Reply Submission
of Altanovo Domains Limited
(f/k/a Afilias Domains No. 3 Limited)

submitted to

the Board Accountability Mechanisms Committee

29 August 2022

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EXECUTIVE SUMMARY

For the reasons already stated by Afilias, the Board should determine that (1) NDC's entry into and performance of the DAA materially violated the New gTLD Program Rules; and (2) as a result, ICANN must reject its application and/or disqualify its bids, and offer .WEB to Afilias as the second-highest bidder. None of assertions offered by Verisign/NDC change those conclusions.

- The IRP Panel determined that Afilias' claims are serious, legitimate, deserving of the Board's careful attention, and timely made. Moreover, the Board cannot now rely on positions taken by ICANN in the IRP, which the IRP Panel concluded were "***contradictory***," and which, according to the IRP Panel, "at least in appearance ***undermine the impartiality of [ICANN's] processes***." Verisign/NDC's lengthy arguments to the contrary are intended to distract the BAMC from the task before it. (**Section 1**).
- Verisign/NDC's allegation that Afilias violated the Blackout Period is untimely and not properly before the Board—having first been raised in a confidential letter to ICANN's counsel in August 2016 and then not pursued in any accountability mechanism. More fundamentally, the one text sent during the Blackout Period—both on its face and in the context of the record evidence—does not fall within any of the prohibited categories stated in Auction Rule 68. (**Section 2**).
- There is no question that NDC transferred rights and obligations in connection with its application to Verisign Redacted - Third Party Designated Confidential Information . Their primary defense—that the Rule bars only the transfer of the "total application"—cannot be reconciled with the plain language of the Rule, which prohibits the transfer of "***any*** of applicant's rights ***or*** obligations ***in connection with*** the application." Moreover, by the time NDC "prevailed" in the ICANN Auction, NDC had already transferred numerous rights and obligations in connection with its application to Verisign—so that Verisign Redacted - Third Party Designated Confidential Information to become the registry operator of .WEB through NDC's application. Verisign/NDC fail to point to ***any*** agreement that is remotely comparable to the DAA. (**Section 3**).
- Nor is there any question that NDC violated the Rules requiring applicants to ensure that their applications are and remain "***true and accurate and complete in <u>all</u> material respects***" and to "***promptly***" notify ICANN if "***at any time*** … information previously submitted by an applicant becomes ***untrue or inaccurate***". Not only did NDC fail to file the required Change Request, when specifically asked by ICANN, NDC affirmatively lied that there were no changes in circumstances involving its application, and that NDC alone made the decision for NDC (and hence the entire Contention Set) to proceed to the ICANN Auction. NDC's violations of the Rules intentionally concealed that non-applicant Verisign was the true party-in-interest behind the application. (**Section 4**).

- The Auction Rules and Bidder Agreement plainly provide that only "Qualified Applicants" may participate in an ICANN Auction—and that they may place bids only on their own behalf. Under the DAA, Redacted - Third Party Designated Confidential Information. Contrary to Verisign/NDC's assertions, these Rules are not merely "mechanical." Like all the other Rules, they are intended to ensure that the entire application process is transparent, fair, and predictable. By materially violating these Rules, Verisign/NDC swept away the guiding principles of the New gTLD Program. (**Section 5**).

SECTION 1: VERISIGN/NDC MISREPRESENT OR IGNORE KEY CONCLUSIONS IN THE FINAL DECISION

The task before the Board is to determine in the first instance (1) if NDC's entry into and performance of its obligations toward Verisign under the DAA violated the New gTLD Program Rules; and (2), if so, what the consequences should be. To distract you from that task, Verisign/NDC make numerous assertions that cannot be reconciled with the IRP Panel's Final Decision. Given page limits, we cannot address all their misrepresentations and omissions of key points decided by the IRP Panel, but briefly address the most important ones below.[1]

1.1 Afilias' Arguments Are Serious, Legitimate, and Made in Good Faith

Verisign/NDC repeatedly assert that Afilias' claims are "frivolous" and brought in "bad faith," even though the IRP Panel plainly found otherwise:

- The IRP Panel found that ICANN has: "***acknowledg[ed] that the questions [Afilias has] raised as to the propriety of NDC's and Verisign's conduct are legitimate, serious and deserving of its careful attention***."[2]
- The IRP Panel stated: "***the questions raised by [Afilias] in connection with NDC's conduct and the latter's arrangements with Verisign were serious and deserving of [ICANN's] attention***."[3]

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1 Verisign/NDC also devote substantial portions of their Initial Submission to issues that are not before you, and in a manner that misrepresents the record. For example, given that the IRP Panel accepted ICANN's position that it does not have the authority "to act as a competition regulator by challenging or policing anticompetitive conduct" (Final Decision (as corrected, 15 July 2021) ("**Final Decision**"), **Altanovo-2**, ¶ 352), it is not clear why Verisign/NDC re-argue this position at length, unless it is to distract from the issues that are now before the Board. It should be noted, however, that the IRP Panel did ***not*** reject Afilias' "contention that 'to the extent that ICANN has discretion regarding the enforcement of the New gTLD Program Rules, ICANN may not exercise its discretion in a manner that would be inconsistent with its competition mandate (or with its other Articles or Bylaws).'" *Id*., ¶ 351 (quoting Afilias' PHB (12 Oct. 2020), **Altanovo-18**, ¶ 145). For the reasons stated in our Opening Submission, in making its first-instance determination, ICANN must act consistent with its Articles and Bylaws—including the provisions concerning the promotion of competition.

2 *Id.*, ¶ 300 (emphasis added).

3 *Id.*, ¶ 318 (emphasis added).

To that end, the IRP Panel further stated that the following questions raised by Afilias in the IRP are "*serious and deserving of [ICANN's] consideration*":[4]

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

While the IRP Panel concluded that these questions[5] are best left to ICANN to address "***in the first instance***," it added a key proviso: "[I]t needs to be emphasized that this deference is necessarily predicated on the assumption that ICANN ***will take ownership of these issues*** … and, ***subject to the ultimate independent review of an IRP Panel***, will take a position as to whether the conduct complained of complies with the Guidebook and Auction Rules."[6]

1.2 The IRP Panel Concluded that Afilias' Claims Are Timely

Verisign/NDC also assert that Afilias "belatedly" commenced the IRP and that its claims are made solely for delay.[7] The IRP Panel also rejected that argument. After laying out a detailed chronology of the facts and circumstances leading up to the filing of the IRP, the IRP Panel ruled that "***[Afilias'] IRP was timely and [ICANN's] time limitations defence … must be rejected***."[8] The IRP Panel's finding on the timeliness of Afilias' claim is binding on the Board.

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4 *Id.*, ¶ 320 (emphasis added).

5 The IRP Panel provided these as "examples" of questions raised by Afilias that are legitimate, serious, and deserving of the Board's careful attention. Other obvious questions the Board must address include, for example: (1) Whether NDC violated its obligations under the Bidder Agreement and Auction Rules; (2) Whether NDC's application for .WEB should be rejected and/or its bids disqualified; and (3) Whether NDC should be deemed ineligible to enter into a registry agreement or .WEB. *See id.*, ¶¶ 299-300, 348, 362-363.

6 *Id.*, ¶ 299 (emphasis added).

7 Initial Submission by Verisign and NDC (29 July 2022) ("**V/N Initial Submission**"), ¶ 51.

8 Final Decision, **Altanovo-2**, ¶ 281 (emphasis added).

1.3 The Board Cannot Rely on Positions Taken by ICANN in the IRP

Verisign/NDC repeatedly argue that the BAMC should side with them because ICANN's counsel made the same arguments in the IRP.[9] For the Board to do so would be extremely unfair and prejudicial to Afilias. As found by the IRP Panel: "***[ICANN] has adopted contradictory positions, including in these proceedings, that at least in appearance undermine the impartiality of its processes***."[10] Moreover, Verisign/NDC's representations of ICANN Staff's views should similarly be discounted, as the IRP Panel found that Staff "***fail[ed] to take a position on the question of whether the DAA complies with the New gTLD Program Rules before moving to delegation***".[11] In particular, the IRP Panel found that Ms. Willet's views on these issues were "***more in the nature of a personal impression than a considered opinion***."[12] Indeed, Ms. Willet testified that she had never seen a copy of the DAA.[13] Verisign/NDC's reliance on Ms. Willet's views, the conduct of Staff, and the arguments presented by litigation counsel is thus wholly inappropriate.

SECTION 2: VERISIGN/NDC'S BLACKOUT PERIOD VIOLATION ALLEGATION IS SIMPLY ANOTHER TACTIC DESIGNED TO DISTRACT

2.1 Verisign/NDC Misrepresent the Facts in Making Their Blackout Allegation

Verisign/NDC's allegation that Afilias violated the so-called Blackout Period (the "**blackout allegation**") is untimely and is not properly before the Board.[14] The claim is based on facts known to Verisign/NDC in June 2016, as evinced by Verisign/NDC's 23 August 2016 letter to ICANN.[15] When ICANN did not act on their Blackout Period complaint, NDC should have

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9 *See, e.g.*, V/N Initial Submission, ¶¶ 5 & 7.
10 Final Decision, **Altanovo-2**, ¶ 300 (emphasis added).
11 *Id.*, ¶ 340 (emphasis added).
12 *Id.*, ¶ 319 (emphasis added).
13 Merits Hr., Tr. Day 4 (6 Aug. 2020), **Altanovo-19**, 666:2-6 (Willett Cross-Examination).
14 The IRP Panel did not instruct the Board to consider the blackout allegation. The Board has unilaterally undertaken to consider it based solely on Verisign/NDC's request that it do so.
15 *See* Letter from R. Johnston (Counsel for Verisign) and B. Leventhal (Counsel or NDC) to E. Enson (Counsel for ICANN) (23 Aug. 2016), **(IRP Ex. C-102)**.

initiated an ICANN accountability mechanism. Neither Verisign nor NDC did so.

Moreover, the allegation is frivolous on its face. Verisign/NDC assert that their argument must be considered in the "context" of the overall factual record, one which they misrepresent by claiming that Afilias and other Qualified Applicants engaged in an illicit scheme to "coerce" NDC into a private auction against its will.[16] The record demonstrates otherwise:

- In the August 2015 DAA, Redacted - Third Party Designated Confidential Information

.[18]

- Until 1 June 2016, Mr. Rasco repeatedly created the impression that NDC was leaning in favor of a private auction. For example, in late 2015, when members of the Contention Set proposed resolving contention in a private auction, he responded by email, dated **18 October 2015**: "I won't be joining you in Dublin, ***but I'll support you however I can***."[19] Afilias (and the other Contention Set members) had no reason to doubt NDC, as it had participated in numerous private auctions in 2014 and 2015[20]—each of which it lost, presumably leading to handsome payouts to NDC.
- The evidence confirms that the decision to go to an ICANN Auction was Verisign's. Indeed, in June 2016, Mr. Rasco admitted that the decision to skip the private auction was ***not*** his to make, and, moreover, that it had been made recently: "***My board instructed me to skip it and proceed to [an] ICANN [auction]***."[21] This was not a one-time slip of the tongue: Mr. Rasco admitted in writing that while he and the two other co-managers at NDC "are still ***technically the managers of the LLC … the decision goes beyond us***."[22] Mr. Rasco also wrote: "Based on your request, I went back to check with ***all the powers that be*** and ***there was no change in the response*** and will [sic] not be seeking an extension".[23]
- In light of the above, Messrs. Heflin and Kane traded several texts with Mr. Rasco on 7 June 2016, suggesting that NDC, as the lone holdout, could receive a guaranteed sum from the proceeds of the Private Auction in exchange for its consent to the Private

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16 V/N Initial Submission, ¶¶ 45, 60.
17 DAA between VeriSign and NDC (25 Aug. 2015) ("**DAA**"), **(IRP Ex. C-69)**, Ex. A, Sec. 1(i) (emphasis added).
18 *Id.* (emphasis added).
19 Emails b/w .WEB Applicants (various dates), **(IRP Ex. C-33)**, p. 4. When asked in the IRP whether it was unreasonable for the other Contention Set members to have expected that NDC would participate in the private auction, Mr. Rasco testified: "***So one could assume, you know, that we would participate in a private auction***." Merits Hr., Tr. Day 5 (7 Aug. 2020), **Altanovo-7**, 852:21-23. Afilias and the other Contention Set members were therefore taken aback when NDC failed to meet the **1 June 2016** private auction application deadline.
20 *See, e.g.*, J. Rasco III WS (1 June 2020), **Altanovo-20**, ¶ 52.
21 Email from J. Kane to H. Lubsen (7 July 2016), **(IRP Ex. C-34)** (emphasis added).
22 Emails b/w J. Nevett and J. Rasco (6 & 7 June 2016), **(IRP Ex. C-35)**, p. 1 (emphasis added).
23 *Id.*, p. 1 (emphasis added).

Auction.[24] There was no attempt to coerce NDC to participate against its will, as the BAMC members will see from the tone of these texts, much of which is clearly in jest (including smiley-face emojis). Mr. Heflin concluded the exchange by stating: "In all seriousness if it helps to delay the private auction a few days to get you back in, it's possible. Just throwing that out if it helps."[25] Mr. Rasco responded: "Unfortunately ***all I can say is that we have to go to ICANN Auction***."[26]

- Ruby Glen took a different approach: As a result of Mr. Rasco's representations, Ruby Glen complained to ICANN Staff, stating that there had been "***change of circumstances***" in NDC's application, rendering it "***false or misleading***."[27] Afilias did not join that complaint, but rather pressed to resolve contention as fast as possible.

- On **27 June 2016**, in response to inquiries from ICANN Staff, Mr. Rasco wrote that "there have been no changes to the NU DOTCO LLC organization that would need to be reported to ICANN."[28] On **7 July 2016**, the ICANN Ombudsman wrote to Mr. Rasco to ask if NDC's circumstances had changed, since that could "change the auction by ***making knowledge of your applicant company different***, and therefore it was ***unfair to the other applicants***."[29] Mr. Rasco's response was categorical: "***There have been no changes to the Nu Dotco, LLC application***."[30] Ms. Willett contacted Mr. Rasco by phone on 8 July 2016 and reported that he claimed NDC decided to proceed to the ICANN Auction and that he had made that decision. As for his exchange with Ruby Glen, Mr. Rasco explained that "in communicating with that competitor, he 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.***"[31] In the IRP, Mr. Rasco testified that he told Mr. Nevett a "***white lie***" to "get the guy off my back."[32] The reality is that he told the truth (partially) to Mr. Nevett and lied to Ms. Willett.

- On **12 July 2016**, the Ombudsman recommended to Ms. Willett that "there [was] nothing which would justify a postponement of the auction ***based on unfairness to the other applicants***."[33] The following day, Ms. Willett informed the .WEB Contention Set that the ICANN Auction would proceed as scheduled.[34] The IRP Panel concluded that ICANN's decision to proceed was reasonable "***in light of the representations by***

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[24] In attempting to negotiate a private auction, Afilias and the other Contention Set members were doing precisely what ICANN wanted and "encouraged" them to do in the AGB: "to reach a settlement among themselves that resolves the contention." gTLD Applicant Guidebook (4 June 2012) ("**AGB**"), **(IRP Ex. C-3)**, Module 4, § 4.1.3 (at p. 4-6) (emphasis added). As ICANN itself has reported, about 90% of contention sets were able to reach self-resolution—many through private auctions—with ICANN's full knowledge. Again, NDC itself participated in numerous private auctions, all of which it lost. Yet, ironically, it now suggests that private auctions constitute "collusion" and even "bid-rigging."

[25] Text Message Thread (7 June 2016), **(IRP Rasco Decl. Ex. A)**, [PDF] p. 3.

[26] *Id.*, [PDF] p. 2 (emphasis added).

[27] Commc'n b/w J. Nevett and J. Erwin (27 June 2016), **(IRP Willett Ex. A)**, [PDF] p. 2 (emphasis added).

[28] Emails from J. Erwin to J. Rasco (27 June 2016), **(IRP Ex. C-96)**, p. 1.

[29] Email b/w C. LaHatte and J. Rasco (7 July 2016), **(IRP Willett Ex. E)**, [PDF] p. 2 (emphasis added).

[30] *Id.* (emphasis added).

[31] Email from C. LaHatte to C. Willett (10 July 2016), **(IRP Willett Ex. D)**, [PDF] p. 3 (emphasis added).

[32] Merits Hr., Tr. Day 5 (7 Aug. 2020), **Altanovo-7**, 860:19-20 (Rasco Cross-Examination).

[33] Email from C. LaHatte to C. Willett (12 July 2016), **(IRP Willett Ex. G)**, [PDF] p. 2 (emphasis added).

[34] Letter from A. Willett to Members of the .WEB/.WEBS Contention Set (13 July 2017), **(IRP Ex. C-44)**.

Mr. Rasco".[35] At this point, ICANN was ignorant as to the existence of the DAA. Absent further investigation, ICANN had no basis to contest the veracity of Mr. Rasco's "representations" (and was no doubt relying on NDC's warranty of truthfulness, accuracy, and completeness and its obligation to advise ICANN of any changes in circumstances regarding it application).

- On **17 July 2016**, Donuts (Ruby Glen's parent) and Radix filed an emergency Reconsideration Request with ICANN, seeking to postpone the ICANN Auction, which ICANN denied on **21 July 2016**.[36] On **22 July 2016**, Ruby Glen sought to enjoin the ICANN Auction — in California federal court.[37] Afilias did ***not*** participate in the Reconsideration Request or in Ruby's Glen's TRO application, but rather supported resolving contention quickly, including at an ICANN Auction.[38]
- On July 20, 2016, the Blackout Period commenced.
- On **22 July 2016**—in light of public reports covering Ruby Glen's effort to postpone the ICANN Auction—Mr. Kane sent the following text to Mr. Rasco: "***If ICANN delays the auction next week would you again consider a private auction? Y-N.***"[39]

Verisign/NDC assert that this single line text, to which Mr. Rasco never responded, constitutes a "serious violation" of the Bidding Rules. This is simply not the case—whether considered on its "face" or in the "context" of the factual record, for the reasons stated below, and as also confirmed by Professor Cramton's expert opinion.

2.2 None of the Texts Violate the Blackout Period

The texts exchanged with Mr. Rasco on 7 June 2016 were made some six weeks before the start of the Blackout Period. They cannot and do not violate Rule 68 of the Auction Rules.[40]

The blackout period rule only prohibits bidders from discussing certain topics. Mr. Kane's

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35 Final Decision, **Altanovo-2**, ¶ 298 (emphasis added). Verisign/NDC repeatedly assert that Afilias and other Contention Set members made "false" allegations that NDC had undergone a change in corporate ownership and control. The record plainly shows that the concerns raised by certain Contention Set members before the ICANN Auction, and by Afilias afterwards, were directed to material changes in circumstances that would have affected NDC's ***application***. Given that Verisign/NDC concealed even the existence of the DAA, Afilias and (presumably) the other Contention Set members had no basis to know what the substantive terms of the DAA provided.

36 *Id*., ¶ 93.

37 *Id*., ¶ 94.

38 *See id*., ¶¶ 93-94. Verisign/NDC's assertion that Afilias "coordinated" these actions with the other Contention Set members is baseless and irrelevant. The record refutes that assertion. Thus, on **7 July 2016**, Mr. Nevett email to Mr. Kane and several other Contention Set members: "Hi guys. ***Just so you aren't surprised, we are seeking a postponement of the .web ICANN auction***. I don't want to get into the details yet, but I didn't want to be surprised either if a postponement was announced." Emails b/w .WEB Applicants (various dates), **(IRP Ex. C-33)**, p. 1 (emphasis added). While Afilias would have been with its rights to join these actions by other Contention Set members, it chose not to do so.

39 Text Message (from cell phone belonging to J. Rasco) (21 July 2016), **(IRP Rasco Ex. C)**, p. 2.

40 *See* Peter Cramton ER (29 July 2022) ("**Cramton Report**"), ¶¶ 46-48.

22 July 2016 text, on its face, does not fall into any of these prohibited categories:

RULE 68 PROHIBITIONS	THE 22 JULY 2016 TEXT
"[C]ooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner [1] **the substance of their own, or each other's, or any competing applicant's bids** or [2] **bidding strategies**."	The text does **not** mention or refer to cooperating, collaborating, discussing, or disclosing (1) the substance of Afilias' or NDC's or any competing applicant's bids or (2) any bidding strategies.
"[D]iscussing or negotiating [1] **settlement agreements** or [2] **post-Auction settlement agreements** or [3] **post-Auction ownership transfer arrangements**, with respect to any Contention Strings."	The text does **not** "discuss" or "negotiate" (1) a settlement agreement, a (2) post-Auction settlement agreement, or (3) a post-Auction ownership transfer arrangement.

Verisign/NDC attempt to argue that Mr. Kane's 22 July 2016 text violated the Blackout Period by "discussing" or "negotiating" a settlement agreement.[41] At the risk of stating the obvious, a settlement agreement is an arrangement where one party offers something to the other party in exchange for something else in order to settle a dispute—or, in this case, to resolve contention. Here, there is no offer at all—let alone an offer of one thing for another. The text simply asks for information. It asks whether—***if*** ICANN postponed the ICANN Auction (something beyond the control of either Afilias or NDC at that point)—NDC ***would again consider*** an alternative path to resolve contention quickly (*i.e.*, a Private Auction). Nothing on the face of Mr. Kane's 22 July 2016 text violates Rule 68.

The factual context in which Mr. Kane sent this email further supports this conclusion. While Verisign/NDC assert that "[b]y asking whether NDC would 'again' consider a private auction, Mr. Kane unambiguously ***referred back*** to Afilias' prior attempts days earlier to induce NDC to agree to a private auction for .WEB by guaranteeing NDC over $17 million to go to such an auction and lose,"[42] there are no facts to support this "interpretation".

The earlier texts to which Mr. Kane's 22 July 2016 text was supposedly "referred back"

41 V/N Initial Submission, ¶ 70.
42 *Id.*, ¶ 75.

were not sent "days earlier." They were sent some ***six weeks earlier*** (on 7 June 2016). As of 22 July, it was too late for NDC to withdraw its objection to postponing the ICANN Auction.[43] The ICANN Auction would be postponed only if the California federal court ordered postponement or if ICANN decided to postpone it on its own. Afilias therefore had nothing to offer and NDC had nothing to give. Whether based on the language of the text or the "context" in which it was sent, there is no reasonable way to construe the text as an offer to settle the ICANN Auction or as involving the substance of the ICANN Auction. Rather, the question was whether—if the ICANN Auction were postponed—there would be any point in once again discussing a private auction. The federal court's denial of the request for postponement (based in significant part on a witness statement from Mr. Rasco) rendered the question moot.

SECTION 3: VERISIGN/NDC'S VIOLATION OF THE ANTI-TRANSFER RULE

3.1 The Anti-Transfer Rule Is Not Limited to Transfers of the "Total Application"

The words of the Anti-Transfer Rule in the AGB's Terms and Conditions are clear:

> Applicant may not resell, assign, or transfer ***any*** of applicant's rights ***or*** obligations ***in connection with*** the application.[44]

We previously demonstrated that NDC materially violated this Rule by transferring rights or obligations in connection with its application to Verisign through the DAA.[45] Notwithstanding its plain language, which prohibits the transfer of "***any***" rights or obligations, Verisign/NDC argue that the Rule "prohibits only the transfer of an [sic] '***total application***' to a third party."[46]

In making their "total application" argument, Verisign/NDC rely solely on the hearing testimony of Ms. Willett. Although Verisign/NDC repeatedly misrepresent that this is the position of "ICANN representative**s**" (plural), there is no evidence that anyone at ICANN other than

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43 Auction Rules for New gTLDs: Indirect Contentions Edition, Version 2015-02-24, Prepared for ICANN by Power Auctions LLC ("**Auction Rules**"), **(IRP Ex. C-4)**, Rule 10.

44 AGB, **(IRP Ex. C-3)**, Module 6, ¶ 10 (at p.6-6) (emphasis added).

45 *See, e.g.*, Altanovo Opening Submission, ¶¶ 99-111.

46 V/N Initial Submission, ¶ 83 (emphasis in original) (quoting Hrg. Tr., Vol. III (Aug. 5, 2020), 568:3-8 (Willett)).

Ms. Willett has ever suggested (let alone advanced) that "interpretation" of the provision.[47]

Ms. Willett was far from an objective and impartial witness. At the hearing, Ms. Willett testified that she considered Afilias' concerns to be "sour grapes"—even while acknowledging that she had "no way of knowing what was in the DAA"[48] because she had never seen it. Instead, Ms. Willett testified that her views were informed solely on Verisign's highly misleading 1 August 2016 post-Auction press release:

> [M]y understanding ***based on Verisign's press release*** is that they had some future intention, hopes, aspirations, to operate the TLD if ICANN approved of a TLD assignment. I also understand ***from the press release*** that they had committed funds that were put forwards toward the auction.[49]

Ms. Willett's "understanding" is thus wholly inapposite to the terms of the DAA.

Nor did Ms. Willett have any involvement in the drafting of the Rules, having arrived at ICANN ***after*** the Rules were already in place.[50] Nonetheless, Verisign/NDC represent that Ms. Willett's testimony "should end the debate" on the matter.[51] The IRP Panel, however, disagreed:

> Ms. Willett having testified that she never even read the DAA when these events were unfolding …, the Panel must conclude that her stated view was more in the nature of a personal impression than a considered opinion.[52]

Even putting aside the other problems with Ms. Willett's testimony, her interpretation of the Anti-Transfer Rule—as prohibiting only the transfer of the "total application"—cannot be reconciled with its plain language prohibiting the resale, assignment, or transfer of ***any*** of the rights ***or*** obligations ***in connection with the application***. The scope of the Rule must be determined by

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47 Other than Ms. Willett's testimony, Verisign/NDC point to no evidence that anyone other than Ms. Willett has ever taken that position. Neither Ms. Burr nor Mr. Disspain addressed it in their IRP testimony.

48 Merits Hr., Tr. Day 4 (6 Aug. 2020), **Altanovo-19**, 666:2-6, 746:1-3 (Willett Cross-Examination).

49 *Id.*, 707:15-22 (emphasis added).

50 At the time of the hearing, Ms. Willett had been separated from ICANN. It remains unclear under what circumstances Ms. Willett's employment with ICANN was terminated.

51 V/N Initial Submission, ¶ 8.

52 Final Decision, **Altanovo-2**, ¶ 319. Ms. Willett conceded not only that she had never seen the DAA "when these events were unfolding." *Id*. She testified that she had never seen the DAA at all. Merits Hr., Tr. Day 4 (6 Aug. 2020), **Altanovo-19**, 707:4-9.

the plain meaning of the words used.[53] If ICANN had wanted to limit the Rule to prohibiting only "the transfer of the total application," ICANN could easily have done so. It did not and there is no evidence to suggest that it intended to do so. ICANN must now enforce that plain language as written. To do otherwise would require ICANN to retroactively rewrite these plain words to excuse NDC from its material violation of this unambiguous Rule.[54]

3.2 The Purpose of the Anti-Transfer Rule

Verisign/NDC's proposal to rewrite the Anti-Transfer Rule to prohibit only the transfer of the "total application" would eliminate its fundamental purpose: to guarantee transparency, fairness, and predictability. As ICANN itself has stated, the Rules were designed to ensure that everyone in the community knows "which gTLD strings are being applied for ***and who is behind the application***."[55] If ICANN were to accept Verisign/NDC's rewrite, applicants could transfer rights that enable non-applicants to indirectly participate in contention set resolution for their own benefit while concealing that fact from ICANN and the rest of the Internet community. That is exactly what this Rule is designed to prevent—and why the DAA so clearly violates it.

Contrary to Verisign/NDC's assertion, the purpose of the Anti-Transfer Rule is entirely consistent with similar anti-transfer provisions in comparable contexts.[56] Parties use anti-transfer provisions that bar the transfer of rights or obligations in a contract, where (for example, ICANN as) "the holder of the correlative right ha[s] 'a substantial interest in having the original promisor [here, each applicant] perform ***or control*** the acts required by the contract."[57] For this reason, anti-

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53 9 Corbin on Contracts § 49.9 (2022), **Altanovo-21** (citing cases).

54 Verisign/NDC fail to cite any language in the AGB or any other applicable authorities to support their assertion that "[t]he Guidebook and established legal principles require that an assignment include (1) a specific ***intention*** to make (2) a ***present transfer of ownership*** of the application, and (3) the transferor ***have no remaining interest*** in the application." V/N Initial Submission, ¶ 104 (emphasis in original). They have simply invented the proposition out of whole cloth.

55 New gTLD: Frequently Asked Questions, **(IRP Ex. C-181)** (emphasis added).

56 *See* V/N Initial Submission, ¶ 86, n. 171.

57 9 Corbin on Contracts § 49.4 (2022), **Altanovo-22**, (emphasis added) (quoting *In re Estate of Sauder*, 156 P.3d 1204 (Kan. 2007)). Indeed, it is also well-settled that contractual rights and obligations of performances are transferred when the transferor cedes control over them to the transferee. *Id.*

transfer provisions are often used in public procurements—especially where the procuring entity has restricted participation to applicants that meet specific criteria, and where the identity of each applicant is supposed to be known to the others. In that context, the anti-transfer rule is necessary to ensure "that no bidder obtains an unfair process over another" and otherwise to preserve "the integrity of the procurement process."[58]

For example, in license auctions conducted by the Federal Communications Commission (the "**FCC**"), pre-qualified entities are not allowed to transfer rights in their bids to undisclosed, non-qualified entities—in part to ensure that each bidder knows the true identity of each other bidder.[59] As stated by the FCC in *Trompex*, that rule promotes "***transparency*** in the competitive bidding process," which also "***levels the playing-field among bidders***":

> Allowing an entity to acquire licenses applied for, bid on, and won by another entity in a Commission auction would be contrary to the public interest because ***it could result in substantial injury to other bidders who based their bidding strategy on knowing those who they were competing against***. If we were to allow an entity to submit an application for licenses bid on and won by another entity, ***such entities could gain an "unfair advantage over other bidders in the auction," and could even intentionally mislead other bidders***.[60]

By entering into the DAA and agreeing to secretly transfer rights and obligations in its .WEB application to Verisign, NDC upended the level playing field and eliminated the transparency that the Anti-Transfer Rule was designed to ensure. As Mr. Rasco testified, he was able to assess the likely bidding strategy of each Qualified Applicants based on its actual identity. (For example, Mr. Rasco said he knew from past experience that Google was conservative in

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[58] *See, e.g.*, *Mil-Tech Systems, Inc. v. U. S.*, 6 Ct. Cl. 26, 33-34 (1984), **Altanovo-23** (citing other cases). *See also, e.g.*, UNCITRAL Model Law on Public Procurement (2011), **(IRP Ex. CA-86)**, Art. 9.8(a); World Bank Procurement Regulations for Investment Project Financing Borrowers (4th ed., 2020), Art. 2.2(b).

[59] As explained by Prof. Cramton (who was involved in the design of FCC spectrum auctions), FCC auctions "served as a model for the auction design eventually adopted by ICANN." Cramton Report, ¶ 6.

[60] *In re Trompex Corp.*, 18 FCC Rcd. 3286, 2003 WL 751038, at *13 (2003), **Altanovo-24** (emphasis added). Anti-transfer provisions similar to the one in the Rules are also used in purely commercial settings. Even where the performance of a contractual right or obligation is clearly delegable, the parties may still agree that the promisee (here, ICANN) "is still entitled to receive performance exclusively from the original promisor" (here, the applicant). 9 Corbin on Contracts § 49.9 (2022), **Altanovo-21** (citing cases).

placing bids.[61]) But none of the other Qualified Applicants knew that they were in fact bidding against Verisign rather than NDC. As reasoned in *Trompex*, the DAA here eliminated transparency and undermined the integrity of the New gTLD Program and caused "substantial injury to other bidders who based their bidding strategy on knowing those who they were competing against."[62]

By selling its rights and obligations in connection with the application to Verisign, NDC enabled Verisign to gain an unfair advantage over other bidders in the auction, and intentionally misled other bidders by concealing the fact that that Verisign was "indirectly" participating in the Contention Set. NDC materially breached its contractual duty to ICANN—which ICANN had required of applicants to satisfy the mandate under its Articles and Bylaws to ensure transparency, fairness, and predictability in the delegation of new gTLDs. The Board can and should easily reject Verisign/NDC's argument that the Anti-Transfer provision bars only the transfer of the entire application, as contrary to the provision's plain language and purpose. As discussed in the following sections, Verisign/NDC's arguments that the DAA did not transfer any rights or obligations in connection with NDC's application are equally flawed.

3.3 The DAA Does Not Provide Merely for a "Future" Assignment of Rights

Verisign/NDC's alternative justification for the DAA—that it provides only for the future assignment of the .WEB registry agreement—is similarly contrary to the plain language of the DAA and to Verisign/NDC's performance of its terms. Among other things:

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[61] Merits Hr., Tr. Day 5 (7 Aug. 2020), **Altanovo-7**, 805:20–806:7.
[62] *Trompex*, 2003 WL 751038, at *13 **Altanovo-24**.

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3.3.1 NDC Transferred Key Rights in Connection with its Application to Verisign

As set out in our opening submission, NDC transferred numerous rights in connection with its application to Verisign.[64] Verisign/NDC focus their arguments on only some of these rights: (1) the right to decide whether to participate in self-resolution of the contention set or proceed to an ICANN Auction; (2) the right to participate and place bids on its own behalf in the ICANN Auction; and (3) the right to negotiate a registry agreement on its own behalf and (if successful) to operate the .WEB registry.[65]

First, while Verisign/NDC appear to acknowledge that NDC, as a "Qualified Applicant," had the "right" to decide whether to proceed to an ICANN Auction,[66] they assert that NDC exercised that right by deciding to proceed to the ICANN Auction because NDC's "Redacted - Third Party Designated Confidential Information

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63 *See* Altanovo Opening Submission, ¶¶ 72, 88, 121, 151, and n. 123, 177 (and citations therein).

64 Those rights include, for example, the right to Redacted - Third Party Designated Confidential Information (DAA, **(IRP Ex. C-69)**, Ex. A, § 1); Redacted - Third Party Designated Confidential Information (*id*., §§ 6, 10(a)); Redacted - Third Party Designated Confidential Information (*id*., Ex. A, § 8) Redacted - Third Party Designated Confidential Information (*id*., Ex. A, § 1(h)); Redacted - Third Party Designated Confidential Information (*id*., Ex. A, § 3(b)); and the right to operate the registry if it prevailed in contention and signed a registry agreement with ICANN (*id*., Ex. A, § 3(c)). *See also* Altanovo Opening Submission, ¶¶ 103-107. Many of the rights are accompanied by corresponding obligations. *See id.*, ¶¶ 108-11.

65 Given page limits—and that fact that the transfer of any of these rights by itself constitutes a material breach of the Anti-Transfer Rule—we limit our reply to Verisign/NDC's baseless arguments that NDC did not transfer these rights to Verisign.

66 V/N Initial Submission, ¶¶ 131-132.

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."[67] In other words, Redacted - Third Party Designated Confidential Information

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The argument is entirely specious. Redacted - Third Party Designated Confidential Information

.[69] By the DAA's plain terms, Redacted - Third Party Designated Confidential Information

"[70] Under ICANN's Rules, if one Qualified Applicant objects to self-resolution, then the Contention Set must go to an ICANN Auction. Redacted - Third Party Designated Confidential Information

. Verisign—acting under the cover of NDC's application—then ambushed the Qualified Applicants with a high bid that they could never see coming. That is a clear violation of the letter and spirit of the Anti-Transfer Rule.

Second, there is no question that under the Rules (including the Auction and Bidding Rules), each Qualified Applicant had the right to participate and place bids on its own behalf in an ICANN Auction.[71] NDC also transferred that right to Verisign. As stated above,

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67 *Id.*, ¶ 174 (citation omitted; emphasis added).
68 Merits Hr., Tr. Day 5 (7 Aug. 2020), **Altanovo-7**, 834:14-20; 875:19–876:3 (Rasco Cross-Examination).
69 DAA, **(IRP Ex. C-69)**, Ex. A, § 1(i).
70 *Id.*
71 New gTLD Auctions Bidder Agreement (3 Apr. 2014) ("**Auctions Bidder Agreement**"), **(IRP Ex. C-5)**, p. 1.

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.[72] Moreover, Redacted - Third Party Designated Confidential Information

.[73] As the DAA required, Redacted - Third Party Designated Confidential Information

—all the while concealing from ICANN and the other Qualified Bidders that Verisign—a non-applicant—was bidding to obtain the rights to .WEB for itself. The transfer of this right also breached the letter and spirit of the Anti-Transfer rule.

Third, Verisign/NDC acknowledge that the Qualified Applicant that prevails in an ICANN Auction ordinarily has the "right" to execute a registry agreement with ICANN. Indeed, they assert that "[h]aving won the auction, NDC has ***the right*** and ICANN has the obligation ***to execute the .WEB Registry Agreement*** (subject to compliance with appropriate conditions)."[74]

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Moreover, as soon as NDC executes the Registry Agreement with ICANN,

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[72] DAA, **(IRP Ex. C-69)**, Ex. A, § 13 (emphasis added). This provision alone contradicts any assertion that the bids submitted at the .WEB Auction were NDC's.

[73] *Id.*, Ex. A, § 1 (emphasis added).

[74] V/N Initial Submission, ¶ 46 (citing AGB, **(IRP Ex. C-3)**, § 5.1(4)).

[75] DAA, **(IRP Ex. C-69)**, Ex. A, § 3(b) (emphasis added).

It is impossible to reconcile these provisions with Verisign/NDC's representation to the BAMC in its opening submission that "NDC's plans for .WEB remain the same as set forth in its application."[77] Verisign/NDC assert that there are possible scenarios under which NDC still might operate .WEB.[78] Even if that were correct, it would not change the fact that NDC transferred rights (and, as discussed below, obligations) in connection with its application to Verisign. By doing so, NDC eliminated the fairness, transparency, and predictability that the Rules (including the Anti-Transfer Rule) were intended to guarantee. Moreover, the possible scenarios are implausible at best, for the reasons discussed below.

Thus, Verisign/NDC assert that NDC could simply breach the DAA and decline to request that ICANN transfer the registry agreement to Verisign.[79] Aside from the obvious fact that their whole argument presupposes a hypothetical—that NDC would breach the DAA

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Verisign/NDC provide no viable business justification as to why NDC would do so. Moreover, the DAA makes it exceptionally difficult for NDC to breach it. Verisign can lawfully force NDC to comply with the DAA, which contains a

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[80]

Verisign/NDC also assert that ICANN might not approve the transfer. But in that scenario,

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[76] *Id.*, Ex. A, § 3(c).
[77] V/N Initial Submission, ¶ 9.
[78] *Id.*, ¶ 138.
[79] *Id.*, ¶ 139.
[80] DAA, **(IRP Ex. C-69)**, § 18(a).

.[83] NDC is not allowed to remain the registry operator for .WEB.

Finally, Verisign/NDC assert that Verisign might decide that it no longer wants .WEB, leaving NDC to operate the gTLD. This is not credible. Verisign has repeatedly—and publicly—made clear that it has every intention of operating the .WEB gTLD.[84] Verisign's Chairman and CEO, Jim Bidzos, told investors in a Verisign earnings call earlier this year that—with the IRP concluded—the "roadblocks [to Verisign obtaining the rights to .WEB] are now out of the way," and that Verisign "***look[s] forward to becoming the .web registry operator and establishing [it] alongside .com and .net*** as an additional operation for businesses and end-users worldwide."[85] Verisign's very participation in this proceeding, where it claims that it will have "the right to operate .WEB" after an "ICANN-approved assignment," further demonstrates its intention to acquire the .WEB registry through the DAA; after all, otherwise Verisign has no reason to dedicate such time and expense to this dispute (unless it is simply to prevent any other company from obtaining the rights to .WEB).[86]

3.3.2 NDC Transferred Key Obligations in Connection with its Application to Verisign

NDC also transferred key obligations in connection with its application to Verisign.[87] Specifically, ICANN requires each applicant to take on obligations under the application, to ensure

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81 *Id.*, Ex. A, § 9.
82 *Id.*
83 *Id.*, Ex. A, §§ 9, 10.
84 *See, e.g.*, 2018 Earnings Conference Call Transcripts at **IRP Exs. C-18**, **C-60**, **C-81**.
85 Verisign, Q4 Earnings Call Tr. (10 Feb. 2022) (remarks of J. Bidzos).
86 V/N Initial Submission, ¶ 2.
87 "An obligation is a legal duty, by which a person is bound to do or not to do a certain thing." Cal. Civ. Code § 1427. An obligation arises from a "contract of the parties" or by "operation of law." *Id.* § 1428.

that the "'application and evaluation process for new gTLDs [] is ***aligned with policy recommendations*** and provides ***a clear roadmap*** for ***applicants*** to reach delegation, including Board approval.'"[88] Applicants are, for instance, required to submit accurate and truthful applications; to maintain the accuracy of their applications; and, should applicants participate in an ICANN-administered auction, to submit bids only on their own behalf. The DAA clearly transferred such obligations to Verisign by granting Verisign complete control over NDC's compliance with the obligations.

First, the Rules impose on NDC an obligation to update its application to reflect any change in circumstances; the DAA, and Verisign's involvement with NDC, indisputably constitutes such a change, especially as it rendered false or misleading numerous statements in NDC's application.[89] NDC, however, Redacted - Third Party Designated Confidential Information

.[90]

Second, the Auction Rules require that NDC only submit bids on its own behalf.[91]

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.[93] NDC sold control over these obligations to Verisign—and Verisign exercised that control to eliminate fairness and transparency from the ICANN Auction to its own advantage. Here too, NDC violated the letter

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88 AGB, **(IRP Ex. C-3)**, pmbl. Transparency and honesty are two such key policies reflected in the AGB, as applicants are required to maintain the accuracy and truthfulness of their public applications at all times. *Id.*, Module 1, p. 1-30 & Module 6, p. 6-2.

89 *Id.*, Module 1, p. 1-30; *see, e.g.*, NDC Application, **Altanovo-6**, pp. 6-9.

90 DAA, **(IRP Ex. C-69)**, § 10(a). Redacted - Third Party Designated Confidential Information

" *Id.*

91 Auctions Bidder Agreement, **(IRP Ex. C-5)**, p. 1.

92 DAA, **(IRP Ex. C-69)**, Ex. A, § 1.

93 *Id.*, Ex. A, § 1(i). This issue is further discussed in **Sections 4** and **5** below.

and spirit of the Rules.

3.4 Verisign/NDC's Arguments About the Supplement to the DAA Are Frivolous

Verisign/NDC cannot be allowed to sidestep the issue of NDC's blatant violations of the Anti-Transfer Rule by arguing that transfers of any rights or obligations in NDC's .WEB application "would be void" under the "DAA Supplement"[94] which

Redacted - Third Party Designated Confidential Information [95] especially now that NDC has performed consistent with its transfer of these rights and obligations.

First, it is well-settled under U.S. law[96] that parties cannot change the meaning and effect of their contracts by including conclusory and contradictory language about how the contract should be characterized by a public body.[97] The "substance over form" doctrine is enshrined in both California and Virginia law,[98] and, although it originated in tax law, it has been applied in several other contexts, including specifically to determine whether an assignment has taken place.[99] For instance, in *Bergin v. Van Der Steen*, the court found that an assignment had been executed even though it was labelled by the parties as a "waiver and relinquishment," holding that "it is the substance and not the form of a transaction which determines whether an assignment was intended."[100]

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94 V/N Initial Submission, ¶ 108 (citing Letter from P. Livesay to J. Rasco (26 July 2016), **(IRP Ex. C-97)**, ¶ C).

95 *Id.*, ¶ 106.

96 *Gregory v. Helvering*, 293 U.S. 465, 470 (1935), **Altanovo-25**.

97 This is especially true where, as here, the parties have performed for nearly a year under the contract and have agreed on such conclusory language only after the propriety of their conduct has been questioned.

98 Cal. Civ. Code § 3528, **Altanovo-26** ("The law respects form less than substance."). Further, it is "an established principle of the law that the substance and not the mere form of transactions constitutes the proper test for determining their real character." *People v. Jackson*, 24 Cal. App. 2d 182, 192 (1937), **Altanovo-27**. Thus, "pursuant to the substance-over-form principle, a court must determine a contract provision's true function and operation when evaluating its legality." *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, 232 Cal. App. 4th 1332, 1356 (2015), **Altanovo-28**. In Virginia, "courts must look to the purpose of the instruments, their substance and not their form. Merely giving to them a particular name or form [does] not take away the nature and effect of the transaction." *Bolling v. Hawthorne Coal & Coke Co.*, 197 Va. 554, 566 (Sup. Ct. 1955), **Altanovo-29**.

99 *See, e.g.*, *McCown v. Spencer*, 8 Cal. App. 3d 216 (1970), **Altanovo-30**; *Recorded Picture Co. v. Nelson Ent., Inc.*, 53 Cal. App. 4th 350 (1997), **Altanovo-31**.

100 *Bergin v. Van Der Steen*, 107 Cal. App. 2d 8, 16 (1951), **Altanovo-32**.

Second, the so-called "DAA Supplement" is actually a countersigned letter that Verisign wrote to NDC on 26 July 2016 after Ruby Glen had filed a complaint in federal court alleging that NDC had failed to disclose a change of control to ICANN. This self-serving letter, which contradicts the plain text of the DAA, confirms that Verisign/NDC were rightly concerned that the DAA would be seen as a violation of the new gTLD Program Rules if it ever came to light.

For example, recognizing that that the DAA transfers several rights and obligations in NDC's application to Verisign, Verisign writes in the DAA Supplement that

Redacted - Third Party Designated Confidential Information [101] ***But the DAA Supplement cannot undo Verisign/NDC's preexisting performance under the DAA.*** Prior to signing the DAA Supplement, among other things, NDC had already violated its obligation to disclose the DAA to ICANN. Verisign had already exercised both its "election" to cause NDC to enter into the Bidder Agreement and its "discretion" to prevent NDC from participating in the private auction for .WEB. These violations cannot be "undone" by the DAA Supplement.

Verisign/NDC's self-serving interpretations of the DAA which they drafted after performing for nearly a year under the DAA (and then only after their scheme was on the verge of being discovered) are relevant only in that they are a roadmap to how Verisign/NDC rightly feared the DAA should be read by ICANN. The nature of the DAA is to be judged by its substance, *i.e.*, by the operative terms of the DAA itself.[102]

3.5 The DAA Is Unprecedented

Verisign/NDC argue that the DAA comports with "industry practice" but fail to produce a

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[101] *See* Letter from P. Livesay to J. Rasco (26 July 2016), **(IRP Ex. C-97)**, pp. 1-2.

[102] Contrary to Verisign/NDC's allegation, Afilias has not admitted that the DAA concerns only ancillary rights. V/N Initial Submission, ¶ 85. When Verisign applied to participate in the IRP as an *amicus curiae*, Verisign argued that it was "the real party in interest" in the IRP. Verisign's Request to Participate as *Amicus Curiae* (11 Dec. 2018), **Altanovo-33**, ¶ 1. Afilias argued that, to the contrary, Verisign could not have any interest in NDC's application under the Rules and, accordingly, should not be allowed to take advantage of its malfeasance by participating in an ICANN accountability mechanism. Afilias' Response to V/N Request to Participate (28 Jan. 2019), **Altanovo-34**, ¶¶ 83-85.

single agreement in which an applicant (a) transferred virtually all material rights and obligations it held as an applicant to a non-applicant and, (b) agreed not to disclose that agreement to ICANN (or anyone else). The exemplar agreements and transaction to which they cite are easily distinguished.

- **Radix/Dot Tech:** The Radix/Dot Tech agreement[103] is utterly devoid of any of the significant control rights that Verisign acquired under the DAA. To the contrary, neither side acquired any rights or undertook any obligations to the other party until and unless Dot Tech prevailed at the .TECH auction.

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- **Donuts/Demand Media:** Verisign/NDC did not produce any agreements between Donuts and Demand Media. There is accordingly no evidence that Demand Media acquired any rights or obligations in any Donuts application. Moreover, there is no question that Donuts and Demand Media each took steps to publicly disclose their relationship. First, in over 100 applications, Donuts specifically identified Demand Media as its "partner[]" for backend registry services.[104] Second, contemporaneously with the submission of these applications, Demand Media issued a press release that ***disclosed the full scope*** of the parties' relationship.[105] Donuts' and Demand Media's public disclosures enabled multiple parties to submit objections and comments on Donuts' applications during the evaluation period, claiming that Donuts was simply an alter ego of Demand Media.[106]
- **.BLOG:** Verisign/NDC also did not produce any agreement between Primer Nivel and Automattic (WordPress), relying solely on an ambiguously worded Automattic press release. That said, the record is clear that prior to the .BLOG auction (1) ***Primer Nivel submitted a change request to ICANN*** regarding Question 11 (Applicant Information), (2) the change request disclosed that an LLC had acquired an interest (if not a controlling interest) in Primer Nivel's application, and (3) ICANN reviewed and published its approval of that change request. Contrary to Verisign/NDC's assertions, there is no evidence that Automattic "secretly bid" for .BLOG. Automattic's press release stated only that "[w]e wanted to stay stealth mode while in the bidding process and afterward in order not to draw too much attention." Setting aside that the approved change request may have sanctioned Automattic's bidding, this "stealth mode" is more

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103 Dot Tech, Sale and Purchase Agreement (undated), **(IRP Livesay Ex. C)**.

104 Afilias' Response to the *Amici* Merits Briefs (24 July 2020), **Altanovo-35**, ¶ 124 ("The following response describes our registry services, as implemented by Donuts and our partners. ***Such partners include Demand Media Europe Limited (DMEL) for back-end registry services***". (quoting Snow Sky, New gTLD Application, App. ID 1-1389-12139 (13 June 2012) (emphasis added)); "Demand Media to Participate in Historic Expansion of Generic Top Level Web Domain Name Extensions," *Business Wire* (11 June 2012, 08:00 AM EDT).

105 *See* *Business Wire*, Op. Cit. n. 104 ("Demand Media has entered into a strategic arrangement with Donuts Inc., an Internet domain name registry founded by industry veterans, through which it may acquire rights in certain gTLDs after they have been awarded to Donuts by ICANN. These rights are shared equally with Donuts and are associated with 107 gTLDs for which Donuts is the applicant. Further, as previously announced, a subsidiary of Demand Media has been selected as the technical registry operator for both Demand Media and Donuts.").

106 *See* Letter from J. Stoler to S. Crocker et al. (28 July 2012).

likely a reference to Automattic's use of an LLC ("Knock Knock Whois There LLC") as the acquiring entity for purposes of its change request. There is simply no evidence in the record regarding the details of this transaction and no basis from which to presume that the extraordinary control rights granted to Verisign in the DAA were in any way replicated in Primer Nivel's .BLOG transaction.[107]

- **Afilias Transactions:** Verisign/NDC also point to transactions that Afilias entered into ***after*** string contention had been completed and a registry agreement executed. Accordingly, all of those deals were governed by Section 7.5 of the Registry Agreement, not the Rules, which control an applicants' conduct until a registry agreement is executed. In contrast, the DAA was signed prior to the .WEB Auction and is covered by the Rules not the registry agreement. Verisign/NDC also point to agreements under which Afilias provided ***consulting*** services to applicants, but where Afilias had no interest or possibility of becoming the operator of the TLD under such applications. Verisign was not acting as a "consultant" to NDC under the DAA. If anything, NDC was acting as an agent to Verisign, to enable Verisign to obtain the registry rights to .WEB. Finally, the transaction by which Afilias recently changed its name to Altanovo (with its former parent company selling off ***other*** assets) is not comparable to the DAA—not least because Altanovo filed a ***Change Request*** which ICANN considered and approved.[108]

As Mr. Rasco testified during the IRP, the DAA Redacted - Third Party Designated Confidential Information

Finally, nothing remotely comparable to the DAA has ever been the subject of an IRP accountability mechanism—which is why ICANN stated that it could not take a position on whether the DAA violated the New gTLD Program Rules. As stated in the Final Decision, the Board must now make its first-instance pronouncement on these issues and do so consistently with the Articles, Bylaws, and Rules.

SECTION 4: VERISIGN/NDC'S VIOLATION OF THE WARRANTY OF TRUTHFULNESS AND CHANGE-REQUEST REQUIREMENTS

The Rules are replete with provisions requiring applicants to ensure that their applications are "***true and accurate and complete in all material respects***" at all times throughout the

[107] Moreover, it is obvious that a single precedent is not sufficient to establish an "industry practice" sufficient to ignore NDC's multiple breaches of the Rules.

[108] Application Update History for New gTLD (.WEB) Application Submitted to ICANN by Afilias, App. ID: 1-1013-6638 (ICANN approval of the Altanovo change request).

[109] Merits Hr., Tr. Day 5 (7 Aug. 2020), **Altanovo-7**, 842:3-8.

application process.[110] These provisions include, for example, the warranty of truthfulness, accuracy, and completeness quoted in the preceding sentence. They include each applicant's agreement "***to notify ICANN in writing of <u>any</u> change in circumstances that would render <u>any</u> information provided in the application <u>false or misleading</u>***."[111] And they include the requirement that "[i]f at ***any time*** during the evaluation process ***information previously submitted by an applicant*** becomes ***untrue or inaccurate***, the applicant must ***promptly notify ICANN***", so that ***ICANN*** can evaluate whether the changes are "material" and whether they require a "***re-evaluation*** of the application."[112] It is not for applicants to decide on their own whether changes in circumstances are material. Applicants are required to notify ICANN, so that ICANN can make that determination and decide the consequences—including whether the application should be subjected to an additional public notice and comment period.

In a process designed to promote transparency, fairness, and predictability—where ICANN and the entire community are supposed to know who is "***behind the application***"—these rules are of crucial importance.[113] This is why the ICANN Ombudsman specifically advised Mr. Rasco when he asked if there had been any undisclosed changes that would "mak[e] knowledge of your applicant company different," as that would make the process "***unfair to the other applicants***."[114] Other applicants were supposed to know the true identity of the applicants against whom they were competing. That did not prevent Mr. Rasco from flatly lying to the Ombudsman that "[t]here have been no changes to [NDC's] application," or from lying to Ms. Willett that he (Rasco) had made the decision to proceed to the ICANN Auction himself.[115]

Verisign/NDC offer no credible explanation to support their assertion that NDC did not

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110 AGB, **(IRP Ex. C-3)**, Module 6, p. 6-2 (emphasis added).
111 *Id.* (emphasis added).
112 *Id.*, Module 1, p. 1-30 (emphasis added).
113 New gTLD Frequently Asked Questions, **(IRP Ex. C-22)**, p. 1.
114 Email b/w C. LaHatte and J. Rasco (7 July 2016), **(IRP Willett Ex. E)**, [PDF] p. 2 (emphasis added).
115 *Id.*

materially violate these provisions of the Rules, in a manner that fundamentally and unfairly changed the resolution of the Contention Set, by concealing that non-applicant Verisign was "indirectly participating in resolution of the Contention Set" and "otherwise seeking to become the registry operator for the Domain."

First, Verisign/NDC assert that updating the "Mission/Purpose" section of NDC's application to account for the DAA was not necessary because, even if false or misleading, that section is "irrelevant" to ICANN's evaluation criteria for determining which applicants are technically and financially qualified to operate a registry.[116] This, however, ignores that the Rules were also designed to guarantee transparency and fairness. The information disclosed in the Mission/Purpose section was relied upon by members of the Internet Community seeking to understand who was applying for a gTLD and why. NDC's extensive representations about its executives and their "long-term commitment" to operate the .WEB registry—including their experience and expertise in marketing .CO to compete against .COM —misled the Internet Community about the true nature of NDC's pursuit of .WEB, which was to assign it to the owner of .COM.

For the same reasons, the Rules obligating applicants to update their applications are not limited to information to be used for the technical/financial evaluation. To the contrary, the Rules require applicants "to notify ICANN in writing of ***any change in circumstances*** that would render ***any information in the application false or misleading***."[117]

Second, NDC's application no longer accurately described the entity seeking to acquire .WEB. In sum, Verisign's assumption of control over virtually all material aspects of NDC's performance of its rights and obligations as an applicant—so as to "indirectly" participate in the

[116] V/N Initial Submission, ¶ 9.
[117] AGB, **(IRP Ex. C-3)**, Modle 6, p. 6-2 (emphasis added).

resolution of the Contention Set—constituted a "change of circumstances" that rendered information in the application to be false or misleading. This was, accordingly, no different than if Verisign had paid NDC in 2012 to submit an application for .WEB on its behalf without disclosing Verisign's involvement.

Third, Verisign/NDC do not explain why—if they believed the DAA to be consistent with the Rules—they did not disclose the DAA until after the Auction was concluded (and only then in response to ICANN's demand). Mr. Rasco had every opportunity to disclose the DAA when the ICANN Ombudsman and Staff asked him whether the application had undergone any changes—and whether NDC had made the decision to proceed to the ICANN Auction on its own. Instead, Mr. Rasco lied to them to conceal the existence of the DAA (choosing to comply with his obligations under the DAA rather than his obligations as an applicant). In the IRP, Mr. Livesay testified that he was concerned that if Verisign's involvement in NDC's application were disclosed during the application process, then Verisign/NDC would have had to answer the same "claims we are hearing now from Afilias,"[118] *i.e.*, the claims the IRP Panel deemed to be legitimate, serious, and deserving of ICANN's careful consideration.

SECTION 5: NDC'S VIOLATIONS OF THE AUCTION RULES WERE NOT "MECHANICAL"

NDC /Verisign devote only four pages of their 75-page brief to denying their violations of the Auction Rules and Bidder Agreement. Contrary to Verisign/NDC's assertions,[119] these documents—and NDC's breaches of them—are not merely "mechanical." In fact, the Auction Rules and the Bidder Agreement were cornerstones of the Rules and NDC's violations of them go to the heart of its undermining of the process carefully laid out by ICANN.

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[118] Merits Hr., Tr. Day 7 (11 Aug. 2020), **Altanovo-8**, 1279:18-21 (Livesay Cross-Examination).

[119] To the extent that Verisign/NDC rely on how ICANN has characterized these documents *in the IRP*, we reiterate that the BAMC cannot be swayed by any of the legal arguments advanced by ICANN in the IRP. Altanovo Opening Submission, ¶ 3.

5.1 The Critical Importance of the Auction Rules and Bidder Agreement

The Auction Rules and Bidder Agreement not only set out the mechanics of ICANN Auctions, but also define the conditions for participation ICANN Auctions and the minimum standards of conduct for participants. For example, the Auction Rules provide that, to participate in an ICANN Auction, an applicant must have "a) Passed evaluation[;] b) Resolved any applicable GAC advice[;] c) Resolved any objections[;] d) No pending ICANN Accountability Mechanisms."[120]

The importance of these documents is self-evident as the terms of both the Auction Rules and the Bidder Agreement prevail over the AGB itself—the centerpiece of the Rules—in the event of a conflict.[121] The Bidder Agreement's importance is further underlined in the AGB, which states that, by entering into this agreement, a bidder "acknowledges its rights and responsibilities in the auction, including that its bids are legally binding commitments to pay the amount bid if it wins … and to enter into the prescribed registry agreement with ICANN."[122] ICANN is expressly stated to be an "intended third party beneficiary" of the Bidder Agreement and "entitled to enforce" the Bidder Agreement, which would not be unnecessary if it were merely "mechanical."[123]

5.2 NDC's Material Violations of the Auction Rules and Bidder Agreement[124]

5.2.1 NDC Facilitated the Participation of Verisign which Was Not a "Bidder" or "Qualified Applicant"

It is undisputed that while Verisign was not a "Bidder" or a "Qualified Applicant," as defined in the Auction Rules and Bidder Agreement,[125] "Verisign participated in the auction."[126]

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120 Auction Rules, **(IRP Ex. C-4)**, Rule 8.

121 AGB, **(IRP Ex. C-3)**, Module 4, p. 4-20; Auctions Bidder Agreement, **(IRP Ex. C-5)**, pmbl.; Auction Rules, **(IRP Ex. C-4)**, Rule 4.

122 AGB, **(IRP Ex. C-3)**, Module 4, p. 4-25.

123 Auctions Bidder Agreement, **(IRP Ex. C-5)**, Sec. 7.10.

124 NDC's material violations of both the Auction Rules and Bidder Agreement are set out in detail at Section 3.4 of our Opening Submission. In the interests of brevity, we will not repeat those submissions here, but rather focus on responding to the assertions made by Verisign/NDC at paragraphs 178-185 of their Initial Submission.

125 V/N Initial Submission, ¶ 178.

126 *Id.*, ¶ 179.

By facilitating Verisign's participation, NDC breached the provisions of the Auction Rules and Bidder Agreement limiting participation in ICANN Auctions to Bidders.[127]

Verisign/NDC's argument that this participation was limited to providing funds for NDC's bids is not credible. Verisign did much more than simply provide the funds for NDC's participation in the .WEB Auction and the DAA is much more than a mere financing agreement.[128] All the ways in which Verisign participated in the .WEB Auction are described at paragraphs 150-156 of our Opening Submission and will not be repeated here. In short, Verisign was in complete control of NDC's actions during the .WEB Auction and there is no plausible scenario in which NDC will ever operate the .WEB registry.

5.2.2 NDC Did Not Bid on Its "Own Behalf"

Verisign/NDC argue that NDC bid on its own behalf because it was obligated to pay the Winning Bid under the Auction Rules.[129] This ignores that (1) Redacted - Third Party Designated Confidential Information

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[127] Auction Rules, **(IRP Ex. C-4)**, Rule 12; *see, e.g.,* Auctions Bidder Agreement, **(IRP Ex. C-5)**, Recitals; Auction Rules, **(IRP Ex. C-4)**, Rules 8, 13, 32 & 40. The clearest evidence of Verisign's participation in the .WEB Auction is the DAA itself, which provides that Verisign "is indirectly participating in resolution of the Contention Set". DAA, **(IRP Ex. C-69)**, Sec. 10(a).

[128] The DAA is not a financing agreement. When companies need to raise capital, they have two broad types of financing available to them: debt financing and equity financing. The DAA is clearly not debt financing, which is the borrowing of money in exchange for a commitment to repay those funds with interest. Yet the DAA does not provide any terms that (a) provide the principal amount to be financed, (b) set the interest rate, or (c) obligate NDC to repay the amounts financed. Nor can the DAA be equity financing, since Verisign/NDC deny that Verisign has acquired any ownership interest in NDC. Indeed, Mr. Livesay testified: "Redacted - Third Party Designated Confidential Information Merits Hr., Tr. Day 7 (11 Aug. 2020), **Altanovo-8**, 1230:20-23. So, what is the DAA? The answer lies in its name—the DAA is an acquisition agreement. The DAA provides that Verisign Redacted - Third Party Designated Confidential Information ". Letter from P. Livesay to J. Rasco (26 July 2016), **(IRP Ex. C-97)**, p. 1. Setting aside the question of whether this admission concedes a serious violation of the Rules, Verisign further admits that the DAA contains Redacted - Third Party Designated Confidential Information *Id.*, p. 2. t " Redacted - Third Party Designated Confidential Information In sum, Verisign did not "finance" NDC's bid—Verisign acquired NDC's right to bid. That is why the DAA is styled as an "Acquisition Agreement". In any event, even if the DAA is characterized as a "funding agreement", this does not change the analysis as to whether its terms violate the Rules. They plainly do.

[129] V/N Initial Submission, ¶ 183.

Redacted - Third Party Designated Confidential Information ,[130] and (2) Redacted - Third Party Designated Confidential Information [131] Moreover, even if Verisign's breach caused NDC to default on its obligation to pay the Winning Bid, Redacted - Third Party Designated Confidential Information [132] Redacted - Third Party Designated Confidential Information [133]

Accordingly, and as explained by Professor Cramton, NDC bore no economic risk associated with any of its bids—only Verisign did.[134] In fact, Redacted - Third Party Designated Confidential Information —this is further evidence that NDC submitted bids on Verisign's behalf at the .WEB Auction.[135]

Faced with the obvious conflict between the DAA's mandate that NDC "Redacted - Third Party Designated Confidential Information [136] and the Rule that Bidders must bid on their own behalf, Verisign/NDC suggest that Bidders may, in fact, submit bids at ICANN Auctions on behalf of non-applicants.[137] There is no interpretation of the Rules that supports that argument.

5.2.3 NDC's Bids Do Not Represent the Amount It Was Willing to Pay for .WEB

Verisign/NDC assert that the bids submitted by NDC reflected amounts that NDC was willing to pay for .WEB because Verisign had committed "pay" the Winning Bid price.[138] The flaw in this argument becomes apparent by comparing, as Verisign/NDC do, NDC's bids with

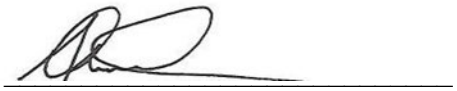
130 DAA, **(IRP Ex. C-69)**, Ex. A, Sec. 3(a).
131 *Id.*, Sec. 18(b).
132 Auction Rules, **(IRP Ex. C-4)**, Rule 55.
133 DAA, **(IRP Ex. C-69)**, Sec. 18(b).
134 Cramton Report, ¶ 41.
135 *Id.*, ¶ 39.
136 DAA, **(IRP Ex. C-69)**, Ex. A, Sec. 1.
137 V/N Initial Submission, ¶ 183 (arguing that Rule 12 applies only to the definition of a Designated Bidder).
138 *Id.*, ¶ 185; DAA, **(IRP Ex. C-69)**, Ex. A, Sec. 3(a).

Afilias' bids. If Afilias had prevailed with its bid of $135 million, Afilias would have been obligated to repay the entire $135 million, plus interest, to its lender. Accordingly, before submitting that bid, Afilias considered whether .WEB would generate sufficient revenues to warrant that investment. By comparison, when NDC submitted its bid of $142 million, NDC assumed no liability for that bid. NDC had no obligation whatsoever to repay Verisign—and in the event that Verisign failed to pay the Winning Bid amount, it was Verisign (and not NDC) that stood to lose its auction deposit. NDC had no interest in whether that bid was for $1 or $1 billion.

SECTION 6: CONCLUSION

Again, ICANN has taken the position that the New gTLD Program Rules are contractual obligations, required by ICANN to ensure that it performs its Mission consistent with its Articles and Bylaws for the benefit of the entire Internet community. ICANN must now enforce the Rules according to their plain terms and determine that (1) NDC's entry into and performance of the DAA materially violated the Rules; and (2) as a result, ICANN must reject its application and/or disqualify its bids, and offer .WEB to Afilias as the second-highest bidder. Any other result would make a mockery of the Rules and violate the Articles and Bylaws.

Respectfully submitted,



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