

**BEFORE THE
BOARD ACCOUNTABILITY MECHANISMS COMMITTEE
OF THE
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS**

IN RE BOARD ACCOUNTABILITY
MECHANISMS COMMITTEE'S REVIEW
OF .WEB PURSUANT TO BOARD
RESOLUTION 2022.03.10.06

**REPLY SUBMISSION BY NU DOTCO,
LLC AND VERISIGN, INC. TO BAMC'S
REQUEST FOR BRIEFING PURSUANT
TO BOARD RESOLUTION 2022.03.10.06**

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GLOSSARY OF DEFINED TERMS

Afilias	Afilias Domains No. 3 Ltd., now known as Altanovo Domains Limited
Afilias' Submission	Afilias' Opening Submission to the BAMC (dated July 29, 2022)
Application	NDC's application for the .WEB gTLD
Auction	The .WEB auction that took place on July 27-28, 2016
Auction Award	The decision in the .WEB Auction determining that NDC submitted the winning bid for .WEB.
Auction Rules	ICANN's Auction Rules for New gTLDs: Indirect Contentions Edition (Feb. 24, 2015) (Afilias Ex. C-4)
BAMC	Board Accountability Mechanisms Committee
Bidder Agreement	ICANN's New gTLD Auctions Bidder Agreement (Apr. 3, 2014) (Afilias Ex. C-5)
Blackout Period	The period of time between the deposit deadline for an auction until the auction provider receives payment in full from the winner of the contention set defined by Clause 68 of the Auction Rules and Section 2.6 of the Bidder Agreement
Blackout Period Rules	Clauses 61 and 68 of the Auction Rules and Sections 2.6 and 2.10 of the Bidder Agreement
Bylaws	ICANN's Bylaws (Afilias Ex. C-1)
Committee	ICANN's Board Accountability Mechanisms Committee
Contention Set	The .WEB contention set comprised of Web.com Group, Inc.; Charleston Road Registry, Inc.; Schlund Technologies GmbH; Dot Web Inc.; Ruby Glen, LLC; Afilias Domains No. 3 Ltd.; and Nu Dotco, LLC
DAA	Domain Acquisition Agreement between NDC and Verisign dated August 25, 2015 (Livesay Ex. D)
DAA Supplement	Confirmation of Understandings between NDC and Verisign dated July 26, 2016 (Livesay Ex. H)
Demand Media	Demand Media, Inc.
DNS	Domain Name System
DOJ	United States Department of Justice
Donuts	Donuts Inc.
Dot Web	Dot Web, Inc.

Guidebook	The gTLD Applicant Guidebook prepared by ICANN for the New gTLD Program (June 4, 2012) (Afilias Ex. C-3)
Final Decision	Final Decision of .WEB IRP Panel dated May 20, 2021 (corrected version dated July 15, 2021)
gTLD	Generic top-level domain
ICANN	Internet Corporation for Assigned Names and Numbers
IDN	Internationalized domain name
IRP	Independent review proceeding
IRP Hearing	Hearings conducted from August 3-11, 2020 in the Afilias' IRP
New gTLD Program/Program	ICANN's 2012 initiative to expand the number of top-level domains
NDC	Nu Dotco, LLC
NDC's & Verisign's Submission	NDC's & Verisign's Opening Submission to the BAMC (dated July 29, 2022)
IRP Panel	The panel appointed to resolve Afilias' IRP
Radix	Radix FZC
Ruby Glen	Ruby Glen, LLC
Rules	Collectively, the Guidebook, Auction Rules and Bidder Agreement
Schlund	Schlund Technologies GmbH
TLD	Top-level domain
Verisign	VeriSign, Inc.

I. EXECUTIVE SUMMARY

A. Afilias' Claims of Guidebook Violations Ignore the Dispositive Evidence from ICANN and, Instead, Attempt to Re-Write the Guidebook

1. Ten years after the launch of the New gTLD Program, Afilias' Submission seeks to re-write Section 10 of the Guidebook to transform its prohibition on *assignment* of an application into one prohibiting something called a "change of working control." Afilias provides no basis for its literal re-writing of Section 10 while ignoring—indeed, *never* mentioning—the dispositive testimony by ICANN representatives as to the meaning of the Guidebook as applied by ICANN and the extensive evidence of industry practice consistent with ICANN's application. Both establish that the DAA fully complies with the Guidebook, which likely is why Afilias has been forced to invent, at this late stage, its fictional account of the Guidebook.

2. The unambiguous testimony of Ms. Willett, who was responsible for managing the Program and applying the Guidebook, establishes that only an assignment of the entire application, as defined in the law, changing the party responsible to ICANN on an application, violates Section 10.¹ Third-party contracts concerning the performance of rights or obligations in connection with the application, auction or future registry operations, like the DAA, do not violate the Guidebook. These are the principles ICANN repeatedly applied in managing the New gTLD Program from its inception, providing the Program with the clarity and predictability required to administer almost 2,000 applications and ancillary third-party transactions concerning new gTLD applications.

3. Afilias' newly fabricated interpretation of the Guidebook, first offered six years into these proceedings, is pure fiction and in stark contrast to ICANN's established practices and predictable rules in applying the Guidebook pursuant to its terms. Afilias' claims are based on substituting the made-up term "change of working control" for the term "assignment" actually used in Section 10 in accordance with its established legal meaning. Afilias' misleading argument is contrary to the law on assignments, contrary to Guidebook provisions that expressly establish a test for change of control, and contrary to years of precedent set by ICANN's application of the

¹ [Hrg. Tr., Vol. III](#) (Aug. 5, 2020), 568:3–8 [Willett].

Guidebook.²

4. The evidence adduced during the IRP was undisputed that ICANN has *never* applied the Guidebook in the manner Afilias proposes nor disqualified an applicant for the reasons claimed by Afilias. New gTLDs have been transferred hundreds of times post-delegation, with the consent of ICANN, including assignments pursuant to pre-delegation agreements.³ There is no basis under the Guidebook or Bylaws to treat NDC and Verisign differently than any of the hundreds of other post-delegation transfers ICANN has approved or to disqualify NDC for an agreement identical in substance to those ICANN has approved.

5. Both Afilias' Guidebook claims, and the draconian relief Afilias seeks, would create uncertain and destabilizing precedent far beyond this matter. Afilias argues that ICANN should void the auction results, quoting several times language from an ICANN court brief that "results of an auction '*could be undone*' if a disqualification is discovered *even long afterward*."⁴ Were Afilias successful in establishing the new and baseless precedent it seeks under the Guidebook, that decision by the Board potentially would subject countless gTLD applications and transfers of new gTLDs to collateral attack on the grounds of the same uncertain, unwritten and ill-advised rules Afilias asks the Board to adopt.

6. At bottom, Afilias' arguments are simply a thinly disguised invitation for the Board to discriminate against NDC and Verisign, contrary to ICANN's Bylaw obligations of consistency, fairness and non-discrimination. They should be rejected.

B. The Evidence of Afilias' Blackout Period Violation Is Undisputed

7. Afilias' Submission does not meaningfully respond to the uncontroverted evidence establishing a Blackout Period violation. Afilias fails to offer a single piece of evidence counter to the testimony of Mr. Rasco and the written communications between him and Mr. Kane. At

² Taking a page from Mr. Neuman, Dr. Cramton, argues that now, after the fact, new unwritten rules should be added to the Auction Rules, contrary to common industry practice and the written Rules themselves. Section VI.C., *infra*.

³ [ICANN's Opposition to Request for Emergency Panelist](#) (Dec. 17, 2018), ¶ 26; [Willett Stmt.](#) (May 31, 2019), ¶ 18.

⁴ Afilias' Opening Submission (July 29, 2022), ¶¶ 20, 161 (citing *Ruby Glen v. ICANN*, ICANN's Opposition to Ex Parte Application for TRO, (IRP Ex. R-8), at 20 (emphases added)).

any time over the last six years Afilius could have offered testimony by Mr. Kane,⁵ if truthful, to dispute Mr. Rasco's testimony explaining their communications. Afilius has never done so, leaving the written communications and Mr. Rasco's testimony as the *only* evidence in the record.

8. Mr. Rasco testified that Mr. Kane reiterated his settlement offer during the Blackout Period. Afilius' only response is Dr. Cramton's "opinion" (unsupported by any competent evidence), that Mr. Kane's communications did not discuss bids, bidding strategies, or post-auction transfers—all of which is contradicted by Mr. Rasco's sworn testimony. Dr. Cramton is notably silent on the decision point of whether Mr. Kane's communications reflected the continuation of a settlement negotiation for the Contention Set, as Mr. Rasco testified, but which is plainly prohibited by the rules.

9. On this record, the only conclusion ICANN can draw is that Afilius violated the Blackout Period—explicitly a "serious violation" under the Guidebook. As a result, Afilius should be disqualified from objecting further in these proceedings.⁶ NDC and Verisign should not be required to respond to future objections from Afilius, which Afilius already has threatened. Instead, NDC and Verisign should be entitled to assert a lack of standing, seeking summary dismissal if necessary, for any further proceedings initiated by Afilius with respect to .WEB.

C. Afilius' Purported "Expert Reports" Should Be Rejected

10. The Board should disregard the reports of Mr. Neuman and Dr. Cramton, as untimely and improper. **First**, Afilius should not be permitted belatedly to introduce new purported evidence in connection with the Board's consideration.⁷ Afilius had over six years to

⁵ Afilius should have offered Mr. Kane's testimony, as well as the reports of Mr. Neuman and Dr. Cramton, during the IRP, when those witnesses would have been subject to cross-examination. It is far too late now for Afilius to supplement the record with evidence it willfully withheld. *See* NDC's & Verisign's Opening Submission (July 29, 2022), ¶ 17, n.14. By contrast, NDC and Verisign, appearing only as *amici*, were not able to present their evidence during the IRP, other than if ICANN was willing to present it as its own.

⁶ Afilius' Blackout Period violation stands in marked contrast to the purported Guidebook violations by NDC asserted by Afilius. Afilius' Blackout Period conduct violates an express, written prohibition in the Auction Rules and Bidder Agreement that is described as a "serious violation." [Afilius C-4](#) (Auction Rules for New gTLDs), at § 61. By contrast, Afilius' claims depend not only on Afilius' re-writing of the Guidebook, but then applying the new unwritten rules in a manner contrary to ICANN's established precedent of approving such agreements, which would be a clear violation of ICANN's Bylaws' obligations to apply rules consistently and without discrimination.

⁷ *See* NDC's & Verisign's Opening Submission (July 29, 2022), ¶ 17 n.14.

produce such evidence, but chose not to do so during the IRP, *where it would have been subject to cross-examination*. **Second**, the Neuman and Cramton Reports should be accorded no weight because their opinions are not based on the complete record of the IRP.⁸ Mr. Neuman and Dr. Cramton failed to consider material evidence, including Ms. Willett’s testimony during the IRP, unrefuted evidence of industry practice in the IRP record, and ICANN’s prior application of the Guidebook. **Third**, Mr. Neuman’s and Dr. Cramton’s purported interpretations of contractual language in the Guidebook on “reselling, assigning, or transferring”⁹ should be disregarded because they are not qualified to offer an opinion on legal terms of art.¹⁰ Similarly, the Neuman Report includes legal argument masquerading as an expert opinion.¹¹ Attorney opinions on the facts of a case are not proper expert opinion.¹²

II. THE DAA FULLY COMPLIES WITH SECTION 10 OF THE GUIDEBOOK

11. Section 10 of the Guidebook prohibits applicants only from assigning their rights and obligations in their applications. NDC’s and Verisign’s Opening Submission established that the DAA complies with this provision for each of the following reasons.

12. **First**, the DAA does not meet the legal definition of an assignment. It was not intended to, and does not, transfer to Verisign NDC’s right to enforce with ICANN NDC’s rights under the .WEB Application; it does not divest NDC of responsibility to ICANN for its application;¹³ and it does not constitute a present transfer of the application or Registry Agreement to Verisign. Afiliast’s Submission ignores the legal requirements for an assignment.

13. **Second**, the DAA fully complies with ICANN’s interpretation of Section 10 prohibiting only a total assignment of the entire application—which ICANN applied to countless

⁸ See *Ashland Hosp. Corp. v. Affiliated FM Ins. Co.*, No. CIV.A. 11-16-DLB-EBA, 2013 WL 3213051, at *7 (E.D. Ky. June 24, 2013) (Appendix Ex. AC-110) (excluding expert opinion where expert “[f]ail[ed] to consider such relevant facts [which] violates Rule 702’s requirement that an expert base his opinions on ‘sufficient facts or data.’”).

⁹ Neuman Report (July 29, 2022), ¶¶ 64–68; Cramton Report (July 29, 2022), ¶¶ 35–43.

¹⁰ See note 152, *infra*.

¹¹ See, e.g., Neuman Report (July 29, 2022), ¶¶ 60–69 (arguing that the DAA violated Module 6 of the Guidebook).

¹² See *Thongleuth v. Astrue*, 2011 WL 1303374, at *19 (D. Kan. Apr. 4, 2011) (Appendix Ex. AC-111) (“Plaintiff’s or her counsel’s mere assertion as lay observers . . . are insufficient to contravene the direct testimony of the expert.”).

¹³ Consistent with the elements of an assignment, according to Ms. Willett, “what ICANN was looking at was that the applying entity continued to retain responsibility for the application.” [Hrg. Tr., Vol. IV](#) (Aug. 6, 2020), 756:23–757:1 [Willett]. “[T]hey couldn’t change the *applying entity*.” [Hrg. Tr., Vol. III](#) (Aug. 5, 2020), 576:17–18 [Willett].

other applications.¹⁴ According to ICANN, “applicants all the time were *assigning rights and designating third parties to operate on their behalf*,”¹⁵ with respect to “all sorts of aspects of their application and future gTLD operations,” including assigning new gTLDs immediately upon execution of the registry agreement.¹⁶ “[T]here were so many hundreds or thousands of those potential relationships, *we didn’t deem it to fall within scope. It wasn’t part of the evaluation criteria that we applied within the guidebook.*”¹⁷ As interpreted by ICANN, the Guidebook did not prohibit third-party agreements like the DAA.

14. **Third**, every party has recognized that the DAA is a private third-party contract, creating rights only between NDC and Verisign, distinct from and ancillary to the .WEB Application between NDC and ICANN. Ms. Willett recognized this critical distinction: such third-party obligations did not “fall within the scope” of the “evaluation criteria” under the Guidebook, and “applicants all the time were assigning rights and designating third parties to operate on their behalf.”¹⁸ Afilias admitted during the IRP, and acknowledges again in its Submission, both the critical distinction between an application and ancillary rights under a private third-party agreement, and that the DAA only concerns the latter.¹⁹ According to Afilias, the DAA is a “wholly separate agreement” between NDC and Verisign, “not the ‘property or transaction’”²⁰ comprising the .WEB Application; the DAA merely grants Verisign the right to “enforce its private contracts”²¹ and does not give “VeriSign any rights in either NDC’s .WEB application . . . or in

¹⁴ NDC’s & Verisign’s Opening Submission (July 29, 2022), ¶¶ 38, 83.

¹⁵ [Hrg. Tr., Vol. III](#) (Aug. 5, 2020), 567:25–568:2 [Willett].

¹⁶ [Hrg. Tr., Vol. IV](#) (Aug. 6, 2020), 708:12–15 [Willett].

¹⁷ [Hrg. Tr., Vol. IV](#) (Aug. 6, 2020), 775:21–24 [Willett].

¹⁸ [Hrg. Tr., Vol. IV](#) (Aug. 6, 2020), 775:22–24 [Willett]; [Hrg. Tr., Vol. III](#) (Aug. 5, 2020), 567:25–568:2 [Willett].

¹⁹ Afilias sought to deny Verisign participation in the IRP by representing that “VeriSign has no rights in NDC’s .WEB application.” Afilias’ *Amici* Opposition (Jan. 28, 2019), ¶ 83 (Appendix Ex. AC-112). Again, in its Submission here, Afilias seeks to deny Verisign standing on the same grounds. Afilias’ Opening Submission (July 29, 2022), ¶ 4. Afilias is bound by its admission that its central claim—that NDC’s .WEB Application was assigned to Verisign—has no merit, and Afilias cannot claim otherwise in its argument to obtain an advantage in this proceeding. *See Keller v. United States*, 58 F.3d 1194, 1198 n.8 (7th Cir. 1995) (Appendix Ex. AC-113) (“Judicial admissions are formal concessions in the pleadings, or stipulations by a party or its counsel, that are binding upon the party making them.”).

²⁰ Afilias’ *Amici* Opposition (Jan. 28, 2019), ¶¶ 84–85 (Appendix Ex. AC-112) (quoting from the Federal Rule standard for what is a related action for purposes of joinder).

²¹ Afilias’ Opening Submission (July 29, 2022), ¶ 4.

any future registry agreement.”²² And according to Mr. Rasco: “none of the elements of the DAA really touched the application. We were not transferring anything to Verisign at this time in entering into the DAA.”²³

15. **Fourth**, the DAA is consistent with industry practice in which applicants (1) made promises to third-parties about how the applicant would exercise its contractual discretion in exchange for financing or (2) contracted with third-parties to fulfill their obligations.²⁴ In addition to Ms. Willett’s testimony regarding these practices, our Submission documented specific transactions involving over 100 new gTLDs in which pre-delegation agreements provided for post delegation assignments of the new gTLD.²⁵

16. Instead of responding to the extensive evidence from the IRP summarized in our Submission, or responding to the legal elements of an assignment under Section 10, Afilias instead chooses to attack the *Guidebook itself*, trying to re-write its terms to support Afilias’ claims. But Afilias’ re-write is contrary to the evidence and law defining the terms of Section 10, and violates well-established principles that a contract document like the Guidebook must be interpreted in light of the parties’ conduct and industry practices, both of which were fully documented during the IRP and in our Submission.²⁶ In short, a decade of experience under the Guidebook cannot be ignored to accommodate Afilias’ fictionalized account of the New gTLD Program.

A. Afilias’ Attempt to Re-Write Section 10 from an “Assignment” to a “Change in Control” Clause Is Contrary to the Guidebook and Legal Authority

17. Afilias and its new lawyer, Mr. Neuman, attempt to invent a new meaning for Section 10. Their new interpretation would require striking the prohibition on an “assignment” of an application in favor of a prohibition on a “change of working control of . . . the application.”²⁷

18. Mr. Neuman’s argument, however, stumbles out of the gate. It is a well-established

²² Afilias’ *Amici* Opposition (Jan. 28, 2019), ¶ 85 (Appendix Ex. AC-112).

²³ Hrg. Tr., Vol. V (Aug. 7, 2020), 897:4–17 [Rasco] (Appendix Ex. AC-80).

²⁴ NDC’s & Verisign’s Opening Submission (July 29, 2022), ¶¶ 111–26.

²⁵ At least 24 of those new gTLDs subsequently were assigned pursuant to those agreements, with ICANN’s approval. NDC’s & Verisign’s Opening Submission (July 29, 2022), ¶¶ 116–23.

²⁶ *Id.* ¶¶ 111–12 & n.232–36.

²⁷ Neuman Report (July 29, 2022), ¶ 54.

principle of law that prohibitions on assignments do not prohibit or otherwise apply to changes in control. “[A] non-assignment clause will not suffice” to limit changes in “control,” which “must [be] through specific language to that effect in the contract (a ‘change of control’ clause).”²⁸ Assignments and changes in control are simply different things under the law.

19. Mr. Neuman then proposes his new test: Redacted - Third Party Designated Confidential Information

, *I consider* that the execution of the DAA . . . unquestionably amounted to a *change of working control* . . . in connection with the application for .web”²⁹ In other words, because it is clear that the DAA is *not* an assignment, Mr. Neuman tries to rewrite the Guidebook to include a new rule that puts aside the prohibition on assignment in favor of a new and different test of Mr. Neuman’s own creation.³⁰ His new test is clearly contrary to Ms. Willett’s testimony as to how ICANN has applied Section 10, how the industry has applied Section 10, and the law of assignment. But none of that is addressed by Mr. Neuman.

20. While effectively striking the term “assignment” from the Guidebook in favor of the term “change of working control,” Mr. Neuman acknowledges that, “[w]hen a contract does not specifically define certain terms, the most common approach to interpreting those terms is through an examination of how they are generally defined and *used in the industry*.”³¹ Nonetheless, Mr. Neuman does not look at industry practice under Section 10, including how Ms. Willett or the industry has interpreted its prohibition on assignments. Instead—and here is

²⁸ *VDF FutureCeuticals, Inc. v. Stiefel Labs., Inc.*, 792 F.3d 842, 846 (7th Cir. 2015) (Appendix Ex. AC-114) (holding that a non-assignment clause does not prohibit changes in control or ownership); *see, e.g., MassMutual Asset Fin. LLC v. ACBL River Operations, LLC*, 220 F. Supp. 3d 450, 456 (S.D.N.Y. 2016) (Appendix Ex. AC-115) (the provision of an agreement prohibiting a sale or transfer of an agreement by a contracting party did not prohibit a change of control of the contracting party).

²⁹ Neuman Report (July 29, 2022), ¶ 54 (emphases added).

³⁰ Mr. Neuman similarly starts his analysis with a complete mischaracterization of the DAA:

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Neuman Report (July 29, 2022), ¶ 53. This is untrue.

Redacted - Third Party Designated Confidential Information See NDC’s & Verisign’s Opening Submission (July 29, 2022), ¶¶ 95–101, 136–41.

³¹ Neuman Report (July 29, 2022), ¶ 65 (emphasis added).

Mr. Neuman’s inspired “bait and switch” act (of which, ironically, he accuses NDC)³²—Mr. Neuman looks at how the term “[c]ontrol is often defined,”³³ as if the term “control” was part of Section 10, which it is not, and in any event is wholly inconsistent with the legal definition of an assignment.

21. Mr. Neuman’s definition of a change in control further is contrary to the ownership disclosure requirements in the Guidebook, which define changes in control prohibited by the Guidebook.³⁴ And Mr. Neuman’s “change of working control” argument is the same disclosure requirement that was rejected during the Guidebook drafting process.³⁵

22. Then to Mr. Neuman’s final leap: “[t]hus, the New gTLD Program Rules themselves” prohibit changes in control, and “there is no doubt that the execution of the DAA amounted to a change of control . . . in connection with NDC’s .web application.”³⁶ In other words, if Section 10 is rewritten to delete the term “assignment” and replace it with the term “control”, and “control” is then defined solely by Mr. Neuman without reference to the Guidebook’s actual definition of control,³⁷ Ms. Willett’s testimony,³⁸ and the IRP evidence of industry practice,³⁹ *then—and only then*—can he proclaim that NDC violated the Guidebook.

³² *Id.*, ¶ 62.

³³ *Id.*, ¶ 65 (emphasis added). Mr. Neuman cites to Black’s Law Dictionary (*Black’s Law Dictionary* (11th ed. 2019): Control (Ex. JJN-4), at 1)) and to a definition of “control” in Module 5 of the Guidebook as alleged support for his opinion. (citing [Afilias C-3](#) (Guidebook), at Module 5, § 5.1). That definition, however, applies *solely* to ICANN’s determination, as part of the transition to delegation, whether there exists any registry-registrar cross-ownership that might raise competition issues. *Id.* In other words, the definition has nothing to do with the Guidebook’s anti-assignment provision.

³⁴ See [Afilias C-3](#) (Guidebook), at Attachment to Module 2, A-6, A-7 (Question 11).

³⁵ The limited ownership disclosure requirements in the Guidebook were a deliberate choice by ICANN in the face of community objections that limited disclosures would encourage “shell” companies that hid the identity of the “alter ego” or “funder” of the applicant. See October 2009 Guidebook Discussion Draft, COA (Module 5, 22 Nov. 2009). (“Mechanism against bad actors running registries The proposed mechanism is deficient. Because bad actors often set up ‘shell’ companies, ICANN should have flexibility to deny a ‘bad actor’ applicant which it discovers is an ‘alter ego’, ‘related entity’ or ‘funder’ of the applicant. It should also be able to disqualify not just on the basis of past record of an entity owning 15% or more of the applicant, but also on the record of that entity’s officers, directors, or controlling stockholders.”), available at <https://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv3-15feb10-en.pdf>.

³⁶ Neuman Report (July 29, 2022), ¶¶ 66–68.

³⁷ [Afilias C-3](#) (Guidebook), at Attachment to Module 2, A-6, A-7 (Question 11).

³⁸ [Hrg. Tr., Vol. III](#) (Aug. 5, 2020), 568:3–8 [Willett].

³⁹ NDC’s & Verisign’s Opening Submission (July 29, 2022), ¶¶ 111–26.

23. Mr. Neuman’s “expert” opinion is of no relevance or value whatsoever.⁴⁰

B. Afilias’ False Claim that NDC Could Not Be the Operator Under the DAA

24. Afilias asserts that NDC’s Application was transferred to Verisign because, “regardless of how events unfold, *once NDC entered into the DAA, it could no longer become the registry operator for .WEB.*”⁴¹ These statements are untrue and contrary to the IRP record.

25. **First**, NDC remains the applicant, responsible for the application.⁴² As ICANN interprets Section 10, until it approves an alternative operator, NDC controls the application and will become and remain the registry operator under the Registry Agreement for .WEB.⁴³

26. **Second**, the DAA provides only for a future, conditional assignment of the Registry Agreement—not the Application—upon consent by ICANN.

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

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(a) Redacted - Third Party Designated Confidential Information

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(b) Redacted - Third Party Designated Confidential Information

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⁴⁰ See *VDF FutureCeuticals, Inc.*, 792 F.3d at 846 (Appendix Ex. AC-114).

⁴¹ Afilias’ Opening Submission (July 29, 2022), ¶ 73 (emphasis in original). Afilias repeats variants of this false statement throughout its Submission: “The DAA, however, operates as an absolute bar to NDC from ever acquiring the rights to .WEB for itself”; Redacted - Third Party Designated Confidential Information

Id., ¶¶ 106, 115 (emphases in original).

⁴² Section II.B., *supra*.

⁴³ Under the express provisions of the DAA and Guidebook,

Redacted - Third Party Designated Confidential Information . Livesay Ex. D (DAA), at Ex. A, § 3(b)-3(d) (Appendix Ex. AC-84); see also [Hrg. Tr., Vol. IV](#) (Aug. 6, 2020), 756:23–757:6 [Willett].

⁴⁴ NDC’s & Verisign’s Opening Submission (July 29, 2022), ¶¶ 95–101, 136–41.

⁴⁵ Livesay Ex. D (DAA), at § 9(b) (Appendix Ex. AC-84).

⁴⁶ Hrg. Tr., Vol. VII (Aug. 11, 2020), 1232:3–8 [Livesay] (Appendix Ex. AC-83); Hrg. Tr., Vol. V (Aug. 7, 2020), 829:19–25 [Rasco] (Appendix Ex. AC-80). *E.g.*, *Huynh v. Vu*, 111 Cal. App. 4th 1183, 1199 (2003) ([AA-91](#)) (“where

Footnote continued on next page

(c)

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⁴⁷ Similar agreements might be expected with respect to any of the hundreds of new gTLD transfers to which ICANN consented, had ICANN refused to consent to the assignment.

(d) NDC and Verisign might amend their still executory agreement in any of countless ways because they have such a right. Since NDC is the applicant and has the right to enter into the registry agreement, ICANN will decide whether to consent to an assignment if and when, and under the facts existing at the time, the request for an assignment is made by NDC.⁴⁸

28. **Finally**, Afiliás' argument, if true (which it is not), is irrelevant. There is no requirement in the Guidebook that an applicant must remain the registry operator.⁴⁹ The new gTLD Registry Agreement only requires that any assignment must be approved by ICANN. In fact, hundreds of new gTLDs were assigned by the applicants; and many of those assignments were made pursuant to agreements entered before the contention set was resolved.

29. In several instances, ICANN became aware, during the application process, of the parties' intention to assign the operation of the registry upon resolution of the contention set.⁵⁰ When that happened, according to Ms. Willett, ICANN's response was to advise the parties not to complete the assignment (even if they had already entered into an agreement to assign) until after the registry agreement was signed by the new gTLD applicant.⁵¹

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it is worth more to the promisor to breach rather than to perform a contract, it is more efficient for the law to allow the promisor to breach the contract and to pay the promisee damages").

⁴⁷ Livesay Ex. D (DAA), at Ex. A, § 9 (Appendix Ex. AC-84). According to Mr. Rasco, Redacted - Third Party Designated Confidential Information Hrg. Tr., Vol. V (Aug. 7, 2020), 841:13–23 [Rasco] (Appendix Ex. AC-80).

⁴⁸ Such changes certainly would not be a surprise between parties whose contract involuntarily has been put on hold during six years of litigation at a cost of over \$10,000,000.

⁴⁹ NDC is the only party that can enter into the Registry Agreement.

⁵⁰ [ICANN's Opposition to Request for Emergency Panelist](#) (Dec. 17, 2018), ¶¶ 25–30; [Hrg. Tr., Vol. IV](#) (Aug. 6, 2020), 774:25–775:24 [Willett].

⁵¹ [Hrg. Tr., Vol. IV](#) (Aug. 6, 2020), 775:14–18 [Willett].

⁵² There is no basis upon which to interpret the Guidebook any differently here than it was interpreted and applied in other cases.

C. Afilias’ Arguments that Certain DAA Terms Violate Section 10 Are Meritless

30. Based on its newly invented interpretation of “assignment” as a “change of working control,” Afilias attacks terms of the DAA Redacted - Third Party Designated Confidential Information ,⁵³

Redacted - Third Party Designated Confidential Information .⁵⁴ According to Afilias’ new (but plainly incorrect) interpretation of Section 10, every third-party contract right or obligation now would be deemed to affect the applicant’s “control” of rights and obligations found in the application and is therefore relevant to, and may violate, Section 10’s newly formulated prohibition on “change[s] of working control.”⁵⁵

31. No such claim can reasonably or credibly be made in the face of (i) the express language of Section 10, (ii) ICANN’s stated interpretation of that language, and (iii) industry practice consistent with ICANN’s interpretation. This is especially true in light of the requirement for ICANN’s rules to have predictable application across thousands of varying transactions concerning applications and the future performance of registry operations.⁵⁶ ICANN’s interpretation of Section 10 provides for that predictability. Afilias’ proposed interpretation is antithetical to predictability and baseless.

32. **First**, Afilias’ claim of violation of Section 10 assumes that NDC’s promises in the DAA to Verisign about how NDC would exercise or exploit a contractual right constitutes an

⁵² Livesay Ex. D (DAA), at Ex. A, § 3(c) (Appendix Ex. AC-84).

⁵³ Afilias’ Opening Submission (July 29, 2022), ¶¶ 69–79; *see* NDC’s & Verisign’s Opening Submission (July 29, 2022), ¶ 150 n.304.

⁵⁴ NDC’s & Verisign’s Opening Submission (July 29, 2022), ¶¶ 95–101.

⁵⁵ Neuman Report (July 29, 2022), ¶ 54.

⁵⁶ By contrast to Afilias’ vague concept of “working control,” which makes every third party contract relevant to a claim of Guidebook violation, ICANN’s straight forward application of Section 10’s prohibition on assignments— itself a single phrase in the middle of 350 pages of rules and policies—allowed the New gTLD Program to be successfully and realistically administered, obviously a challenging task in light of the thousands of competing applicants, “all sorts of creative arrangements,” and “so many hundreds or thousands of those potential relationships.” [Hrg. Tr., Vol. IV](#) (Aug. 6, 2020), 757:2–6, 775:21–24 [Willett]. A successful Program could never have proceeded based on the uncertainty and disputes that would have ensued under rules Afilias would have the Board adopt, years after the Program largely was concluded but, according to Afilias, still “could be undone.” Afilias’ Opening Submission (July 29, 2022), ¶ 161. Indeed, what Afilias has done here proves the point.

assignment of rights or obligations in the separate Application. The DAA itself, however, Redacted - Third Party Designated Confidential Information ,⁵⁷ and NDC’s promises to Verisign only establish contract rights as between Verisign and NDC, and do not operate as an assignment to Verisign of rights or obligations in the Application with ICANN.⁵⁸

33. **Second**, Afiliás contends the DAA Redacted - Third Party Designated Confidential Information provisions required NDC to breach the Guidebook. Quite the opposite,

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Thus, assuming arguendo that any term of the DAA might violate the Guidebook (which is untrue), the Guidebook would preempt such a term, Redacted - Third Party Designated Confidential Information

34. **Third**, Afiliás contends that NDC lost control of the Application

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⁵⁷ According to the DAA Supplement, the parties “ Redacted - Third Party Designated Confidential Information Livesay Ex. H (DAA Supplement), ¶ D (Appendix Ex. AC-86). “In determining whether an assignment has been made, ‘the intention of the parties as manifested in the instrument is controlling.’” [AA-9](#), *Cal. Ins. Guarantee Assn. v. Workers’ Comp. Appeals Bd.*, 203 Cal. App. 4th 1328, 1335 (2012). Afiliás concedes this principle: “For an assignment to be effective [under Section 10 of the Guidebook], it ‘must include manifestation to another person by the owner of his intention to transfer the right, without further action, to such other person or to a third person.’” [Afiliás’ Response to the Amicus Curiae Briefs](#) (July 24, 2020), ¶ 79.

⁵⁸ Section II.C., *supra*.

⁵⁹ Afiliás’ Opening Submission (July 29, 2022), ¶ 9 Redacted - Third Party Designated Confidential Information

(emphases omitted); Neuman Report (July 29, 2022), ¶ 55 (same).

⁶⁰ Afiliás’ Opening Submission (July 29, 2022), ¶ 109 Redacted - Third Party Designated Confidential Information internal citation omitted).

⁶¹ Livesay Ex. D (DAA), at § 4(g) (Appendix Ex. AC-84).

⁶² Livesay Ex. H (DAA Supplement), ¶ F (Appendix Ex. AC-86). I Redacted - Third Party Designated Confidential Information

Id. at Ex. A, § 1(k). Afiliás quarrels with this provision Redacted - Third Party Designated Confidential Information

. Hrg. Tr., Vol. V (Aug. 7, 2020), 821:9–14 [Rasco] (Appendix Ex. AC-80); *id.*, Vol. VII (Aug. 11, 2020), 1247:23–1248:2 [Livesay] (Appendix Ex. AC-83).

⁶³ Afiliás’ Opening Submission (July 29, 2022), ¶¶ 9, 14, 150, 151, 153; Neuman Report (July 29, 2022), ¶ 55.

because

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.⁶⁴ Just as the Guidebook permitted Afilias to agree with its lender that it would not bid more than \$135 million,⁶⁵ the Guidebook permitted

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Guidebook does not prohibit

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35. **Fourth**, Afilias contends that the DAA was a change in control that the Guidebook required NDC to disclose.⁶⁷ Afilias' contention is wrong because the only mandatory disclosures of actual changes in control required by the Guidebook are written and explicit, and relate to officers, owners, and major shareholders.⁶⁸ Under the actual Guidebook obligations, NDC was not required to disclose whether it was receiving auction funding from Verisign, or intended to assign the Registry Agreement to Verisign, because those facts did not fall within the written rules for changes of control and they otherwise were not material to the evaluation criteria as applied by ICANN, including in numerous similar transactions documented in our Submission.⁶⁹

36. **Finally**, by falsely equating an assignment with a change of control and falsely claiming the DAA effected a change of control over NDC, Afilias concludes that Verisign, not NDC, prevailed in the Contention Set in violation of the Guidebook.⁷⁰ We have already laid bare the illogic of this argument. But it also fails for the simple and straightforward reason that NDC is the Applicant of record and, as it prevailed in the Auction, NDC, not Verisign, will sign the Registry Agreement with ICANN. Moreover,

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⁶⁴ NDC's & Verisign's Opening Submission (July 29, 2022), ¶¶ 174, 180–82.

⁶⁵ [Afilias' Amended IRP Request](#) (Mar. 21, 2019), ¶ 35.

⁶⁶ NDC's & Verisign's Opening Submission (July 29, 2022), ¶¶ 64, 131–33.

⁶⁷ Neuman Report (July 29, 2022), ¶¶ 61–62 (The Guidebook required NDC to notify of “*any changes in or changes in circumstances relating to NDC's application*,” so that ICANN could determine if the changes were material.

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At that moment all of NDC's submitted information contained within its application . . . was no longer ‘true’”) (emphasis in original).

⁶⁸ [Afilias C-3](#) (Guidebook), at Attachment to Module 2, A-6, A-7 (Question 11).

⁶⁹ NDC's & Verisign's Opening Submission (July 29, 2022), ¶¶ 111–26.

⁷⁰ Cramton Report (July 29, 2022), ¶ 43; Neuman Report (July 29, 2022), ¶ 73. *See* Section III.B., *infra*.

.⁷¹ Accordingly, the Guidebook rules fully served their purpose in vetting NDC during the application process.

III. NDC'S PARTICIPATION IN THE .WEB AUCTION COMPLIED WITH ALL APPLICABLE RULES AND REQUIREMENTS

37. The Guidebook is clear that an applicant's compliance with the "auction rules" is determined by the actual *Auction Rules*, not the Guidebook's description of the anticipated auction process.⁷² To that end, the Guidebook expressly provides that "[i]f any conflict arises between this module and the auction rules, the auction rules will prevail."⁷³ Thus, Afilias' claimed breaches of the Auction Rules and Bidder Agreement must be assessed by reference to the rights and obligations actually existing as described in *those documents*.

A. The DAA Did Not "Require" NDC to Breach the Auction Rules or Bidder Agreement, as Afilias Claims

38. In its Opening Submission, Afilias lists a litany of defined terms and contractual provisions in the Auction Rules and Bidder Agreement that it contends NDC breached.⁷⁴ According to Afilias, "[t]he DAA required NDC to breach all these provisions."⁷⁵ As discussed in detail in NDC's and Verisign's Opening Submission, Afilias' claim is based on a mischaracterization of the Guidebook, Auction Rules and Bidder Agreement, and the DAA.⁷⁶

39. Afilias bases its argument on the language in the DAA that

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⁷¹ See Section II.B., *supra*; Livesay Ex. D (DAA), at Ex. A, § 3(c) (Appendix Ex. AC-84).

⁷² See [Afilias C-3](#) (Guidebook), § 4.3.1. Afilias tries to use the sentence in the Guidebook stating that "[o]nly bids that comply with all aspects of the auction rules will be considered valid," somehow to argue that all of NDC's bids were not "valid" because of NDC's purported violations of the anti-assignment or other provisions in the Guidebook. Afilias' Opening Submission (July 29, 2022), ¶ 129 (quoting [Afilias C-3](#) (Guidebook), § 4.3.1(5)). Apart from the lack of merit to the claims of a Guidebook violation, addressed above, Afilias' argument ignores the specific terms governing auctions in the Auction Rules and Bidder Agreement—including a *definition of a "valid" bid* that is contrary to Afilias' manufactured definition. See [Afilias C-4](#) (Auction Rules for New gTLDs), at 16 ("Table of Definitions").

⁷³ [Afilias C-3](#) (Guidebook), § 4.3.1 (emphasis added). This provision is consistent with a standard rule of contract interpretation that "specific terms control over general ones" because specific contract terms express the parties' intent more precisely than general ones. *Shivkov v. Artex Risk Sols., Inc.*, 974 F.3d 1051, 1063 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2856 (2021) (Appendix Ex. AC-116).

⁷⁴ Afilias' Opening Submission (July 29, 2022), ¶¶ 147–56.

⁷⁵ *Id.*, ¶ 150.

⁷⁶ NDC's & Verisign's Opening Submission (July 29, 2022), ¶¶ 142–49.

construction of the meaning of that clause is contrary to the DAA’s language, its logic, and the parties’ sworn testimony. As Mr. Rasco explained, Redacted - Third Party Designated Confidential Information

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40. Redacted - Third Party Designated Confidential Information

Afilias devotes inordinate attention to the real-time interactions between NDC and Verisign during the Auction, arguing that Verisign’s presence—and rights under the DAA—mean that NDC was not really the Bidder, acting for itself in the .WEB auction.⁷⁹ Afilias’ arguments are contradicted by the IRP record. As the representative for NDC, Mr. Rasco testified during the IRP Hearing, Redacted - Third Party Designated Confidential Information

.⁸⁰ NDC’s decisions regarding who to consult with or, indeed, take directions from, during the Auction do not divest NDC of its status as a Qualified Applicant and Bidder under the Auction Rules or Bidder Agreement.

B. NDC Did Not Violate the Auction Rules or Bidder Agreement

41. As ICANN has noted, the Auction Rules and Bidder Agreement concern “only [] the mechanics of the Auction and each applicant’s participation in the Auction,” and “cannot bear the weight Afilias puts on them.”⁸¹ In any event, NDC fully complied with ICANN’s rules.

⁷⁷ Afilias’ Opening Submission (July 29, 2022), ¶¶ 150–51 (quoting Livesay Ex. D (DAA), Ex. A, § 2.1 (Appendix Ex. AC-84)).

⁷⁸ Rasco Stmt. (June 1, 2020), ¶¶ 99–100 (Appendix Ex. AC-85).

⁷⁹ Afilias’ Opening Submission (July 29, 2022), ¶¶ 153–55.

⁸⁰ Hrg. Tr., Vol. V (Aug. 7, 2020), 828:11–13 [Rasco] (Appendix Ex. AC-80).

⁸¹ [ICANN’s Rejoinder Memorial](#) (June 1, 2020), ¶ 85.

1. NDC’s bids were “valid” under the Auction Rules.

42. Afilias claims, citing the Guidebook, that NDC’s bids are not valid because they purportedly did not “comply with all aspects of the auction rules.”⁸² But the rules Afilias cites are in the Auction Rules, not the Guidebook.

43. Rule 40 of the Auction Rules sets forth a detailed and precise definition of a “valid bid”⁸³—which Afilias fails even to mention, let alone argue that NDC does not satisfy it. NDC’s bids fully complied with the definition of a valid bid in the controlling Auction Rules.

2. NDC bid on its “own behalf.”

44. Afilias argues that NDC’s bids are invalid because NDC purportedly bid on behalf of Verisign and not itself.⁸⁴ The evidence submitted in the IRP, which Afilias fails to mention, demonstrates conclusively that NDC did in fact bid on its own behalf—as the .WEB applicant. NDC submitted bids with the knowledge and understanding that it was legally obligated to pay should it win the Auction, regardless of whether Verisign honored its obligations under the DAA.⁸⁵

45. Afilias cites a Recital in the Bidder Agreement in support of its contention:

WHEREAS, the Qualified Applicant will place bids in the Auction on its own behalf or may designate an agent (“**Designated Bidder**”) to enter bids in the Auction on the Qualified Applicant’s behalf.⁸⁶

46. This recital states nothing more than the obvious proposition that the Qualified Applicant places the bids itself or designates an agent to do so for it.⁸⁷ Contrary to Afilias’ assertion, the Auction Rules are not intended to police the reasons for an applicant’s bids.

⁸² Afilias’ Opening Submission (July 29, 2022), ¶ 169 (citing [Afilias C-3](#) (Guidebook), § 4.3.1(5)).

⁸³ [Afilias C-4](#) (Auction Rules for New gTLDs), at § 40 (“(a) the Bid must have been submitted no earlier than the Starting Time of the relevant Round and no later than the Ending Time of the relevant Round, with the exception of Bids permitted by the Auction Manager pursuant to clause 39; (b) the Bid must be placed by a Bidder for its Application in an Open Contention Set; (c) in Round 2 or later, the Bid must be placed by a Bidder for an Application that is deemed to be eligible for bidding pursuant to clause 35; (d) the price of the Bid must be a whole number of \$US that is not less than the Bid of the previous round (or \$1 in the first Round); and (e) the price of the Bid must not exceed the Bidding Limit assigned to the Bidder for the Contention Set—this clause will not place any constraint if the Bidding Limit is ‘Unlimited.’”)

⁸⁴ Afilias’ Opening Submission (July 29, 2022), ¶¶ 168–69.

⁸⁵ Livesay Stmt. (June 1, 2020), ¶¶ 32–33 (Appendix Ex. AC-81); Hrg. Tr., Vol. V (Aug. 7, 2020), 828:11–13 [Rasco] (Appendix Ex. AC-80); *see also id.* at 826:20–25, 827:21–25, 829:19–25 [Rasco].

⁸⁶ [Afilias C-5](#) (Bidder Agreement) (Apr. 3, 2014), at 1.

⁸⁷ As set forth in NDC’s and Verisign’s Response, a “Whereas” clause is not a contractually binding obligation. *See* NDC’s & Verisign’s Opening Submission (July 29, 2022), ¶ 183 n.392.

3. NDC plainly met the definitions of “Qualified Applicant,” “Bidder” and “Bid” in the Auction Rules.

47. Afilias asserts that the DAA required NDC to breach the qualification requirements set forth in the Auction Rules’ definitions of “Qualified Applicant,” “Bidder,” and “Bid.”⁸⁸ Afilias’ own submission demonstrates this is false.

48. Afilias acknowledges that the Auction Rules state that a Bidder is a “Qualified Applicant or its Designated Bidder”, and that Qualified Applicant is defined as: “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.”⁸⁹ It is beyond dispute that NDC meets each of these requirements.

49. Similarly, a Bid is defined as “A Bidder’s binding willingness to secure its Application within the Contention Set at prices up to the specified price.”⁹⁰ Afilias presents no evidence that NDC was not willing to, and did not, pay the “specified price” for .WEB.⁹¹

4. NDC’s conduct was consistent with the design of the Auction.

50. As explained in detail in the Miller Declaration, NDC’s conduct in the Auction complied not only with the Auction Rules and Bidder Agreement, it also was consistent with the design of the auction. As Dr. Miller explains, “[n]othing in traditional auction practice or the rules applicable to the .WEB Auction prohibited Verisign from instructing NDC on whether to bid, how to bid, and in what amount to bid.”⁹² To the contrary, it is not uncommon for auction participants to have relationships with undisclosed third parties—such as financiers, consultants, and anticipated assignees—who influence or even control the bids submitted by the bidders.⁹³

⁸⁸ Afilias’ Opening Submission (July 29, 2022), ¶¶ 147–50.

⁸⁹ *Id.*, ¶ 142 (citing [Afilias C-4](#) (Auction Rules for New gTLDs), at 19 (“Schedule - Table of Definitions”)).

⁹⁰ [Afilias C-4](#) (Auction Rules for New gTLDs), at 16 (“Schedule - Table of Definitions”).

⁹¹ Afilias also argues that NDC’s bids did not represent the price that NDC was “willing to pay to resolve string contention within a Contention Set in favor of its Application.” Afilias’ Opening Submission (July 29, 2022), ¶ 152 (quoting [Afilias C-4](#) (Auction Rules for New gTLDs), at § 32). Afilias’ argument is not supported by the evidence, as Mr. Rasco clearly testified without challenge that NDC was willing to pay the amount it bid in the .WEB Auction. *See* NDC’s & Verisign’s Opening Submission (July 29, 2022), at Section VI.B.3.

⁹² Declaration of Dr. Bradley Miller (Aug. 29, 2022), ¶ 14, submitted concurrently.

⁹³ *Id.* ¶¶ 45, 50.

IV. NDC DID NOT FAIL TO DISCLOSE ANY INFORMATION REQUIRED UNDER THE GUIDEBOOK

A. The Application Remains Accurate and No Update Was Required

51. The DAA did not require any changes to NDC’s .WEB Application. Afilias’ hyperbolic assertions to the contrary ignore the evidence, most notably Ms. Willett’s testimony, that ICANN only requires applicants to update the core, material information provided in their applications, *i.e.*, the applying entity, management, contact personnel, “and any ownership interest in the applying entity greater than 15 percent.”⁹⁴ The DAA did not change these facts in any way.

52. Afilias’ argument that “[a]t its most basic level” NDC’s .WEB Application was inaccurate and required amending because, “under the DAA, NDC could *not* become the registry operator for .WEB,”⁹⁵ is also belied by the IRP evidence, as discussed in Section II.B., *supra* and Section V.E.4 of our Opening Submission. But even if Afilias were correct (which it is not), that fact would not render NDC’s Application false or misleading and did not require an update to the Application. Unless and until ICANN approved an assignment, NDC remained the applicant and all of the information in NDC’s Application remained correct. The same principle was applied by ICANN to other applicants intending to assign registry operations upon delegation.⁹⁶

53. Having no response to either Ms. Willett’s testimony or ICANN’s established practices, Afilias again resorts to complaining that NDC’s responses to Question 18 of its Application concerning its “Mission/Purpose” for .WEB were not accurate in light of the DAA.⁹⁷

54. Responses to Question 18, however, are irrelevant because they are “*not used as part of the evaluation* or scoring of” a gTLD application.⁹⁸ Trying to argue otherwise, Afilias cites a letter from ICANN’s counsel, Jones Day, to the IRP Panel stating that Section 18 is “relevant *to the Program* as it allows the community to comment on the application (during the

⁹⁴ [Hrg. Tr., Vol. III](#) (Aug. 5, 2020), 550:24-551:10 [Willett]; [Hrg. Tr., Vol. IV](#) (Aug. 6, 2020) at 708:24-709:1 [Willett].

⁹⁵ Afilias’ Opening Submission (July 29, 2022), ¶ 115 (emphasis in original).

⁹⁶ See Section II, *supra*; NDC’s & Verisign’s Opening Submission (July 29, 2022), ¶¶ 111-26; [Hrg. Tr., Vol. IV](#) (Aug. 6, 2020), 774:25-775:24 [Willett].

⁹⁷ Afilias’ Opening Submission (July 29, 2022), ¶¶ 60-64.

⁹⁸ [Afilias C-3](#) (Guidebook), at Attachment to Module 2, A-11, A-12 (Question 18) (emphasis added); see NDC’s & Verisign’s Opening Submission (July 29, 2022), ¶ 162; [Rasco Stmt.](#) (June 1, 2020), ¶¶ 18-20.

public comment period) based on the applicant’s statement of the mission and purpose and how the gTLD is intended to be operated.”⁹⁹ That lone citation does not support Afilias’ claim. No one disputes that Section 18 may be relevant *to the Program* in general, but it is undisputed that Section 18 is not relevant *to the evaluation of a given application*, and did not require amendment should an applicant’s “mission/purpose” change,¹⁰⁰ just as it did not in the case of the many other transactions we discuss in our Opening Submission.¹⁰¹ Moreover, NDC’s responses remain accurate because NDC’s “mission/purpose” has never changed, “irrespective of who operates .WEB.”¹⁰²

B. NDC Made No Misstatements to ICANN

55. NDC did not make misstatements to ICANN in 2016 concerning supposed changes to its ownership and control. The IRP Panel rejected Afilias’ conspiracy theories in its decision,¹⁰³ and it is absurd that Afilias continues to peddle this lie,¹⁰⁴ when Mr. Rasco has repeatedly explained those statements without any rebuttal or contrary evidence.¹⁰⁵ Afilias’ arguments are addressed in detail in our Opening Submission, and need not be repeated here.¹⁰⁶ Instead, we briefly address two new ways in which Afilias now stretches the facts and the Guidebook beyond recognition.

56. **First**, Afilias complains about Mr. Rasco’s statement to ICANN that there had “been no changes to the [NDC] organization that would need to be reported to ICANN,” *not* because there *had been* such changes (there had not),¹⁰⁷ but because, according to Afilias, “the

⁹⁹ Afilias’ Opening Submission (July 29, 2022), ¶ 125 n.143 (citing Ex. Altanovo-12 at 3-4) (emphasis added).

¹⁰⁰ In fact, not surprisingly, Afilias omits Jones Day’s additional statements agreeing with NDC that (i) “ICANN generally does not evaluate Section 18 as part of the scoring of an application” and (ii) “ICANN has exercised its discretion to generally not require applicants to update and revise statements made in Section 18 of their applications except to the extent those statements are of a nature that they are to be incorporated into a registry agreement.” Letter to IRP Panel from S. Smith (Counsel for ICANN) (July 18, 2020), (Ex. Altanovo-12) at 3.

¹⁰¹ NDC’s & Verisign’s Opening Submission (July 29, 2022), ¶¶ 111–26.

¹⁰² NDC’s & Verisign’s Opening Submission (July 29, 2022), ¶¶ 163–64; [Rasco Stmt.](#) (June 1, 2020), ¶ 16.

¹⁰³ [Final Decision](#) (July 15, 2021), ¶ 298 (concluding that “very little turns” on this issue “insofar as [Afilias’] core claims are concerned” and rejecting Afilias’ “contention that the Respondent violated its Bylaws by the manner in which it investigated and resolved the pre-auction allegations of change of control within NDC.”).

¹⁰⁴ Afilias’ Opening Submission (July 29, 2022), ¶¶ 83–84.

¹⁰⁵ [Rasco Stmt.](#) (June 1, 2020), ¶ 78.

¹⁰⁶ NDC’s & Verisign’s Opening Submission (July 29, 2022), ¶¶ 166–74.

¹⁰⁷ *Id.*, ¶ 171.

DAA had fundamentally altered the NDC *organization's goals*.¹⁰⁸ But nothing in the Guidebook requires an applicant to disclose changes to its “organization’s goals,” which is simply yet another rule invented by Afilias in this instance. Moreover, even if Afilias was correct, its argument is merely another variation of Afilias’ “mission/purpose” argument. NDC’s “goals” had not changed, including in connection with .WEB—NDC’s “goals” were to apply for and obtain TLDs; what NDC did with those TLD’s if it were successful was not ICANN’s immediate concern. Instead, any such issue would be addressed upon a request to assign the Registry Agreement.¹⁰⁹

57. **Second**, the entire premise of ICANN’s pre-Auction investigation was to determine whether there had been a change of ownership or control at NDC. Relying on Mr. Neuman, Afilias now suggests that “assignment” means a different “change of control” of NDC’s .WEB Application, rather than the change in control defined in the Guidebook.¹¹⁰ Afilias’ argument is meritless, as explained in Section II.A., *supra*. Nothing in the DAA gave Verisign any control over NDC the entity, as defined in the Guidebook, and NDC retained control over its .WEB Application.

58. **Third**, Afilias seeks to apply Mr. Neuman’s newly manufactured test for control over the .WEB *Application* (Section 10) to evaluate the completeness of Mr. Rasco’s statements to ICANN in 2016, when ICANN was asking whether there was a change in control of the *corporate applicant* under the written Guidebook definition of control. Of course, no one had heard Mr. Neuman’s legal theories until thirty days ago, and Mr. Rasco certainly could not have anticipated them six years ago. In any event, Mr. Rasco acted consistent with the written definition of change of control in the Guidebook, and his un rebutted testimony establishes that it “never occurred to [him] that ICANN’s routine inquiry might require disclosure of NDC’s financing arrangement with Verisign in general or the DAA in particular, especially given the well-known industry practice of transferring domains, with ICANN’s consent, after the auction process

¹⁰⁸ Afilias’ Opening Submission, ¶ 120 (emphasis added).

¹⁰⁹ See Section IV.A., *supra*.

¹¹⁰ Neuman Report (July 29, 2022), ¶¶ 54, 68.

concluded.”¹¹¹

59. Finally, as explained in considerable depth by Dr. Miller, contrary to what Afiliat and its expert Dr. Cramton have argued,¹¹² neither common auction practice nor the rules applicable to the .WEB Auction required NDC to disclose to other bidders its relationship with Verisign.¹¹³ In fact, as Dr. Miller explains, in view of the .WEB Auction design, and the free assignability of rights to .WEB (upon ICANN’s consent), bidders were incentivized to bid up to their maximum valuation without regard to the identities of other bidders or knowledge about any third-party relationships.¹¹⁴ Accordingly, the disclosures that Afiliat insists upon not only were not required or necessary,¹¹⁵ they would not have altered the outcome of the Auction.¹¹⁶

V. AFILIAT FAILS TO OFFER ANY EVIDENCE IN DEFENSE OF THE BLACKOUT PERIOD CLAIM

60. Afiliat contends its violation of the Blackout Period rules is not before ICANN.¹¹⁷ Not so. The issue was raised in the IRP,¹¹⁸ and the IRP Panel directed that all issues it did not determine, including NDC’s Blackout Period allegations, be directed to the ICANN Board for decision.¹¹⁹ This Committee confirmed it will “review, consider, and evaluate . . . the allegations relating to [Afiliat’s] conduct during the Auction Blackout Period of the .WEB Auction.”¹²⁰

61. On the merits, Afiliat argues against a strawman, asserting that two of Mr. Kane’s text messages could not have violated the Blackout Period because they were sent before it

¹¹¹ [Rasco Stmt.](#) (June 1, 2020), ¶ 78.

¹¹² Cramton Report (July 29, 2022), ¶¶ 16, 21, 31–32; Afiliat’s Opening Submission (July 29, 2022), ¶¶ 1, 93.

¹¹³ Miller Declaration (Aug. 29, 2022), ¶¶ 45–46.

¹¹⁴ *Id.* ¶¶ 20–27.

¹¹⁵ Afiliat’s own conduct demonstrates that it knows its manufactured disclosure requirement does not exist. If it did, Afiliat would have disclosed its own auction financing, which of course it did not.

¹¹⁶ Miller Declaration (Aug. 29, 2022), ¶¶ 31–32.

¹¹⁷ *Cf.* Afiliat’s Opening Submission (July 29, 2022), ¶¶ 175–76 (arguing that “the blackout violation allegation is not properly before the Board”).

¹¹⁸ *E.g.*, [Final Decision](#) (July 15, 2021), ¶ 175. NDC and Verisign have raised Afiliat’s Blackout Period violation with ICANN repeatedly over several years. *See, e.g.*, Letter from R. Johnston (Counsel for Verisign) to E. Enson (Counsel for ICANN) (Aug. 23, 2016) (Appendix AC-101); Letter from S. Marenberg (Counsel to NDC) to M. Botterman (ICANN) (July 23, 2021) (Appendix Ex. AC-71).

¹¹⁹ [Final Decision](#) (July 15, 2021), ¶ 322.

¹²⁰ Letter from Burr to Altanovo Domains Limited, Nu Dotco, LLC and Verisign, Inc. (May 19, 2022), at 1 (Appendix Ex. AC-95).

started.¹²¹ That argument misses the logic of NDC’s and Verisign’s argument. The two earlier texts are offered as *context* to understand the meaning, and Mr. Rasco’s understanding, of Mr. Kane’s *third* text, which was indisputably sent *during* the Blackout Period.¹²²

62. Afilias also argues that the third text—“IF ICANN delays the auction next week would you consider a private auction? Y-N”—does not constitute an attempt at a “settlement agreement” and is not a violation because it was based on a hypothetical of ICANN delaying the Auction.¹²³ This argument ignores the statement’s context, which is that Afilias and other Contention Set members were doing everything in their power to delay the public auction and force a private auction.¹²⁴ The goal of this conduct was to attempt to reach a settlement whereby NDC would lose a private auction in exchange for \$17,000,000, an offer made in the earlier messages from Mr. Kane.¹²⁵ In this context, Mr. Kane’s text during the Blackout Period plainly was in furtherance of an attempted settlement of the Contention Set, including, as reasonably understood by Mr. Rasco, as a reiteration of the earlier settlement offer by Mr. Kane.

63. Mr. Rasco submitted a sworn declaration stating that he understood (and reasonably so) that Mr. Kane was proposing settlement of the Contention Set in violation of the Blackout Period.¹²⁶ Afilias could have disputed Mr. Rasco’s testimony by submitting a declaration from Mr. Kane, but has not done so despite having many opportunities to do so over the past six years. Instead, Afilias withdrew Mr. Kane as a witness in advance of the IRP Hearings, despite an earlier witness statement from Mr. Kane—which also was silent on the Blackout Period communications.

64. Afilias’ only attempted response to the actual evidence is the “expert” opinion of Dr. Cramton, who asserts the “text does not fit into any of the categories prohibited by the Blackout Period rule” because it does not “disclose . . . bids,” “discuss any bidding strategy,” or “attempt to negotiate a transfer of .WEB after the auction.”¹²⁷ Notably absent from Dr. Cramton’s Report is

¹²¹ Afilias’ Opening Submission (July 29, 2022), ¶¶ 178–79.

¹²² NDC’s & Verisign’s Opening Submission (July 29, 2022), ¶¶ 70–77.

¹²³ Afilias’ Opening Submission (July 29, 2022), ¶ 180.

¹²⁴ NDC’s & Verisign’s Opening Submission (July 29, 2022), ¶¶ 40–44, 47, 62–69.

¹²⁵ *Id.*, ¶ 64.

¹²⁶ [Rasco Stmt.](#) (June 1, 2020), ¶ 96.

¹²⁷ Cramton Report (July 29, 2022), ¶ 49.

any denial that Mr. Kane’s text was sent in furtherance of an attempt to *settle* the Contention Set, which is expressly forbidden by the rules. Furthermore, Dr. Cramton has no basis upon which to testify as to the parties’ understandings or to dispute Mr. Rasco’s testimony. Dr. Cramton may be an expert on some matters, but he is not a mind reader and was “not in the room.”

65. Afilias’ repeated failure to introduce evidence, clearly within its control, to respond to Mr. Rasco’s testimony, leaves ICANN no option but to conclude that Afilias has no response and its Blackout Period violation occurred precisely as attested to by Mr. Rasco.

VI. EVEN IF A VIOLATION WERE FOUND—WHICH WOULD BE CONTRARY TO THE FACTS AND LAW—DISQUALIFICATION WOULD BE IMPROPER

66. Afilias’ claims of Guidebook violations are meritless and must be rejected in their entirety. That determination should end the Committee’s inquiry. In the event, however, the Committee chooses to respond specifically to Afilias’ demands for draconian relief, we explain below why Afilias’ demands for disqualification and forfeiture remedies are contrary to the Bylaws, ICANN’s years-long implementation of the New gTLD Program, and applicable law. Afilias fails to offer (nor could it) any evidence to support its absurd claims for disqualification, including that publication of the DAA or an amended Application would have been made any difference whatsoever in the result of the Auction and Award of .WEB to NDC. Nor does Afilias argue that such remedies have ever been imposed before by ICANN in cases similar to this—because they *never* have been.

67. Afilias argues that ICANN effectively has no discretion to determine “what the remedy should be” for NDC’s and Verisign’s alleged violations but rather must automatically disqualify NDC upon the finding of any violation.¹²⁸ Afilias’ argument squarely contradicts the express terms of the Guidebook, Auction Rules and Bidder Agreement, and Afilias’ proposed remedy—which, conveniently, would result in Afilias obtaining .WEB for far less than its market value—would result in a draconian forfeiture in violation of contract law and ICANN’s Bylaws.

68. The IRP Panel soundly rejected Afilias’ contention that ICANN lacks discretion to

¹²⁸ Afilias’ Opening Submission (July 29, 2022), ¶ 24.

impose a less severe remedy than a complete forfeiture of NDC’s right to obtain .WEB. The IRP Panel determined “that it is for [ICANN], that has the requisite knowledge, expertise, and experience, to pronounce . . . on the question of whether NDC’s application should be rejected and its bid at the auction disqualified by reason of its alleged violations.”¹²⁹ While ICANN’s discretion “is necessarily constrained by [ICANN’s] obligation to enforce the New gTLD Program Rules objectively and fairly,” ICANN “does enjoy some discretion in addressing violations of the Guidebook and Auction Rules.”¹³⁰ Indeed, as ICANN explained during the IRP, the applicable rules all grant ICANN broad discretion on what remedy to impose, if any, for any rules violation.¹³¹

69. In exercising its discretion, ICANN must act “in conformity with relevant principles of . . . applicable local law.”¹³² Under the applicable law of contracts, which Afilias contends would apply,¹³³ “[f]orfeitures . . . are not favored.”¹³⁴ If an “agreement can be reasonably interpreted so as to avoid the forfeiture, it is [the tribunal’s] duty to do so.”¹³⁵ ICANN is, therefore, under a duty to avoid imposing a forfeiture of NDC’s Application or the .WEB TLD if there is any reasonable basis to do so. We are unaware of any forfeiture ever being directed against an applicant for a new gTLD consistent with the “remedy” Afilias seeks here.

70. Settled contract law further “sensibly recognizes that although every instance of noncompliance with a contract’s terms constitutes a breach, not every breach justifies treating the contract as terminated. . . . [C]ourts allow termination only if the breach can be classified as ‘material,’ ‘substantial,’ or ‘total.’”¹³⁶ A factfinder “must weigh the purpose to be served, the

¹²⁹ [Final Decision](#) (July 15, 2021), ¶ 362.

¹³⁰ *Id.*, ¶ 363.

¹³¹ [ICANN’s Rejoinder Memorial](#) (June 1, 2020), ¶ 81 (approval of application “entirely *at ICANN’s discretion*”) (quoting [Afilias C-3](#), (Guidebook), at Module 6, § 3)), *id.* (misrepresentation “*may cause*” rejection of application) (quoting [Afilias C-3](#), (Guidebook), at Module 6, § 11)), *id.* (failure to notify about change “*may result*” in denial) (quoting [Afilias C-3](#), (Guidebook), at Module 1, § 1.2.7)), *id.*, ¶ 84 (“*ICANN’s decision shall be final and binding*” on application of Auction Rules) (quoting [Afilias C-4](#) (Auction Rules for New gTLDs), at § 72)), *id.* (applicant “*may be subject to penalty*” for violation of Bidders Agreement) (quoting [Afilias C-5](#) (Bidder Agreement), at § 2.10)) (all emphases in original).

¹³² [Afilias C-1](#) (Bylaws), at § 1.2(a).

¹³³ Afilias’ Opening Submission (July 29, 2022), ¶ 5.

¹³⁴ *Boston LLC v. Juarez*, 245 Cal. App. 4th 75, 86 (2016) (Appendix Ex. AC-117) (internal quotation omitted).

¹³⁵ *Id.* at 85.

¹³⁶ *NIVO I LLC v. Antunez*, 217 Cal. App. 4th Supp. 1, 5 (Cal. App. Dep’t Super. Ct. 2013) (internal quotation omitted) (Appendix Ex. AC-118).

desire to be gratified, the excuse for deviation from the letter, [and] the cruelty of enforced adherence.”¹³⁷ Furthermore, “even if a breach is total, the injured party may treat it as partial.”¹³⁸ When a breach involves a misrepresentation or nondisclosure, the law will not treat the misrepresentation or nondisclosure as material unless the deceived party would have made a substantially different decision if it had known the truth.¹³⁹

71. Afiliás cannot meet any of these legal requirements for the relief it seeks. Furthermore, in exercising its discretion, ICANN is bound by the Bylaws to “[m]ake decisions by applying documented policies consistently, neutrally, objectively and fairly, without singling out any particular party for discriminatory treatment.”¹⁴⁰ The Bylaws thus likewise require rejection of the unprecedented claim Afiliás makes.

72. At bottom, Dr. Miller concludes that Afiliás has not presented any evidence that a disclosure of the arrangement between NDC and Verisign would have caused a different result in the Auction or Award of .WEB to NDC.¹⁴¹ The evidence, summarized below, is to the contrary. Accordingly, for this reason alone (among others we discuss), disqualifying NDC would be an abuse of discretion.

A. The Anti-Assignment Provision Could Not Support a Forfeiture

73. The purpose of Section 10 is to ensure that applicants, such as NDC, remain personally obligated to perform their obligations to ICANN and to protect ICANN from potential double liability on ICANN’s contractual obligations.¹⁴² The DAA could not affect fulfillment of

¹³⁷ *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.*, 195 Cal. App. 3d 1032, 1051 (1987) (Appendix Ex. AC-119).

¹³⁸ *Coughlin v. Blair*, 41 Cal. 2d 587, 598 (Cal. 1953) (Appendix Ex. AC-123).

¹³⁹ *Mitchell v. United Nat’l Ins. Co.*, 127 Cal. App. 4th 457, 474 (2005) (Appendix Ex. AC-120) (“The test for materiality is whether the information would have caused the underwriter to reject the application, charge a higher premium, or amend the policy terms, had the underwriter known the true facts.”); *Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276, 1291 (Fed. Cir. 2011) (Appendix Ex. AC-121) (“When an applicant fails to disclose prior art to the PTO, that prior art is but-for material if the PTO would not have allowed a claim had it been aware of the undisclosed prior art”); *Quidel Corp. v. Siemens Med. Sols. USA, Inc.*, 2021 WL 4622504, at *1 (9th Cir. Oct. 7, 2021) (Appendix Ex. AC-122) (holding false advertising statements immaterial because they were “not likely to have ‘influence[d] purchasing decisions’”).

¹⁴⁰ [Afiliás C-1](#) (Bylaws), § 1.2(a)(v).

¹⁴¹ Miller Declaration (Aug. 29, 2022), ¶¶ 31–32.

¹⁴² NDC’s & Verisign’s Opening Submission (July 29, 2022), ¶ 86 n.171 (citing *Gallagher v. S. Source Packaging, LLC*, 564 F. Supp. 2d 503, 507 (E.D.N.C. 2008) (Appendix Ex. AC-124)).

these purposes. It did not transfer to Verisign any right to sue ICANN,¹⁴³ or allow ICANN to sue Verisign, under the Application.¹⁴⁴

74. Afilias attempts to recast the purpose of Section 10 by contending, without support, that its “most fundamental purpose” is to ensure that NDC can “become the registry operator for .WEB.”¹⁴⁵ But the anti-assignment provision only prohibits assignment of *an application*,¹⁴⁶ not an agreement to assign a *registry agreement*.¹⁴⁷ As explained in our Opening Submission, the drafting history of the Guidebook confirms that ICANN expressly considered and rejected imposing any such prohibitions.¹⁴⁸ ICANN may not disqualify NDC based on criteria that the drafters of the Guidebook purposefully excluded.¹⁴⁹

75. Adopting Afilias’ view to impose a forfeiture would also violate the Bylaws requirement that ICANN make decisions fairly and in a nondiscriminatory manner because ICANN has never interpreted the anti-assignment provision in the manner Afilias urges, despite numerous opportunities to do so, as Ms. Willett testified and we explain in Section II, *supra*.¹⁵⁰ Afilias is attempting to bait ICANN into adopting one set of rules for NDC and Verisign and another set of rules for Afilias and the rest of the domain industry.¹⁵¹

76. As discussed *supra* at Section II.C., equally meritless is Afilias’ argument that the purpose of Section 10 was to prevent applicants from making contractual promises to third-parties about how they would exercise their “rights” and “obligations.”¹⁵² Indeed, such agreements were

¹⁴³ NDC’s & Verisign’s Opening Submission (July 29, 2022), ¶¶ 92–110.

¹⁴⁴ *Id.*

¹⁴⁵ Afilias’ Opening Submission (July 29, 2022), ¶¶ 106–07.

¹⁴⁶ [Afilias C-3](#) (Guidebook), at Module 6, § 10.

¹⁴⁷ *Id.*

¹⁴⁸ NDC’s & Verisign’s Opening Submission (July 29, 2022), ¶¶ 89–90.

¹⁴⁹ [Afilias C-1](#) (Bylaws), at § 1.2(a).

¹⁵⁰ [Hrg. Tr., Vol. IV](#) (Aug. 6, 2020), 757:2–6 [Willett] (“more than a handful of applicants who signed a Registry Agreement and then immediately transferred a TLD to another registry operator”; such arrangements were “consistent with the rules” “as long as the applying entity was still managing the application.”); NDC’s & Verisign’s Opening Submission (July 29, 2022), ¶¶ 124–26.

¹⁵¹ [Afilias C-1](#) (Bylaws), § 1.2(a) (Bylaws’ fairness and neutrality requirements).

¹⁵² Dr. Cramton, an economist hired by Afilias, contends that “[a]s an economist, it is my view that NDC effectively transferred performance rights to Verisign (*e.g.*, Redacted - Third Party Designated Confidential Information Cramton Report (July 29, 2022), ¶ 37. That is not how ICANN interpreted Section 10. In any event, however, under Dr. Cramton’s view, Afilias’ or NDC’s contractual promises to their lenders that limited their

Footnote continued on next page

a necessary and regular practice under the Program.¹⁵³ The Bylaws prohibit the imposition of *ad hoc* rules, which would be contrary to the obligation to act fairly, applicable only to NDC.¹⁵⁴

77. The fundamental purpose of the anti-assignment provision, as confirmed by years of ICANN practice, was ensuring “that the applying entity continued to retain responsibility for the application.”¹⁵⁵ The DAA did not interfere with that fundamental purpose. Thus, disqualifying NDC would be an inappropriate remedy for any alleged violation of the anti-assignment provision.

B. The Disclosure Obligations Could Not Support a Forfeiture

78. In responding to Question 18 (Mission/Purpose) of the Application, NDC stated that it intended to compete against “older incumbent players.”¹⁵⁶ According to Afilias, “older incumbent players” referred to Verisign, and, when NDC did not disclose its intent to transfer the Registry Agreement to Verisign and submit a change request in accordance with these intentions, NDC’s Application became false and misleading requiring ICANN to disqualify NDC.¹⁵⁷

79. Afilias’ cramped reading of NDC’s “mission/purpose” statement is at odds with the plain language of NDC’s response to Question 18, which did not single out any particular registry operator.¹⁵⁸ More to the point, Afilias has introduced *no evidence* that this “mission” has changed. Whether operated by NDC or Verisign, .WEB will compete against existing TLDs, including

freedom and independence when bidding would constitute a “transfer” of their rights as applicants. The terms “assignment” and “transfer,” however, are legal terms of art, which, when used in a contract, are “presume[d] . . . to have their ordinary legal meaning,” not the meanings assigned to them by Dr. Cramton. *Grande v. Eisenhower Med. Ctr.*, 44 Cal. App. 5th 1147, 1165 (2020) (Appendix Ex. AC-125). Dr. Cramton is not qualified to offer an opinion on legal terms of art, and he admits he “do[e]s not provide any form of legal opinion.” Cramton Report (July 29, 2022), ¶ 36. Moreover, the ordinary legal meaning of these terms are vastly different than Dr. Cramton’s definition, *i.e.* that a “transfer” occurs whenever a party does not have complete freedom and independence in exercising its contractual rights. *See* Rest. (Second) Contracts § 317(1) (Appendix Ex. AC-126) (defining “assignment” as a “transfer . . . by virtue of which the assignor’s right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance”). Because the Guidebook incorporates legal terms of art rather than Dr. Cramton’s economic theories, his opinions are of *no relevance* in determining whether NDC committed any violation let alone one of sufficient gravity to warrant a forfeiture of its Application.

¹⁵³ [Hrg. Tr., Vol. IV](#) (Aug. 6, 2020), 775:21–24 [Willett] (“there were so many hundreds or thousands of those potential relationships, we didn’t deem it to fall within the scope. It wasn’t part of the evaluation criteria that we applied within the guidebook.”).

¹⁵⁴ [Afilias C-1](#) (Bylaws), § 1.2(a).

¹⁵⁵ [Hrg. Tr., Vol. IV](#) (Aug. 6, 2020), 756:23–757:1 [Willett].

¹⁵⁶ NDC’s .WEB Application (June 13, 2012) (Ex. Altanovo-6), at 6 (Question 18(b)).

¹⁵⁷ Afilias’ Opening Submission (July 29, 2022), ¶¶ 17, 62–64.

¹⁵⁸ NDC’s .WEB Application (June 13, 2012) (Ex. Altanovo-6), at 6 (Question 18(b)).

.COM and .NET.¹⁵⁹

80. Furthermore, Afilias' claim is contrary to the Bylaws' requirement to apply documented policies fairly and neutrally. As discussed *supra* at Section IV.A., Question 18 "is not used as part of the evaluation or scoring of the application."¹⁶⁰ To use the failure to amend the response to Question 18 as a basis to reject an application in its entirety would be a flagrant violation of the documented policies principle.¹⁶¹

81. Finally, an amendment of the Application (which was not required) would not have affected the outcome of ICANN's evaluation because it is beyond dispute that Verisign would have passed evaluation. Indeed, Mr. Neuman admits that the impact of disclosure of the DAA, at most, would have been that ICANN may have invoked "the right to require a re-evaluation of the application, which could involve additional fees or even an application being deferred until the next subsequent round of new gTLDs."¹⁶² ***Even Afilias' own expert does not claim that amending NDC's Application to disclose the DAA would have resulted in rejection of the Application.***¹⁶³ Obviously, Afilias' remedy of disqualification and forfeiture would be grossly disproportionate to any violation and an abuse of discretion.¹⁶⁴

82. Even if a hypothetical amendment required public comments, "application comments have a very limited role in the dispute resolution process."¹⁶⁵ The history of the New gTLD Program confirms that public comments have had no impact on application evaluation under circumstances like those here. For example, after Jeffrey Stoler commented that Demand Media—

¹⁵⁹ Strubbe Declaration (Dec. 17, 2018), ¶ 7 (Appendix Ex. AC-127).

¹⁶⁰ [Afilias C-3](#) (Guidebook), at Attachment to Module 2, Question 18(a).

¹⁶¹ [Afilias C-1](#) (Bylaws), § 1.2(a).

¹⁶² Neuman Report (July 29, 2022), ¶ 42.

¹⁶³ Similarly, Mr. Neuman states that the Application should have been amended to disclose that Verisign's, rather than Neustar's, back-end services would be used with .WEB. Neuman Report (July 29, 2022) ¶ 39. But Mr. Neuman does not contend that Verisign's back-end services would fail evaluation, nor could he plausibly do so given that Verisign's back-end services are already used for 106 TLDs.

¹⁶⁴ [Afilias C-1](#) (Bylaws), § 1.2(a).

¹⁶⁵ Application comments are "relevant to ICANN's task of determining whether applications meet the established criteria" in the Guidebook. [Afilias C-3](#) (Guidebook), at Module 1, § 1.1.2.3. It is beyond dispute that Verisign, which operates fourteen gTLDs (IANA, Root Zone Database, *available at* <https://www.iana.org/domains/root/db>), meets the criteria to operate a gTLD. It would have been objectively unfair and discriminatory to rely on public comments to invent new grounds unrelated to evaluation criteria for rejecting an application.

the entity behind 107 Donuts’ applications—had a disqualifying history of cybersquatting, all 107 applications passed initial evaluation without ICANN even mentioning his comments.¹⁶⁶

83. Nor would a change in control —whether it be an actual change under the written Guidebook or Afilias’ newly manufactured “change of working control”—have been a reason to disqualify NDC if one had occurred.¹⁶⁷ As Ms. Willett confirmed, “[e]ven if NDC had submitted a change request indicating that it had undergone a change of control and/or ownership, NDC would not have been disqualified from the auction set to take place on 27 July 2016.”¹⁶⁸

84. Afilias’ claim for disqualification also violates the Bylaws’ neutrality principles. ICANN previously approved 24 assignments from Donuts to Demand Media, among others, even though those assignments occurred pursuant to an undisclosed pre-auction partnership agreement.¹⁶⁹ Conceding to Afilias’ demands would be singling out NDC for disqualification based on the same conduct by other applicants for which ICANN took no action.¹⁷⁰

C. The Auction Rules or Bidder Agreement Could Not Support a Forfeiture

85. As ICANN has explained, the Auction Rules “are concerned only with the mechanics of the Auction . . . , such as deposits that must be paid, notices that ICANN must release, the process for submitting bids, the currency that must be used,” and the mechanics of payment.¹⁷¹

86. There is no dispute that the DAA did not interfere with the mechanics of the auction as spelled out in the Auction Rules and Bidder Agreement. NDC, for example, was willing to pay and, in fact, did pay, the full amount required by its winning bid.¹⁷² Because the DAA could not

¹⁶⁶ Declaration of Hannah Coleman (Aug. 29, 2022), ¶ 11, submitted concurrently. Moreover, Verisign has run a search against the public comments database for terms related to competition and discovered none asserting that a particular entity’s operation of an open gTLD would impact competition. *Id.* ¶ 9.

¹⁶⁷ ICANN received nearly 800 change requests for questions pertaining to ownership or control of the applicant, and ICANN has not disqualified *a single application* on the basis of such changes. [Willett Stmt.](#) (May 31, 2019), ¶ 18.

¹⁶⁸ *Id.* GAC has not objected to Verisign’s involvement in .WEB, despite it being public knowledge for six years. Furthermore, a GAC objection could not have led to the disqualification of NDC’s Application: “the GAC Early Warning is a notice only. It is not a formal objection, nor does it directly lead to a process that can result in rejection of the application.” [Afilias C-3](#) (Guidebook), at Module 1, § 1.1.2.4.

¹⁶⁹ NDC’s & Verisign’s Opening Submission (July 29, 2022), ¶¶ 116–22. Similarly, WordPress used Primer Nivel’s application “to stay stealth in the bidding process.” *Id.*, ¶ 124. Likewise, Radix acquired .TECH from Dot Tech LLC pursuant to an undisclosed pre-auction agreement. *Id.*, ¶ 125.

¹⁷⁰ [Afilias C-1](#) (Bylaws), § 1.2(a).

¹⁷¹ [ICANN’s Rejoinder Memorial](#) (June 1, 2020), ¶ 85; [Afilias C-4](#) (Auction Rules for New gTLDs), § 32..

¹⁷² [Afilias’ Amended IRP Request](#) (Mar. 21, 2019), ¶ 4.

conflict with the fundamental purpose of the Auction Rules and Bidder Agreement, declaring NDC's bids invalid and its rights forfeited would be an utterly inappropriate remedy.¹⁷³

87. Were ICANN now to adopt Afilias' construction of the Auction Rules and Bidder Agreement, ICANN would be adopting a radically different construction from what NDC and Verisign could have anticipated and from how ICANN itself interpreted those rules until this point. Imposing a harsh remedy of disqualification because NDC and Verisign failed to anticipate a radical change in the interpretation of the rules would be a clear violation of ICANN's obligation to make decisions based on documented policies.¹⁷⁴ Additionally, disqualifying NDC on this basis would also require ICANN to impose obligations on NDC that it has not imposed on any other applicant, as explained above in Section VI.A.¹⁷⁵

88. NDC and Verisign submit that no reasonable person could interpret the applicable rules in the manner that Afilias advocates. But it is beyond dispute that Afilias asks ICANN to interpret them in ways that are contrary to how ICANN has conducted the Program in the past and never before endorsed in its decision-making. Under these circumstances, if ICANN were to agree with any of Afilias' contentions concerning the interpretation of the Guidebook rules, the only appropriate remedy is for ICANN to clarify its documented policies so that the rules can be enforced *prospectively* in a transparent, fair and predictable manner. To discriminate against NDC by ordering a forfeiture of NDC's Application under a rules construction that differs from how ICANN has applied the rules throughout the New gTLD Program would be grossly unfair and violate ICANN's Bylaws.

¹⁷³ Recognizing that NDC fulfilled the actual written rules in the Auction Rules and Bidder Agreement, Afilias' expert Dr. Cramton conjures yet another fabricated auction "rule" out of thin air. According to Dr. Cramton, whether a bid is valid requires ICANN to conduct an economic analysis to ascertain "which party bore the economic risk of the bids that were submitted." Cramton Report (July 29, 2022), ¶ 41. If an economist could conclude Verisign, rather than NDC, bore the economic risk, the bids NDC submitted would be deemed Verisign's bids and invalidated. Dr. Cramton's "economic analysis" is a *post hoc* invention solely for this proceeding that is found nowhere in the applicable rules.

¹⁷⁴ [Afilias C-1](#) (Bylaws), § 1.2(a).

¹⁷⁵ Demand Media, for example, bore the true economic risk of dozens of domains for which Donuts was the applicant, but ICANN approved each of Donuts' applications and 24 assignments from Donuts to Demand Media. NDC's & Verisign's Opening Submission (July 29, 2022), ¶¶ 124–26. Similarly, WordPress admitted that it provided the funds and thus bore the risk of Primer Nivel's bids for .BLOG, but ICANN did not disqualify Primer Nivel once WordPress's involvement became public. *Id.*, ¶ 124.

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