sworn Congressional testimony of Ms. Esther Dyson, ICANN's first chairwoman. Ms. Dyson, appearing to support the introduction of the New gTLD Program, testified that ICANN's "primary mission" was to "break" the .COM "monopoly." S. Hrg. 112-394, ICANN's Expansion of Top Level Domains, Hearing before the Committee on Commerce, Science, and Transportation, U.S. Senate, 112th Congress, First Session, December 8, 2011, [Ex. JZ-2], p.46.

342 Preliminary Report of Dennis Carlton Regarding Impact of New GTLDS on Consumer Welfare (March 2009), available at https://archive.icann.org/en/topics/new-gtlds/prelim-report-consumer-welfare-04mar09-en.pdf, [Ex. GS-33], ¶ 20.

193. Dr. Carlton specifically disagreed with critics who opined that the competition would *only* be furthered if new gTLDs were able to erode .COM's market power:

> Even if *.com* (or, for that matter, any other TLD) today exercises market power, new gTLDs could enhance consumer welfare by creating new products and fostering innovation, and promoting future competition with *.com* and other TLDs. That is, ***entry of a new gTLD can be desirable even if the gTLD does not erode any of the market power that .com may possess***.[343]

194. Dr. Carlton further opined that the introduction of a new gTLD would promote competition, *even if its introduction did not result in a price effect on .COM*:

> Even if the new gTLDs authorized under the ICANN proposal would not compete with *.com* for *existing* registrants and ***did not result in the reduction of the fee for .com registration below the price cap level***, entry would still be likely to benefit consumers by increasing the likelihood of the successful introduction of ***new and innovative registration services*** which generate benefits to consumers.[344]

195. Regarding .COM specifically, Dr. Carlton opined:

> The DOJ, for example, speculates that the network effects that make *.com* registrations so valuable to consumers will be difficult for other TLDs to overcome. However, any market power associated with *.com* will attract entrants with strategies built around bringing new registrants to the new gTLDs. ***Restricting the opportunity for entrants to compete for such profits necessarily has the effect of preserving profits associated with .com***.[345]

196. Dr. Carlton also rejected any criticisms that he had not quantified consumer benefit on a cost/benefit basis:

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343 Dennis Carlton (Compass Lexecon), Comments on Michael Kende's Assessment of Preliminary Reports on Competition and Pricing (5 June 2009), [Ex. C-126], ¶ 5.

344 Dennis Carlton (Compass Lexecon), Comments on Michael Kende's Assessment of Preliminary Reports on Competition and Pricing (5 June 2009), [Ex. C-126], ¶ 8; *see also* Michael Katz *et al.*, An Economic Framework for the Analysis of the Expansion of Generic Top-Level Domain Names: A Report Prepared for ICANN (June 2010), available at https://archive.icann.org/en/topics/new-gtlds/economic-analysis-of-new-gtlds-16jun10-en.pdf (last accessed on 23 July 2020), ¶ 28 (noting a "broad consensus among economists" that competition is preferable to regulation, specifically because competition is better at promoting innovation).

345 Preliminary Report of Dennis Carlton Regarding Impact of New GTLDS on Consumer Welfare (March 2009), available at https://archive.icann.org/en/topics/new-gtlds/prelim-report-consumer-welfare-04mar09-en.pdf, [Ex. GS-33], ¶ 22.

> *Requiring entrants to justify entry on [a] cost/benefit basis, however, is likely to result in significant consumer harm* because the competitive benefit of new business methods or technologies facilitated by entry can be very hard to predict *a priori*.[346]

197. For this reason, Dr. Carlton concluded that the introduction of new gTLDs was "likely to *improve consumer welfare by facilitating entry and creating new competition* to the major gTLDs such as *.com*, *.net*, and *.org*."[347]

198. In this IRP, Dr. Carlton inexplicably takes a contrary view:[348]

- First, despite opining in 2009 that even if the entry of a gTLD "***did not result in the reduction of the fee for .com registrations below the price cap level, entry would still be likely to benefit consumers***,"[349] Dr. Carlton opines here that Afilias must show that "an Afilias-operated .WEB would cause Verisign to reduce its .COM prices" to demonstrate that the acquisition of .WEB by Verisign would not "promote competition."[350] Indeed, Dr. Carlton had opined to the contrary in 2009, when he advised that "[r]equiring entrants to justify entry on [a] cost/benefit basis …. is likely to result in significant consumer harm."[351]

- Second, despite opining in 2009 that "***entry of a new gTLD can be desirable even if the gTLD does not erode any of the market power that .com may possess***,"[352] Dr. Carlton opines here that Afilias must establish that an Afilias-operated .WEB would restrain Verisign's .COM pricing above and beyond those restraints imposed by the U.S. government-imposed price caps on .COM.[353]

- Third, despite recognizing in 2009 the procompetitive benefits of introducing new gTLDs "***holds even if .com pricing continues to be regulated through price caps*** because competition has the potential for inducing registries of regulated TLDs to reduce prices below

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346 Preliminary Report of Dennis Carlton Regarding Impact of New GTLDS on Consumer Welfare (March 2009), available at https://archive.icann.org/en/topics/new-gtlds/prelim-report-consumer-welfare-04mar09-en.pdf, [Ex. GS-33], ¶ 41.

347 Preliminary Report of Dennis Carlton Regarding Impact of New GTLDS on Consumer Welfare (March 2009), available at https://archive.icann.org/en/topics/new-gtlds/prelim-report-consumer-welfare-04mar09-en.pdf, [Ex. GS-33], ¶ 5.

348 Each of Dr. Carlton's new opinions are joined by the *Amici*'s expert, Dr. Murphy.

349 Dennis Carlton (Compass Lexecon), Comments on Michael Kende's Assessment of Preliminary Reports on Competition and Pricing (5 June 2009), [Ex. C-126], ¶ 8.

350 Expert Report of Dennis Carlton (30 May 2019), ¶ 6. *See also* Expert Report of Kevin M. Murphy (Verisign) (30 May 2020), ¶ 4 (criticizing Dr. Sadowsky for not conducting an "analysis of how the acquisition of .web by Verisign would alter the pricing incentives for .com").

351 Preliminary Report of Dennis Carlton Regarding Impact of New GTLDS on Consumer Welfare (March 2009), available at https://archive.icann.org/en/topics/new-gtlds/prelim-report-consumer-welfare-04mar09-en.pdf, [Ex. GS-33], ¶ 41.

352 Dennis Carlton (Compass Lexecon), Comments on Michael Kende's Assessment of Preliminary Reports on Competition and Pricing (5 June 2009), [Ex. C-126], ¶ 5.

353 Expert Report of Dennis Carlton (30 May 2019), ¶¶ 29-30. *See also* Expert Report of Kevin M. Murphy (Verisign) (30 May 2020), ¶ 3(d) (arguing that there is "no economic basis to believe that Verisign would lower the price of .COM if .WEB were owned by someone else" because .com is subject to price regulation).

these caps,"[354] Dr. Carlton opines here that, to demonstrate that allowing Verisign to control .WEB would violate ICANN's mandate to promote competition, Afilias must demonstrate that "competitive pressure from an Afilias-operated .WEB would cause Verisign to reduce its .COM prices or otherwise improve the quality of the .COM offering."[355]

Neither the *Amici* nor ICANN offer any explanation for Dr. Carlton's *volte face*.

B. Any Decision Furthering Verisign's Acquisition of .WEB Is Inconsistent With ICANN's Competition Mandate

199. There is no legitimate argument against the obvious conclusion that Verisign possesses market power. The *Amici*'s arguments to the contrary are meritless.

- First, in 2008, the ***DOJ specifically determined that Verisign possesses significant market power because many registrants do not perceive .COM and other gTLDs and ccTLDS to be substitutes***.[356] Specifically, as there is no genuinely adequate substitute TLD for .COM at present, Verisign remains the only source for new registrants wishing to enjoy the distinct benefits of branding on a .COM domain name. The DOJ has never opined otherwise.

- Second, the U.S. government continues to regulate the price of .COM, as it has done consistently over the last 20 years.[357] The U.S. government may only regulate the pricing of private companies where they are deemed to have a monopoly or near monopoly.[358] In 2018, the U.S. Department of Commerce determined that price regulation of .COM continues to be necessary.[359] Contrary to the *Amici's* representations to this Panel, Amendment 35 of Verisign's Cooperative Agreement with the U.S. government does not eliminate pricing regulation, but rather permits Verisign to pursue with ICANN an up to 7

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354 Preliminary Report of Dennis Carlton Regarding Impact of New GTLDS on Consumer Welfare (March 2009), available at https://archive.icann.org/en/topics/new-gtlds/prelim-report-consumer-welfare-04mar09-en.pdf, [Ex. GS-33], ¶ 24.

355 Expert Report of Dennis Carlton (30 May 2019), ¶ 6. *See also* Expert Report of Kevin M. Murphy (Verisign) (30 May 2020), ¶ 35 (restricting competitive analysis to whether the introduction of .WEB will reduce .COM pricing).

356 Expert Report of Dennis Carlton (30 May 2019), ¶¶ 51-52 (citing the December 2008 letter from Deborah A. Garza of DOJ to Meredith Baxter of NTIA, [Ex. C-125]).

357 It should be noted that both .COM and .NET are uniquely subject to price regulation by the U.S. government, which removed all price regulation from the other so-called legacy gTLDs earlier this year. The U.S. government's decision to retain price control over Verisign alone is an implicit recognition of Verisign's continued market power. *See* Amendment to Financial Assistance Award between the U.S. Department of Commerce and VeriSign, Inc., Award No. NCR-92-18742, Amendment Thirty-Five (35) (26 Oct. 2018), [Ex. KM-25], Sec. 2; *see also* .Net Registry Agreement between ICANN and Verisign (1 July 2017), available at https://www.icann.org/sites/default/files/tlds/net/net-agmt-html-01jul17-en.htm (last accessed 23 July 2020).

358 Price controls imposed by the U.S. government are generally deemed to be unconstitutional if they are arbitrary, discriminatory, or otherwise irrelevant to a legitimate government purpose. *See Pennell v. City of San Jose*, 485 U.S. 1, 11 (1988), [Ex. CA-44]. The exception to this rule is that the U.S. government may intervene in markets to regulate pricing where "prices … are artificially inflated as a result of the existence of a monopoly or near monopoly." *Id.* That is exactly why the U.S. government intervened 20 years ago and imposed price caps on .COM. Sadowsky Report, ¶¶ 17, 50.

359 Amendment to Financial Assistance Award between the U.S. Department of Commerce and VeriSign, Inc., Award No. NCR-92-18742, Amendment Thirty-Five (35) (26 Oct. 2018), [Ex. KM-25], Sec. 2.

percent increase in the prices of .COM domain names in each of the last four years of the new six-year contract.[360] Thus, the U.S. government has effectively ceded to ICANN the authority to determine whether the price cap on .COM annual registrations should be raised from $7.85 to $10.29.[361] ***Thus, in 2018, the U.S. government again determined that Verisign possesses a monopoly or near-monopoly.***[362]

- Third, as Dr. Carlton observes, Verisign has always priced .COM registrations at the maximum price allowable under government price caps.[363] Indeed, Dr. Carlton opines that "***[t]he fact that Verisign has consistently charged the maximum-allowable price for .COM domain name registrations indicates that regulation is a binding constraint and that Verisign would set a higher price for .COM absent the regulation***."[364] Dr. Carlton's concession that an unregulated Verisign would raise prices is telling, since Verisign's internal costs have remained constant and the current $7.85 annual price for a .COM registration remains considerably above the annual cost of operating a registry, estimated at only approximately $1.00 per registration.[365] Indeed, Afilias offered to charge only $1.65 per registration if it were granted approval to operate the .IN registry on behalf of the Government of India.

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360 Amendment to Financial Assistance Award between the U.S. Department of Commerce and VeriSign, Inc., Award No. NCR-92-18742, Amendment Thirty-Five (35) (26 Oct. 2018), **[Ex. KM-25]**, Sec. 2.

361 Over widespread objections, ICANN, in exchange for a $20 million payment from Verisign, approved the increase in the .COM cap earlier this year. *See* Zak Muscovitch, "Report and Analysis of Public Comments Submitted to ICANN on the .COM Pricing Provisions (Part II)," *CircleID* (6 Mar. 2020), available at http://www.circleid.com/posts/20200306_report_and_analysis_of_public_comments_submitted_to_icann_part_ii/ (last accessed 23 July 2020).

362 Dr. Murphy is incorrect on two grounds in this respect. First, contrary to his assertions at ¶ 37 of his report, the recent action by the U.S. government to ***continue to regulate the price of*** .COM registrations means that the U.S. government continues to believe that Verisign wields monopoly or near monopoly power as a result of its control of the .COM registry. Second, Dr. Murphy's reliance on the U.S. government's characterization of Amendment 35 as providing for "pricing flexibility" at ¶ 37 of this report ignores the fact that this "flexibility" amounts to raising the price cap by only 7% over 6 years.

363 Expert Report of Dennis Carlton (30 May 2019), ¶ 30.

364 Expert Report of Dennis Carlton (30 May 2019), ¶ 30. Drs. Carlton and Murphy opine in their reports that government price regulation of Verisign is the best means of constraining Verisign's market power. Expert Report of Dennis Carlton (30 May 2019), ¶ 32; Expert Report of Kevin M. Murphy (Verisign) (30 May 2020), ¶ 35. The U.S. government takes a decidedly different view. *See* Stuart Chemtob, U.S. Department of Justice, The Role of Competition Agencies in Regulated Sectors (5th International Symposium on Competition Policy and Law, Institute of Law, Chinese Academy of Social Science, Beijing, China, 11 May 2007), available at https://www.justice.gov/atr/speech/role-competition-agencies-regulated-sectors (last accessed 23 July 2020), **[Ex. CA-108]** (agreeing with the "general principle that the invisible hand of the market results in a more optimal distribution of resources and a higher level of economic welfare than does regulation of economic activity by the heavy, visible hand of the government."). Dr. Murphy's opinion thus conflicts with the generally held principle that competition is preferably to regulation. *See also* Michael Katz *et al.*, An Economic Framework for the Analysis of the Expansion of Generic Top-Level Domain Names: A Report Prepared for ICANN (June 2010), available at https://archive.icann.org/en/topics/new-gtlds/economic-analysis-of-new-gtlds-16jun10-en.pdf (last accessed on 23 July 2020), ¶. 28 (noting a "broad consensus" among economists that competition is preferable to regulation of prices).

365 Registries often price their domain names at or around $1.00, suggesting that this is a reasonable approximation of costs. Indeed, the .SITE registry reduced the cost of registration to $0.48 in May 2019. *See* Kieren McCarthy, "Dot-com web addresses prices to swell, thanks to sweetheart deal between Uncle Sam, Verisign: Freeze on renewal, base costs lifted so we all pay a bit more," *Register* (2 Nov. 2018), available at https://www.theregister.com/2018/11/02/dotcom_domains_pricing/ (last accessed 23 July 2020).

- Fourth, there is scant evidence to suggest that the New gTLD Program has, to date, constrained Verisign's market power. Since the introduction of new gTLDs in the third quarter of 2013, Verisign has gained more new registrations (35.3 million) than all new gTLDs ***combined*** (26.1 million). Furthermore, while Verisign secured at least 9.2 million new ***unique*** registrations since 2013, neither ICANN nor the *Amici* have demonstrated how many of the registrations in new gTLD registries were made in addition to registrations taken in the .COM registry. Moreover, while Dr. Kevin M. Murphy contends that gTLDs compete with ccTLDs,[366] he cites no evidence to support this sweeping conclusion. If this was in fact true, the decision by the U.S. government to continue to impose price regulations on the .COM registry would be unconstitutional.[367]

200. Perhaps in light of the obviousness of Verisign's market power, the *Amici* (and ICANN) dismiss .WEB as "just another gTLD," suggesting that adding .WEB to Verisign's stable would not impact competition.[368] As explained by Drs. George Sadowsky and Jonathan Zittrain, there are compelling reasons to believe why this is not true.[369] Of all potential gTLD domains, only .WEB is (1) three-letters long,[370] (2) completely generic, (3) closely identified with the Internet, and (4) memorable.[371] None of the alternatives proposed by the *Amici* satisfy this standard. As the table set forth in Annex B demonstrates, the *Amici*'s complete failure to identify even a single alternative for .WEB from the entirety of the English language is telling.

366 Expert Report of Kevin M. Murphy (Verisign) (30 May 2020), ¶ 21.

367 For the reasons set forth in the Sadowsky Report, n. 12, it is obvious that ccTLDs do not compete with .COM. *First*, it is highly unlikely that a U.S. company would choose to have a ".uk, .fr, or .de" web address, which would imply that the company is British, French, or German, respectively. Second, companies that wish to reach consumers globally are unlikely to choose to brand themselves by adopting a web address that ties them to a particular geography. This is why, as Verisign concedes, its .COM registry is just as popular outside of the United States as within it. Expert Report of Kevin M. Murphy (Verisign) (30 May 2020), ¶ 23. Moreover, while some ccTLDs have marketed themselves as de facto gTLDs (e.g., .co and .tv), none of these ccTLDs have amassed a sufficient number of registrations to restrain Verisign's pricing of .COM, which Dr. Murphy concedes must be restrained by government regulation. *Id.*, ¶ 3(d).

368 Verisign Br., Sec. III(C); Expert Report of Dennis Carlton (30 May 2019), Sec. V(A); Expert Report of Kevin M. Murphy (Verisign) (30 May 2020), Sec. V. *See also* ICANN's Rejoinder Memorial, ¶ 103.

369 Zittrain Report, Sec. 8; Sadowsky Report, Sec. VII.

370 Three-letter domains are uniquely attractive. Sadowsky Report, ¶ 35.

371 Sadowsky Report, ¶ 41. There are two other domains that satisfy this three-part test: .COM and .NET, both of which are controlled by Verisign. Verisign's protestations to the contrary, .COM is perhaps the most obvious manifestation of the concept of the Internet in a domain name, as evidence by the event known as "the .COM boom" and the identification of leading internet companies as ".COMs."

201. For this reason, .WEB has been uniquely identified by members of the Internet community as the next best competitor for .COM:

- "Is it likely that .web will be a standout among new TLDs? Here are a few points that may indicate ***.web is poised to gain traction relative to other recently introduced TLDs***. … We're already used to using the term 'web' for internet-related activities. We refer to online properties as 'websites' or 'web pages' and the talent who create them are 'web designers' and 'web developers.' We use 'web servers' and 'web browsers' and even 'web apps'. The common references make a transition to a .web domain a natural activity for a mass online and mobile audience."[372]

- "***.WEB is a different animal***. … .WEB is what we call a '***super generic***' and arguably the ***best new TLD alternative to .COM***. It is a word that is commonly used with intuitive meaning. ***.WEB could make a serious dent to .COM*** over the long run."[373]

- "[.WEB] is both most sufficiently generic, sufficiently catchy, sufficiently short and of sufficient semantic value to provide ***a real challenge to .com***."[374]

- ".web is widely considered [to be] ***the gTLD with the most potential*** out of 1,930 applications for new domain extensions ICANN received to battle .com and .net for widespread adoption."[375]

- "***.web is the one domain that could unseat .com***."[376]

202. Verisign's own conduct marks .WEB as unique among all new gTLDs. As Mr. Livesay states, in 2014, he was "put in charge of identifying potential business opportunities for Verisign in ICANN's New gTLD Program."[377] As Verisign notes, ICANN received applications to run over 1,200 unique new gTLD registries.[378] Yet Verisign chose to pursue just one of these, .WEB. Verisign's focus on acquiring .WEB has been singular, focused and relentless. Industry commentators have identified why:

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372 Derek Vaughn, "Inside the High Stakes Auction for .WEB," *InetServices* (25 July 2016), available at https://www.inetservices.com/blog/inside-the-high-stakes-auction-for-web/ (last accessed 19 July 2020), **[**Ex. C-130**]**, p. 2.

373 Peter Lamantia, ".WEB Acquired for $135 Million. Too much? How does it compare?," *Authentic Web* (*undated*), **[**Ex. C-29**]**, p. 2.

374 Kevin Murphy, "Verisign likely $135 million winner of .web gTLD," *Domain Incite* (1 Aug. 2016), **[**Ex. C-30**]**, p. 2.

375 Cybele Negris, "How a $135 million auction affects the domain name industry and your business," *BIV* (10 Aug. 2016), **[**Ex. C-31**]**, p. 2.

376 "The Next Big Domain Extension," *Supremacy SEO* (*undated*), **[**Ex. C-32**]**, p. 2.

377 Livesay WS, ¶ 4.

378 Verisign Br., ¶ 36.

- "*.web is expected to pose significant competition to .com and .net domain systems in the future*. As a result, VeriSign was keen to secure the management of this domain name when it was put to auction by ICANN."[379]

- "With correct positioning, marketing, and rollout, *[.WEB] could become a $500M recurring business* over the next decade."[380]

- "Recall VeriSign is paying $135M for the ownership rights to be the registry operator of .web. This could offer a new growth opportunity for the company into the future, but just as important, we think it is *a very good defensive strategic move keeping .web out of the hands of the potential competitor as we believe .web could be the closest thing to .com in the minds of customers looking for domain names*."[381]

203. The *Amici*'s arguments that attempt to explain away Verisign's efforts to stymie competition are unavailing. For example, despite the record price paid at auction for .WEB, Dr. Carlton speculates that Verisign's valuation of .WEB "may have been based on its desire to sell registrations, not necessarily to prevent competition."[382] However, economic theory accepts that incumbent firms like Verisign will, at least in part, base their valuation on the benefits derived from keeping competitive assets out of the hands of competitors. Indeed, "in a highly concentrated industry with large margins between the price and incremental cost … the value of keeping [competing assets] out of competitors' hands could be very high" and warning

379 Dilantha de Silva, "VeriSign: An Overvalued Company With A Strong Moat," *Seeking Alpha* (23 Sep. 2019), available at https://seekingalpha.com/article/4293005-verisign-overvalued-company-strong-moat (last accessed 19 July 2020), **[**Ex. C-175**]**, p. 2.

380 Ash Anderson, "VeriSign Is Immune From Coronavirus," *Seeking Alpha* (16 Mar. 2020), available at https://seekingalpha.com/article/4332180-verisign-is-immune-from-coronavirus (last accessed 19 July 2020), **[**Ex. C-176**]**, p. 4. Industry projections for .WEB are in stark contrast to Dr. Murphy's flawed net present value ("NPV") analysis, which purports to estimate the number of registrations .WEB can be expected to achieve based on the results of the .WEB auction. Expert Report of Kevin M. Murphy (Verisign) (30 May 2020), ¶¶ 50-57. The limits of this flawed analysis are obvious. Dr. Murphy's conclusion that .WEB would achieve registrations of only 0.5 million in year one and only 3.1 million registrations after 5 years, based on his NPV analysis, are belied by the new gTLD .ICU, which amassed 1 million registrations in its first year after being delegated and over 6 million registrations in its first two years. No one would suggest that .ICU is a better domain name than .WEB. *See* NTLDSTATS, STATISTICS: NEW GTLDS, https://ntldstats.com/tld/icu (last accessed 23 July 2020).

381 J.P.Morgan, *VeriSign (VRSN US): DoJ Clears Way for VRSN to Close .web Purchase* (10 Jan. 2018), **[**Ex. JZ-3**]**.

382 Expert Report of Dennis Carlton (30 May 2019), ¶ 45.

that acquisitions may "foreclose or raise the costs of competitors".[383] Indeed, Verisign structured the DAA to avoid setting a cap on how much it could bid for .WEB[384]

204. In particular, Dr. Murphy's analysis of the future competitiveness of .WEB, based on inferences drawn from the $135 million price Verisign paid at auction for .WEB, is fundamentally flawed for two reasons.[385]

205. *First*, while most auctions are open to the public generally, the .WEB auction was limited to just the seven applicants for .WEB that comprised the contention set. Indeed, these applicants were required to express their interest in .WEB in 2012, two years before the first gTLDs were introduced and four years before the .WEB Auction was conducted. In 2012, no one knew what any new gTLD was worth, let alone .WEB specifically. Indeed, it is unlikely that many of the .WEB contention set members would have applied for .WEB if they knew in 2012 what they knew about .WEB's valuation by 2016, since few contention set members had the financial resources to compete at the .WEB Auction and there would have been little incentive to pay the $185,000 application fee simply to lose at auction. It is equally probable that had the .WEB Auction been open to the public, rather than limited to contention set members, better financed bidders would have participated in the auction and the auction price would have been substantially higher.[386]

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383 *In the Matter of Policies Regarding Mobile Spectrum Holdings*, FCC, WT Docket No. 12-269, Ex Parte Submission of the United States Department of Justice (11 Apr. 2013), [Ex. CA-109]. This description perfectly mirror's Verisign's position as the dominant incumbent in a highly concentrated market where it enjoys a profit margin that bests the rest of the Fortune 100 companies.

384 Verisign has tried to characterize the DAA as merely a "financing arrangement." But in a typical financing arrangement, a lender would specify a funding limit based on its assessment of either (a) the applicant's ability to repay the loan, or (b) the value of the target acquisition. Here, the DAA's structure confirms that Verisign's bids for .WEB were not based on its valuation of .WEB itself—that valuation could have been completed in advance and NDC provided with a bidding cap. Verisign specifically structured the DAA to ensure that it would be in the room to respond to competing bids in real time. The only reason to structure the DAA this way—to gain total control of how much was bid during each round—was because the real value to Verisign was in keeping .WEB out of the hands of competitors.

385 Dr. Murphy's analysis is set forth at paragraphs 50-57 of his Report.

386 In 2019, a private equity firm valued .ORG at $1.135 billion despite the fact that the .ORG registry is less than 10% of the size of the .COM registry. Dr. Sadowsky opines that "a .web TLD would have a degree of attraction similar to .com and would attract a very large number of registrations." Sadowsky Report, ¶ 54. The auction price therefore bore little resemblance to the true value of .WEB.

Dr. Murphy's analysis fails for this reason alone: the value .WEB realized at auction was largely based on the fact that eligibility to participate in the auction was determined four years earlier.

206. *Second*, even though some very well-financed companies such as Google participated in the .WEB auction,[387] press reports suggest that by 2015 (one year prior to the .WEB Auction), Google's strategy had shifted and it was now pursuing only those gTLDs where it was the only applicant.[388] Accordingly, Google's bids (if any) at the .WEB auction bore no resemblance to what Google would have bid in 2012. The inherent fatal flaw in Dr. Murphy's analysis can be simply explained thusly: if NDC had not violated the New gTLD Program Rules and Verisign had not participated in the .WEB Auction, .WEB would have sold for $70.9 million instead of $135 million.[389] By Dr. Murphy's analysis, that would mean that .WEB would be nearly 50% less successful simply because Verisign had not participated in the bidding.

207. Moreover, both Drs. Murphy and Carlton speculate that Verisign would be a more efficient supplier of .WEB domain names given its experience and leading position in the market.[390] Neither of these opinions, however, are based on anything more than rank speculation and, as such, should be ignored.[391]

208. In making decisions about the disposition of .WEB, therefore, ICANN must, consistent with its Bylaws, be guided by the potential for .WEB to compete with .COM. To simplify, there are essentially two

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387 It is unclear how much Donuts and Radix, the other two larger companies in the .WEB contention set, were able to bid in 2016, having spent so much already on acquiring other new gTLDs. Dr. Murphy does not even attempt to estimate whether the other contention set members were able to submit bids in line with their valuation of .WEB.

388 *See* Kieren McCarthy, "Larry Page was held back by Google execs from flooding world with new dot-word domains: Moneybags CEO wanted to own rights to scores of gTLDs," *Register* (13 Aug. 2015), available at https://www.theregister.com/2015/08/13/larry_google_domain_names/ (last accessed 23 July 2020) (reporting that Google's plan to acquire 101 gTLDs was "boiled down to the company's brand names and those it has already applied for but was the only applicant.").

389 Indeed, if Afilias had not be constrained by the terms of its bank financing arrangements, Afilias would have bid more for .WEB.

390 Expert Report of Kevin M. Murphy (Verisign) (30 May 2020), ¶¶ 77-81; Expert Report of Dennis Carlton (30 May 2019), ¶ 55.

391 The DOJ's view is that efficiency claims, such as those offered by Drs. Murphy and Carlton, cannot be taken at face value. The DOJ will not consider efficiency claims if they are vague, speculative, or otherwise cannot be verified by reasonable means. *See* U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* (19 Aug. 2010), [Ex. CA-110], p. 30 (requiring that efficiency claims be verify by reasonable means, i.e., "the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific").

possible actions that will resolve the current conflict: .WEB will be awarded to either Afilias or Verisign. Concentrating on outcomes near the extremes, .WEB will be either relatively unsuccessful or it will succeed and become a significant competitive force. The decision facing ICANN therefore has only a few possible effects:

ICANN Decision	.WEB succeeds	.WEB fails
Delegate .WEB to Verisign	Verisign's market dominance is enhanced. Price regulation required.	No competitive effects
Award .WEB to Afilias	Verisign's market dominance is challenged. Price may be set by market competition.	No competitive effects

209. Even accepting that the effects of new entry are always uncertain, under the worst case scenario, if .WEB fails to attract significant registrations, the state of competition will remain unchanged, regardless of which action is taken. The only opportunity to enhance competition is the possibility that .WEB will be successful and it is awarded to an operator other than Verisign: if .WEB proves to be a success, market competition may be sufficient to stop regulating Verisign's pricing power. Indeed, "there is a broad consensus among economists that regulation is an imperfect substitute for competition, particularly with respect to its ability to promote innovation."[392]

C. The DOJ's Decision to Close its Investigation Is Irrelevant to the Panel's Analysis

210. The *Amici* argue that the DOJ's decision to close its investigation without taking any action is dispositive of any competitive questions concerning Verisign's potential acquisition of .WEB. *First*, because ICANN did not refer this matter to the DOJ for investigation, the DOJ's investigation focused on whether it should file a lawsuit to enjoin Verisign from acquiring .WEB because its doing so would tend "***substantially***

[392] Michael Katz *et al.*, An Economic Framework for the Analysis of the Expansion of Generic Top-Level Domain Names: A Report Prepared for ICANN (June 2010), available at https://archive.icann.org/en/topics/new-gtlds/economic-analysis-of-new-gtlds-16jun10-en.pdf (last accessed on 23 July 2020), at ¶ 28.

to lessen competition."[393] This is a significantly higher standard than ICANN's competition mandate to "*introduce and promote competition*," which must, by ICANN's Bylaws, "guide the decisions and actions of ICANN."[394]

211. *Second*, the fact that the DOJ investigation lasted for more than a year demonstrates that the DOJ believed that Verisign's proposed acquisition of .WEB raised significant competition concerns. As a DOJ official recently testified before Congress, of all potential transactions notified each year to the agency, the DOJ conducts lengthy investigations of transactions in only 1-2% of the thousands of transactions filed each year – in "ordinarily, only the most concerning deals."[395]

212. *Third*, the DOJ's decision to close its investigation does not suggest that the DOJ "concluded … that Verisign's operation of .WEB is not likely to harm competition."[396] To the contrary, there are many reasons that the DOJ, a federal agency that has limited resources, may elect to close an investigation without taking any actions that are completely unrelated to the competition concerns raised by the deal. In a recent brief filed by the DOJ, the agency completely refuted the *Amici*'s and ICANN's argument that this Panel should view the DOJ's decision to close its .WEB investigation as dispositive of any competition issues. Rejecting exactly that argument, the DOJ stated:

> Contrary to [appellant]'s suggestion, ***no inference should be drawn from the Division's closure of its investigations*** into [appellant]'s proposed and consummated acquisition of [the target]. As the United States has stated twice previously in this case in response to [appellant]'s assertions,

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393 Clayton Act, § 7, 15 U.S.C. § 18 (1996), **[Ex. CA-111]** (emphasis added). ICANN's mandate to take decisions consistent with its core value of promoting competition is necessarily considerably broader than Section 7 of the Clayton Act. DOJ's discretionary authority to enforce Section 7 requires, at a minimum, the agency to conclude that it can prove that a proposed transaction will, in fact, substantially lessen competition. ICANN's mandate requires ICANN to exercise its discretionary authority in a manner that will best promote competition. Thus, DOJ may decline to enforce the antitrust laws even in cases where it has substantial concerns about future competition, but ICANN may not exercise its discretion to foreclose the only opportunity to enhance competition.

394 The Bylaws' command that its Core Values must guide ICANN's decisions and actions is significantly broader than Ms. Burr's statement that ICANN fulfills its competition mandate through policy development alone. *See* notes 339-340 above.

395 Written Testimony of John W. Elias before the U.S. House Committee on the Judiciary (24 June 2020), available at https://judiciary.house.gov/uploadedfiles/elias_written_testimony_hjc.pdf?utm_campaign=4024-519 (last accessed 19 July 2020), **[Ex. C-177]**, p. 2.

396 Expert Report of Dennis Carlton (30 May 2019), ¶ 61. Notably, Dr. Carlton cites no authority for his assertion.

> there are many reasons why the Antitrust Division might close an investigation or choose not to take an enforcement action. ***The Division's decision not to challenge a particular transaction is not confirmation that the transaction is competitively neutral or procompetitive***.[397]

213. As the DOJ itself, recently and repeatedly, instructed U.S. courts to do, this Panel should not infer anything from the DOJ's decision to close its .WEB investigation.

IX. SCOPE OF THE PANEL'S REMEDIAL AUTHORITY

214. The *Amici* support ICANN's erroneous—and indeed surprisingly misguided—position that the scope of the Panel's remedial authority is limited and that the Panel may only issue a declaration as to whether ICANN acted in conformity with its Articles and Bylaws when ICANN claims that its Board deferred taking any action on the merits of Afilias' .WEB complaints in November 2016.[398]

215. In the first instance, and as discussed *supra*, Afilias disputes that any such "decision to defer" took place. It appears that, at an informal Board workshop session, some members of the Board were briefed on the dispute concerning .WEB. But ICANN's Board is not permitted to take decisions in secret and Board practice is that any decisions or actions coming out of a Board workshop session would subsequently be adopted publicly by resolution.[399] The Bylaws require that "any actions" taken by the Board be publicly reported. Here, no resolutions were adopted with respect to .WEB; nor were any actions reported. And if a

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397 *Steves & Sons, Inc. v. JELD-WEN, Inc.*, No. 19-1397 (4th Cir. 2019), Brief for the United States of America as *Amicus Curiae* in Support of Appellee Steves and Sons, Inc. (23 Aug. 2019), [Ex. C-118], p. 15 (internal citations omitted; emphasis added). In this case, Jeld-Wen had acquired CMI, the only other manufacturer of doorskins for molded interior doors. DOJ investigated the acquisition twice, closing both investigations without taking any action. Plaintiff Steves & Sons, which purchased doorskins from Jeld-Wen and which competed with Jeld-Wen in the sale of molded interior doors, sued Jeld-Wen, claiming that its acquisition of CMI was anticompetitive. Despite the fact that the deal had been investigated by DOJ twice and that those investigations were closed without DOJ taking any action, the jury returned verdict in favor of Steves, awarding treble antitrust damages in amount of $175,879,362. Steves moved for equitable relief, under Clayton Act, seeking order, inter alia, to restore competition in doorskin market. The District Court granted Steves' motion to require Jeld-Wen divest itself of the acquired facility. *Steves and Sons, Inc. v. JELD-WEN, Inc.*, 345 F.Supp.3d 614, 682 (E.D. Va. 2018), [Ex. CA-112].

398 NDC Br., ¶ 78; Verisign Br., p. 1.

399 ICANN in its Rejoinder states that at its November 2016 Board meeting, "the Board chose to see if the results of such [Accountability Mechanism] proceedings might require the Board to take any action related to the .WEB Contention Set." ICANN's Rejoinder Memorial, ¶ 41. That assertion seems to suggest that the Board anticipated that an IRP Panel might order ICANN to take specific action. Surely, ICANN cannot be arguing that the Board could fail to take any action—wait for years while proceedings play out—so that the Panel can order ICANN to make the decision that it failed to make in the first place (without weighing in on how the decision should be made).

decision of some sort was made in November 2016, there is no evidence that ICANN Staff respected that decision when they commenced the process to delegate .WEB to NDC in June 2018, or that they reverted to the ICANN Board to take direction regarding their plans. Nor is there any evidence that any sort of informed, transparent and neutral analysis was undertaken by the Staff or Board of Afilias' complaints—or the legitimacy of the DAA with reference to the AGB, irrespective of Afilias' complaints, even though ICANN has represented in these proceedings that it did evaluate something—prior to Staff's decision to move forward with NDC.

216. Whichever of ICANN's various angles or attempted rationalizations regarding its conduct the Panel considers, there is no escaping the conclusion that ICANN failed to "***[make] decisions*** by applying documented policies consistently, neutrally, objectively, and fairly…."[400] Given ICANN's conduct that led to these proceedings, and the positions that ICANN has adopted in these proceedings—to say nothing of its conduct—the only fair and final way for Afilias' claims to be considered is for the Panel to resolve this Dispute. As envisioned by the Bylaws, the Panel should resolve this Dispute not simply by deciding whether ICANN violated its Articles and Bylaws—in the manner that we have demonstrated—but also by directing ICANN to take sufficient actions to give effect to the relief Afilias has requested.

217. The following points suffice to demonstrate that (i) the *Amici*'s assessment of what this Panel may or may not order is simply incorrect, and (ii) the Panel has the necessary authority to direct ICANN to adopt the relief that Afilias has requested.[401]

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400 Bylaws, [Ex. C-1], Sec. 1.2(a)(v) (emphasis added).

401 We note that this is the first IRP under the new Bylaws. Accordingly, what the Panel decides regarding the scope of an IRP panel's remedial authority will be of the ***utmost precedent-setting importance***.

A. Meaningful and Effective Accountability Requires Review and Redress of ICANN's Conduct

218. Corporate bylaws are interpreted according to the general rules governing construction of statutes and contracts.[402] As such, bylaws "are construed according to their plain meaning within the context of the document as a whole"[403] and in light of the "usual, ordinary, and commonly accepted meaning" of the language.[404] "Any ambiguity in the bylaws will be construed against the corporation and its officers."[405]

219. "Accountability" is commonly understood as "the quality or state of being accountable[;] *especially*: an obligation or willingness to accept responsibility or to account for one's actions."[406] In other contexts, ICANN has endorsed a definition of the term "accountability" that is instructive for this Panel's consideration of its remedial authority. That definition confirms that the Panel's authority to hold ICANN accountable is broader than issuing a simple declaratory statement of the type urged by the *Amici* and ICANN. Thus, accountability entails both "mechanisms for independent checks and balances," as well as "review" and "redress."[407]

> The group adopted the definition of 'accountability' used by the board and organization in its development of the board resolution on delegated authorities, passed in November 2016. Accountability in this context is defined, according to the NETmundial multistakeholder statement, as ***"the existence of mechanisms for independent checks and balances as well as for review and redress***."[408]

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402 *Singh v. Singh*, 114 Cal. App. 4th 1264, 1294 (2004), [Ex. CA-113].

403 18A Am. Jur. 2d *Corporations* § 262 (2020), [Ex. CA-114] (citations omitted).

404 18A Am. Jur. 2d *Corporations* § 262 (2020), [Ex. CA-114].

405 18A Am. Jur. 2d *Corporations* § 262 (2020), [Ex. CA-114].

406 *Merriam-Webster Dictionary* (on-line version): accountability, available at https://www.merriam-webster.com/dictionary/accountability (last accessed 23 July 2020), [Ex. CA-115]; *see also Oxford English Dictionary* (on-line version): accountability, available at https://www-oed-com.nyli.idm.oclc.org/view/Entry/1197?redirectedFrom=accountability&&print (last accessed 24 July 2020), [Ex. CA-116] ("The quality of being accountable; liability to account for and answer for one's conduct, performance of duties, etc. (in modern use often with regard to parliamentary, corporate, or financial liability to the public, shareholders, etc.); responsibility.").

407 ICANN, Recommendations to Improve ICANN Staff Accountability (13 Nov. 2017), [Ex. C-84], p. 4.

408 ICANN, Recommendations to Improve ICANN Staff Accountability (13 Nov. 2017), [Ex. C-84], p. 4.

220. The most common definitions of the word "redress" include: "the setting right of what is wrong," "relief from wrong or injury," and "compensation or satisfaction for a wrong or injury."[409] Thus, if the Panel is to properly hold ICANN accountable for breaching its Articles and Bylaws, it must issue a decision that provides relief or satisfaction that would eliminate the effects of the breach. This is also required under international law: "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation."[410]

B. The Internet Community Broadened the Scope of ICANN's Accountability under the Current Bylaws

221. One of the conditions and consequences of ICANN's long-sought-after independence from the U.S. Government's oversight was the requirement that ICANN's accountability mechanisms be strengthened through "[a]n enhanced Independent Review Process and redress process with broader scope and the power to ensure ICANN stays within its Mission."[411] This did not just simply entail coming up with more didactic rules for IRPs, but also, following a detailed review process by CCWG-Accountability, an expansion of the mandate given to panels in their review of ICANN's actions and inactions. Thus, for example, the scope of an IRP panel's accountability review was extended to encompass the conduct of ICANN Staff and not just that of the Board.

222. CCWG-Accountability's other recommendations are also instructive regarding the scope of the remedial authority the ICANN community intended for an IRP panel, requiring that claimants be given the right to "seek redress" through an IRP of ICANN's conduct and authorizing an IRP panel to 'direct[] [ICANN] to take appropriate action to remedy the breach."

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409 Dictonary.com: redress, available at http://dictionary.reference.com/browse/redress (last accessed 23 July 2020), **[Ex. CA-117]**; *see also Black's Law Dictionary* (11th ed. 2019): redress, **[Ex. CA-118]** ("[r]elief; remedy").

410 *Factory at Chorzów (Claim for Indemnity) (Merits)*, Judgment (Sep. 13), 1928 P.C.I.J. (Ser. A) No. 17, **[Ex. CA-119]**, p. 29; *see also id.* ("[R]eparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself.").

411 CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), **[Ex. C-91]**, p. 5.

- "Standing: Any person/group/entity 'materially affected' by an ICANN action or inaction in violation of ICANN's Articles of Incorporation and/or Bylaws shall have the right to ***file a complaint under the IRP and seek redress.***"[412]

- "Decisions[:] … The CCWG-Accountability intends that if the panel determines that an action or inaction by the Board or staff is in violation of ICANN's Articles of Incorporation or Bylaws, then that decision is binding and the ICANN Board and staff ***shall be directed to take appropriate action to remedy the breach***. However, the Panel shall not replace the Board's fiduciary judgment with its own judgment."[413]

C. The Panel Must Assess its Authority Based on the Text, Context, Object and Purposes of the IRP

223. ICANN and the *Amici* rely upon Section 4.3(o) of the Bylaws to argue that the Panel's authority is circumscribed to the items listed in that Section.[414] But Section 4.3(o) does not say that the Panel's authority is limited to the listed items.[415] The drafters of the Bylaws could certainly have inserted the word "only" if they had intended to restrict an IRP panel's remedial authority to just those items. They did not, but instead specified that the scope of an IRP panel's authority is "[s]ubject to" the other provisions of Section 4.3. Section 4.3(o), therefore, must be read, *inter alia*, with reference to Section 4.3(a).

224. Section 4.3(a) mandates that "[t]his Section 4.3 [i.e., the Bylaws section addressing IRPs] shall be construed, implemented, and administered in a manner consistent with these Purposes of the IRP."[416] Thus, the Panel's authority must be determined with reference to the entirety of Section 4.3, with the scope and effect of each individual article interpreted through the lens of the enumerated "Purposes of the IRP." Read within a proper context of the objectives that the ICANN community intended to achieve through an "enhanced" accountability process for Board and Staff conduct, the requirement of a declaration by an IRP panel is thus a formalistic one. The Panel must, in issuing its decision, make a formal "declaration" that

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412 CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (23 Feb. 2016), **[Ex. C-91]**, ¶ 178 (at p. 35).

413 CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Annex 07 – Recommendation #7: Strengthening ICANN's Independent Review Process (23 Feb. 2016), **[Ex. C-122]**, ¶¶ 54, 57.

414 ICANN's Rejoinder Memorial, Sec. V; Verisign Br., p. 1; NDC Br., Sec. III.A.

415 Bylaws, **[Ex. C-1]**, Sec. 4.3(o) (at p. 28).

416 Bylaws, **[Ex. C-1]**, Sec. 4.3(a) (at p. 21).

"an action/failure to act complied or did not comply" with the Articles and/or Bylaws. This does not, however, preclude the Panel from declaring that ICANN must take certain steps to remedy the breaches of its Articles and Bylaws to "resolve" the Dispute and provide an aggrieved claimant with "redress."

225. As relevant to the issues in dispute in these proceedings, the Bylaws provisions supporting the foregoing are as follows:

226. Section 4.3(a), Preamble: The Preamble to Section 4.3 of the Bylaws provides that an IRP panel's decision must "resolve Disputes,"[417] meaning that the remedy or remedies granted must "settle or find a solution to" the Disputes that have been put before that Panel.[418] This requirement is also stated in Section 4.3(g) of the Bylaws.[419] As we have discussed elsewhere, for present purposes, "Disputes" are defined as or consist of "Claims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws…."[420] The Bylaws define a "Covered Action" as "any action[] or failure[] to act by or within ICANN committed by the Board … or Staff members that give[s] rise to a Dispute."[421] Hence, the Panel's mandate is to "resolve" (i.e., "settle or find a solution to") Afilias' claims regarding "any actions or failures to act"—here, ICANN's failure to disqualify NDC's application and award .WEB to Afilias—by the Board or Staff that the action or failure to act violates the Articles and Bylaws.

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417 Bylaws, [Ex. C-1], Sec. 4.3(a) (at p. 20).

418 Lexico.com: resolve, available at https://www.lexico.com/en/definition/resolve (last accessed 23 July 2020), [Ex. CA-120]; *see also Oxford English Dictionary* (on-line version): resolve, available at https://www-oed-com.nyli.idm.oclc.org/view/Entry/163733?rskey=u3QyP2&result=2&isAdvanced=false&print (last accessed 24 July 2020), [Ex. CA-121] ("To answer (a question); to solve (a problem of any kind); to determine, settle, or decide upon (a point or matter regarding which there is doubt or dispute).").

419 Section 4.3(g) states that "[the] IRP Panel shall be charged with ***hearing and resolving the Dispute***, considering the Claim and ICANN's written 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. Bylaws, [Ex. C-1], Sec. 4.3(g).

420 The definition is all-inclusive ("including but not limited to any action or inaction that: (1) exceeded the scope of the Mission…."). Bylaws, [Ex. C-1], Sec. 4.3(b)(iii). To adopt ICANN's and *Amici's* view of the Panel's authority would make this meaningless, as opposed to "meaningful." *See id.*, Sec. 4.3(a)(ii).

421 Bylaws, [Ex. C-1], Sec. 4.3(b)(ii).

227. Section 4.3(a)(i): In resolving the Disputes, the Panel's mandate is to determine not only whether ICANN "exceed[ed] the scope of its Mission," but more broadly also to ensure that ICANN has "otherwise complie[d] with its Articles of Incorporation and Bylaws."[422] This is a broad mandate, and one that cannot simply be satisfied through the issuance of the type limited declaration advocated by ICANN and the *Amici*.

228. Section 4.3(a)(ii): In resolving the Disputes, an IRP panel is required to issue a remedy that would allow a "Claimant[] to ***enforce compliance*** with the Articles of Incorporation and Bylaws…."[423] A simple thumbs-up or thumbs-down declaration, as ICANN and the *Amici* suggest is all that an IRP panel can do, would not be sufficient to allow a Claimant to "enforce" ICANN's compliance in respect of the Dispute that has been put before the Panel.

229. Section 4.3(a)(iii): In resolving the Disputes, the Panel must "ensure" that its decision reflects ICANN's accountability to the global Internet community and the claimant.[424] As mentioned above, accountability requires that the Panel's decision serve as a check and balance on ICANN, and also provides for review and redress.

230. Section 4.3(a)(viii): In resolving the Disputes, the Panel is directed to issue a decision that "[l]ead[s] to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction."[425] This instruction would hardly be achieved if the Panel were to simply issue a declaration instructing ICANN to assess whether NDC's .WEB application should be disqualified—an outcome that ICANN appears to have already decided should not happen, given its June 2018 decision to enter in to a registry agreement with NDC.

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422 Bylaws, [Ex. C-1], Sec. 4.3(a)(i).

423 Bylaws, [Ex. C-1], Sec. 4.3(a)(ii).

424 Bylaws, [Ex. C-1], Sec. 4.3(a)(iii).

425 Bylaws, [Ex. C-1], Sec. 4.3(a)(viii).

231. Section 4.3(g): "Following the selection of an IRP Panel, that IRP Panel shall be charged with hearing and resolving the Dispute, considering the Claim and ICANN's written 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."[426]

232. Section 4.3(i): In resolving the Disputes, an IRP panel is directed to "conduct an objective, de novo examination of the Dispute."[427] Insofar as this requirement is concerned, CCWG-Accountability provided guidance:

> Standard of Review:[] The IRP Panel, with respect to a particular IRP, shall decide the issue(s) presented based on its own independent interpretation of ICANN's Articles of Incorporation and Bylaws in the context of applicable governing law and prior IRP decisions. The standard of review shall be an objective examination as to whether the complained-of action exceeds the scope of ICANN's Mission and/or violates ICANN's Articles of Incorporation and/or Bylaws and prior IRP decisions. Decisions will be based on each IRP panelist's assessment of the merits of the claimant's case. The panel may undertake a de novo review of the case, make findings of fact, and issue decisions based on those facts.[428]

233. Section 4.3(i)(i): Where the claim is based on actions or failures to act by or within the Board or Staff (*i.e.*, a Covered Action), the IRP panel is directed ("shall") to "make findings of fact to determine whether the Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws." It is firmly established in international law that such findings of fact and conclusions of law, embodied in the form of a declaratory judgment by an international court or tribunal, are legally binding on the parties. As stated by the Permanent Court of International Justice in the *Chorzów Factory* case:

> the intention of [a declaratory judgment] is to ensure recognition of a situation at law, once and for all, and with *binding force as between the*

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426 Bylaws, [Ex. C-1], Sec. 4.3(g).

427 Bylaws, [Ex. C-1], Sec. 4.3(i).

428 CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Annex 07 – Recommendation #7: Strengthening ICANN's Independent Review Process (23 Feb. 2016), [Ex. C-122], ¶¶ 33-34.

> *parties*; so that the legal position thus established cannot again be called in question in so far as the legal facts ensuring therefrom are concerned.[429]

234. Section 4.3(v): The Bylaws also provide, again taking in to account all of the requirements and directions set out in Section 4.3 as a whole ("Subject to this Section 4.3"), that an IRP panel's decision "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 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."

235. Section 4.3(x): Finally, the Bylaws provide that "[t]he IRP is intended as a final, binding arbitration process," including in that "IRP Panel decisions are binding final decisions to the extent allowed by law" and in that "ICANN intends, agrees, and consents to be bound by all IRP Panel decisions of Disputes of Covered Actions as a final, binding arbitration." As Gary Born reports in his leading treatise on international arbitration, "under most national arbitration regimes, it is well-settled that arbitrators have broad discretion in fashioning relief," and indeed may have broader discretion than do the domestic courts.[430] This is true, in particular, under the English Arbitration Act, which provide the *lex arbitri* for this arbitration seated in London.[431] Thus, the Bylaws' commitment to IRPs as a binding arbitration process carries with it the consequence that IRP panels have broad remedial authority.

236. In sum, in order to comply with its accountability mandate under the Articles and Bylaws, the Panel must:

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429 *Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory)*, Judgment (Dec. 16), 1927 P.C.I.J. (Ser. A) No. 13, [Ex. CA-122], p. 20 (emphasis added).

430 Gary Born, *International Commercial Arbitration* (2d ed. 2014), [Ex. CA-123], pp. 3069-3070.

431 Gary Born, *International Commercial Arbitration* (2d ed. 2014), [Ex. CA-123], p. 3069, n. 363. It is also worth noting that uniquely, the English Arbitration Act 1996 explicitly empowers an arbitral tribunal to provide remedies in the form of declarations, monetary payment, and several types of specific performance absent party agreement to the contrary. Arbitration Act 1996 (Eng.), [Ex. CA-124], c. 23, § 48. Although it is Afilias' position that ICANN's Bylaws provide agreement that the Panel is empowered to issue any appropriate remedy, the Arbitration Act 1996 would so empower the Panel if it were to decide that the Bylaws themselves are silent on this issue.

- Base its decision on an objective and de novo review of ICANN's actions and inactions;
- Include in its decision findings of fact as to whether the Covered Actions complained of constituted an action or inaction that violated the Articles of Incorporation or Bylaws
- Issue a decision that actually resolves the Disputes that have been put before it;
- Issue a decision that reflects a well-reasoned application of the how the Disputes submitted to it were resolved;
- Declare that ICANN must take certain steps to remedy the breaches by ICANN of its Articles and Bylaws;
- Direct ICANN Staff to take appropriate action to remedy the breaches determined by the Panel; and
- Include in its decision a declaration as to whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws.

X. CONCLUSION

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

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