

**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

**AMENDED REQUEST BY AFILIAS DOMAINS NO. 3 LIMITED
FOR INDEPENDENT REVIEW**

21 March 2019

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TABLE OF CONTENTS

	Page
1. THE PARTIES.....	2
1.1 Afilias.....	2
1.2 ICANN.....	2
2. SUMMARY OF SALIENT FACTS.....	3
2.1 The New gTLD Program and the AGB.....	3
2.2 Overview of Relevant New gTLD Program Rules.....	3
2.2.1 Applicants' Required Disclosures and Public Review of Applications.....	3
2.2.2 Applicants' Obligation to Amend Their Applications.....	4
2.2.3 Anti-Assignment Rules.....	6
2.2.4 Multiple Applicants and Contention Set Resolution.....	6
2.3 .WEB and the .WEB Auction.....	8
2.4 How VeriSign Sought to Acquire .WEB.....	10
2.4.1 VeriSign Pursues .WEB Secretly as it Negotiates with ICANN for .COM.....	10
2.4.2 The Terms of the Domain Acquisition Agreement.....	12
2.5 Afilias Complains to ICANN.....	13
3. NDC VIOLATED THE NEW GTLD PROGRAM RULES.....	15
3.1 NDC Failed to Amend its Application.....	15
3.2 NDC Violated the AGB's Prohibition Against the Resale, Transfer, or Assignment of NDC's Application.....	18
3.3 Each of NDC's Bids at the .WEB Auction Was Invalid.....	19
4. ICANN'S FAILURE TO DISQUALIFY NDC BREACHES ICANN'S OBLIGATION TO APPLY DOCUMENTED ICANN POLICIES NEUTRALLY, OBJECTIVELY, AND FAIRLY.....	20
5. ICANN'S DECISION TO FINALIZE A REGISTRY AGREEMENT WHILE KNOWING OF NDC'S ARRANGEMENT WITH VERISIGN VIOLATES ICANN'S MANDATE TO PROMOTE COMPETITION.....	22
6. ICANN VIOLATED ITS BYLAWS IN ADOPTING RULE 7 OF THE INTERIM PROCEDURES.....	23
7. RELIEF REQUESTED.....	25

GLOSSARY OF DEFINED TERMS

Afilias	Afilias Domains No. 3 Limited
AGB	ICANN's New gTLD Applicant Guidebook ¹
Articles	ICANN's Articles of Incorporation ²
Auction Rules	ICANN's Auction Rules for New gTLDs: Indirect Contention Edition ³
Bidder	A "Qualified Applicant" or a "Designated Bidder" under the New gTLD Program Rules
Bidder Agreement	New gTLD Auctions Bidder Agreement; the agreement between members of the .WEB contention set and ICANN's third-party auction manager, Power Auctions LLC ⁴
Bylaws	ICANN's Bylaws, as amended 18 June 2018 ⁵
CEP	ICANN's Cooperative Engagement Process, described in Bylaws Art. 4, Sec. 4.3(e)
Change Request Criteria	ICANN's New gTLD Application Change Request Process and Criteria ⁶
DAA or Domain Acquisition Agreement	NDC's Domain Acquisition Agreement with VeriSign <small>Third Party Designated Confidential Information Redacted</small> 7
Designated Bidder	"A party designated by a Qualified Applicant to bid on its behalf in an Auction" ⁸
DIDP	ICANN's Documentary Information Disclosure Policy
DNS or Domain Name System	The Internet's addressing system
GNSO	ICANN's Generic Names Supporting Organization, ICANN's policy-making body
GNSO Report	The GNSO's Final Report, Part A: Introduction of New Generic Top-Level Domains dated 8 August 2017 ⁹
gTLD	Generic Top-Level Domain
ICANN	The Internet Corporation for Assigned Names and Numbers
ICDR	The International Centre for Dispute Resolution
Interim Procedures	The Interim Supplementary Procedures for ICANN IRP
IRP	ICANN's Independent Review Process ¹⁰
NDC	Nu Dotco LLC
New gTLD Program Rules, or Rules	The AGB, the Auction Rules, and other rules related to the New gTLD Program
Procedures Officer Decision	Declaration of the Procedures Officer dated 28 February 2019 ¹¹
Qualified Applicant	"An entity that has submitted an Application for a new gTLD, has received all necessary approvals from ICANN, and which is included within a Contention Set to be resolved by an Auction." ¹²
Rationales	ICANN Board Rationales for the Approval of the Launch of the New gTLD Program dated 20 June 2011 ¹³
Request	Afilias' Amended Request for Independent Review dated 20 March 2019

Ruby Glen	Ruby Glen, LLC
VeriSign	VeriSign, Inc.
.WEB	The .WEB gTLD registry
.WEB Auction	The ICANN-administered Auction for .WEB

1. Afilias submits this Request¹⁴ pursuant to Section 4.3 of the Bylaws,¹⁵ the International Arbitration Rules of the ICDR, and the Interim Procedures. Afilias has suffered direct harm as a result of ICANN's breaches of its Articles and Bylaws.¹⁶

2. This IRP arises out of ICANN's breaches of its Articles and Bylaws as a result of the ICANN Board's and Staff's failure to faithfully enforce the rules for, and underlying policies of, ICANN's New gTLD Program, including the rules, procedures, and policies set out in the AGB¹⁷ and the Auction Rules.¹⁸ This IRP also encompasses the ICANN Board's breach of its Bylaws in connection with its adoption of Rule 7 of the Interim Procedures.¹⁹

3. Afilias was one of seven entities that applied for .WEB.²⁰ Under the New gTLD Program Rules, unless it is resolved voluntarily, ICANN 'breaks the tie' among the applicants by administering an auction. The proceeds of the auction are paid to ICANN.

4. As Afilias learned after commencing this IRP,²¹ nearly a year prior to the .WEB Auction, another applicant, NDC, secretly entered into a "domain acquisition agreement" with VeriSign, the registry market's dominant player.²² VeriSign had not applied for .WEB. Pursuant to this DAA, Third Party Designated
Confidential Information
Redacted

²³ At the time, neither NDC nor VeriSign discloses the DAA to ICANN or and NDC did not modify its .WEB application as required by the New gTLD Program Rules to reflect that it had entered into the DAA with VeriSign or to account for the implications of the agreement's terms for its application. NDC won the .WEB Auction on VeriSign's behalf with a bid exceeding USD 135 million; Afilias presented the second-highest bid. VeriSign has paid the exit bid amount to ICANN.

5. Based on the terms of the DAA, it is evident that NDC violated the New gTLD Program Rules. ICANN, however, has refused to disqualify NDC from the .WEB contention set, or to disqualify NDC's bids in the .WEB Auction. Specifically, ICANN has breached the obligation contained in its Bylaws to make decisions by applying its documented policies "neutrally, objectively, and fairly."²⁴ ICANN has also breached its obligations

under international and California law to act in good faith. Furthermore, by failing to implement faithfully the New gTLD Program Rules and thereby enabling VeriSign eventually to acquire the .WEB gTLD, ICANN has eviscerated one of the central pillars of the New gTLD Program and one of ICANN's founding principles: to introduce and promote competition in the Internet namespace in order to break VeriSign's monopoly.²⁵

1. THE PARTIES

1.1 Afilias

6. Afilias is organized under the laws of the Republic of Ireland, with its principal place of business in Dublin, Ireland. Afilias provides technical and management support to registry operators and operates several TLD registries.²⁶

1.2 ICANN

7. ICANN is a not-for-profit corporation organized under the laws of the State of California. As multiple IRP panels have stated, ICANN functions as the global regulator²⁷ of the Domain Name System, or DNS. Although a private organization in form, ICANN has extraordinary powers and regulatory responsibilities to governments and Internet stakeholders worldwide.

8. ICANN's Articles stipulate that it must "operate in a manner consistent with [its] Articles and its Bylaws for the benefit of the Internet community as a whole[.]"²⁸ ICANN is required to carry out its activities "in conformity with relevant principles of international law and international conventions and applicable local law[.]"²⁹ As determined by the first-ever IRP panel (Schwebel, Paulsson, Trevizian), this includes the obligation of good faith.³⁰ ICANN must also adhere to the "Core Values" and "Commitments" expressed in its Bylaws, which require it to "[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly[.]"³¹ The version of the Bylaws in effect when the AGB was published and when the .WEB Auction occurred also included the requirement that ICANN apply documented policies "with integrity and fairness."³² The Bylaws expressly prohibit ICANN from "apply[ing] its standards, policies, procedures, or practices inequitably or singl[ing] out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion

of effective competition.”³³ ICANN is also required to operate “through open and transparent processes that enable competition and open entry in Internet-related markets[,]”³⁴ and “[i]ntroduc[e] and promot[e] competition in the registration of domain names where practicable and beneficial to the public interest[.]”³⁵ The Bylaws “are intended to apply in the broadest possible range of circumstances” and “are intended to apply consistently and comprehensively to ICANN’s activities.”³⁶

2. SUMMARY OF SALIENT FACTS

2.1 The New gTLD Program and the AGB

9. As presented more fully in the accompanying Expert Report of Jonathan Zittrain, ICANN was created in 1998 to promote competition in the DNS by introducing new gTLDs and encouraging new registries to compete with VeriSign.³⁷ The ICANN Board’s Rationales for the Approval of the Launch of the New gTLD Program emphasized that the New gTLD Program “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.”³⁸

10. In June 2011, ICANN’s Board of Directors approved the AGB, describing it as “the implementation of [a] Board-approved consensus policy concerning the introduction of new gTLDs.”³⁹ The AGB is a detailed 338-page set of policies, rules, and procedures that provides a “step-by-step procedure for new gTLD applicants.”⁴⁰ ICANN is required to interpret and enforce the New gTLD Program Rules strictly in accordance with its Articles and Bylaws, which, pursuant to the requirement that ICANN “carry[] out its activities in conformity with relevant principles of international law[,]”⁴¹ requires ICANN to interpret and apply them in good faith.⁴²

2.2 Overview of Relevant New gTLD Program Rules

2.2.1 Applicants’ Required Disclosures and Public Review of Applications

11. Transparency is a central policy of the AGB. To that end, the AGB requires applicants to answer a series of detailed questions describing their business plan for the proposed gTLD; to demonstrate the requisite financial, technical, and operational capabilities needed to operate a registry; and to provide documentation

substantiating the claims made in the application.⁴³ Further, the AGB requires “applicant[s] (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any and all others acting on [their] behalf)” to provide extensive background information, including the identity of all persons responsible for managing and operating each applicant.⁴⁴ Applicants are required to maintain the accuracy and truthfulness of their applications at all times.⁴⁵

12. Save for confidential financial and technical details, applications are published for public review and comment on ICANN’s website. This allows the public (including other applicants) to know who is applying for which gTLDs and why. All complete applications are subject to a 60-day public comment period, during which ICANN’s Government Advisory Committee, the public, and other interested parties may review and comment on the applications. The AGB’s public comment mechanisms are designed to comply with ICANN’s Commitments and Core Values to “promot[e] competition,” “achiev[e] broad representation of global Internet communities,” and “develop[] policy appropriate to [ICANN’s] mission through bottom-up, consensus-based processes.”⁴⁶

2.2.2 Applicants’ Obligation to Amend Their Applications

13. To ensure ongoing transparency into the application process, the AGB requires applicants to notify ICANN ***promptly*** of any change in circumstances that would cause any information in an application to become untrue or inaccurate, including by omission of material information.

14. AGB Section 1.2.7 states that:

If at ***any time*** during the evaluation process information previously submitted by an applicant becomes ***untrue or inaccurate***, the applicant must ***promptly notify ICANN*** via submission of the appropriate forms. This includes applicant-specific information such as changes in financial position and changes in ownership or control of the applicant. ICANN reserves the right to require a re-evaluation of the application in the event of a material change. This could involve additional fees or evaluation in a subsequent application round. *Failure to notify ICANN of ***any change in circumstances*** that would render ***any information*** provided in the application ***false or misleading*** may result in ***denial of the application***.*⁴⁷

15. AGB Module 6 (Terms and Conditions) further clarifies the scope of this obligation, providing that:

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 ***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**.⁴⁸

16. The obligation to ensure the completeness, truthfulness, and accuracy of the disclosures provided in the application extends throughout the process and is ultimately reflected in the Registry Agreement between ICANN and the prospective registry operator. ICANN's standard form Registry Agreement, which is incorporated into the AGB, states as follows:

Registry Operator represents and warrants to ICANN ... [that] **all material information** provided and statements made in the registry TLD application, and statements made in writing during the negotiation of this Agreement, were true and correct in all material respects at the time made, and **such information or statements continue to be true and correct in all material respects** as of the Effective Date except as otherwise previously disclosed in writing by Registry Operator to ICANN[.]⁴⁹

17. The above requirements of completeness, truthfulness, and accuracy throughout the AGB process are intended to (i) protect the interests of other stakeholders, in particular other members of a contention set, and (ii) ensure a fair and transparent application and evaluation process by which registry rights are awarded—as originally envisioned by the GNSO.⁵⁰ These objectives are also reflected in ICANN's published criteria for determining whether to accept or reject an applicant's request to amend an application, assuming that such a request is made in the first place.⁵¹ According to ICANN, the "criteria were carefully developed to enable applicants to make necessary changes to their applications **while ensuring a fair and equitable process for all applicants**."⁵² The criteria therefore recommend rejection of change requests that would "**affect other third parties materially**," "**particularly other applicants**," or put the applicant filing the change request in a position of advantage or disadvantage compared to other applicants.⁵³ They state that if a change request would "**materially impact other third parties**, it will likely be found to cause issues of unfairness," therefore weighing in favor of denial.⁵⁴ The relevant focus of the criteria is to assess whether "the change [would] affect **string contention**."⁵⁵ As ICANN's explanatory notes state: "This criterion assesses how the change request will impact

the status of the application and *its competing applications*, the string, [and] *the contention set*[.]”⁵⁶

18. In short, the fundamental premise underlying ICANN’s Change Request Criteria is that applicants must disclose any information that could potentially impact string contention or the interests of other applicants. The focus is less on the nature or effects of the new circumstances on the applicant, but rather on the impact of the new circumstances on other applicants in the contention set and the fairness of the process.

2.2.3 Anti-Assignment Rules

19. The AGB’s Terms and Conditions strictly prohibit an applicant from reselling, assigning, or transferring any of its rights in connection with its *application*:

Applicant understands and agrees that it will acquire rights in connection with a gTLD only in the event that it enters into a registry agreement with ICANN, and that applicant’s rights in connection with such gTLD will be limited to those expressly stated in the registry agreement. ... ***Applicant may not resell, assign, or transfer any of applicant’s rights or obligations in connection with the application.***⁵⁷

20. Here, too, the terms and purpose of the AGB and Auction Rules are clear: if an applicant is permitted to act secretly on behalf of a non-applicant, the result is that the public and other applicants are deceived about the identity of the true party in interest.⁵⁸ The anti-assignment provision is therefore necessary to ensure that all interested parties in each application are publicly disclosed, furthering ICANN’s policy of transparency.

2.2.4 Multiple Applicants and Contention Set Resolution

21. Where multiple applicants seeking the same gTLD are approved, as was the case with .WEB,⁵⁹ all approved applicants are placed into a “contention set” for resolution.⁶⁰ The AGB “encourage[s]” contention set members to negotiate and resolve their competing claims without the need for ICANN’s intervention,⁶¹ such as through joint ventures or royalty or revenue sharing agreements.⁶² Alternatively, contention set members can resolve their competing claims by an auction administered by the contention set, provided that all members agree to do so. The vast majority of contention sets have been resolved through such private auctions.

22. If a contention set is not privately resolved by an ICANN-set deadline, the AGB provides that ICANN ‘break the tie’ by administering an auction of last resort.⁶³ The ICANN Board adopted the mechanism of contention set resolution via auction because it considered an auction to be “an objective test; other means are

subjective and might give unfair results, are unpredictable, and might be subject to abuses.”⁶⁴ Further, according to the Board, resolution via auction “provide[s] objectivity and transparency: ‘Auctions rely on relatively simple and transparent rules that apply to all participants. As such they are fair and transparent...’”⁶⁵ In selecting an auction mechanism, ICANN sought to *avoid* scenarios where winners “flipped” or “resold” the acquired gTLD to “larger entities at substantial profit without ever delivering service to a single customer.”⁶⁶ For this reason, ICANN stressed that it “intend[ed] to use auctions in the new gTLD process as a tie-breaking mechanism ... for the resolution of string contention **among competing new gTLD applicants** for identical or similar strings.”⁶⁷ The Rules thus made it clear that the ICANN-administered auction was not open for all comers, but only for bona fide approved applicants for the same new gTLD.

23. The AGB and the Auction Rules provide a detailed set of rules that govern ICANN-administered auctions. The AGB provides that, during the auction, “[t]he auctioneer [will] successively increase[] the prices associated with applications within the contention set, and the respective **applicants** [will] indicate their willingness to pay these prices. As the prices rise, **applicants** will successively choose to exit from the auction.”⁶⁸ The AGB further provides that “[o]nly bids that comply with all aspects of the auction rules will be considered valid.”⁶⁹ If a Bidder submits an invalid bid during a round of the auction, “**the bid is taken to be an exit bid at the start-of-round price for the current auction round.**”⁷⁰ In other words, Bidders that submit invalid bids cannot progress to the next round of the auction.

24. Under the Auction Rules, participation in an ICANN-administered auction is limited to Bidders,⁷¹ defined as either: (i) a Qualified Applicant (“[a]n entity that has submitted an Application for a new gTLD, has received all necessary approvals from ICANN, and which is included within a Contention Set to be resolved by an Auction”)⁷² or (ii) a Designated Bidder (an entity that a Qualified Applicant designates “to bid on its behalf”).⁷³

25. The Auction Rules provide that a Bidder may only “**bid on its behalf**,” not on behalf of a third party. For example, Auction Rule 13 provides that prior to an ICANN-administered Auction, “each Bidder shall nominate up to two people (‘Authorized Individuals’) **to bid on its behalf** in the Auction.”⁷⁴ Pursuant to Auction

Rule 15, the actions of Authorized Individuals are attributable “to the Bidder that nominated the Authorized Individual **to bid on its behalf**.”⁷⁵ Consistent with these rules, the standard Bidder Agreement provides that “the Qualified Applicant will **place bids in the Auction on its own behalf** or may designate an agent (‘Designated Bidder’) to enter bids at the Auction **on the Qualified Applicant’s behalf**.”⁷⁶

2.3 .WEB and the .WEB Auction

26. The .WEB gTLD is one of the—if not the—crown jewels of the New gTLD Program. As set out in greater detail in Dr. George Sadowsky’s Expert Report,⁷⁷ .WEB is a unique gTLD because of properties inherent in its name, and it is widely viewed as the one potential new gTLD with a sufficiently broad and global appeal to compete with VeriSign’s .COM.⁷⁸

27. Some of the largest players in the domain name business applied for .WEB. ICANN ultimately included seven applicants in the .WEB contention set: Afilias; Google, Inc. (through Charleston Road Registry Inc.); Donuts, Inc. (through Ruby Glen); Radix FZC (through DotWeb Inc.); InterNetX GmbH (Schlund Technologies GmbH); Web.com Group, Inc.; and NDC.⁷⁹

28. NDC was established as a special purpose vehicle to acquire gTLDs in the New gTLD Program. NDC applied for twelve other gTLDs, but lost every auction it entered other than the .WEB Auction. NDC’s application did not identify or include any information about VeriSign. To the contrary, NDC represented that it would itself aggressively market .WEB as an alternative to .COM in order to increase competition and fight “congestion” in a market for “commercial TLD names [that] fundamentally advantages older incumbent players,” and that its partner Neustar, Inc. would provide the back-end support necessary to operate the registry.⁸⁰

29. ICANN set a 27 July 2016 date for the .WEB Auction if the contention set had not voluntarily resolved itself beforehand.⁸¹ By mid-May 2016, it seemed that all of the contention set members had agreed to participate in a private auction.⁸² An auction vendor was retained to administer the private auction on 15-16 June 2016.⁸³ NDC, however, failed to meet the deadline to submit its application to participate in this private auction. Because voluntary resolution of contention sets must be unanimous, NDC’s refusal meant that the contention set

would have to be resolved at the ICANN-administered auction scheduled for the following month.

30. On 1 June 2016, Afiliás' John Kane contacted Jose Ignacio Rasco III—who is one of NDC's three founders, one of its three managers, its CFO, and the primary contact identified in its .WEB application—to ascertain why NDC had failed to submit its application.⁸⁴ Rasco told him that his "**board [had] instructed [him]** to skip [the private auction] and proceed to [the] ICANN [auction]."⁸⁵ Other contention set members received similar responses from Rasco. For example, Rasco informed contention set member Ruby Glen:

The three of us are still technically the managers of the LLC, but **the decision goes beyond just us**. ... I'm still running our program and Juan sits on the board with me and several others. Based on your request, **I went back to check with all the powers that be** and there was no change in the response....⁸⁶

31. In submitting Rasco's reply to ICANN, Ruby Glen complained that a third party was likely controlling NDC. ICANN thereupon undertook to investigate the matter, writing to NDC's Rasco:⁸⁷

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).⁸⁸

Rasco's response was carefully crafted and answered only part of ICANN's inquiry: "I can confirm that there have been no changes to the [NDC] organization that would need to be reported to ICANN."⁸⁹ Notably missing was a response to ICANN's request that NDC "confirm that there have not been changes to your application ... that need to be reported to ICANN."⁹⁰

32. On 8 July 2016, ICANN's Christine Willett (Vice President, gTLD Operations, Global Domains Division) followed up with Rasco by phone, but does not appear to have pressed Rasco on his response to ICANN's query, which is surprising—if not incredible—given that there were abundant rumors circulating at the time (which were known to ICANN) that VeriSign was somehow involved with NDC. In a summary of that conversation provided to the ICANN Ombudsman later that day, Willett wrote that Rasco had represented to her that, in responding to Ruby Glen and Afiliás:

[H]e used language to give the impression that the decision to not resolve contention privately was not entirely his. However, **this decision was in fact his**.⁹¹

33. In short, either Rasco had lied to Willett, or the two of them had their conversation on a “don’t ask, don’t tell” understanding. Indeed, as of Third Party Designated Confidential Information Redacted

. Thus, the decision whether or not to participate in the private auction was not “in fact his” (i.e., Rasco’s). Third Party Designated Confidential Information Redacted

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92

34. On 13 July 2016, Willett wrote to the contention set, stating that ICANN intended to proceed with the .WEB Auction, as scheduled, on Wednesday 27 July 2016. She stated: “in regards to potential changes of control of [NDC], we have investigated the matter, and to date we have found no basis to initiate the application change request or postpone this auction.”⁹³

35. At the .WEB Auction, several contention set members dropped out early, with four bidders passing the prior record and through the round ending at USD 71.9 million. Thereafter, only Afilias and one other bidder continued to bid. Under the terms of its bank financing agreements, Afilias was able to bid up to USD 135 million for .WEB, which was more than three times the record bid in any previous ICANN auction.⁹⁴ In the final round, Afilias submitted a bid of USD 135 million, short of the USD 142 million needed to progress to the next round. ICANN subsequently announced that NDC had won the auction.

2.4 How VeriSign Sought to Acquire .WEB.

2.4.1 VeriSign Pursues .WEB Secretly as it Negotiates with ICANN for .COM

36. When the New gTLD Program application window opened in 2012, VeriSign had applied only for non-Latin character versions of .COM and .NET, as well as two gTLDs associated with its trademarks. VeriSign did not apply for .WEB. Instead, Third Party Designated Confidential Information, VeriSign entered into the DAA.⁹⁵ VeriSign and NDC kept

the existence of the DAA a secret from the public, and apparently from ICANN, until after the auction results were announced. (As discussed below, the *terms* of the DAA remain a secret from the public; Afilias' counsel first learned of the terms pursuant to a Confidentiality Agreement in December 2018, as a result of discovery granted in this IRP.)

37. Following the .WEB Auction, VeriSign filed a 10-Q statement with the SEC. A footnote in that statement obliquely referred to the result of the .WEB Auction:

Subsequent to June 30, 2016, the Company incurred a commitment to pay approximately \$130.0 million for the future assignment of contractual rights, which are subject to third-party consent.⁹⁶

VeriSign's disclosure was not accurate:

Third Party Designated Confidential Information Redacted

A flurry of media reports immediately appeared, speculating that VeriSign had acquired .WEB.⁹⁷

38. On 1 August 2016, and in response to the speculation in the marketplace, VeriSign issued a press release, stating that it had "entered into an agreement with [NDC] wherein [VeriSign] provided funds for [NDC's] bid for the .web TLD We anticipate that [NDC] will execute the .web Registry Agreement with [ICANN] and will then seek to assign the Registry Agreement to Verisign upon consent from ICANN."⁹⁸ As shown below, VeriSign's press release did not accurately describe the terms of the DAA.

39. Following complaints by Afilias, ICANN requested VeriSign and NDC to provide a copy of their agreement. Third Party Designated Confidential Information Redacted Afilias, however, did not become aware of the DAA or when it was provided to ICANN until it received the DAA on 18 December 2018, when it was produced to Afilias by ICANN based on a production order from the Emergency Panelist (and under a Confidentiality Agreement in which only Afilias' General Counsel, outside counsel, and experts assisting in this case may see it). Prior to this, ICANN had refused to provide the DAA (or even confirm its existence), or otherwise provide any other .WEB-related documents that Afilias had requested pursuant to ICANN's Documentary Information Disclosure Policy.⁹⁹

2.4.2 The Terms of the Domain Acquisition Agreement

40. By agreeing to the DAA, Third Party Designated Confidential Information Redacted

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42. By entering into the DAA, Third Party Designated Confidential Information Redacted

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43. Reflecting its total control over NDC's .WEB application, VeriSign has reported that it is involved in the delegation process for .WEB. During an earnings call on 8 February 2018, VeriSign CEO D. James Bidzos reported that "[w]e are now engaged in ICANN's process to move the delegation of .web forward."¹¹³ Bidzos made similar comments on 23 April 2018 and 26 July 2018.¹¹⁴

2.5 Afiliás Complains to ICANN

44. On 8 August 2016, Afiliás wrote to ICANN, stating that VeriSign's arrangement with NDC violated the New gTLD Program Rules and demanding that ICANN disqualify NDC's bid and, in accordance with the Rules,

award .WEB to the next highest bidder, Afilias.¹¹⁵ Afilias also lodged a complaint with the ICANN Ombudsman.¹¹⁶

45. Having received no response to its letter, on 9 September 2016, Afilias again wrote to ICANN, requesting that ICANN specify what steps it had taken to disqualify NDC's bid and to confirm that ICANN would not enter into a Registry Agreement with NDC for .WEB until the Ombudsman had completed its investigation, the ICANN Board had reviewed the matter, and any ICANN accountability mechanisms had been completed.¹¹⁷

Third Party Designated Confidential Information Redacted

46. On 16 September 2016, ICANN sent Afilias, VeriSign, NDC, and Ruby Glen a questionnaire to "facilitate informed resolution" of questions regarding, among other things, whether NDC should have participated in the 27-28 July 2016 .WEB Auction and whether NDC's application for the .WEB gTLD should be rejected.¹¹⁸

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47. On 30 September 2016, Mr. Akram Atallah (President, ICANN's Global Domains Division) wrote to Afilias and stated: "As an applicant in the contention set, the primary contact for the Afilias's application **will be notified of [any] future changes to the contention set status or updates regarding the status of [.WEB]...** We will continue to take Afilias's comments, and other inputs that we have sought, into consideration **as we consider this matter.**"¹¹⁹

48. Afilias responded to ICANN's request on 7 October 2016.¹²⁰ Afilias does not know what ICANN did with the information it received, including presumably from VeriSign, NDC, and Ruby Glen.

49. Throughout 2017, ICANN did not—as Mr. Atallah had promised—notify Afilias of **any** "changes to the contentions set status" or **any** "updates regarding the status of .WEB." However, Afilias had no reason to believe that ICANN was not investigating and considering the issues raised by Afilias – which, again, is what ICANN said it would do.

50. Beginning in February 2018, Afilias' counsel at Dechert made repeated requests to ICANN for updates on whether it had reached any decision on how it intended to proceed with .WEB. On 28 April 2018, ICANN's counsel at Jones Day responded to Afilias' counsel that "**the .WEB contention set is on hold.** When

the contention set is updated, your client – along with all other members of the contention set – will be notified promptly[.]”¹²¹

51. Without providing any reasons for its decision, on 7 June 2018, ICANN notified Afilias that it had decided to take the .WEB contention set off hold status—signaling that it intended to proceed with delegation of .WEB to NDC;¹²² and, of course, in light of the terms of the DAA, of which ICANN was now fully aware, to VeriSign.

52. In response to ICANN’s notification, on 18 June 2018 Afilias initiated a CEP—an ICANN accountability mechanism intended to allow the parties to amicably resolve or narrow the issues in dispute.¹²³ In response, on 20 June 2018, ICANN once again placed the .WEB contention set “on-hold.”¹²⁴ ICANN terminated the CEP on 13 November 2018.¹²⁵ Afilias commenced this IRP the following day on 14 November 2018. The .WEB contention set is still on-hold.

3. NDC VIOLATED THE NEW GTLD PROGRAM RULES

53. Below we set out how NDC violated the AGB by (i) omitting material information from and failing to correct material misleading information in its .WEB application, (ii) assigning its rights and obligations in its .WEB application to VeriSign, and, (iii) agreeing to submit bids on VeriSign’s behalf at the .WEB Auction.

3.1 NDC Failed to Amend its Application

54. The information that NDC failed to disclose— Third Party Designated Confidential Information
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—was material to its application, to the fairness and integrity of the resolution-by-auction process, and ultimately to the objectives of the New gTLD Program itself. NDC’s failures to disclose these facts and to amend its application following its agreement with VeriSign constitute breaches of the AGB requiring NDC’s disqualification.

55. NDC’s failure to disclose the terms of its agreement with VeriSign was an omission of material information, as its obligations assumed under the DAA fundamentally changed the nature of NDC’s application. VeriSign has long enjoyed a monopoly, by virtue of its control over the .COM and .NET gTLDs, and a fundamental purpose of the New gTLD Program was to break this monopoly. Afilias and the other applicants sought to acquire

.WEB for exactly this purpose: to compete with VeriSign. It would be absurd to suggest that NDC believed that its agreement with VeriSign would not be materially relevant to the other applicants, the Internet community, and, indeed, to ICANN. Indeed, the lengths to which it went to conceal VeriSign's involvement suggests that it was well aware how material this involvement was.

56. As discussed previously, the AGB requires applicants to answer a series of detailed "mandatory" questions concerning, *inter alia*, the specific entity applying for a given gTLD; the primary individuals at the entity responsible for the application; the names and positions of the directors, officers, and/or partners of the entity; the names and positions of all shareholders holding at least 15% of the entity; the "mission/purpose" of the proposed gTLD; and how the applicant expected to use the gTLD to "benefit registrants, Internet users, and others."¹²⁶ The information that NDC provided in response to several of these mandatory questions became untrue, inaccurate, false, and/or misleading when NDC entered into the DAA (*i.e.*, a "change in circumstance").

57. However, NDC ignored the AGB's rules and procedures for amending its application. Instead, NDC concealed that VeriSign—a non-applicant that had not been through the public comment or evaluation processes and whose monopoly the New gTLD Program was designed to challenge—had now become the real party-in-interest behind its application. By concealing VeriSign's "indirect participation in the Contention Set," NDC misled ICANN, the other members of the .WEB contention set, and indeed the entire Internet community, into believing that it was seeking to obtain .WEB for itself in order to compete against .COM (as stated in the Mission/Purpose statement of NDC's application). Once NDC had sold its rights in its .WEB application to VeriSign, this representation was simply and entirely false.

58. Third Party Designated
Confidential Information NDC's application was no longer true, accurate, or complete. For example, NDC was required, at Section 18 of its application, to describe the "Mission/Purpose" of its proposed .WEB registry. Here, ICANN required NDC to detail its business plan for .WEB, including how the .WEB registry would "benefit registrants" and "add to the current space, in terms of competition, differentiation, or innovation."¹²⁷ For NDC's "application to be considered complete, answers to this section must be fulsome and sufficiently

quantitative....”¹²⁸

59. Answers provided in response to Section 18 are included in the non-confidential version of applications posted to ICANN’s website, so that members of the public may understand who is applying for which gTLDs and for what purpose. NDC’s application contained a detailed response to Section 18, repeatedly noting that .WEB would follow the marketing path that NDC’s management used with .CO. For example, NDC wrote:

Prospective 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). ... The experienced team behind this application initially launched and currently operates the .CO ccTLD. The intention is for .WEB to be added to .CO’s product portfolio, where it can benefit from economies of scale along with the firm’s experience and expertise in marketing and branding TLD properties.¹²⁹

60. Further, NDC justified its pursuit of .WEB on the basis, *inter alia*, that it was seeking to challenge the dominance of “older incumbent players” (e.g., VeriSign—the oldest of such incumbent players).¹³⁰ The only possible reading of NDC’s business plan was that NDC intended to acquire .WEB for itself, to operate .WEB itself, and to market .WEB itself. ^{Third Party Designated Confidential Information} none of these things were true: NDC’s business plan for .WEB had been reduced to one singular objective: to secretly obtain the rights in .WEB for VeriSign, and then to assign .WEB to VeriSign.

61. Other parts of NDC’s application were also, at best, misleading. For example, in Section 1 of its application, NDC continued to identify itself as the “applicant,” that is, the “entity that would enter into a Registry Agreement with ICANN.”¹³¹ ^{Third Party Designated Confidential Information} this was all but fiction except in the most superficial sense:

^{Third Party Designated Confidential Information Redacted}

62. By failing to submit the necessary change requests to fully detail the operation and effect of the DAA on its application, NDC flouted both the letter and the spirit of the numerous transparency and disclosure requirements contained in the New gTLD Program Rules. ICANN’s failure to disqualify NDC for these violations breaches its obligations under its Articles and Bylaws and, further, is a gross abdication of its responsibilities as the administrator of the New gTLD Program and, specifically, of the .WEB Auction.

3.2 NDC Violated the AGB's Prohibition Against the Resale, Transfer, or Assignment of NDC's Application

63. In addition to its failure to disclose material information relevant to its application, NDC also breached the AGB's prohibition against an applicant reselling, transferring, or assigning its application. The AGB states in unambiguous terms that an "[a]pplicant may not resell, assign, or transfer **any** of the applicant's rights or obligations in connection with the application."¹³²

64. Contrary to the AGB's anti-assignment clause, NDC transferred to VeriSign its obligations to take certain actions required of applicants under the AGB. For example, the AGB requires applicants "to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading."¹³³ Third Party Designated Confidential Information Redacted

.¹³⁴ NDC therefore impermissibly transferred its obligation to amend its application, as necessary, to VeriSign.

65. NDC also impermissibly transferred crucial rights as an applicant to VeriSign. For example, pursuant to the AGB, applicants "are encouraged to reach a settlement or agreement among themselves that resolves the contention."¹³⁵ An applicant therefore has the right to choose to "withdraw their application," "combin[e] in a way that does not materially affect the remaining application," or participate in a private auction.¹³⁶

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¹³⁷ Third Party Designated Confidential Information Redacted

¹³⁸ Third Party Designated Confidential Information Redacted

¹³⁹ in direct violation of the AGB, which strictly limits participation in contention sets to applicants. Indeed, with the transfer of such rights, NDC was no longer an applicant for .WEB in any real sense; Third Party Designated Confidential Information Redacted

Third Party Designated Confidential Information Redacted

66. Finally, VeriSign's control over NDC in all matters regarding its .WEB application is further demonstrated by the fact that VeriSign is "engaged in ICANN's process to move the delegation of .web forward."¹⁴⁰ As the purported winner of the .WEB Auction, it is NDC that has the obligation under the AGB to negotiate and execute a Registry Agreement for .WEB with ICANN. VeriSign has no standing to be at the negotiating table in any capacity regarding the delegation of .WEB. VeriSign's participation in the "ICANN process" for the delegation of .WEB reflects NDC's impermissible transfer of its obligation as the winning applicant to negotiate and conclude a Registry Agreement with ICANN and participate in the pre-delegation testing for .WEB.

67. Third Party Designated Confidential Information Redacted

68. NDC's sale, assignment, and/or transfer of its rights and obligations in its .WEB application to VeriSign violates the Terms and Conditions of the AGB. ICANN's failure to disqualify NDC constitutes a clear breach of ICANN's Articles and Bylaws and, further, is a gross abdication of its responsibilities as the administrator of the New gTLD Program.

3.3 Each of NDC's Bids at the .WEB Auction Was Invalid

69. As set forth above, the AGB provides that "[o]nly bids that comply with **all aspects** of the auction rules will be considered valid."¹⁴¹ In relevant part, the Auction Rules provide that a Bidder may only "bid on **its** behalf"¹⁴² at an ICANN-administered Auction and that all such bids must reflect "a price which the **Bidder** is willing to pay to resolve string contention within a Contention Set in favor of its Application."¹⁴³ An invalid bid must be treated as "an exit bid at the start-of-round price for the current auction round."¹⁴⁴ Accordingly, any entity that

submits an invalid bid may not proceed to the next round of the auction.

70. NDC participated in the .WEB Auction as the Bidder for its Application. Although NDC was obligated under the Auction Rules to participate in the .WEB Auction “on its own behalf,”¹⁴⁵ Third Party Designated Confidential Information Redacted

146

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71. Moreover, although NDC was obligated to submit bids at the .WEB Auction that reflected the amount that *it* was willing to pay for .WEB, Third Party Designated Confidential Information Redacted

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73. Thus, even though NDC mechanically entered bids during the .WEB Auction, it was *VeriSign* that was the true bidder-in-interest. Third Party Designated Confidential Information Redacted

147

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148

74. For these reasons, none of NDC’s bids complied with “all aspects of the auction rules.” ICANN’s failure to deem NDC’s initial bid at the .WEB Auction an exit bid constitutes a clear breach of ICANN’s Articles and Bylaws and, further, is a gross abdication of its responsibilities as the administrator of the .WEB Auction.

4. ICANN’S FAILURE TO DISQUALIFY NDC BREACHES ICANN’S OBLIGATION TO APPLY DOCUMENTED ICANN POLICIES NEUTRALLY, OBJECTIVELY, AND FAIRLY

75. The Bylaws obligate ICANN to “[m]ake decisions by applying its documented policies

consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment....”¹⁴⁹ ICANN is permitted to “single out [a] ... party for disparate treatment” if it is “justified by substantial and reasonable cause, such as the promotion of effective competition.”¹⁵⁰ Even where the AGB grants ICANN the discretion whether or not to take action, ICANN cannot refrain from acting where the neutral, objective, and fair application of its policies require it to act.

76. The GNSO, ICANN’s policy making body, determined that the New gTLD Program must be administered pursuant to “a clear and pre-published application process using objective and measurable criteria.”¹⁵¹ This policy was cited in the ICANN Board’s Resolutions that approved the New gTLD Program.¹⁵² In so doing, the Board observed that the AGB satisfies the GNSO’s policy by mapping out the various phases of the application process, from submission through transition to delegation.

77. Moreover, the ICANN Board determined that ICANN would administer an auction as a method of last resort for resolving contention where “contending applications have not resolved the contention among themselves.”¹⁵³ In explaining its decision to adopt the auction method for this purpose, the ICANN Board explained that compared with other methods of resolution, auctions are “fair and transparent.”¹⁵⁴ As the auction administrator, ICANN is further obligated to act in good faith.

78. ICANN failed to apply these policies “neutrally, objectively, and fairly” here:

- The AGB required ICANN to “disqualify” NDC because it “fail[ed] to provide ICANN with the identifying information necessary to confirm the identity” of the true applicant, namely VeriSign.¹⁵⁵
- The AGB required ICANN to “reject” NDC’s application for the omission of material information from its application, namely that it was obligated to assign .WEB to VeriSign.¹⁵⁶
- The AGB required ICANN to “deny” NDC’s application for “fail[ing] to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading.”¹⁵⁷
- ICANN failed to fully investigate rumors that NDC had reached an agreement with VeriSign prior to the .WEB Auction. Although ICANN specifically asked NDC to confirm that “there have not been changes to your application ... that need to be reported to ICANN,”¹⁵⁸ NDC declined to do so and ICANN failed to pursue a response.
- ICANN failed to sanction NDC for lying to ICANN investigators about its decision not to participate in a .WEB private auction.

- ICANN further violated its policy of transparency by refusing to update Afilias as to the status of its investigation, the details of its findings, and its intentions in that regard for over 18 months. ICANN concealed the terms of the DAA and its decision to delegate .WEB to NDC (and hence to VeriSign).
- ICANN also failed administer the .WEB Auction “neutrally, objectively, and fairly[.]”¹⁵⁹ The AGB provides that bids are valid only if they comply with “all aspects of the auction rules.”¹⁶⁰ None of NDC’s bids were valid, as they were submitted on VeriSign’s, not NDC’s behalf, and reflected the amount that VeriSign, not NDC, was willing to pay for .WEB. Once the DAA was disclosed to ICANN, ICANN failed to disqualify NDC on the basis that its bids submitted at the .WEB Auction were all invalid.

5. ICANN’S DECISION TO FINALIZE A REGISTRY AGREEMENT WHILE KNOWING OF NDC’S ARRANGEMENT WITH VERISIGN VIOLATES ICANN’S MANDATE TO PROMOTE COMPETITION

79. The harm to Afilias caused by ICANN’s failure to enforce its policies, rules, and procedures is compounded by the fact that NDC’s and VeriSign’s subterfuge subverts another one of ICANN’s Core Values, and indeed, one of the principal purposes for the New gTLD Program’s creation: to introduce and promote competition, including, specifically, competition that could break VeriSign’s monopoly.

80. As discussed in the Expert Report of Dr. Zittrain, ICANN was founded to introduce competition in the domain name space. This Competition Mandate was reflected in ICANN’s founding documents, its Bylaws, its policymaking, and in the New gTLD Program itself. When ICANN was established, its Memorandum of Understanding with the United States Government tasked ICANN with privatizing the management of the DNS “in a manner that increases competition” by adopting “market mechanisms to support competition and consumer choice ... [to] promote innovation, [preserve diversity,] and enhance user choice and satisfaction.”¹⁶¹ ICANN’s first generation of leaders understood plainly ICANN’s purpose: as Esther Dyson, ICANN’s first chairman, said in her testimony about the New gTLD Program, “*our ... mission was to break the [NSI/VeriSign] monopoly....*”¹⁶² Thus, one of the Core Values stated in ICANN’s Bylaws is to introduce and promote competition.¹⁶³ Indeed, the Bylaws state at the outset that ICANN “must operate ... through open and transparent processes *that enable competition and open entry in Internet-related markets.*”¹⁶⁴ ICANN’s mandate to introduce and promote competition must inform all of its decision-making.

81. The ICANN Board launched the New gTLD Program “in fulfilment of a core part of ICANN’s Bylaws: the introduction of competition and consumer choice in the DNS.”¹⁶⁵ The Board’s view reflects the

intentions of the GNSO, ICANN's primary policy-making organ, which stated that one of the "key drivers for the introduction of new top-level domains" is to "stimulate competition at the registry service level which is consistent with ICANN's Core Value 6."¹⁶⁶

82. As discussed in the Expert Report of Dr. Sadowsky, .WEB is widely seen as the best potential competitor to .COM. In recognition of its competitive potential, the members of the .WEB contention set bid a record amount to secure the rights to .WEB. Afilias bid more than three times what any gTLD had publicly auctioned for in history to acquire .WEB to compete with VeriSign. VeriSign—bidding secretly through NDC—outbid Afilias in what was plainly an effort to protect its dominant market position.

83. ICANN's failure to apply its documented policies consistently, neutrally, objectively, and fairly—and its failure to carry out its activities through open and transparent processes—have also resulted in the violation of ICANN's mandate to introduce and promote competition. For reasons described in Dr. Sadowsky's Expert Report, .WEB remains the last, best hope of creating a competitive environment at the wholesale registry level of the DNS and ending VeriSign's market power, which, to date, has been regulated through price controls. By violating its Commitments and Core Values in its Bylaws, thereby enabling VeriSign to gain control over .WEB, ICANN has all but destroyed the last best chance to create a truly competitive environment within the DNS—*i.e.*, one of the principal purposes of the New gTLD Program, and indeed, of ICANN's existence.

6. ICANN VIOLATED ITS BYLAWS IN ADOPTING RULE 7 OF THE INTERIM PROCEDURES

84. As described more fully in Afilias' briefing to the Procedures Officer appointed by the ICDR for this IRP, VeriSign exploited its leadership position on the committee that drafted the Interim Procedures to ensure that the Interim Procedures contained provisions that gave it (and NDC, which VeriSign controls in all relevant respects), an absolute right to participate in this IRP. Moreover, VeriSign did so with the knowledge and assistance of ICANN personnel.

85. Although the drafting committee had begun work on the Interim Procedures in 2016 and, in fact, had published a draft set of rules for public comment in November 2016, VeriSign connived to amend Rule 7

(Consolidation, Intervention and Joinder) in October 2018, just days before the Board voted to adopt the Interim Procedures on 25 October 2018.

86. The Board's adoption of Rule 7 violated ICANN's Bylaws in several respects:

- **First**, the Bylaws require that the drafting committee be comprised of members of the global Internet community, but the committee wrongly included ICANN's internal and external counsel in quorum counts. Barring the inclusion of ICANN's lawyers, the committee would have lacked a quorum when changes to Rule 7 were discussed in October 2018.
- **Second**, the Bylaws require that the Interim Procedures conform to "norms of international arbitration," but the final text of Rule 7 provides for rights of participation that are wholly foreign to all forms of international arbitration.
- **Third**, the Bylaws require that the Interim Procedures be published for public comment pursuant to ICANN's practices, which require public review of all "significant changes" to the rules. Rule 7 was not re-submitted for public comment, although the revised rule was certainly a "significant change" from the version that had been published for public comment in November 2016.
- **Fourth**, the Bylaws provide that the Board may reasonably withhold approval of the Interim Procedures, yet the Board's approval was based on its understanding that certain drafting "principles" had been followed and that the 11th hour edits to Rule 7 reflected the committee's prior discussions. In fact, at least as regards Rule 7, each of the drafting principles that were to guide the committee's work had been materially violated and the text of Rule 7 admittedly did not reflect the committee's prior discussions.

87. The Procedures Officer found that "the issues raised [by Afilias] are of such importance to the global Internet community and Claimants that they should not be decided by a 'Procedures Officer'" and therefore referred the question of the enforceability of Rule 7 of the Interim Procedures to the Panel.

88. VeriSign and NDC, relying on the text of Rule 7 that had been added at the 11th hour, moved to participate in this IRP as *amicus curiae*.¹⁶⁷ As already evinced by the substantial briefing before the Procedures Officer, the wrongful adoption of Rule 7 has significantly increased Afilias' costs associated with prosecuting this IRP. Moreover, ICANN's effectuation of the rule changes in this manner for the benefit of VeriSign is part of a course of conduct ^{Third Party Designated Confidential Information Redacted}, when ICANN learned of but concealed from the public the terms of the DAA from the public, and falsely promised Afilias that it would investigate and consider Afilias' complaints. Since that time, ICANN has continually violated its commitments and core values of transparency, non-discrimination, promotion of competition, and decision-making through the consistent, neutral, objective, and fair application of document policies – all for the purpose of assisting VeriSign's efforts to obtain the rights in .WEB

for itself.

7. RELIEF REQUESTED

89. Reserving its rights to amend the relief requested below, inter alia, to reflect document production and further witness evidence, Afilias respectfully requests the IRP Panel to issue a binding Declaration:

- (1) that ICANN has acted inconsistently with its Articles and Bylaws, breached the binding commitments contained in the AGB, and violated international law;
- (2) that, in compliance with its Articles and Bylaws, ICANN must disqualify NDC's bid for .WEB for violating the AGB and Auction Rules;
- (3) ordering ICANN to proceed with contracting the Registry Agreement for .WEB with Afilias in accordance with the New gTLD Program Rules;
- (4) specifying the bid price to be paid by Afilias;
- (5) that Rule 7 of the Interim Procedures is unenforceable and awarding Afilias all costs associated with the additional work needed to, among other things, address arguments and filings made by VeriSign and/or NDC;
- (6) declaring Afilias the prevailing party in this IRP and awarding it the costs of these proceedings; and
- (7) granting such other relief as the Panel may consider appropriate in the circumstances.

Respectfully submitted,



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LIST OF EXHIBITS

Exhibit No.	Description
C-69	Domain Acquisition Agreement between VeriSign, Inc. and Nu Dotco LLC Third Party Designated Confidential Information Redacted
C-70	Declaration of the Procedures Officer (29 Feb. 2019)
C-71	Emergency Panelist's Decision on Afiliias' Request for Production of Documents in Support of Its Request for Interim Measures (2 Dec. 2018)
C-72	United States Department of Commerce, Amendment to Financial Assistance Award (VeriSign, Inc.) (26 Oct. 2018)
C-73	World Bank, Open Learning Center, <i>Beneficial Ownership Transparency</i> , available at https://olc.worldbank.org/print/content/beneficial-ownership-transparency (last accessed on 17 Mar. 2019)
C-74	ICANN, Contention Set Status, New Generic Top-Level Domains (as of 19 Feb. 2019), available at https://gtldresult.icann.org/applicationstatus/stringcontentionstatus (last accessed on 15 Mar. 2019)
C-75	<i>Ruby Glen, LLC v. ICANN</i> , 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 <i>Ex Parte</i> Application for Temporary Restraining Order (25 July 2016)
C-76	ICANN New Generic Top-Level Domains, New gTLD Auction Results, available at https://gtldresult.icann.org/applicationstatus/auctionresults (last accessed on 15 Mar. 2019)
C-77	A. Allemann, "It looks like Verisign bought .Web domain for \$135 million (SEC Filing)," <i>Domain Name Wire</i> (28 July 2016), available at https://domainnamewire.com/2016/07/28/looks-like-verisign-bought-web-domain-135-million-sec-filing/ (last accessed on 15 Mar. 2019)
C-78	Letter from A. Ali (Counsel for Afiliias) to ICANN Board (23 Feb. 2018)
C-79	Letter from A. Ali (Counsel for Afiliias) to ICANN Board of Directors (23 Apr. 2018)
C-80	Letter from J. LeVee (Counsel for ICANN) to A. Ali (Counsel for Afiliias) (28 Apr. 2018)
C-81	VeriSign (VRSN) CEP Jim Bidzos on Q4 2018 Results – Earnings Call Transcript (7 Feb. 2019), available at https://seekingalpha.com/article/4239256-verisign-inc-vrsn-ceo-jim-bidzos-q4-2018-results-earnings-call-transcript?part=single (last accessed on 17 Mar. 2019)

LIST OF LEGAL AUTHORITY

Authority No.	Description
CA-11	<i>Booking.com B.V. v. ICANN</i> , ICDR Case No. 50-20-1400-0247, Final Declaration (3 Mar. 2015)

END NOTES

- 1 ICANN, *gTLD Applicant Guidebook* (4 June 2012) (“**AGB**”), [Ex. C-3].
- 2 ICANN, Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers (approved on 9 Aug. 2016, filed on 3 Oct. 2016) (“**Articles**”), [Ex. C-2].
- 3 Power Auctions LLC, *Auction Rules for New gTLDs: Indirect Contentions Edition* (24 Feb. 2015) (“**Auction Rules**”), [Ex. C-4].
- 4 ICANN, New gTLD Auctions Bidder Agreement (3 Apr. 2014), [Ex. C-5].
- 5 ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 18 June 2018) (“**Bylaws**”), [Ex. C-1].
- 6 ICANN, New gTLD Application Change Request Process and Criteria (“**Change Request Criteria**”), [Ex. C-56].
- 7 Domain Acquisition Agreement between VeriSign, Inc. and Nu Dotco LLC Third Party Designated Confidential Information Deleted (“**DAA**”), [Ex. C-69].
- 8 Auction Rules [Ex. C-4], p. 17.
- 9 ICANN, Generic Names Supporting Organization, Final Report, Part A: Introduction of New Generic Top-Level Domains (8 Aug. 2017) (“**GNSO Report**”), [Ex. C-20].
- 10 Bylaws [Ex. C-1], Art. 4, Sec. 4.3.
- 11 Declaration of the Procedures Officer (29 Feb. 2019) (“**Procedures Officer Decision**”), [Ex. C-70].
- 12 Auction Rules [Ex. C-4], p. 19.
- 13 ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (20 June 2011) (“**Rationales**”), [Ex. C-9].
- 14 On 9 January 2019 and 29 January 2019, respectively, Afilias notified counsel for ICANN and the ICDR of its intention to amend its original Request for IRP pending the decision by the Procedures Officer. In light of ICANN’s disclosure of the August 2015 Domain Acquisition Agreement between VeriSign and NDC, Afilias withdraws the witness statements of Ram Mohan, Jonathan Robinson, and John Kane filed with the original Request for IRP.
- 15 Bylaws [Ex. C-1], Sec. 4.3. ICANN takes the position that the IRP is the only third-party dispute resolution process available to gTLD applicants for independent review of ICANN’s actions. AGB [Ex. C-3], p. 6-4. The enforceability of the “litigation waiver” ICANN imposed upon new gTLD applicants, however, is questionable under the laws of various jurisdictions. Afilias reserves its right to challenge ICANN’s conduct in any court of competent jurisdiction worldwide.
- 16 Afilias requests leave to supplement this submission to take into consideration ICANN’s compliance with its DIDP, customary document production during these proceedings, further witness evidence, and ICANN’s submissions.
- 17 AGB [Ex. C-3].
- 18 Auction Rules [Ex. C-4]. The Auction Rules are binding upon bidders in an ICANN auction. ICANN, New gTLD Auctions Bidder Agreement (3 Apr. 2014), [Ex. C-5].
- 19 NDC and VeriSign have applied to participate in this IRP as *amicus curiae*. Afilias has objected to their participation, mainly based on the ICANN Board’s improper approval of certain parts of Rule 7 of the Interim Procedures, and ICANN’s Staff’s conduct in connection therewith, as set out more fully in Afilias’ submissions

END NOTES

to the Procedures Officer. These submissions are incorporated by reference herewith. This matter is now before the IRP Panel pursuant to the Procedures Officer Decision. Procedures Officer Decision **[Ex. C-70]**, p. 38. This Request also encompasses the ICANN Staff's improper refusal under ICANN's DIDP to disclose to Afiliás documents relevant to the .WEB Auction, a decision that was upheld by the ICANN Board on 6 November 2011. ICANN, Approved Board Resolutions, Special Meeting of the ICANN Board (6 Nov. 2018), **[Ex. C-7]**, pp. 1-12.

²⁰ See ICANN, New gTLD Application Submitted to ICANN by Afiliás Domains No. 3 Limited, Application ID: 1-1013-6638 (13 June 2012), **[Ex. C-8]**.

²¹ Third Party Designated Confidential Information Redacted

ICANN produced the DAA to Afiliás, only after being required to do so by the Emergency Panelist. Emergency Panelist's Decision on Afiliás' Request for Production of Documents in Support of Its Request for Interim Measures (2 Dec. 2018), **[Ex. C-71]**, pp. 5-6.

²² DAA **[Ex. C-69]**.

²³ *Id.*, Ex. A, Sec. 1 (emphasis added).

²⁴ Bylaws **[Ex. C-1]**, Sec 1.2(a)(v).

²⁵ Since 2000, VeriSign has controlled the exclusive rights to the .COM and .NET registries. This market dominance has endured, leading the ICANN Board to opine in 2011 that "[t]o date, ICANN has not created meaningful competition at the registry level." Rationales **[Ex. C-9]**, p. 27. Members of the United States Senate opined in 2016 that "Verisign's government-approved control of the .com registry allows it to operate as a monopoly—a fact that has not gone unnoticed in the financial services industry and the stock market." Letter from Senators T. Cruz, M. Lee and S. Duffy (United States Senate) to R. Hesse (Acting Assistant Attorney General, United States Department of Justice) (12 Aug. 2016), **[Ex. C-10]**, p. 2. Financial analysts who have studied VeriSign agree, describing it as having "a virtual monopoly on Internet domains" that gives it "unrivalled power" in "the fastest-growing industry in the world -- the Internet." M. Hargrave, "Profit from a 'Monopoly on the Internet' with 45% Upside," *StreetAuthority* (6 Nov. 2013), **[Ex. C-11]**, p. 1. Industry observers have likewise concluded that VeriSign "holds a legal monopoly on the DNS industry" (B. Katz, "VeriSign Is Brian Katz's Highest Conviction Holding - Here's Why," *Seeking Alpha* (29 Dec. 2009), **[Ex. C-12]**, p. 2) and that its "exclusive contract with [ICANN] gives the company a significant barrier to entry for competitors." "Verisign: Time To Make Some Real Money," *Seeking Alpha* (29 June 2016), **[Ex. C-13]**, p. 1. Today, VeriSign continues to control more than 78% of all gTLD registrations. Verisign, "Fourth Quarter 2017 Domain Report," 15(1) *The Domain Name Industry Brief* (Feb. 2018), **[Ex. C-14]**, p. 2. To protect consumers, the U.S. government has required that ICANN contractually impose price caps on the wholesale prices of .COM registrations. VeriSign, *Verisign Statement on .com Registry Agreement Renewal* (1 Nov. 2012), **[Ex. C-15]**, p. 1; United States Department of Commerce, Amendment to Financial Assistance Award (VeriSign, Inc.) (29 Nov. 2012), **[Ex. C-16]**, p. 3. The U.S. government, however, recently permitted an amendment to the .COM registry agreement that lets VeriSign increase the price of .COM registrations by seven percent in the last four years of every six-year contract period. United States Department of Commerce, Amendment to Financial Assistance Award (VeriSign, Inc.) (26 Oct. 2018), **[Ex. C-72]**. Price controls had scant effect on VeriSign's profitability before the amendment: VeriSign's operating margin had exceeded 60%, among the highest of any S&P 500 company, before the amendment. VeriSign (VRSN) Q2 2018 Results - Earnings Call Transcript (26 July 2018), **[Ex. C-18]**; D. Dayen, "Special Investigation: The Dirty Secret Behind Warren Buffett's Billions," *The Nation*, **[Ex. C-17]**, p. 10. If its margins continue to grow at the current rate, within the next decade VeriSign will "post the highest rate of profitability of any public company on earth." *Id.*

²⁶ Afiliás, *About Us*, **[Ex. C-19]** ("Afiliás is the ICANN Designated Registry Operator for a wide range of gTLDs, including the following: .INFO, .MOBI, .PRO, .PINK, .BLUE, .BLACK, .RED, .KIM, .SHIKSHA, .ORGANIC,

END NOTES

- .dotCHINESEMobile, .LGBT, .VOTE, .VOTO, .GREEN .POKER, .PROMO, .BET, .PET, .BIO, .SKI, .ARCHI, and .LLC.”).
- 27 *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], ¶¶ 1-2, 10; *Vistaprint Ltd. v. ICANN*, ICDR Case No. 01-14-0000-6505, Final Declaration of the Independent Review Panel (9 Oct. 2015), [Ex. CA-2], ¶ 125.
- 28 Articles [Ex. C-27], ¶ 2(III); see Bylaws [Ex. C-1], Sec. 1.2(a).
- 29 Bylaws [Ex. C-1], Sec. 1.2(a); Articles [Ex. C-2], ¶ 2(III).
- 30 *ICM Registry v. ICANN*, Declaration of the Independent Review Panel [Ex. CA-1], ¶ 152 (“the 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.”) (emphasis added).
- 31 Bylaws [Ex. C-1], Sec 1.2(a)(v).
- 32 ICANN, Bylaws for Internet Corporation for Assigned Names and Numbers (as amended 11 Feb. 2016), [Ex. C-23], Art. I, Sec. 2(8).
- 33 Bylaws [Ex. C-1], Sec. 2.3.
- 34 Articles [Ex. C-2], ¶ 2(III); Bylaws [Ex. C-1], Sec. 1.2(a).
- 35 Bylaws [Ex. C-1], Sec. 1.2(b)(iv).
- 36 *Id.*, Sec 1.2(c).
- 37 Expert Report by Jonathan Zittrain (26 Sep. 2018), ¶¶ 21-24, 41-45.
- 38 Rationales [Ex. C-9], p. 7.
- 39 AGB [Ex. C-3], p. 1-2.
- 40 ICANN, *News & Media: New gTLD Frequently Asked Questions*, [Ex. C-22], p. 9; see also *Booking.com B.V. v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration (3 Mar. 2015), [Ex. CA-11], ¶ 17 (describing the AGB as the “crystallization of Board-approved consensus policy concerning the introduction of new gTLDs.”) (internal citation omitted).
- 41 Bylaws [Ex. C-1], Sec. 1.2(a); Articles [Ex. C-2], ¶ 2(III).
- 42 See also B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (2006), [Ex. CA-3], p. 107 (“In short, good faith requires that one party should be able to place confidence in the words of the other, as a reasonable man might be taken to have understood them in the circumstances.”).
- 43 AGB [Ex. C-3], pp. 1-4, 1-25, A-5 – A-46.
- 44 *Id.*, p. 6-2.
- 45 *Id.*, pp. 1-30, 6-2.
- 46 *Id.*, p. 1-5.
- 47 *Id.*, Sec. 1.2.7 (at p. 1-11) (emphasis added).
- 48 *Id.*, p. 6-2 (emphasis added).
- 49 ICANN, Registry Agreement (as of 31 July 2017), [Ex. C-26], Sec. 1.3(a)(i) (emphasis added).

END NOTES

- 50 GNSO Report [Ex. C-20], p. 13 (ICANN's "evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination.").
- 51 Change Request Criteria [Ex. C-56], pp. 1-3.
- 52 *Id.* (emphasis added).
- 53 *Id.* (emphasis added).
- 54 *Id.* (emphasis added).
- 55 *Id.* (emphasis added).
- 56 *Id.* (emphasis added).
- 57 AGB [Ex. C-3], p. 6-6 (emphasis added).
- 58 As observed by the World Bank: "Transparency of beneficial ownership will help ensure that the puppet masters and their associates and facilitators are not able to operate in secrecy and impede development." See World Bank, Open Learning Center, *Beneficial Ownership Transparency*, available at <https://olc.worldbank.org/print/content/beneficial-ownership-transparency> (last accessed on 17 Mar. 2019), [Ex. C-73].
- 59 AGB [Ex. C-3], p. 1-15 (identifying the lifecycle timeline for an uncomplicated gTLD application).
- 60 *Id.*, p. 1-13.
- 61 *Id.*, p. 1-28.
- 62 *Id.*, p. 4-6.
- 63 *Id.*, p. 4-19.
- 64 Rationales [Ex. C-9], p. 104.
- 65 ICANN, Economic Case for Auctions in New gTLDs (8 Aug. 2008), [Ex. C-27], p. 2.
- 66 *Id.*, pp. 5, 6 ("Winners [of lotteries] would often 'flip' or resell their licenses to larger entities at substantial profit without ever delivering service to a single customer. ... The disadvantages of comparative evaluations [include] ... [i]f other than the highest-value applicant wins the comparative evaluation, the winner is likely to 'flip' the rights for speculative profits[.]").
- 67 *Id.*, p. 1 (emphasis added).
- 68 AGB [Ex. C-3], p. 4-20 (emphasis added). Reflecting the AGB, the Auction Rules also provide that "[a] Bid represents a price, **which the Bidder is willing to pay** to resolve string contention within a Contention Set in favor of its Application." Auction Rules [Ex. C-4], p. 5 (emphasis added).
- 69 AGB [Ex. C-3], p. 4-22 (emphasis added).
- 70 *Id.*, p. 4-23 (emphasis added).
- 71 *Id.*, p. 2.
- 72 Auction Rules [Ex. C-4], p. 19.
- 73 *Id.*, p. 17.
- 74 *Id.*, p. 3 (emphasis added).
- 75 *Id.* (emphasis added).

END NOTES

- 76 New gTLD Auctions Bidder Agreement [Ex. C-5], p. 1 (emphasis added).
- 77 Report of George Sadowsky (20 Mar. 2019), ¶¶ 39-46.
- 78 P. Lamantia, “.WEB Acquired for \$135 Million. Too much? How does it compare?,” *Authentic Web* (undated), [Ex. C-29], p. 2 (“**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.**”) (emphasis added); K. Murphy, “Verisign likely \$135 million winner of .web gTLD,” *Domain Incite* (1 Aug. 2016), [Ex. C-30], p. 2 (“**[.WEB] is both most sufficiently generic, sufficiently catchy, sufficiently short and of sufficient semantic value to provide a real challenge to .com.**”) (emphasis added); C. Negriz, “How a \$135 million auction affects the domain name industry and your business,” *BIV* (10 Aug. 2016), [Ex. C-31], p. 2 (“**.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.**”) (emphasis added); “The Next Big Domain Extension,” *Supremacy SEO* (undated), [Ex. C-32], p. 2 (“**.web is the one domain that could unseat .com.**”) (emphasis added).
- 79 ICANN, Contention Set Status, New Generic Top-Level Domains (as of 19 Feb. 2019), available at <https://gtldresult.icann.org/applicationstatus/stringcontentionstatus> (last accessed on 15 Mar. 2019), [Ex. C-74].
- 80 ICANN, New gTLD Application Submitted to ICANN by NU DOTCO LLC, Application ID: 1-1296-36138 (13 June 2012) (“**NDC App.**”), [Ex. C-24], p. 6. Neustar Inc. accordingly provided copious technical disclosures in the NDC App. *Id.*, pp. 13-18.
- 81 Email Communications between .WEB Applicants (*various dates*), [Ex. C-33], p. 3 (email from J. Kane dated 28 Apr. 2016).
- 82 *Id.*, p. 2.
- 83 *Id.*
- 84 Email from J. Kane (Vice President, Afilias’ Corporate Services) to H. Lubsen (CEO, Afilias) (7 July 2016), [Ex. C-34].
- 85 *Id.* (emphasis added).
- 86 Email communications between J. Nevett (CEO, Donuts, Inc.) and J. I. Rasco (CFO, NDC) (6 & 7 June 2016), [Ex. C-35].
- 87 Ruby Glen’s complaint was also investigated by ICANN’s Ombudsman. See *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Ca.), Exhibit B to Declaration of Christine Willett in Support of ICANN’s Opposition to Plaintiff’s *Ex Parte* Application for Temporary Restraining Order (25 July 2016) (“**Willett Decl., Ex. B**”), [Ex. C-38].
- 88 *Id.*, [PDF] p. 3 (emphasis added).
- 89 *Id.*
- 90 *Id.*
- 91 *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], [PDF] p. 4 (emphasis added).
- 92 DAA [Ex. C-69], Ex. A, Secs. 1(a), 1(i) (emphasis added).

END NOTES

- 93 Letter from A. Willett (ICANN) to Members of the .WEB/.WEBS Contention Set (13 July 2017), [Ex. C-44], p. 1.
- 94 ICANN New Generic Top-Level Domains, New gTLD Auction Results, available at <https://gtldresult.icann.org/applicationstatus/auctionresults> (last accessed on 15 Mar. 2019), [Ex. C-76].
- 95 DAA [Ex. C-69], p. 15.
- 96 Verisign Inc., *Form 10-Q (Quarterly Report)* (28 July 2016), [Ex. C-45], Note 11 (at p. 13).
- 97 A. Allemann, "It looks like Verisign bought .Web domain for \$135 million (SEC Filing)," *Domain Name Wire* (28 July 2016), available at <https://domainnamewire.com/2016/07/28/looks-like-verisign-bought-web-domain-135-million-sec-filing/> (last accessed on 15 Mar. 2019), [Ex. C-77]; K. McCarthy, "Someone (cough, cough VeriSign) just gave ICANN \$135m for the rights to .web," *The Register* (28 July 2016), [Ex. C-43]; K. Murphy, "Verisign likely \$135 million winner of .web gTLD," *Domain Incite* (1 Aug. 2016), [Ex. C-30].
- 98 VeriSign, *VeriSign Statement Regarding .Web Auction Results* (1 Aug. 2016), [Ex. C-46].
- 99 Letter from A. Ali (Counsel for Afiliias) to ICANN Board (23 Feb. 2018), [Ex. C-78]; Letter from A. Ali (Counsel for Afiliias) to ICANN Board of Directors (23 Apr. 2018), [Ex. C-79].
- 100 DAA [Ex. C-69], Sec. 1; Ex. A, Secs. 4(b), 4(d).
- 101 *Id.*, Sec. 10(a) (emphasis added).
- 102 *Id.*, Sec. 4(f) (emphasis added).
- 103 *Id.*, Sec. 4(j) (emphasis added).
- 104 *Id.*, Ex. A, Sec. 1 (emphasis added).
- 105 *Id.*, Ex. A, Sec. 1(i) (emphasis added).
- 106 *Id.* (emphasis added).
- 107 *Id.*, Ex. A, Sec. 8 (emphasis added).
- 108 *Id.*, Ex. A, Sec. 1(h) (emphasis added).
- 109 *Id.*, Ex. A, Sec. 2(e) (emphasis added).
- 110 *Id.*, Ex. A, Sec. 1(f) (emphasis added).
- 111 *Id.*, Ex. A, Sec. 3(g) (emphasis added).
- 112 *Id.*, Ex. A, Sec. 10.
- 113 Verisign Inc., Edited Transcript of Earnings Conference Call or Presentation (8 Feb. 2018), [Ex. C-47], p. 4.
- 114 VeriSign (VRSN) Q1 2018 Results - Earnings Call Transcript (26 Apr. 2018), [Ex. C-48], p. 2 ("**And for those who weren't here or aren't familiar with what the status is, we're engaged in ICANN's process to move the delegation forward for .web.**") (emphasis added); VeriSign (VRSN) Q2 2018 Results - Earnings Call Transcript (26 July 2018), [Ex. C-18], p. 6 ("**Well, we're engaged in ICANN's process on .web to move the delegation forward but this is ICANN's process so we can't say exactly when it will conclude.**") (emphasis added).
- 115 Letter from S. Hemphill (General Counsel, Afiliias) to A. Atallah (President, ICANN's Global Domains Division) (8 Aug. 2016), [Ex. C-49].

END NOTES

- 116 It should be noted at the time that Afiliias took these actions, Afiliias was relying on the limited public disclosures that had been made by VeriSign. Afiliias' counsel did not know the extent of the violations until it obtained the DAA during the course of this IRP.
- 117 Letter from S. Hemphill (General Counsel, Afiliias) to A. Atallah (President, ICANN's Global Domains Division) (9 Sep. 2016), **[Ex. RE-12]**.
- 118 Letter from C. Willett (Vice President, ICANN's gTLD Operations) to J. Kane (Vice President, Afiliias' Corporate Services) (16 Sep. 2016), **[Ex. C-50]**, p. 1.
- 119 Letter from A. Atallah (President, ICANN's Global Domains Division) to S. Hemphill (General Counsel, Afiliias) (30 Sep. 2016), **[Ex. C-61]**, p. 1 (emphasis added).
- 120 Letter from J. Kane (Vice President, Afiliias' Corporate Services) to C. Willett (Vice President, ICANN's gTLD Operations) (7 Oct. 2016), **[Ex. C-51]**.
- 121 Letter from J. LeVee (Counsel for ICANN) to A. Ali (Counsel for Afiliias) (28 Apr. 2018), **[Ex. C-80]**, p. 1.
- 122 Email from ICANN Global Support to J. Kane (Vice President, Afiliias' Corporate Services) (7 June 2018), **[Ex. C-62]**.
- 123 See Letter from A. Ali (Counsel for Afiliias) to ICANN (18 June 2018), **[Ex. C-52]**; Email from ICANN to A. Ali (Counsel for Afiliias) (20 June 2018), **[Ex. C-53]**, p. 2.
- 124 Email from ICANN to A. Ali (Counsel for Afiliias) (20 June 2018), **[Ex. C-53]**, p. 2.
- 125 Email from ICANN Independent Review to A. Ali and R. Wong (Counsel for Afiliias) (13 Nov. 2018), **[Ex. C-54]**.
- 126 AGB **[Ex. C-3]**, p. A-12.
- 127 *Id.*
- 128 *Id.*, p. A-11.
- 129 NDC App. **[Ex. C-24]**, [PDF] pp. 6, 7.
- 130 *Id.*, [PDF] p. 6.
- 131 AGB **[Ex. C-3]**, p. A-5; see NDC App. **[Ex. C-24]**, [PDF] p. 1. The final section of the public portions of NDC's application provide a "demonstration of technical and operational capability." *Id.*, p. 13. Virtually all of the information provided in this part of the application is based on information provided by a third party that, following the execution of the DAA, ceased to have any role regarding the operation of .WEB.
- 132 AGB **[Ex. C-3]**, p. 6-6 (emphasis added).
- 133 *Id.*, p. 6-2.
- 134 DAA **[Ex. C-69]**, Sec. 4(f).
- 135 AGB **[Ex. C-3]**, p. 4-6.
- 136 *Id.*
- 137 DAA **[Ex. C-69]**, Sec. 4(j).
- 138 *Id.*, Ex. A, Sec. 1(i).
- 139 *Id.*, Sec. 10(a).
- 140 Verisign Inc., Edited Transcript of Earnings Conference Call or Presentation (8 Feb. 2018), **[Ex. C-47]**, p. 4.

END NOTES

- 141 AGB [Ex. C-3], p. 4-22 (emphasis added).
- 142 Auction Rules [Ex. C-4], p. 3 (emphasis added).
- 143 *Id.*, p. 5 (emphasis added).
- 144 AGB [Ex. C-3], p. 4-23.
- 145 New gTLD Auctions Bidder Agreement [Ex. C-5], p. 1.
- 146 DAA [Ex. C-69], Ex. A, Sec. 1.
- 147 *Id.*, Sec. 1, Ex. A, Secs. 4(b), 4(d).
- 148 *Id.*, Sec. 1, Ex. A, Sec. 2(d).
- 149 Bylaws [Ex. C-1], Sec. 1.2(a)(v).
- 150 *Id.*, Sec. 2.3.
- 151 GNSO Report [Ex. C-20], pp. 7, 26.
- 152 Rationales [Ex. C-9], p. 12.
- 153 *Id.*, p. 101.
- 154 Economic Case for Auctions in New gTLDs [Ex. C-27], p. 2.
- 155 AGB [Ex. C-3], p. 1-24.
- 156 *Id.*, p. 6-2.
- 157 *Id.*, p. 1-30.
- 158 Willett Decl., Ex. B [Ex. C-38], [PDF] p. 3.
- 159 Bylaws [Ex. C-1], Art. 1, Sec. 1.2(a)(v).
- 160 AGB [Ex. C-3], p. 4-22.
- 161 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], Secs. II(A), II(C)(2).
- 162 Statement of Esther Dyson (Founding Chair of ICANN), 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 (8 Dec. 2011), [Ex. C-58], p. 46 (emphasis added).
- 163 Bylaws [Ex. C-1], Art. 1, Sec. 1.2(b)(iii).
- 164 *Id.*, Sec. 1.2(a) (emphasis added).
- 165 Rationales [Ex. C-9], p. 7.
- 166 GNSO Report [Ex. C-20], ¶¶ 13, 13(iv). In the then-current Bylaws, Core Value 6 was identical to Art. 1, Sec. 1.2(b)(iii) of today's Bylaws.
- 167 VeriSign's CEO confirms that his company seeks to do more than simply submit a "friend of the court" type of brief. In a recent analyst call, he stated that: "We are not a parties to that arbitration yet BUT we are actively seeking to join and participate in it." VeriSign (VRSN) CEP Jim Bidzos on Q4 2018 Results – Earnings Call Transcript (7 Feb. 2019), *available at* <https://seekingalpha.com/article/4239256-verisign-inc-vrsn-ceo-jim-bidzos-q4-2018-results-earnings-call-transcript?part=single> (last accessed on 17 Mar. 2019), [Ex. C-81].