INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTER FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LTD., Claimant, and INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, Respondent, and VERISIGN, INC. and NU DOTCO, LLC. *Amicus Curiae*.	ICDR CASE NO: 01-18-0004-2702

POST-HEARING BRIEF OF AMICUS CURIAE NU DOTCO, LLC AND VERISIGN, INC.

12 October 2020

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I. INTRODUCTION[1]

1. In this proceeding, Afilias seeks to divest NDC and, if an assignment is approved by ICANN, Verisign, of the right to operate the new .WEB gTLD. NDC placed the winning bid of $135 million for .WEB—a sum that will go to the benefit of the internet community—in a fair and competitive public auction. Contrary to Afilias' assertion of claims of misconduct against *Amici*, the hearing that was conducted before this Panel between August 3 and August 11 demonstrated both that the Panel does not have jurisdiction to determine claims against *Amici* and, were the Panel to consider those claims over *Amici*'s objection, the claims are meritless.

2. The Panel accurately observed that this IRP, a*n ICANN accountability mechanism*, "is not the proper forum for the resolution of potential disputes between Afilias and two non-parties." (Procedural Order No. 5 (July 14, 2020), ¶ 22) Yet, Afilias has *flagrantly misused* this IRP since its inception for *precisely that purpose*—to deprive *Amici* of the .WEB TLD without an opportunity to be heard. Specifically, Afilias commenced this IRP based on *claims of misconduct by Amici*, seeking affirmative injunctive relief to *set aside the award of .WEB to NDC*—while at the same time seeking to deny *Amici* any right to be heard in the proceedings. Afilias' transparent strategy throughout has been to induce the Panel to determine claims of *Amici* misconduct outside the Panel's authority while denying *Amici* due process.[2]

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[1] *Amici* Nu DotCo, LLC ("NDC") and VeriSign, Inc. ("Verisign") submit their post hearing argument in this consolidated Post-Hearing Brief. *Amici* address the specific questions of the Panel in Section X at pages 84 through 100, *infra.* Although some of the Panel's questions are addressed in earlier Sections of the brief, the specific pages of the brief containing those discussions are identified in Section X in relation to the specific numbered Panel question.

[2] The Panel directed the Parties to file a joint revised Phase II issues list. *Amici* understand that Afilias and ICANN agreed (without consultation with *Amici*) that they would not work together to prepare a joint issues list, would each submit its own list, and would not exchange issues lists in advance of filing. Neither Afilias nor ICANN consulted with *Amici* in the preparation of their issues lists or shared any version of their respective lists with *Amici*. ICANN specifically refused to share its Phase II issues list with *Amici* upon *Amici*'s request. Accordingly, *Amici* object to the Parties' Phase II issues lists to the extent that they omit or misrepresent the issues before this Panel, as presented in the parties' briefing and at the hearing and consistent with this Panel's jurisdiction and remedial authority (*see* Section III, *supra*).

The Panel also directed the Parties to prepare a Joint Chronology. *Amici* were not consulted by the Parties in their preparation of the Chronology, and *Amici* first received a copy of the Joint Chronology Sunday evening prior to the Monday, October 12 filing deadline for post-hearing briefs, despite the Panel's direction (and Afilias' agreement) to submit the chronology to *Amici* for comment. *See* Hrg. Tr., Vol. VII (Aug. 11, 2020), 1303:18-1304:10. *Amici* object that the Joint Chronology is incomplete, quotes selectively and incompletely from documentary evidence, and omits relevant undisputed facts that are part of the record before this Panel, specifically with respect to *Amici*'s positions in this IRP in defense of Afilias' allegations of *Amici*'s misconduct. For example, the Joint Chronology

3. This closing brief follows almost two years of litigation, thousands of pages of pleadings, letter briefs and evidentiary submissions, 7 days of hearings, and millions of dollars of legal expense to each party and *Amici*. Notwithstanding this record and the extreme divestiture sought by Afilias, ***Afilias, shockingly, failed to call a single percipient or fact witness to support its case during the hearing***. Indeed, Afilias *withdrew* the Witness Statements for *all* of its company witnesses before the hearing and never called another company or fact witness to support its claims. In fact, the evidence at the hearing plainly establishes that Afilias could not call any of its witnesses because their testimony would have *contradicted* Afilias' claims, proving them to be false. On the record actually presented at the hearing, Afilias' dramatic claims of alleged conspiracies between *Amici* and ICANN and Guidebook violations have been *revealed as utterly baseless*, and the claims of Verisign's purported secret monopolistic design to buy and bury .WEB has been *revealed as pure fiction*. Contrary to Afilias' unsupported claims, the agreement between NDC and Verisign is, in fact, commonplace, consistent with the Guidebook as interpreted and applied by ICANN, and consistent with industry practices, including those of Afilias.

4. The claims of misconduct asserted by Afilias against NDC and Verisign in this IRP have been an abuse of process by Afilias since they were filed. Afilias' true motivation underlying this IRP always has been to delay a competitor from bringing .WEB to market and, possibly, to gain some undue advantage through an award in a one-sided proceeding. In the end analysis, when Afilias was required to present evidence to support its extra-jurisdictional claims against *Amici*, it failed—it could not present a single witness or other credible evidence because its claims against *Amici* are false.

5. The following Sections of this Brief address these issues in order as follows.

6. **II. Adverse inferences against Afilias.** Afilias failed to call a single witness

omits any mention of Afilias' offer to pay over $17 million to NDC were NDC to participate in and to lose a private auction, Afilias' failure to disclose third party financing for its auction bid, and the undisputed evidence of hundreds of post-delegation assignments of new gTLDs approved by ICANN.

with knowledge of *any fact* at issue in this IRP. Instead, prior to the hearing, Afilias withdrew all of the Witness Statements Afilias filed in support of its Request for IRP. The withdrawn witnesses were all *Afilias employees*, including an *ICANN Board member* from 2008 through 2018. These witnesses had direct personal knowledge on virtually *every issue* in the IRP—including (i) the Guidebook, ICANN and industry practices, and Afilias' transactions, consistent with the DAA, (ii) every relevant ICANN decision, in which Afilias' Board member played a part (and *Amici* did not), and (iii) the complete absence of collusion between ICANN and NDC or Verisign. Adverse inferences are compelled and should be made with respect to every issue in the IRP based on Afilias *purposefully, voluntarily and knowingly withholding such evidence* from the Panel.

7. **III–V. The Panel's limited jurisdiction and requirements of due process.** ICANN's Bylaws, the CCWG Report, and prior IRP decisions make clear that the Panel's jurisdiction is limited to declaring whether ICANN violated its Bylaws; it does not include findings of fact on third party claims or awarding affirmative injunctive relief contravening third party rights, as Afilias seeks here. The Guidebook's litigation waiver, separately created years after the IRP process was established, did not expand the jurisdiction of the Panel, as is well established by governing law addressed below. The decisions Afilias tries to induce this Panel to make are beyond its jurisdiction and would violate the due process rights of *Amici*.

8. **IV. The DAA complies with the Guidebook.** The evidence at the hearing was clear and unequivocal: Transactions comparable to the one effected by the DAA have regularly occurred as part of the gTLD Program, with ICANN's knowledge and approval and consistent with the Guidebook. Section 10 of the Guidebook, as interpreted and applied by ICANN, prohibits only a sale or transfer of an *entire application*—not agreements between applicants and an independent third party to support an application, provide financing, or request ICANN to approve a future assignment of a registry agreement. ICANN has approved numerous assignments of registry agreements under such circumstances and there is no basis for the Panel

to upend these precedents. Undoubtedly Afilias' withdrawn witnesses *knew* this too and that knowledge is precisely why they were *not* made available to the Panel.

9. **VII. *Amici* did not evade scrutiny by maintaining the DAA confidential during the auction.** First, the DAA did not render NDC's Application misleading or inaccurate, nor did maintaining the confidentiality of that agreement violate any disclosure requirements of the Guidebook. Rather the evidence at the hearing confirmed that other applicants, including Afilias, routinely treat such agreements as confidential. Second, the evidence confirmed the obvious—the contention that NDC and Verisign planned to hide the terms of their agreement from ICANN is frivolous and absurd. The DAA was always intended to be and will be subject to the same scrutiny as the numerous other post delegation assignments of new gTLDs—when NDC requests ICANN to approve an assignment of the registry agreement to Verisign. This type of post-delegation review is no different than what ICANN has consistently undertaken in other instances involving the assignment of new gTLDs to third parties. Finally, the assignment of .WEB will receive the ***same scrutiny as the literally hundreds of other assignments*** of new gTLDs requested of ICANN—whether the assignment agreement was reached during or after the application period. Those assignments generally did *not* include a public disclosure or review of the potential assignment during the evaluation for the new gTLD. When ICANN reviews the request to assign .WEB, this will be the same review received by requests to assign new gTLDs *by and to Afilias*. Again, these are all undisputed facts that obviously were *known* by the Afilias employees who were withdrawn as witnesses.

10. Notwithstanding these undisputed facts, Afilias has concocted an argument, without any evidentiary support whatsoever, that someone might have objected to the DAA had they known about it. But even were the Panel (improperly) to substitute speculation for evidence, Afilias fails to cite a basis for such an objection among those objections expressly allowed under the Guidebook, nor does Afilias otherwise cite a single example of such an objection ever being made—since the inception of the new gTLD Program through this date—that resulted in any action by ICANN.

11. **VIII. There was no evidence of anticompetitive intent or effect.** Afilias' claims that Verisign sought to "buy and bury" the .WEB gTLD, or otherwise manipulate ICANN, fizzled out at the hearing. Indeed, from all appearances, Afilias virtually abandoned its competition claims in their entirety, spending no time on them during the hearing and failing to cross-examine the three competition witnesses called by ICANN, including two of the world's leading economists, both of whom opined that there is no evidence that an assignment of .WEB to Verisign would be anticompetitive.

12. **IX. Afilias never rebutted the evidence of its violation of the Guidebook.** The record evidence is undisputed on the subject of Afilias' conduct during the Blackout Period. One of its withdrawn employee witnesses intentionally violated the Blackout Period in order to try to pay off NDC to enter a private auction for .WEB -- and lose. As a result of Afilias' violations of the Blackout Period and unclean hands, Afilias lacks standing to assert any claim in this IRP.[3] At a minimum, Afilias' conduct should be considered by ICANN in reviewing Afilias' claims.

II. THE PANEL SHOULD DRAW ADVERSE INFERENCES ON AFILIAS' CLAIMS BASED ON ITS FAILURE TO PRESENT ANY PERCIPIENT WITNESS TO SUPPORT ITS CLAIMS

13. Afilias initially presented—but then withdrew—Witness Statements for three witnesses, each of whom was a high-ranking Afilias executive and an expert on the domain name industry. One withdrawn Afilias executive witness also was an ICANN Board member during the period of time relevant to this IRP. The withdrawn witnesses are:

> (1) John L. Kane ("Mr. Kane"), Vice President of Corporate Services for Afilias plc., who submitted a *23-page statement and 20 exhibits spanning 577 pages*;[4]
>
> (2) Ram Mohan ("Mr. Mohan"), Executive Vice President and Chief Technology Officer of Afilias plc. and former member of ICANN's Board of Directors, who submitted a *19-page statement and 20 exhibits spanning 1,110 pages*;[5] and

[3] *See* **Ex. C-1**, Bylaws, § 4.3(o)(i) (authorizing summary dismissal where claims "are brought without standing, lack substance, or are frivolous or vexatious").
[4] Witness Stmt. of John L. Kane (Oct. 15, 2018) (withdrawn) ("Kane Statement"); Exhibits JLK-1 to JLK-20.
[5] Witness Stmt. of Ram Mohan (Nov. 1, 2018) (withdrawn) ("Mohan Statement"); Exhibits RM-1 to RM-20.

(3) Jonathan M. Robinson ("Mr. Robinson"), Executive Chairman of Afilias plc., who submitted a *21-page statement and 23 exhibits spanning 707 pages*.[6]

14. These Afilias executives have substantial direct personal knowledge and special industry expertise material to virtually *every contested issue in this IRP*.[7] Yet Afilias withdrew these witnesses and declined to present any other fact witness in support of its case.[8] Meanwhile, Afilias had the opportunity to cross-examine each witness offered in support of ICANN's and *Amici*'s positions; and Afilias did cross-examine *some* of those witnesses.

15. The reason for Afilias' failure to offer a single fact witness to support its claims is simple: There is no evidence that would support Afilias' allegations against *Amici*. When Afilias' utter failure to present witnesses is considered in light of the consistent testimony at the hearing, *the only rational conclusion is that Afilias' witness testimony would have supported Amici's position and disproven Afilias' claims*. These circumstances require the drawing of adverse inferences by the Panel against Afilias with respect to every issue in the IRP.

16. It is an established principle of law that a fact-finder may draw adverse inferences when a party fails to produce a witness within its control who was available and could have provided relevant or material testimony.[9] In *Graves v. United States*, the U.S. Supreme Court explained that "if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable."[10] Likewise, the courts of England have

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[6] Witness Stmt. of Jonathan M. Robinson (Sept. 27, 2018) (withdrawn) ("Robinson Statement"); Exhibits JMR-1 to JMR-23.

[7] *See, e.g.*, Revised Procedural Timetable for Phase II (attachment to Procedural Order No. 3) (Mar. 27, 2020), ¶ 11 (noting that Afilias' Reply submission should be accompanied with all supporting witness statements).

[8] Afilias offered two purported expert witnesses to testify regarding competition issues—a claim it appears ultimately to have abandoned (¶ 182, *infra*)—but neither of the purported experts has knowledge of any of the facts at issue in this IRP. Nor is either expert even a practicing economist. By contrast, ICANN presented testimony by Mr. Murphy and Mr. Carlton, two of the world's leading economists. Afilias ultimately declined to cross-examine them.

[9] In fact, acknowledging this established principle, *Afilias' counsel* implied at the hearing that adverse inferences should be drawn based on the fact that Mr. Akram Atallah, former president of ICANN's Global Domains Division, is not a witness in this IRP. *See* Hrg. Tr., Vol. I (Aug. 3, 2020), 55:16–21 [Afilias Opening Statement]. Importantly, however, unlike Afilias' withdrawn witnesses, Mr. Atallah is not in control of a party to this IRP, as he now works for Donuts rather than ICANN. *See Akram Atallah*, ICANN WIKI, https://icannwiki.org/Akram_Atallah (last accessed Sept. 17, 2020).

[10] **AA-88**, 150 U.S. 118, 121 (1893) (emphasis added).

stated that "in certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action."[11] In California, where ICANN is incorporated, jurors are instructed that "[i]f a party provided weaker evidence when it could have provided stronger evidence, you may distrust the weaker evidence."[12]

17. Arbitral tribunals—and the present IRP Panel—have broad discretion to draw adverse inferences,[13] and they may do so even when a party has not been asked or ordered to produce specific evidence.[14] For example, the ICDR Arbitration Rules, which apply in the present proceeding,[15] provide that "[t]he arbitral tribunal may . . . draw adverse inferences . . . as are necessary to protect the efficiency and integrity of the arbitration."[16] As Gary Born has explained, adverse inferences may be drawn in response to "the failure of a party to produce . . . a statement from an expected witness."[17] An adverse inference is especially appropriate when the missing witness is "uniquely available" to the other party.[18]

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[11] **AA-106**, *Wisniewski v. Central Manchester Health Authority*, [1998] P.I.Q.R. P324, at 324–25.
[12] **AA-71**, Cal. Civ. Jury Instruction 203 ("Party Having Power to Produce Better Evidence. You may consider the ability of each party to provide evidence. If a party provided weaker evidence when it could have provided stronger evidence, you may distrust the weaker evidence.")
[13] *See, e.g.*, **AA-66**, *Agility Public Warehousing Company K.S.C. v. Supreme Foodservice GMBH*, Partial Final Award, 2008 WL 8683417 (S.D.N.Y. 2008) ("The drawing of [an adverse] inference is not in the nature of a sanction but within the panel's permissible discretion when viewing the evidence as a whole.").
[14] *Amici* had no right in this IRP to insist that Afilias produce its witnesses. While ICANN had such a right, it did not specifically insist that Afilias present evidence from its percipient witnesses. Nonetheless, Afilias has an obligation to carry the burden of proof for each of its claims and allegations, which implies a further inherent obligation to present relevant facts and material witnesses.
[15] *See* **Ex. C-59**, Interim Supplementary Procedures for ICANN Independent Review Process (Oct. 25, 2018), at 1 n.1 ("These Interim Supplementary Procedures are intended to supplement the ICDR Rules. Therefore, when the ICDR Rules appropriately address an item, there is no need to re-state that Rule within the Supplemental Procedures.").
[16] International Centre for Dispute Resolution, *Rules and Mediation Procedures*, at Art. 20(7), *available at* https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules.pdf.
[17] **AA-51**, GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION (2d ed., 2014), at 2394 n.348 (quoting Ehrenhaft, *Discovery in International Arbitration Proceedings*, 9 Private Invs. Abroad 1 (2000)).
[18] **AA-74**, *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 701 (S.D.N.Y. 2014); *see also* **AA-47**, DAVID ST. JOHN SUTTON, JUDITH GILL, & MATTHEW GEARING, RUSSELL ON ARBITRATION (23d ed., 2009) ("Russell on Arbitration"), 5:5-148 ("A tribunal does not have the power to require the attendance of a witness who refuses to attend and give evidence, although if that witness is within the control of one of the parties, the tribunal may in appropriate circumstances be justified in drawing an adverse inference from his failure to do so.").

18. Here, the record compelling the Panel to draw adverse factual inferences against Afilias is extraordinary. Not only do the withdrawn witnesses, Messrs. Kane, Mohan, and Robinson, have direct personal knowledge of facts material to Afilias' claims, Afilias called no other witnesses to support its claims. Afilias clearly had the power to produce these witnesses; it chose not to do so for reasons having nothing to do with their availability or willingness to testify.[19] It is obvious that Afilias failed to call these witnesses because their testimony would have contradicted the unsupportable fiction Afilias presented at the hearing.

19. During the hearing, Afilias tried to mask its true reasons for withdrawing all of its witnesses by claiming that it withdrew them "because their testimony is irrelevant to the claims at issue in this IRP."[20] Specifically, Afilias asserted that it withdrew the witnesses "after [it] received the Domain Acquisition Agreement," because "[it] didn't see that their testimony had really any relevance after [Afilias] had a chance to study the Domain Acquisition Agreement."[21] These statements are both nonsensical and untrue. The withdrawn witness statements were not limited to the DAA but rather, as shown in the table below, the testimony—and cross-examination—of each of these witnesses would have been relevant to virtually every disputed question in this IRP. Instead, it is obvious that Afilias withdrew its witnesses because they *did* have probative evidence but that evidence would have contradicted (rather than supported) Afilias' baseless attorney arguments, including with respect to ICANN and industry and Afilias practices that disprove Afilias' claims.

[19] *See* Afilias' Opening Presentation (Aug. 3, 2020), at 10; Hrg. Tr., Vol. I (Aug. 3, 2020), 28:14–28 [Afilias Opening Statement].
[20] Afilias' Opening Presentation (Aug. 3, 2020), at 10.
[21] Hrg. Tr., Vol. I (Aug. 3, 2020), 28:14–28 [Afilias Opening Statement]; *see also* Afilias' Amended IRP Request (Mar. 21, 2019), at n.14 ("In light of ICANN's disclosure of the August 2015 Domain Acquisition Agreement between VeriSign and NDC, Afilias withdraws the witness statements of Ram Mohan, Jonathan Robinson, and John Kane filed with the original Request for IRP.").

Table 1: Inferences to Draw from the Absence of Afilias' Witnesses

Issue	Relevance and knowledge of Afilias' witnesses	Inference that the Panel should draw from the witnesses' absence
New gTLD industry practice and Afilias' past practices in the New gTLD program.	*Amici* and ICANN have shown that transactions like the DAA are commonplace, that they do not violate the Guidebook, and that Afilias itself has participated in transactions effectively identical to the DAA.[22] In responding to these facts, Afilias could have—but failed to[23]—rely upon evidence from witnesses who were involved in the cited transactions, and who have relevant knowledge of industry practice. Each of the withdrawn witnesses is a high ranking Afilias executive who has personal knowledge relating to one or more relevant transactions. In fact, Mr. Kane "participated in over fifty applications for new gTLDs pursuant to the . . . New gTLD Program."[24] Mr. Kane was Afilias' primary contact for its .MEET application.[25] As the Panel will recall, the .MEET transaction mirrors the arrangement between NDC and Verisign.[26] For his part, Mr. Mohan's Witness Statement addresses Afilias' use of third-party financing to bid for .WEB,[27] notwithstanding Afilias' complaints about NDC's financing arrangement with Verisign.[28]	Transactions like the DAA are common, and often are not disclosed until a request for assignment of a registry agreement. *Amici* have accurately described Afilias' transactions that are comparable to the DAA.
Interpretation of Section 10 of the Guidebook (*i.e.*, limitation on assignments)	*Amici* have shown that the Guidebook was not intended to prevent the types of post-delegation assignments of registry agreements contemplated by the DAA.[29] As major players in the New gTLD program, Afilias' witnesses were intimately familiar with ICANN's governing documents, the Guidebook, and ICANN and industry practices.[30] For example, Mr. Kane purported to describe the development and purpose of several of the Guidebook's provisions,[31] and Mr. Mohan offered testimony regarding the Guidebook and New gTLD application requirements.[32] Mr. Robinson, who had previously been involved with ICANN's policy-making processes, speculated as to what ICANN should have done after it learned about the DAA.[33] In short, each of the witnesses could have been asked about industry understanding of the anti-assignment provision of the Guidebook, but Afilias prevented that from happening by withdrawing the witnesses.	Neither the DAA nor NDC's non-disclosure of it violates the Guidebook. Section 10 of the Guidebook prohibits only the assignment of the *entirety* of a New gTLD application.[34]
Adoption of Rule 7 of the Interim	Mr. Mohan served on ICANN's Board of Directors when Rule 7 was adopted and, in fact, moved for its	There was no misfeasance in the

[22] *See* Nu DotCo, LLC's Pre-Hearing Brief (Phase II) (June 26, 2020) ("NDC's Pre-Hearing Brief"), ¶¶ 32–39; VeriSign, Inc's Pre-Hearing Brief (Phase II) (June 26, 2020) ("Verisign's Pre-Hearing Brief"), ¶¶ 37–45; ICANN's Response to Amended IRP Request (May 31, 2019), ¶¶ 27–29.
[23] *See* Afilias' Response to the *Amicus Curiae* Briefs (July 24, 2020), ¶¶ 134–36.
[24] Kane Stmt., ¶ 5.
[25] **Ex. RE-2**, .MEET New gTLD Application (excerpts) (June 13, 2012).
[26] *See* NDC's Pre-Hearing Brief, ¶ 110 and citations therein; **Ex. R-3,** Application for Assignment – Registry Agreement (Material Subcontracting Arrangement for .MEET).
[27] Mohan Stmt., ¶ 25.
[28] *See, e.g.*, Afilias' Response to the *Amicus Curiae* Briefs, ¶¶ 69, 72–73, 78, 136.
[29] *See, e.g.*, Verisign's Pre-Hearing Brief, ¶¶ 49–51.
[30] *See, e.g.*, Kane Stmt., ¶¶ 6–14; Mohan Stmt., ¶¶ 6–10, 15–20; Robinson Stmt., ¶¶ 39–41.
[31] *See* Kane Stmt., ¶¶ 6–14.
[32] *See* Mohan Stmt., ¶¶ 15–19.
[33] Robinson Stmt., ¶¶ 41–42.
[34] *Accord* Hrg. Tr., Vol. III (Aug. 5, 2020), 568:4–568:8 ([Willet:] "[W]e viewed this Paragraph 10 about not assigning rights and obligations of the application to be of the total application. You couldn't sell your application in total to someone else"); Livesay Stmt., ¶¶ 19–23; Rasco Stmt., ¶¶ 46–53.

Issue	Relevance and knowledge of Afilias' witnesses	Inference that the Panel should draw from the witnesses' absence
Supplementary Procedures	adoption.[35] At the time he did so, he would have been aware that Afilias planned to initiate the IRP, which is evident by the fact that his witness statement is dated 1 November 2018, only 7 days after the board meeting adopting the Interim Supplementary Procedures. Mr. Mohan could, for example, have testified regarding Afilias' contention that the ICANN Board was misled by the IRP-IOT regarding the nature of the changes made to the Interim Procedures prior to the Board's vote approving them. Mr. Mohan also could have testified regarding why he, with knowledge of Afilias' imminent IRP, seconded the motion to approve Procedures that Afilias later would claim violated ICANN's Bylaws.	adoption of Rule 7.[36]
Alleged collusion between ICANN and Verisign and/or NDC	Afilias has repeatedly alleged that ICANN and its Board of Directors somehow colluded with NDC and/or Verisign in connection with pre- and post-auction events.[37] Mr. Mohan served on ICANN's Board of Directors during the relevant time.[38] Yet his withdrawn witness statement did not include any allegation of any collusion between ICANN and Verisign or NDC. Had he been presented as a witness, he could have been asked what the ICANN Board knew or decided at relevant times, and whether there was any purported collusion as alleged, without basis, by Afilias.	There was no collusion between, on the one hand, ICANN or its Board of Directors, and, on the other hand, Verisign / NDC.
ICANN's November 2016 Board meeting	To recall, ICANN has stated that, during an ICANN Board workshop meeting in November 2016, the Board chose not to make any material decisions regarding .WEB.[39] Afilias questions "the veracity of ICANN's representations to the Panel about what took place or came out of the Board workshop meetings in November 2016."[40] Yet, as noted, Mr. Mohan served on ICANN's Board, including in November 2016. Accordingly, Mr. Mohan could have testified whether he was aware, or unaware, of the choice that ICANN's Board made in November 2016 regarding .WEB.	During the November 2016 workshop meeting of ICANN's Board, the Board made a choice not make any material decisions regarding .WEB.
Afilias' violation of the Blackout Period	As *Amici* have shown, Afilias violated the Guidebook's "Blackout Period." Afilias did so by trying to collude with other contention set members during the prohibited period before the auction.[41] Afilias' violation of Blackout Period is evidenced by a text message from Mr. Kane to Mr. Rasco on 22 July 2016.[42] Rather than ask Mr. Kane to testify about what he meant by his text message, Afilias chose not to call him, and instead offered the baseless views of counsel about Kane's alleged intent.[43]	Afilias violated the Blackout Period.
The scope of the Panel's jurisdiction and remedial authority	As a former member of ICANN's Board familiar with ICANN's Bylaws,[44] Mr. Mohan could have testified regarding the interpretation of the IRP provisions of the Bylaws, the Panel's jurisdiction and remedial authority, and the decision by the ICANN Board in November 2016 to defer a decision on Afilias' claims.	The scope of the Panel's jurisdiction and remedial authority are limited, as explained by ICANN and *Amici*.

[35] Mohan Stmt., ¶ 2; **NDC Annex A**, ICANN Public Board Meeting AGM (Oct. 25, 2018), at 26.
[36] *Accord* ICANN's Response to Amended Request for IRP, ¶¶ 77–82.
[37] *See, e.g.*, Afilias' Reply Memorial (May 4, 2020), Section III.
[38] Mohan Stmt., ¶ 2.
[39] *See, e.g.*, ICANN's Rejoinder Memorial, ¶¶ 89–93.
[40] *See, e.g.*, Afilias' Response to the *Amicus Curiae* Briefs, ¶¶ 51, 49–66.
[41] *See* NDC's Pre-Hearing Brief, ¶¶ 114–19 and citations therein.
[42] **Rasco Ex. R**, Text message from J. Kane (Afilias) to J. Rasco (NDC) (July 22, 2016); *see also* NDC's Pre-Hearing Brief, ¶ 117; Rasco Stmt., ¶ 96.
[43] *See* Afilias' Response to the *Amicus Curiae* Briefs, ¶¶ 180–84.
[44] *See* Mohan Stmt., ¶¶ 6–10.

20. Because Afilias withdrew all of the witness statements of its employees—and because the witnesses were not made available for cross-examination and questions from the Panel—the Panel should draw the inferences identified above regarding what the witnesses' testimony would have revealed had Afilias called any of the multiple witnesses in its employ.

21. In short, a party who initiates an IRP and pursues it in a manner that costs parties and non-parties alike millions of dollars in fees and costs has an obligation to do more, including to produce witnesses in its employ who can offer competent evidence, rather than withdrawing their witnesses' statements to protect them from cross-examination that would reveal the truth.

III. THE PANEL LACKS JURISDICTION TO ORDER AFFIRMATIVE RELIEF

22. As *Amici* and ICANN have explained in their pre-hearing briefs, (i) the Panel's remedial jurisdiction is narrowly circumscribed under the Bylaws, and (ii) the Panel lacks authority to order affirmative relief.[45] At the hearing, however, Afilias doubled-down on its unsupported argument to the contrary, asserting that "[the Panel's] authority is, in fact, quite broad . . . [and the Panel] ha[s] the specific authority to direct ICANN what to do."[46] Afilias is wrong. As previously explained, and as set forth further below, the Panel lacks authority to order the affirmative relief that Afilias requests pursuant to the plain terms of ICANN's Bylaws.

23. It is a fundamental principle of alternative dispute resolution that "[t]he remedial powers of [a tribunal] are defined in the first instance by the parties' arbitration agreement."[47] By initiating the IRP, Afilias accepted ICANN's offer to resolve certain types of "Disputes" in accordance with the procedures set forth in the Bylaws. The Bylaws specifically provide, among other things, that "[an] IRP Panel shall be charged with hearing and resolving the Dispute, . . . *in compliance with the* Articles of Incorporation and *Bylaws*."[48] The Bylaws thus constitute the

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[45] *See* NDC's Pre-Hearing Brief, ¶¶ 66–70; ICANN's Rejoinder Memorial in Response to Amended Request by Afilias for IRP (June 1, 2020) ("ICANN's Rejoinder"), ¶¶ 114–24.
[46] Hrg. Tr., Vol. I (Aug. 3, 2020), 82:4–14 [Afilias Opening Statement].
[47] **AA-51,** BORN, INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 17, at 3068. *See also* **AA-50**, English Arbitration Act 1996, § 48(1) ("The parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies."); **AA-47**, RUSSELL ON ARBITRATION, *supra* note 18, ¶ 6-097.
[48] **Ex. C-1**, Bylaws, *supra* note 3, § 4.3(g) (emphasis added). *See also id.* § 4.3(v); **Ex. C-59**, Interim Supplementary Procedures, *supra* note 15, Rule 11(b).

applicable "arbitration agreement,"[49] and they define the Panel's remedial powers.

24. The pre-hearing briefs of *Amici* and ICANN set forth the reasons why[50] the express terms of Section 4.3(o) of the Bylaws circumscribe the remedial authority of IRP panels.[51] In short, Section 4.3(o) identifies a *closed list* of panel authority, stating that "[s]ubject to the requirements of this Section 4.3, *each IRP Panel shall have the authority to*: [take seven enumerated actions]."[52] The only *remedial* actions that a panel is authorized to take are to (i) "[d]eclare whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws,"[53] and (ii) "[r]ecommend that ICANN stay any action or decision, or take necessary interim action, until such time as the opinion of the IRP Panel is considered."[54] Section 4.3(o) does *not* authorize panels to take any other remedial action, and it certainly does not grant panels "the specific authority to direct ICANN what to do," as Afilias contends.[55] Simply put, the Panel can grant the relief specified in Section 4.3(o) and none other.

25. Afilias has mostly ignored Section 4.3(o) of the Bylaws during this IRP. In fact, Afilias neglected even to acknowledge its existence in its seventy-three page Reply Memorial.[56] The Panel invited Afilias to comment, however, on Section 4.3(o) as it relates to the remedies it is seeking in this IRP.[57] While the Panel's invitation was not directed at *Amici*, *Amici* take this opportunity to address Afilias' repeated and significant misstatements regarding the scope of this Panel's jurisdiction and remedial authority.

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[49] NDC previously indicated that the applicable "arbitration agreement" also comprised the Guidebook's Terms and Conditions, in addition to the Bylaws. *See* NDC's Pre-Hearing Brief, ¶ 66. However, the Terms and Conditions refer only to challenges to "any *final* decision made by ICANN with respect to [a gTLD] application." **Ex. C-3**, Guidebook, at Module 6, § 6. It now seems that ICANN has not reached a *final* decision on Afilias' application. But even if it had, and the Panel were to consider the Terms and Conditions part of the applicable "arbitration agreement," the analysis would be the same. That is because the Bylaws define the Panel's jurisdiction and remedial powers. By contrast, as discussed *infra* in Section III.C, the Guidebook makes no reference to the scope of the IRP or the Panel's jurisdiction or remedial powers and simply refer to and incorporate by reference the "accountability mechanism[s] set forth in ICANN's Bylaws." **Ex. C-3**, Guidebook, at Module 6, § 6.
[50] NDC's Pre-Hearing Brief, ¶¶ 66–70; ICANN's Rejoinder, ¶¶ 114–24.
[51] **Ex. C-1**, Bylaws, *supra* note 3, § 4.3(o)(iii).
[52] *Id.* § 4.3(o) (emphasis added).
[53] *Id.* § 4.3(o)(iii).
[54] *Id.* § 4.3(o)(iv).
[55] Hrg. Tr., Vol I. (Aug. 3, 2020), 82:4–14 [Afilias Opening Statement].
[56] *See generally* Afilias' Reply Memorial (May 4, 2020).
[57] List of Questions to be Addressed in Post-Hearing Briefs (Aug. 24, 2020), Question 8.

26. *First*, in its response to *Amici*'s pre-hearing submissions, Afilias argued that the phrase "[s]ubject to the requirements of this Section 4.3" *broadens* the scope of the Panel's authority to include remedial authority not expressly identified in Section 4.3(o).[58] Afilias has also asserted that if the drafters of the Bylaws had intended to restrict an IRP panel's remedial authority to only the authority listed in Section 4.3(o), they would have inserted the word "only" into that section.[59] Afilias is incorrect on both points.

27. As an initial matter, the phrase, "subject to" is a limiting phrase, meaning, "conditioned upon, limited by, or subordinate to."[60] In other words, while other provisions in Section 4.3 might *further narrow* the Panel's authority, they would not broaden such authority.

28. Further, Afilias' argument ignores the widely recognized principle of *expressio unius est exclusio alterius*. Pursuant to that principle (i) the absence in a list of a word like "includes" indicates that the list is exhaustive; (ii) the absence of a catchall category at the end of the list indicates that the list is exhaustive; and (iii) when drafters of a statute, contract or bylaws have enumerated a list of remedies, courts should not create remedies not included in the list.[61] The *expressio unius* principle is settled law in California, including with respect to the interpretation of legislation, contracts, and bylaws.[62] Applying this principle to the Bylaws, it is

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[58] Afilias' Response to the *Amicus Curiae* Briefs, ¶ 223.

[59] *Id.*

[60] *See, e.g.*, **AA-82**, *Erickson v. Aetna Health Plans of California, Inc.*, 71 Cal. App. 4th 646, 657 (Cal. Ct. App. 1999) ("The phrase 'subject to' means 'conditioned upon, limited by, or subordinate to.'").

[61] *See, e.g.*, **AA-93**, *In re Ben Franklin Retail Store, Inc.*, 227 B.R. 268, 270 (Bankr. N.D. Ill. 1998) ("If Congress had intended that the list of trustee duties contained in § 704 be non-exhaustive, it could have simply used the word 'includes.'"); **AA-75**, *Christian Coalition of Florida, Inc. v. U.S.*, 662 F.3d 1182, 1193 (11th Cir. 2011) ("Where Congress has provided a comprehensive statutory scheme of remedies, as it did here, the interpretive canon of *expressio unius est exclusio alterius* applies.").

[62] **AA-46**, *Crawford-Hall v. United States*, 394 F. Supp. 3d 1122, 1143 (C.D. Cal. 2019) ("The canon of statutory construction *expressio unius est exclusio alterius* . . . 'creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions;'" holding that a government administrator's decision-making authority in certain adjudicatory proceedings was limited to two expressly defined types of decisions) (internal citations omitted)); **AA-61**, *White v. W. Title Ins. Co.*, 40 Cal. 3d 870, 882 n.4 (Cal. 1985) ("This canon [*expressio unius est exclusio alterius*], based on common patterns of usage and drafting, is equally applicable to the construction of contracts."); **AA-67**, *American Center for Education, Inc. v. Cavnar*, 26 Cal. App. 3d 26, 32–33 (Cal. Ct. App. 1972) ("It is generally accepted that corporate bylaws are to be construed according to the general rules governing the construction of statute and contracts. . . . [Our] interpretation of the bylaws is further aided by the application of the familiar maxim 'expressio unius est eclusio alterius. . . . Thus the provision concerning the power to delegate the election of board members to existing vacancies, implies the denial of the power to create such vacancies by the removal of board members.'").

plain that Section 4.3(o) limits a panel's authority to the seven enumerated actions in that section, and that it limits the *remedial* authority of panels to *declaring* whether ICANN violated its Bylaws or Articles of Incorporation, and *recommending* certain *interim* actions by ICANN.

29. *Second*, *Amici* anticipate that Afilias may argue in its post-hearing brief that Section 4.3(o)(v) of the Bylaws constitutes a "catchall" that authorizes panels to take broad action. That section provides that IRP panels "shall have the authority to . . . [c]onsolidate Disputes if the facts and circumstances are sufficiently similar, *and take such other actions as are necessary for the efficient resolution of Disputes*."[63] However, it is clear from the language that "*such* other actions" refers to a class of case management powers akin to "[c]onsolidat[ing] Disputes." This interpretation is consistent with the widely applied *ejusdem generis* canon of statutory and contractual construction (*i.e.*, a general term following a specific term is interpreted in light of the specific term).[64] Therefore, read in context, Section 4.3(o)(v) plainly does not authorize IRP panels to order a new type of substantive relief.

30. *Third*, to justify its expansive interpretation of the Panel's remedial powers, Afilias has also relied upon a convoluted interpretation of the "purposes" of an IRP set forth in the Bylaws.[65] For example, Afilias has emphasized that one purpose of IRPs is to "resolve Disputes."[66] But because a "Dispute" is defined as a claim that ICANN violated its Articles of Incorporation or Bylaws,[67] a declaration that ICANN did or did not violate its Articles of Incorporation or Bylaws would, in fact, "resolve [a] Dispute[]." To "resolve" such a "Dispute" would not also require an IRP panel to take the further step, beyond the Bylaws definition of a "Dispute," of ordering a specific remedy through affirmative relief.

31. *Fourth*, to the extent that the authority of IRP panels should be interpreted by

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[63] **Ex. C-1**, Bylaws, *supra* note 3, § 4.3(o)(v) (emphasis added).
[64] *See, e.g.*, **AA-104**, *U.S. v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1200 (D.D.C. 2005) ("Applying the canons of *noscitur a sociis* and *ejusdem generis*, we will expand on the remedies explicitly included in the statute only with remedies similar in nature to those enumerated.").
[65] *See* Afilias' Reply Memorial, ¶¶ 151–55; Afilias' Response to the *Amicus Curiae* Briefs, ¶¶ 223–36.
[66] Afilias' Reply Memorial, ¶ 151; Afilias' Response to the *Amicus Curiae* Briefs, ¶ 226; **Ex. C-1**, Bylaws, *supra* note 3, § 4.3(a).
[67] **Ex. C-1**, Bylaws, *supra* note 3, § 4.3(b)(iii)(A).

reference to the "purposes" of an IRP at all, such authority should be considered within the context of the overall regulatory structure of the Bylaws.[68] Here, by design, IRPs have the narrow goal of ensuring ICANN's compliance with its Mission and Articles of Incorporation and Bylaws.[69] The purpose of IRPs is *not* to determine the liability or claims of third parties or invalidate their rights, all of which Afilias seeks to do here, or even to determine whether ICANN itself made a correct decision. Use of an IRP for such purposes, as Afilias advocates here, would violate the fundamental purpose of the IRP process—which is to determine whether ICANN violated its Articles or Bylaws or, in the language of the Bylaws, decide the "Dispute."

32. *Finally*, as ICANN explained in its Rejoinder, even if the description of an IRP's "purpose" could be construed to expand a panel's authority (which it cannot), such general provisions would yield to the specific provisions of Section 4.3(o), which limit such authority.[70]

33. In summary, the Bylaws are clear and controlling, and the Panel does not have the broad remedial authority that Afilias has asked the Panel to exercise. Further, as shown in the sections below, (i) this interpretation of the Bylaws is consistent with numerous prior IRP decisions, which should inform the present Panel's views; (ii) the interpretation is consistent with the recommendations of the Cross-Community Working Group for Accountability ("CCWG") (whose recommendations are, in any event, secondary to the plain text of the Bylaws); (iii) the "litigation waiver" in the Guidebook does not expand the scope of the Panel's remedial jurisdiction, as Afilias argued for the first time at the hearing; and (iv) a decision by the Panel granting the affirmative relief that Afilias seeks would trample upon *Amici*'s due process rights and would be subject to a set-aside challenge in the courts of England (the seat of this IRP).

A. Prior IRP Decisions Confirm That The Panel's Authority Is Limited

34. As NDC showed in its pre-hearing brief, numerous prior IRP panels have

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[68] *See, e.g.*, **AA-85**, *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 121 (2000) ("In determining whether Congress has specifically addressed the question at issue, the court should not confine itself to examining a particular statutory provision in isolation. Rather, it must place the provision in context, interpreting the statute to create a symmetrical and coherent regulatory scheme.").

[69] *See, e.g.*, **Ex. C-1**, Bylaws, *supra* note 3, § 4.3(a)(i) ("The IRP is intended to . . . : (i) Ensure that ICANN does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws.").

[70] *See* ICANN's Rejoinder, ¶ 122 (legal citations omitted).

confirmed that the remedial authority of IRP panels is strictly limited.[71] The Panel has now asked "[w]hat is the precedential value of [such] decisions on questions such as . . . the remedial powers of IRP Panels . . . in light of changes that may have been made to ICANN's Bylaws after the date of the decisions?"[72] Although it is uncertain whether prior IRP decisions constitute *per se* binding precedent vis-à-vis subsequent panels,[73] it is clear that prior IRP decisions should—at

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[71] *See* NDC's Pre-Hearing Brief, ¶¶ 71–74. *See also* **CA-11**, *Booking.com B.V. v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration (Matz, Bernstein, Drymer) (2015), ¶ 153 (holding that the panel "cannot grant [the claimant] the relief that it seeks [because] [a] panel such as ours can only declare whether, on the facts as we find them, the challenged actions of ICANN are or are not inconsistent with ICANN's Articles of Incorporation and Bylaws."); **AA-43**, *Asia Green IT System v. ICANN*, ICDR Case No. 01-15-0005-9838, Final Declaration (Hamilton, Cahill, Reichert) ("*AGIT*, Final Declaration") (2017), ¶ 149 ("[N]othing as to the substance of [ICANN's ultimate] decision [on the claimant's applications] should be inferred by the parties from the Panel's opinion in this regard. The decision, whether yes or no [to the claimant's applications], is for [ICANN]."); **AA-49**, *Dot Registry, LLC v. ICANN*, ICDR Case No. 01-14-0001-5004, Final Declaration (Brower (dissenting), Kantor, Donahey) ("*Dot Registry*, Declaration") (2016), ¶ 70 ("An IRP Panel is tasked with declaring whether the ICANN Board has, by its action or inaction, acted inconsistently with the Articles and Bylaws. It is not asked to declare whether the applicant who sought reconsideration should have prevailed."); **AA-55**, *Merck KGaA v. ICANN*, ICDR Case No. 01-14-0000-9604, Final Declaration (Reichert, Matz, Dinwoodie) (2015), ¶ 21 ("[I]t is clear that the [p]anel may not substitute its own view of the merits of the underlying dispute."); **AA-56**, *Namecheap, Inc. v. ICANN*, ICDR Case No. 0120-0000-6787, Decision on Request for Emergency Relief (Benton (Emergency Panelist) (2020), ¶ 114 ("To the extent there are competing Core Values involved, it is for the Board to exercise its judgment as to which competing Core Values are most relevant and to find an appropriate balance."); **AA-42**, *Amazon EU S.A.R.L v. ICANN*, ICDR Case No. 01-16-0000-7056, Final Declaration (Bonner, O'Brien, Matz (concurring and partially dissenting) (2017) ("*Amazon*, Final Declaration"), ¶¶ 83, 124–25 (declining to grant the claimant's request for "affirmative relief in the form of a direction to ICANN to grant [claimant's] applications," and instead recommending that the Board make an objective and independent judgment regarding whether there were reasons for denying the claimant's applications); **CA-16**, *Corn Lake, LLC v. ICANN*, ICDR Case No. 01-15-0002-9938, Final Declaration (Miles, Morril, Ostrove) (2016) ("*Corn Lake*, Final Declaration"), ¶¶ 8.15, 10.1, 11.1 (quoting with approval the holding from *Booking.com* that "it is not for the Panel to opine on whether the Board could have acted differently than it did; rather, our role is to assess whether the Board's action was consistent with applicable rules found in the Articles, Bylaws and Guidebook;" the panel also declined to grant the claimant's request to direct ICANN to take certain steps in connection with the claimant's gTLD application); **AA-48**, *Donuts, Inc. v. ICANN*, ICDR Case No. 01-14-0001-6263, Final Declaration (Coe, Boesch, Hamilton) (2016) ("*Donuts*, Final Declaration"), ¶ 133 ("[A panel is not permitted to] base its determinations on what it, itself, might have done, had it been the Board."); **CA-2**, *Vistaprint Ltd. v. ICANN*, ICDR Case No. 01-14-0000-6505, Final Declaration (Glas, Elsing, Gibson) (2015) ("*Vistaprint*, Final Declaration"), ¶¶ 149, 196 (discussed below).

[72] List of Questions to be Addressed in Post-Hearing Briefs (Aug. 24 2020), Question 1.

[73] The Bylaws do provide clearly that IRP decisions are intended to create precedent *for ICANN*. *See* **Ex. C-1**, Bylaws, *supra* note 3, § 4.3(a)(vi). But, as can be seen in the block-quoted language above, the Bylaws are less direct about whether prior IRP decisions constitute *per se* binding precedent vis-à-vis *subsequent IRP panels*. At least one prior IRP panel noted, based on language in a prior version of the Bylaws, that "prior IRP decisions are indeed precedential, *although not binding on this Panel* . . . ." **AA-42**, *Amazon*, Final Declaration, ¶ 89 (emphasis added). On the other hand, the CCWG Report states that "IRP panelists shall consider and give precedential effect to prior decisions of other Independent Review Processes that address similar issues." **Ex. C-122**, CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, Annex 07 ("CCWG Report, Annex 7") (Feb. 23, 2016), ¶ 16. As discussed in Section III.B below, the text of the Bylaws control, rather than the CCWG Report. So it remains open to interpretation whether prior decisions are binding precedent on subsequent panels or merely informative non-binding 'precedent.' In any event, the distinction between *per se* binding precedent and non-binding precedential value is largely academic in the context of prior panel's interpretation of

a minimum—guide later panel's decision making with respect to certain issues. Specifically, Section 4.3(g) of the Bylaws provides that

> [an] IRP Panel shall be charged with hearing and resolving the Dispute, . . . in compliance with the Articles of Incorporation and Bylaws, *as understood in light of prior IRP Panel decisions decided under the same (or an equivalent prior) version of the provision of the Articles of Incorporation and Bylaws at issue*, and norms of applicable law.[74]

Further, Section 4.3(i)(ii) of the Bylaws likewise provides that "[a]ll Disputes shall be decided in compliance with the Articles of Incorporation and Bylaws, *as understood in the context of the norms of applicable law and prior relevant IRP decisions*."[75] Thus, a prior panel's interpretation of the Bylaws undoubtedly should be persuasive, if not binding precedent, for the present Panel's interpretation, as long as such prior panels interpreted the same or an equivalent prior version of the provision of the Bylaws at issue.

35. That is the case here. Since the IRP system began in 2002, as shown in the table below, every version of the Bylaws has *limited* the authority of IRP panels to a closed and defined list of actions based on language substantially equivalent to the current Section 4.3(o)(iii), which limits the Panel's authority to "declar[ing] whether" ICANN violated its Articles of Incorporation or Bylaws:

Relevant Language from Bylaws on the Scope of IRP Panel Authority[76]		
15 December 2002 to 10 April 2013	11 April 2013 to 30 September 2016	1 October 2016 to Present
"*The IRP shall have the authority to:*	"*The IRP Panel shall have the authority to:*	"Subject to the requirements of this Section 4.3, *each IRP Panel shall have the authority to:*

their remedial powers. As previously shown, and as discussed above, not a single prior IRP panel has issued any type of binding affirmative relief, as requested by Afilias.

[74] **Ex. C-1**, Bylaws, *supra* note 3, § 4.3(g) (emphasis added). *See also id.* § 4.3(v) (instructing IRP panels to issue decisions that "reflect a well-reasoned application of how the Dispute was resolved in compliance with the Articles of Incorporation and Bylaws, *as understood in light of prior IRP decisions decided under the same (or an equivalent prior) version* of the provision of the Articles of Incorporation and Bylaws at issue, and norms of applicable law" (emphasis added)).

[75] *Id.* § 4.3(i)(ii) (emphasis added). *See also* **Ex. C-59**, Interim Supplementary Procedures, *supra* note 15, Rule 11(b) (same).

[76] Prior versions of the Bylaws are available at https://www.icann.org/resources/pages/governance/bylaws-archive-en.

[76] Panels also have always been authorized to "recommend" that ICANN take certain *interim* action, but such "recommendations" by their nature are not binding, as discussed in more detail in Section IV.C below.

a. request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties; *b. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws;* and c. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP." (Emphasis added.)	a. summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious; b. request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties; *c. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws;* and [*sic*] d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP; e. consolidate requests for independent review if the facts and circumstances are sufficiently similar; and f. determine the timing for each proceeding." (Emphasis added.)	(i) Summarily dismiss Disputes that are brought without standing, lack substance, or are frivolous or vexatious; (ii) Request additional written submissions from the Claimant or from other parties; *(iii) Declare whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws*, declare whether ICANN failed to enforce ICANN's contractual rights with respect to the IANA Naming Function Contract or resolve PTI service complaints by direct customers of the IANA naming functions, as applicable; (iv) Recommend that ICANN stay any action or decision, or take necessary interim action, until such time as the opinion of the IRP Panel is considered; (v) Consolidate Disputes if the facts and circumstances are sufficiently similar, and take such other actions as are necessary for the efficient resolution of Disputes; (vi) Determine the timing for each IRP proceeding; and (vii) Determine the shifting of IRP costs and expenses consistent with Section 4.3(r)." (Emphasis added.)

36. The binding remedial authority of IRP panels always has been expressly limited to a declaration whether an action or inaction violated the Articles of Incorporation or Bylaws. The Panel's interpretation of its remedial power should follow the many prior IRP decisions that have considered this issue and concluded that IRP panels have limited remedial authority.

37. By way of example, in the *Vistaprint* IRP, the panel thoroughly assessed the scope of its remedial power, and considered in detail the text of the applicable Bylaws and prior IRP decisions. The panel concluded that it did "*not have authority to render affirmative relief* requiring ICANN's Board to take, or refrain from taking, any action or decision" and it therefore did "*not* have authority to order the relief requested by [the claimant]."[77] Instead, the *Vistaprint*

[77] **CA-2**, *Vistaprint*, Final Declaration, *supra* note 71, ¶¶ 149, 196 (emphasis added).

panel found that its authority was limited to the alternative actions authorized by the precursor to present-day Section 4.3(o) of the Bylaws,[78] including the authority to issue a binding "declaration of whether or not the Board violated the Articles [or] Bylaws."[79] As the panel explained, in accordance with the Bylaws, "[t]o the extent that the IRP Panel renders any form of relief whereby the Panel would direct the Board to take, or refrain from taking, any action or decision, that relief must be 'recommend[ed]' to the Board, which then 'reviews and acts upon the opinion of the IRP,' as specified in § [4.3(o)(iv)] of the Bylaws."[80]

38. Consistent with the precedent set by the panel in *Vistaprint*, and in numerous other IRPs (*see* NDC's Pre-Hearing Submission and footnote 71 above), the Panel should conclude that it lacks the authority to issue the affirmative relief that Afilias has requested.

B. The CCWG Report Confirms The Panel's Limited Remedial Authority

39. In arguing that the Panel has authority to grant broad affirmative relief, Afilias has relied almost exclusively[81] on a report by the CCWG (the "CCWG Report").[82] In this connection, the Panel has asked the parties and *Amici* to address the following questions:

> What is the legal effect of the Board's adoption of the CCWG Report (C-122) insofar as the later-adopted (amended) Bylaws (C-1) contain provisions contrary to or inconsistent with the Report? Is the CCWG Report relevant to the interpretation of the provisions of the Bylaws relating to the accountability mechanisms of ICANN?[83]

As shown below, the CCWG Report confirms that the CCWG intended for IRP Panels to have limited remedial powers.[84] The Bylaws and the Report are therefore consistent on that issue, and it is unnecessary to determine the precise legal effect of the Board's adoption of the Report. In

[78] *See id.* ¶¶ 136–49 (describing the authority of IRP panels set forth in a prior version of the Bylaws—Article IV, § 3.11—which is substantively identical to current Section 4.3(o)).
[79] *Id.* ¶ 141.
[80] *Id.* ¶ 149 (emphasis added) (referring to § 3.11(d) of a prior version of the Bylaws, which is equivalent to current Section 4.3(o)(iv)).
[81] As noted above, Afilias has also advocated a convoluted interpretation of certain language from the Bylaws. *See* Afilias' Reply Memorial, ¶¶ 151–55; Afilias' Response to the *Amicus Curiae* Briefs, ¶¶ 223–36. As discussed *infra*, Afilias' strained interpretation of the Bylaws does not withstand scrutiny.
[82] *See* Afilias' Reply Memorial, ¶ 150; Afilias' Response to the *Amicus Curiae* Briefs, ¶¶ 221–22; Afilias' Opening Presentation (Aug. 3, 2020), Slides 64–65.
[83] List of Questions to be Addressed in Post-Hearing Briefs (Aug. 24, 2020), Question 2.
[84] NDC's Pre-Hearing Brief, ¶¶ 85–89; Hrg. Tr., Vol. I (Aug. 3, 2020), 174:19–176:12 [*Amici* Opening Statement]; Verisign's Opening Presentation (Aug. 3, 2020), Slides 7–9.

any event, consistent with traditional rules regarding statutory interpretation and the treatment of "legislative history," the plain language of the Bylaws—rather than the CCWG Report—controls the issue of the Panel's remedial power, and the Bylaws are clear that such power is limited.

40. As *Amici* have previously explained,[85] the CCWG Report provides—under the heading "Possible Outcomes of the Independent Review Process"—that "*an IRP would result in a 'declaration*' that an action/failure to act complied or did not comply with ICANN's Articles of Incorporation and/or Bylaws."[86] None of the "Possible Outcomes" identified in the Report constitutes affirmative relief.[87] The Report provides further that (i) a declaration represents a "*limitation* to the type of decision by an IRP panel";[88] and (ii) a purpose of such limitation is "*to mitigate the potential effect that one key decision of the panel might have on several third parties.*"[89] These statements are consistent with *Amici*'s interpretation of the Bylaws.

41. The CCWG Report and *Amici*'s interpretation of the Bylaws is also consistent with Ms. Beckwith Burr's testimony. Ms. Burr participated in the CCWG and helped implement the CCWG's recommendations into the Bylaws. Ms. Burr confirmed during the hearing that:

> *[I]t was never the intention of the CCWG . . . that the Panel could prescribe a remedy* . . . [T]he IRP's authority is limited to finding -- making a determination about whether an action or inaction violated the articles of incorporation and bylaws, and that's what's binding on ICANN.[90]

42. Undeterred by Ms. Burr's refutation of its position, Afilias tried to muddy the waters at the hearing by emphasizing the following statement from the CCWG Report:

> The CCWG-Accountability intends that if the panel determines that an action or inaction by the Board or staff is in violation of ICANN's Articles of Incorporation or Bylaws, then that decision is binding *and the ICANN Board and staff shall be directed to take appropriate action to remedy the breach.* However, the Panel shall not replace the Board's fiduciary judgment with its own judgment.[91]

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[85] *See* NDC's Pre-Hearing Brief, ¶¶ 85–89; Hrg. Tr., Vol. I (Aug. 3, 2020), 174:19–176:12 [*Amici* Opening Statement]; Verisign's Opening Presentation (Aug. 3, 2020), Slides 7–9.
[86] **Ex. C-122**, CCWG Report, *supra* note 73, Annex 7, ¶ 16 (emphasis added).
[87] *See id.*
[88] *Id.* (emphasis added).
[89] *Id.* (emphasis added).
[90] Hrg. Tr., Vol. II (Aug. 4, 2020), 324:8–22 [Burr].
[91] *Id.* at 333:1–11 [Afilias cross-examination of Burr] (quoting **Ex. C-122**, CCWG Report, Annex 7, *supra* note 73, ¶ 57 (emphasis added)). *See also* Afilias' Response to the *Amicus Curiae* Briefs, ¶¶ 222, 236.

43. On the basis of this excerpt of the CCWG Report, Afilias' counsel suggested to Ms. Burr that the CCWG intended that IRP panels would "direct ICANN how to remedy [a] breach [of the Bylaws or Articles of Incorporation]."[92] Afilias misinterprets the CCWG's statement. As is clear from the text itself, and as Ms. Burr confirmed at the hearing, "[w]hat the CCWG intended is that the Panel would issue a binding determination regarding a bylaws violation, and in respon[se] to that finding, *ICANN* must take appropriate action to remedy the breach."[93] In other words, the CCWG expected that a panel would determine whether a breach occurred, but ICANN would determine what "appropriate action" to take to remedy the breach.[94]

44. This two-step approach makes good sense. As an initial matter, ICANN, and not an IRP panel, is best equipped to consider the "many moving parts" that are relevant to any remedial action,[95] and to mitigate any risk to the rights of third parties that might result from a remedy. This is evidenced by the sentence of the Report immediately following the language on which Afilias' relies—"[h]owever, the Panel shall not replace the Board's fiduciary judgment with its own judgment."[96] As Ms. Burr explained, if a panel were to dictate a remedy, and such remedy in turn effected the rights of one or more third parties, such third parties might then have causes of action against ICANN.[97] Here, if the Panel were to grant the broad relief requested by Afilias, it would undoubtedly have a severe prejudicial effect on "several third parties"[98]—including *Amici*—in contradiction to the CCWG's stated intent. ICANN is better situated than the Panel to avoid such prejudicial effects.

45. *Finally*, in arguing that the CCWG Report demonstrates an intent to grant IRP panels broad remedial authority, Afilias has focused on the fact that the CCWG recommended

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[92] Hrg. Tr., Vol. II (Aug. 4, 2020), 333:1–6 [Afilias cross-examination of Burr] ("Q. So the CCWG intended that an IRP Panel, if it were to find that ICANN breached its bylaws or articles, should issue a binding declaration that ICANN breached its articles and bylaws and *further that the Panel should direct ICANN how to remedy that breach*, correct?"). *See also* Afilias' Response to the *Amicus Curiae* Briefs, ¶¶ 222, 236.
[93] Hrg. Tr., Vol. II (Aug. 4, 2020), 333:7–11 [Burr].
[94] *See also id.* at 333:1–334:20 [Burr]; NDC's Pre-Hearing Brief, ¶ 89.
[95] Hrg. Tr., Vol. II (Aug. 4, 2020), at 324:8–13, 334:11–12 [Burr].
[96] **Ex. C-122**, CCWG Report, Annex 7, *supra* note 73, ¶ 57.
[97] *See* Hrg. Tr., Vol. II (Aug. 4, 2020), 333:25–334:20.
[98] **Ex. C-122**, CCWG Report, Annex 7, *supra* note 73, ¶ 16 (emphasis added).

"[a]n enhanced Independent Review Process and redress process with broader scope and the power to ensure ICANN stays within its Mission."[99] The CCWG did indeed recommend enhancements. But such enhancements *did not* include authority for panels to direct ICANN what to do, as Afilias has alleged.[100] Instead, the CCWG recommended (i) expanding IRPs to cover actions and inactions by ICANN's Staff and others, rather than just ICANN's Board; (ii) clarifying the standard of review for IRPs (which is discussed in more detail in Section IV.B below); and (iii) confirming that IRP decisions would be binding on ICANN (a fact that ICANN had previously contested).[101] These recommendations had the effect of substantially broadening the jurisdiction of an IRP panel.[102]

46. In short, the CCWG did *not* recommend expanding IRP panel's remedial authority, and instead confirmed that such authority was limited and should not result in decisions that may impact third parties.

47. Even if there were discrepancies between the CCWG's recommendations and the text of the Bylaws (*quod non*), the text of the Bylaws would control. As Ms. Burr testified, "the official source has to be the [B]ylaws, because that's where the rules come from."[103]

48. While the ICANN Board issued a resolution "accept[ing]" the CCWG Report,[104] such resolution did not elevate the Report to the status of binding rules on par with the Bylaws. This conclusion even follows directly from the CCWG Report which provided that "[i]mplementation of these enhancements will necessarily require additional detailed work" and

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[99] Hrg. Tr., Vol. I (Aug. 3, 2020), 20:6–9 [Afilias Opening Statement] (quoting **Ex. C-219**, CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations (Feb. 23, 2016), at 5 (¶ 3)).
[100] **Ex. C-219**, CCWG-Accountability Supplemental Final Proposal, *supra* note 99, at 5 (¶ 3).
[101] *See* **Ex. C-122**, CCWG Report, Annex 7, *supra* note 73, at 10–11 (¶¶ 54–58).
[102] Afilias' counsel even seemed to acknowledge at the hearing that this was, in fact, the extent of the recommended enhancements. *See* Hrg. Tr., Vol. I (Aug. 3, 2020), 20:4–22:22 [Afilias Opening Statement] (describing the "enhancements" listed above, but making no mention of any recommendation to expand the remedial authority of IRP panels).
[103] Hrg. Tr., Vol. II (Aug. 4, 2020), 318:21–23 [Burr]. *See also id.* at 319:11–13 ([Burr:] "[T]o the extent there's any discrepancy between this document [the CCWG Report] and the bylaws, the bylaws is the relevant document."); Hrg. Tr., Vol. I (Aug. 3, 2020), 121:12–13 ([Counsel for ICANN:] "[W]hat controls are the resulting amended [B]ylaws [rather than the CCWG Report].").
[104] *See* **Ex. C-184**, ICANN Board Resolutions (2016), at 43–44 ("Resolved . . . the ICANN . . . Board accepts the [CCWG-Accountability] Work Stream 1 Report.").

"[d]etailed rules for the implementation of the IRP (such as rules of procedure) are to be created by the ICANN community . . . and approved by the Board."[105] Put differently, while the recommendations were to guide the development of the revised IRP provisions, the final form of the IRP would be set forth in the Bylaws and approved by the Board.[106]

49. The fact that the text of the Bylaws should control over any apparent intention expressed in the CCWG Report is consistent with the way that courts treat legislative history for purposes of interpreting statutes. As the U.S. Supreme Court recently explained,

> *There is no need to consult extratextual sources* when the meaning of a statute's terms is clear. Nor may extratextual sources overcome those terms. The only role such materials can properly play is to help 'clear up . . . not create' ambiguity about a statute's original meaning.[107]

Here, there is no ambiguity: As explained in Paragraphs 22 to 33 above, the Bylaws clearly and expressly circumscribe the Panel's remedial authority. The CCWG Report does not support a contrary view. But even if it did, the Panel should not consult the Report for purposes of interpreting the Bylaws, which are unambiguous regarding the Panel's limited remedial powers.

C. The Guidebook's Litigation Waiver Does Not Alter The Scope Of The Panel's Jurisdiction Or Remedial Authority Vis-À-Vis Afilias' Claims In This IRP

50. The Guidebook includes a "litigation waiver," which requires gTLD applicants to waive their right to challenge in court any final decision by ICANN with respect to a gTLD application.[108] The Guidebook also expressly provides that "[an] applicant may utilize any accountability mechanism set forth in ICANN's Bylaws for purposes of challenging any final

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[105] **Ex. C-122**, CCWG Report, Annex 7, *supra* note 73, at 11 (¶ 63).
[106] *See also* Hrg. Tr., Vol. II (Aug. 4, 2020), 390:9–14 ([Burr:] "[A]ll of the aspects of the recommendation were reflected back into the bylaws, and then those bylaws, the draft bylaws were published for comment, that is my recollection, to make sure that they faithfully represented the input of the CCWG.").
[107] **AA-95**, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (emphasis added). *See also, e.g.*, **AA-90**, *Hernandez v. Dep't of Motor Vehicles*, 49 Cal. App. 5th 928, 935 (Cal. Ct. App. 2020) ("If the statutory language is unambiguous, then its plain meaning controls."). *See also* **AA-73**, *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 646 (2005) ("The relevant case law makes clear that restrictive language contained in Committee Reports is not legally binding."); **AA-101**, *State ex rel. Harris v. PricewaterhouseCoopers, LLP*, 39 Cal. 4th 1220, 1233 n.9 (Cal. 2006) ("[T]he Legislative Counsel's declarations are not binding or persuasive where contravened by the statutory language, and by other indicia of a contrary legislative intent.").
[108] **Ex. C-3**, Guidebook, *supra* note 49, at Module 6, § 6.

decision made by ICANN with respect to the application."[109]

51. At the hearing, Afilias argued—for the first time—that "[the Panel's] jurisdiction [in this IRP] is based on what . . . the scope of the litigation waiver is."[110] Afilias also made this argument through its cross-examination of Ms. Burr, suggesting to her that the enhanced IRP was intended to fill a "gap" in the types of claims that applicants may not assert before a court.[111] Afilias' last-minute argument—which should be rejected as untimely[112]—prompted the Panel to ask the parties and *Amici* the following questions relating to the Guidebook's litigation waiver:

> (1) "What is the scope of the litigation waiver (Terms and Conditions of Module 6 in the Guidebook): 'Applicant agrees not to challenge in court . . . any final decision made by ICANN with respect to the Application . . . or any other legal claim . . . with respect to the application'?"
>
> (2) "What link, if any, exists between the litigation waiver and the scope of the jurisdiction of IRP panels under the Bylaws, in light of ICANN accountability obligations?"
>
> (3) "Does the litigation waiver have any relationship to the specific claims advanced in the Claimant's Amended Request?"[113]

52. Question (1) is a legal question better suited for a court. While *Amici* take no position on the question, a federal court in California found that the litigation waiver "only applies to claims related to ICANN's processing and consideration of a gTLD application."[114]

53. As for Question (3), it is difficult to see how the litigation waiver could have any relationship to Afilias' specific claims in this IRP. Afilias' claims here, while substantively aimed at *Amici*, are styled as an invocation of ICANN's accountability mechanisms—*i.e.*, that ICANN violated its Bylaws as a result of certain actions and inactions; Afilias' claims are not framed as any type of claim that would be brought before a court, making the litigation waiver

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[109] *Id.*
[110] Hrg. Tr., Vol. IV (Aug. 6, 2020), 598:7–9 [Counsel for Afilias]. Afilias also implied this argument during its cross examination of Ms. Burr. *See* Hrg. Tr., Vol. II (Aug. 4, 2020), 329:15–330:6, 340:2–341:13, 342:22–343:1, 345:18–22.
[111] *See* Hrg. Tr., Vol. II (Aug. 4, 2020), 329:15–330:6, 340:2–341:13, 342:22–343:1, 345:18–22 [Afilias cross-examination of Burr].
[112] Procedural Order No. 3 (Mar. 27, 2020), at 3 (directing the parties to "file the entirety of the remainder of their case" with the second round of submissions). *See also* Procedural Order No. 5 (July 14, 2020), ¶¶ 14–15.
[113] List of Questions to be Addressed in Post-Hearing Briefs (Aug. 24, 2020), Question 4.
[114] **C-106**, *Ruby Glen, LLC v. Internet Corp. for Assigned Names & Numbers*, No. CV 16-5505 PA (ASx), Dkt. 48, at *5 (C.D. Cal. Nov. 28, 2016) ("*Ruby Glen*, Order").

irrelevant to Afilias' specific claims in this IRP.[115]

54. As to question (2), in *Amici*'s view, there is *no link* whatsoever between the litigation waiver and the scope of the jurisdiction of IRP panels under the Bylaws. As shown below, (i) there is no evidence that the scope of the IRP Panel's jurisdiction is linked to the scope of the litigation waiver—indeed, the evidence contradicts this contention; and (ii) there are no principles relating to litigation waivers or alternative dispute resolution from which such a link could be implied to exist. Instead, the jurisdiction of IRP panels is limited to considering whether ICANN failed to comply with its Articles of Incorporation or Bylaws.[116]

55. *First*, contrary to Afilias' suggestions at the hearing,[117] there is no evidence that ICANN intended for there to be a relationship between the scope of IRPs and the scope of the litigation waiver, or that IRPs would fill any "gap" in available remedies. To the contrary, the IRP system was developed in 2002, *long before* the litigation waiver was drafted. While the IRP system has been revised and "enhanced" in the years since the litigation waiver was published in the Guidebook, the evidence indicates that such revisions were made without regard to the litigation waiver.[118] None of the witnesses who were asked about the relationship between the IRP system and the litigation waiver provided any basis for a connection between the IRP process and litigation waiver; their testimony is only consistent with the fact that no such relationship was intended.[119] Ms. Burr, who was closely involved in the development of ICANN's present-day accountability mechanisms, flatly denied that such a relationship exists:

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[115] *See, e.g.*, Afilias' Amended IRP Request, ¶ 1 ("Afilias submits this Request pursuant to Section 4.3 of the Bylaws, the International Arbitration Rules of the ICDR, and the Interim Procedures. Afilias has suffered direct harm as a result of ICANN's breaches of its Articles and Bylaws.").

[116] *See, e.g.*, **Ex. C-1**, Bylaws, *supra* note 3, § 4.3(a)(i); *id.* § 4.3(b)(B)(ii) (defining "Covered Actions" as "as any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute"); *id.* § 4.3(b)(B)(iii) (defining "Disputes" as "Claims that Covered Actions constituted *an action or inaction that violated the Articles of Incorporation or Bylaws* . . ." (emphasis added)).

[117] *See* Hrg. Tr., Vol. II (Aug. 4, 2020), 340:21–22 [Afilias cross-examination of Burr].

[118] *See id.* at 343:2–6 ("[Burr:] I do not believe there was a discussion [by the CCWG] about a gap-filler. The CCWG intended that, and I don't recall any specific obligations with the applicant guidebook, although there could have been."); Hrg. Tr., Vol. VI (Aug. 10, 2020), 1049:19–24 ("[Counsel for Afilias:] [D]id the IOT discuss the implications created by the litigation waiver that applicants for new gTLDs were required by ICANN to agree to? [McAuley:] I do not recall that.")

[119] *See, e.g.*, Hrg. Tr., Vol. II (Aug. 4, 2020), 329:15–330:20, 340–43 [Burr]; Hrg. Tr., Vol. VI (Aug. 10, 2020), 1049:19–1052:19, 1089:18–1907 [McAuley].

> [Counsel for Afilias:] So in light of the litigation waiver, an IRP Panel's jurisdiction must cover all matters that could not be addressed by a court of competition – competent jurisdiction, otherwise a new gTLD applicant who was required to agree to the waiver would have no effective means of re-dress; is that fair?
>
> [Ms. Burr:] So there's a contract here, right, and people are applying for a new gTLD, and the contract, the application, includes a provision that says, 'We are not going to sue you in a court. *To the extent we have a complaint about violations of the bylaws, we'll use the — the by-laws-provided remedies.'* You're passing this in, like – sort of in big terms, but I think the issue is there's an agreement here, *when you apply for a new gTLD, you are agreeing that disputes related to violation of the bylaws are going to be decided through ICANN's accountability mechanism, and otherwise you don't have a contractual right to sue.*[120]

56. *Second*, while the availability of an alternative dispute mechanism might aid a court in establishing the validity of a litigation waiver,[121] courts routinely find litigation waivers valid even when there is no alternative dispute mechanism.[122] Litigation waivers generally are given broad effect in accordance with their plain terms, especially where both contracting parties are sophisticated.[123] That is undoubtedly true for ICANN and Afilias. In fact, in Afilias' withdrawn witness statements, Afilias executives declared that they were intimately familiar with the Guidebook's development (which includes the litigation waiver).[124] Thus, contrary to

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[120] Hrg. Tr., Vol. II (Aug. 4, 2020), 329:25–330:20 [Burr]. *See also id.* at 340:22–341:7 ("[Counsel for Afilias:] Is there a gap between what applicants are prevented from bringing to a court and between – and what an IRP Panel can decide? Are there claims simply that an applicant can't bring anywhere because it's waived its right to a court hearing and the IRP Panel can't decide it? [Burr:] A. . . . I am telling you that with respect to anything that involves an alleged violation of the bylaws, the IRP is the process that's available."); *id.* at 343:20–344:1 ("[Burr:] [The IRP] did not go to other issues that were outside of the bylaws. The IRP is so absolutely specific over and over and over again about what it's intended to address. So to the extent there was a gap-filling, it was, we are not going to allow you to say you get to violate your bylaws via a contract provision.").

[121] *See, e.g.*, **C-106**, *Ruby Glen*, Order, *supra* note 114, at *5–6 ("[T]he covenant not to sue does not leave Plaintiff without remedies. Plaintiff may still utilize the accountability mechanisms contained in ICANN's Bylaws.").

[122] *See, e.g.*, **AA-97**, *Reudy v. Clear Channel Outdoor, Inc.*, 356 Fed. App'x 2, 3 (9th Cir. 2009) ("Plaintiffs' claims . . . are barred by the broad release of all known and unknown claims entered into by Plaintiffs and CBS in conjunction with CBS's purchase of seven outdoor advertising sign billboards from Plaintiffs."); **AA-72**, *CAZA Drilling (California), Inc. v. TEG Oil & Gas U.S.A., Inc.*, 142 Cal. App. 4th 453, 478 (Cal. Ct. App. 2006) (upholding validity of liability release between drilling company and oil company).

[123] *See* **C-106**, *Ruby Glen*, Order, *supra* note 114, at 7. *See also, e.g.*, **AA-77**, *Continental Airlines, Inc. v. Goodyear Tire & Rubber Co*., 819 F.2d 1519, 1527 (9th Cir. 1987) ("[I]t makes little sense in the context of two large, legally sophisticated companies to invoke the *Tinkle* application of the unconscionability doctrine"); **AA-68**, *Appalachian Ins. Co. v. McDonnell Douglas Corp.*, 214 Cal. App. 3d 1, 30 (Cal. Ct. App. 1989) ("This case does not involve a large entity using its bargaining strength against an individual member of the public. This case involves two large, sophisticated corporations with relatively equal bargaining power who negotiated the terms of a voluntary agreement.").

[124] *See* Mohan Stmt., ¶¶ 15–19; Kane Stmt., ¶¶ 6–14.

Afilias' untimely argument, a litigation waiver is valid even if an available alternative dispute mechanism does not encompass all claims covered by the waiver or does not exist at all.

57. Even if, in some context (not present here), a litigation waiver theoretically could be relevant to the scope of claims subject to an applicable dispute resolution agreement, that is not the case here because the waiver expressly incorporates by reference the "accountability mechanism[s] set forth in ICANN's Bylaws."[125] In doing so, the waiver does not purport to alter the scope of such accountability mechanisms. Instead, their scope is described and defined in the Bylaws. As emphasized by Ms. Burr during the hearing,[126] the scope of IRPs as set out in the Bylaws is limited to determining whether ICANN exceeded the scope of its Mission or otherwise failed to comply with its Articles of Incorporation or Bylaws.[127] As also explained in detail above, the remedial power of IRP panels is limited to declaring whether ICANN complied with its Articles of Incorporation and Bylaws. This remedial scope is not altered by the litigation waiver, even if the litigation waiver covers claims beyond those subject to the IRP process.

58. To date, two courts have upheld the validity of ICANN's litigation waiver and, in doing so, implicitly found that there is no link between the scope of the litigation waiver and the scope of an IRP. In *DCA v. ICANN*, the plaintiff had argued that the litigation waiver was substantively unconscionable, including because (i) "the IRP can only review ICANN's procedural actions, not any substantive claims,"[128] and (ii) "[the Guidebook] allows ICANN to change the terms of the . . . alternative dispute resolution process."[129] The court rejected these arguments.[130] In doing so, it implicitly found that it was irrelevant that the alternative dispute

[125] **Ex. C-3**, Guidebook, *supra* note 49, at Module 6, § 6.
[126] *See* Hrg. Tr., Vol. II (Aug. 4, 2020), 329:15–330:19, 342:22–343:6 [Burr].
[127] *See, e.g.*, **Ex. C-1**, Bylaws, *supra* note 3, § 4.3(a)(i); *id.* § 4.3(b)(B)(ii) (defining "Covered Actions" as "as any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute"); *id.* § 4.3(b)(B)(iii) (defining "Disputes" as "Claims that Covered Actions constituted *an action or inaction that violated the Articles of Incorporation or Bylaws* . . ." (emphasis added)).
[128] Plaintiff DCA's Opposition to ICANN's Motion for Summary Judgment, *DotConnectAfrica Trust v. ICANN* (Cal. Sup. Ct., July 26, 2017), at 4. *See also id.* at 14 ("Here, an applicant like DCA is only permitted to challenge ICANN's procedural actions in the IRP, pursuant to ICANN's IRP rules, through which ICANN attempts to limit evidence, testimony, and hearings. . . . DCA is required to employ the ICANN-favorable IRP for any limited redress. . . .").
[129] **AA-79**, *DotConnectAfrica Trust v. ICANN*, BC607494 (Cal. Sup. Ct. Feb. 3, 2017) ("*DCA*, Order"), at 7.
[130] *Id.* at 7.

mechanisms would not provide the same rights that a plaintiff might enjoy in a litigation.

59. The District Court in *Ruby Glen* also rejected arguments that the litigation waiver was unconscionable, finding that the waiver was not procedurally unconscionable given:

> the nature of the relationship between ICANN and Plaintiff, the sophistication of Plaintiff, the stakes involved in the gTLD application process, and the fact that the Application Guidebook "is the implementation of [ICANN] Board-approved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period.[131]

The *Ruby Glen* court emphasized that without the litigation waiver "any frustrated applicant could, through the filing of a lawsuit, derail the entire system developed by ICANN to process applications for gTLDs."[132] The court also noted that "ICANN and frustrated applicants do not bear this potential harm equally."[133] The Ninth Circuit affirmed the District Court's decision.

60. If—as Afilias contends—ICANN's accountability mechanisms were meant to fully replace the right to bring a court action, the same risk would exist that a barrage of claims could derail the gTLD application processing system. Instead, as ICANN explained in its Ninth Circuit appellate brief, "[i]n requiring applicants to resolve disputes through ICANN's accountability mechanisms, *the Guidebook sought to invoke a curative process appropriate to the competitive context of the New gTLD Program*."[134] Such process—while "provid[ing] [applicants] with valuable redress"— is nonetheless *limited*, as it only "gives [gTLD applicants] the ability to pursue claims that ICANN has not complied with its foundational documents."[135]

61. In summary, the scope of the Panel's jurisdiction under the Bylaws is not expanded because of the litigation waiver contained in the Guidebook.[136]

IV. THE PANEL LACKS AUTHORITY TO FIND THAT THE DAA VIOLATES THE GUIDEBOOK OR THAT *AMICI* ENGAGED IN MISCONDUCT

62. Section 4.3(o)(i) of the Bylaws establishes the standard of review for IRP panels,

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[131] **C-106**, *Ruby Glen*, Order, *supra* note 114, at *7.
[132] *Id.*
[133] *Id*.
[134] **Ex. C-187**, *Ruby Glen v. ICANN*, ICANN's Answering Brief (9th Cir., Oct. 30, 2017), 60 (emphasis added).
[135] *Id.* at 38–39 & n.14.
[136] Afilias has not identified (1) the legal claim that it would have brought but-for the litigation waiver; or (2) the source of a court's authority to order ICANN to take the affirmative steps that Afilias has asked this Panel to order.

instructing them to "conduct an objective, de novo examination of the Dispute." Section 4.3(o)(i) provides that, "[w]ith respect to Covered Actions, the IRP Panel shall make findings of fact to determine whether the Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws."

63. As shown below, this standard of review (i) does not empower the Panel to determine third party rights, such as making findings of fact as to whether the DAA violated the Guidebook or *Amici* engaged in other alleged wrongful conduct and (ii) directs the Panel to determine only whether ICANN complied with its Bylaws in making or failing to make a decision—which means, in substance, whether ICANN acted transparently, whether ICANN made a reasoned decision, and whether ICANN acted neutrally, in good faith and without discrimination.[137] The function of an IRP Panel is not to second-guess the merits of ICANN's decisions or substitute its views in place of a court with jurisdiction to determine claims against third parties or third party rights, as Afilias always has sought in this IRP. Instead, the Panel's role is to determine whether ICANN acted consistent with its Bylaws—a function that is focused on the process by which decisions are made, namely, whether the process or manner in which ICANN made its decision was reasoned, transparent and in good faith.

A. The Panel Lacks Jurisdiction To Make Findings Of Fact Or Conclusions As To The Alleged Misconduct Of NDC And Verisign

64. As *Amici* explained at the hearing,[138] the Panel lacks jurisdiction and authority to make findings of fact or conclusions with respect to the conduct of third-parties, such as *Amici*. There is no dispute that Section 4.3(i)(i) of the Bylaws empowers the Panel to "make findings of fact."[139] But, in accordance with Section 4.3(i)(i), the sole purpose of such fact-finding authority is "to determine whether the Covered Action [alleged by a claimant] constituted an action or inaction that violated the Articles of Incorporation or Bylaws."[140] The Bylaws define a "Covered

[137] *See* **Ex. C-1**, Bylaws, *supra* note 3, §§ 1.2(a), 2.3, 3.1, 4.3(i)(i).
[138] *See* Hrg. Tr., Vol. I (Aug. 3, 2020), 170:3–171:20 [*Amici* Opening Statement]; Verisign's Opening Presentation (Aug. 3, 2020), Slides 3–4.
[139] **Ex. C-1**, Bylaws, *supra* note 3, § 4.3(i)(i); **Ex. C-59**, Interim Supplementary Procedures, *supra* note 15, Rule 11(a).
[140] **Ex. C-1**, Bylaws, *supra* note 3, § 4.3(i)(i).

Action" as "any actions or failures to act *by or within ICANN* committed by the Board, individual Directors, Officers, or Staff members that give rise to a Dispute."[141] Accordingly, "findings of fact to determine whether the Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws" refers to findings of fact regarding actions or failures to act *by ICANN* (including its Board, individual Directors, Officers, or Staff).

65. Although Afilias' claims violate these principles, Afilias nonetheless acknowledged the limited scope of a panel's fact-finding authority during its opening statement. As Afilias' counsel stated at the hearing in reference to Section 4.3(i)(i) of the Bylaws,

> These are findings of fact that apply generally, but of course — or contextually, but also specifically with *reference to the Board's conduct and staff's conduct* in terms of whether the *covered action* constitutes an action or inaction that violates ICANN's articles or bylaws.[142]

66. This statement constitutes an admission by Afilias that the Panel's fact-finding authority extends only to findings of fact concerning the actions and inactions of ICANN and not *Amici*. But even if the Bylaws were not clear (as they are), there are other compelling reasons for the Panel to limit its findings of fact to ICANN's conduct, including that the power to make findings of fact should be constrained by general principles of fundamental fairness and due process. Such principles provide, *inter alia*, that the rights and obligations of third parties must not be adjudicated where the third parties are not full participants in the relevant proceeding.[143]

67. Accordingly, the Panel should not make findings of fact regarding the conduct of third-parties, including *Amici*, and it should instead properly focus its findings of fact on the conduct of ICANN. Any decision at variance with these principles would be subject to being set aside as fundamentally unfair (Section V, *infra*).

B. The Panel Should Limit Its Review To ICANN's Decision Making *Process*

68. Because the Bylaws empower the Panel only "to determine whether the Covered

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[141] *Id.* § 4.3(b)(ii) (emphasis added).
[142] Hrg. Tr., Vol. I (Aug. 3, 2020), 25:4–10 [Afilias Opening Statement].
[143] *See, e.g.*, **AA-51**, BORN, INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 17, at 3068–69 ("It is of course, elementary that a tribunal may only order relief against the parties to the arbitration, consistent with the consensual status of the arbitral process.").

Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws,"[144] the Panel's review in most cases, including this one, should be a process based review of ICANN's decisions, intended to assess whether ICANN has complied with its internal governing rules—*i.e.*, its Bylaws. Specifically, the Panel should ask whether ICANN acted "by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment (*i.e.*, making an unjustified prejudicial distinction between or among different parties)."[145] In other words, the Panel should determine whether ICANN's decision was made through such a reasoned process— not second guess ICANN on the underlying merits of a decision.[146]

69. Here, where ICANN has stated that it has not made any determination with respect to Afilias' allegations about NDC's conduct—instead deciding to defer such a decision—the first question that the Panel should ask is whether ICANN had a duty to make a determination concerning those allegations. As the panel in the *Donuts* IRP explained,

> Not all inaction is actionable . . . . *[A]ctionable inaction is a failure that is inconsistent with a duty to act*, whether that duty is formally established by ICANN's constitutive documents, generated by some other explicitly or clearly implied undertaking by the Board, or, powerfully suggested by all the circumstances present.[147]

ICANN states that it deferred a decision on Afilias' claims in accordance with its policy not to decide such matters while an accountability or similar proceeding is pending. Under such circumstances, the Panel should limit its review, for example, to whether ICANN in fact applied that policy in a reasoned manner, neutrally and in good faith.

70. By contrast, if the Panel were to find that ICANN did have a duty under its Bylaws to decide Afilias' objections while accountability or similar proceedings were pending,

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[144] **Ex. C-1**, Bylaws, *supra* note 3, § 4.3(i)(i). *See also* **Ex. C-59**, Interim Supplementary Procedures, *supra* note 15, Rule 11.
[145] **Ex. C-1**, Bylaws, *supra* note 3, § 1.2(a)(v).
[146] In this regard, the CCWG Report further confirms that "[t]he standard of review shall be an objective examination as to whether the complained-of action exceeds the scope of ICANN's Mission and/or violates ICANN's Articles of Incorporation and/or Bylaws and prior IRP decisions." **Ex. C-122**, CCWG Report, Annex 7, *supra* note 73, ¶ 34 (emphasis added).
[147] **AA-48**, *Donuts*, Final Declaration, *supra* note 71, ¶ 129 (emphasis added).

then the Panel could declare as much. In those circumstances, it would be for ICANN—not this Panel—to proceed to decide Afilias' objections in a manner that complies with ICANN's Bylaws.[148]

71. The Panel's role in this IRP is *not* to second-guess ICANN on the merits of its decisions.[149] Any findings of fact by the Panel must not encroach on the domains of ICANN's expertise, which includes the expertise to balance competing interests, including the interests of third parties and the Internet community generally, and make Internet policy. Such an approach accords with principles of judicial abstention, pursuant to which courts abstain from fact finding that is properly left to the expertise of the relevant decision-making body.[150]

72. Multiple prior IRP panels have recognized the limited and procedural nature of their review.[151] For example, the panel in the *GCC* IRP explained that the role of an IRP panel is to examine the *process* undertaken by ICANN, and not whether ICANN is "right or wrong on the merits."[152] Likewise, the panel in the *Corn Lake* IRP explained that its "role [wa]s to assess whether [ICANN's] action was consistent with applicable rules found [in its governing

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[148] Alternatively, if the Panel were to consider that ICANN *did* take some action by, for example, deciding to sign a registry agreement with NDC without considering Afilias' objections, then the Panel should ask whether such a decision was consistent with ICANN's obligations under its Bylaws, namely, whether it was a reasoned decision, made neutrally and in good faith.

[149] For Board action, the Bylaws are clear that "[f]or Claims arising out of the Board's exercise of its fiduciary duties, the IRP Panel shall not replace the Board's reasonable judgment with its own so long as the Board's action or inaction is within the realm of reasonable business judgment." **Ex. C-1**, Bylaws, *supra* note 3, § 4.3(i)(iii). During hearing opening statements, the Panel asked ICANN for an example of a Board decision that *would not* be entitled to the benefit of the business judgment rule. One such example is a Board decision when acting under a material conflict of interest. **AA-83**, *Everest Investors 8 v. McNeil Partners*, 114 Cal. App. 4th 411, 430 (Cal. Ct. App. 2003); **AA-87**, *Gaillard v. Natomas Co.*, 208 Cal. App. 3d 1250, 1263 (Cal. Ct. App. 1989).

[150] *See* NDC's Pre-Hearing Brief, ¶¶ 71–74.

[151] As noted in NDC's Pre-Hearing Brief, the review expected of the present IRP Panel under the current Bylaws is substantially the same as the review that was expected of previous IRP panels under earlier versions of the Bylaws. For example, as the current version of the Bylaws provides that "the IRP Panel shall make findings of fact to determine whether the Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws" (**Ex. C-1**, Bylaws, *supra* note 3, § 4.3(i)(i)), prior versions of the Bylaws similarly provided that the Panel "shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provision of those Articles of Incorporation and Bylaws." Prior IRP panels have interpreted such standard of review to mean that ICANN's conduct "is to be reviewed and appraised by the IRP Panel using an objective and independent standard," which is consistent with the way the standard of review is defined in the current version of the Bylaws. *See* **CA-2**, *Vistaprint* Final Declaration, *supra* note 71, ¶ 125.

[152] **CA-17**, *GCC*, ICDR Case No. 01-14-0002-10656, Partial Final Declaration (Reed, Sabater, van den Berg) (2016), ¶ 95.

documents]," but that the panel should not "opine on whether [ICANN] could have acted differently than it did."[153]

73. The *Vistaprint* IRP panel similarly confirmed that "[it] [wa]s neither asked to, nor allowed to, substitute its judgment for that of the Board."[154] And, in the *Merck* IRP, the Panel stated that "it is clear that the Panel may not substitute its own view of the merits of the underling dispute."[155] Finally, the panel in the *Donuts* IRP stated that the standard of review "does not allow the Panel to base its determinations on what it, itself, might have done had it been the Board;" instead, the only issue was whether ICANN's conduct was consistent with its governing documents.[156]

74. Here, any assessment of the correctness of ICANN's decision-making would encroach upon ICANN's broad discretion with respect to gTLD applications. The Guidebook states, for example, that, "[ICANN's] decision to review, consider and approve an application to establish one or more gTLDs and to delegate new gTLDs after such approval is entirely at ICANN's discretion."[157] ICANN's proper exercise of discretion is especially important in the context of the Guidebook, as ICANN's Guidebook-related decisions implicate an international program that affects thousands of registries, thousands of registrars, and millions of users.[158]

75. In short, any findings of fact by the Panel should focus on the process or procedural aspects of ICANN's conduct. The Panel's decision would not properly include findings regarding *Amici*'s rights or the propriety of their conduct.

C. If The Panel Were To Make Any Non-Binding Recommendations, Any Such Recommendations Must Relate To The Process Of ICANN's Decision-Making, Rather Than To What Decisions ICANN Should Make

76. Any "relief" granted to Afilias must be assessed in the context of the limited fact-

[153] **CA-16**, *Corn Lake*, Final Declaration, *supra* note 71, ¶ 115.
[154] **CA-2**, *Vistaprint*, Final Declaration, *supra* note 71, ¶ 124.
[155] **AA-55**, *Merck*, Final Declaration, *supra* note 71, ¶ 21.
[156] **AA-48**, *Donuts*, Final Declaration, *supra* note 71,¶ 133.
[157] *See* **Ex. C-3**, Guidebook, *supra* note 49, at Module 6, § 3; *see also id.* at Module 5, § 5.1 ("[ICANN's Board has] the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community."); NDC's Pre-Hearing Brief, ¶ 75.
[158] *See* Verisign's Opening Presentation (Aug. 3, 2020), Slide 10.

finding regime described above. In this regard, Section 4.3(o)(iv) of the Bylaws authorizes IRP panels to "[r]ecommend that ICANN stay any action or decision, or take necessary interim action, until such time as the opinion of the IRP Panel is considered."[159] By the express terms of the Bylaws, this authority to make recommendations extends only to recommendations regarding *interim action*, pending final action by ICANN.

77. Notwithstanding the clear language of Section 4.3(o)(iv), a few prior IRP panels have interpreted their "recommendation" authority more broadly, as authorizing panels to recommend future or permanent steps to be taken by ICANN.[160] Mr. Disspain of ICANN indicated during the hearing that ICANN's Board would consider closely any proper recommendations by this Panel.[161] To be clear, however, the terms of the Bylaws do not authorize IRP panels to make any type of broad or *non-interim* recommendations.

78. In any event, all panels that have made recommendations—including those panels that have made recommendations beyond interim relief—have acknowledged that, by their very nature, any such recommendations are non-binding on ICANN.[162]

79. While some panels may have made recommendations that exceeded the scope of interim recommendations authorized by Section 4.3(o)(iv), nearly all panels that have recommended any course of conduct by ICANN have only recommended process based steps for

[159] **Ex. C-1**, Bylaws, *supra* note 3, § 4.3(iv).
[160] *See, e.g.*, **CA-5**, *DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50-2103-001083, Final Declaration (Barin, Kessedjian, Cahill) ("*DCA*, Final Declaration") (2015), ¶ 128 ("The Panel finds that both the language and spirit of the above section gives it authority to recommend how the ICANN Board might fashion a remedy to redress injury or harm that is directly related and causally connected to the Board's violation of the Bylaws or the Articles of Incorporation."); **AA-48**, *Donuts*, Final Declaration, *supra* note 71, ¶ 227 (taking a "broad view of its prerogative" to make recommendations as an advisory body on how ICANN could improve its process).
[161] Hrg. Tr., Vol. V (August 7, 2020), 987:7–17, 988:16–19, 990:13–23 [Disspain].
[162] *See, e.g.*, **CA-2**, *Vistaprint*, Final Declaration, *supra* note 71, ¶ 131 ("[W]hen it comes to the question of whether or not the IRP Panel can require that ICANN's Board implement any form of redress based on a finding of violation, here, the Panel believes that it can only raise remedial measures to be considered by the Board in an advisory, non-binding manner. The Panel concludes that this distinction—between a "binding" declaration on the violation question and a 'non-binding' declaration when it comes to recommending that the Board stay or take any action—is most consistent with the terms and spirit of the charter instruments upon which the Panel's jurisdiction is based, and avoids conflating these two aspects of the Panel's role."); *id.* ¶ 140(iv) ("[A]ny form of relief in which the IRP Panel would direct the Board to take, or refrain from taking, any action or decision is only a recommendation to the Board. In this sense, such a recommendation is not binding on the Board.")

ICANN to take.[163] For example, in the *Amazon* IRP, the panel rejected claimant's request for "affirmative relief in the form of a direction to ICANN to grant [claimant's] applications."[164] Instead, the panel recommended that the Board make an objective and independent judgment regarding whether there were reasons for denying the claimant's applications.[165]

80. Likewise, in the *Dot Registry* IRP, the panel "decline[d] to substitute its judgment for the judgment of [ICANN]" on a disputed substantive issue; instead, the issue would go back to ICANN to be determined.[166] The *Asia Green* IRP provides another example. There, as NDC noted in its pre-hearing submission, the panel held that ICANN violated the Bylaws by placing a gTLD application "on hold" rather than acting promptly. While the panel held that ICANN needed to approve or deny the application, it confirmed that "nothing as to the substance of the decision should be inferred by the parties from the Panel's opinion in this regard. The decision, whether yes or no, is for [ICANN]."[167]

81. Therefore, to the extent that the Panel were to make any non-binding recommendations to ICANN, any such recommendations should be of a procedural or process based nature. For example, the Panel might make recommendations regarding (i) the time within which ICANN should render a future decision regarding Afilias' objections; (ii) principles from the Bylaws that ICANN might consider in making a decision on Afilias' objections; and (iii) the form (but not substance) of ICANN's ultimate decision (*e.g.*, that it be in writing and express reasons). In no event should the Panel make any recommendations that would prejudice *Amici* or the rights of any other third party; and in no event should the Panel recommend the decision that ICANN should reach regarding Afilias' objections.

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[163] *See, e.g.*, **CA-16,** *Corn Lake*, Final Declaration, *supra* note 71, ¶ 11.1 (recommending that ICANN following a certain process in reviewing a gTLD application); **AA-48**, *Donuts*, Final Declaration, *supra* note 71, ¶ 9.1 (recommending that ICANN reconsider its denial of certain Reconsideration Requests.)
[164] **AA-42**, *Amazon*, Final Declaration, *supra* note 71, ¶ 83.
[165] *See, e.g.*, *id.* ¶¶ 83, 124–25 (declining to grant the claimant's request for "affirmative relief in the form of a direction to ICANN to grant [claimant's] applications," and instead recommending that the Board make an objective and in-dependent judgment regarding whether there were reasons for denying the claimant's applications).
[166] **AA-49**, *Dot Registry*, Final Declaration, *supra* note 71, ¶ 153.
[167] **AA-43**, *AGIT*, Final Declaration, *supra* note 71, ¶ 124.

V. A PANEL DECISION GRANTING AFILIAS' REQUESTED RELIEF, OR MAKING FINDINGS ON THE DAA OR *AMICI*'S CONDUCT, WOULD VIOLATE *AMICI*'S DUE PROCESS RIGHTS

82. Any decision by the Panel granting the broad affirmative relief requested by Afilias or otherwise determining *Amici*'s rights—including Afilias' request to determine that the DAA violated the Guidebook or *Amici* engaged in misconduct, or to order ICANN to enter into the Registry Agreement for .WEB with Afilias instead of NDC[168]—would violate *Amici*'s due process rights. Not only would such a decision be beyond the jurisdiction of the Panel (Section III, *supra*), it would violate due process because of *Amici*'s limited participation in the IRP.

83. *Amici*'s participation was strictly limited by the Panel at Afilias' request. While *Amici* ultimately were permitted, over Afilias' objections, to cooperate with ICANN for purposes of presenting evidence that *ICANN wanted to introduce to support ICANN's case*,[169] *Amici* were not permitted, among other things, to (i) participate in early foundational decisions concerning the IRP, (ii) plan or execute a defense, (iii) call their own witnesses, (iv) request documents and other evidence from Afilias or ICANN, (v) request the attendance of witnesses who are under Afilias' control, (vi) object to Afilias' withdrawal of its percipient witnesses,[170] or (vii) cross-examine any witnesses.[171]

84. The Panel limited *Amici*'s participation because *Amici* were not parties to the IRP. Nonetheless, Afilias seeks remedies in this IRP directly against *Amici* and their legal interests as if *Amici* were parties with the full opportunity to defend themselves, which of course was not the case. If the IRP system could be used as Afilias has tried to use it here, the entire system would be stricken down as a violation of due process. As Gary Born has explained, "[i]t is of course, elementary that a tribunal may only order relief against the parties to the arbitration, consistent

[168] *See* Afilias' Amended IRP Request, ¶ 89(3).
[169] Such cooperation does not constitute participation sufficient to protect *Amici*'s due process rights. Indeed, ICANN has very different interests from *Amici*, and any cooperation would never be sufficient to fully protect their rights and interests.
[170] In this regard, *see* Section II.
[171] *See* Procedural Order No. 5 (July 14, 2020), ¶ 15 ("The *Amici* are non-disputing parties that were granted the limited participation rights of an *amicus curiae* as provided for in Rule 7; these rights do not include the right to file evidence, whether it be documentary or witness evidence."). *See also* Procedural Order No. 3 (Mar. 27, 2020).

with the consensual status of the arbitral process."[172] Here, the Panel itself has acknowledged, "[this] is not the proper forum for the resolution of potential disputes between Afilias and two non-parties that are participating in these proceedings as *amici curiae*."[173]

85. Additionally, any decision that purports to grant Afilias the relief it requests would be beyond the remedial powers of the Panel and therefore *ultra vires*. Such a decision would be subject to a set-aside challenge under the English Arbitration Act 1996, as beyond the substantive jurisdiction of the Panel and/or as a serious irregularity.[174]

86. Stated differently, the validity of the Panel's decision will be contingent upon whether it acts within the confines of its jurisdiction and remedial powers, and does not unfairly prejudice the rights and interests of non-party *Amici*.

VI. THE DAA COMPLIES WITH THE APPLICANT GUIDEBOOK

87. The evidence adduced at the hearing established that the DAA fully complies with the terms of the Guidebook, including as interpreted and applied by ICANN and other participants in the industry.[175] More specifically, the clear and unequivocal testimony during the hearing establishes that Section 10 of the Guidebook prohibits an applicant from selling its application—or, as Ms. Christine Willett put it, its "*total application*."[176] The Guidebook does *not* prohibit the myriad of contracts and arrangements that applicants commonly enter with third parties with respect to performance under the application or post-delegation obligations, including, specifically, agreements to fund an auction bid in exchange for a future assignment of a registry agreement upon ICANN's consent.

88. New gTLDs have been transferred hundreds of times post-delegation since the promulgation of the Guidebook by many companies in the industry, including, notably, Afilias.

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[172] **AA-51**, BORN, INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 17, at 3068–69.
[173] Procedural Order No. 5 (July 14, 2020), ¶ 22.
[174] *See* **AA-50**, English Arbitration Act 1996, § 67 (challenge for lack of substantive jurisdiction); *id.* § 68 (challenge for serious irregularity). *See also* **AA-51**, BORN, INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 17, at 3071 ("[R]elief ordered by an arbitrator can potentially be challenged in either annulment or recognition proceedings on the grounds that it exceeds the arbitrator's authority (an 'excess of authority'), particularly . . . where a tribunal exercises an authority that the parties' arbitration agreement clearly denies it.").
[175] ICANN and industry practices are controlling. Authorities cited at note 231, *infra*.
[176] Hrg. Tr., Vol. III (Aug. 5, 2020), 568:3–8 [Willett].

In all these instances, ICANN has never objected or refused to consent to an assignment on the grounds that: (i) a pre-delegation agreement provides for a post-delegation assignment of the registry agreement and/or (ii) that there was a lack of public scrutiny because the assignment occurred after application evaluation period had closed. Treating NDC and Verisign differently than any of the hundreds of other post-delegation transfers ICANN has approved—none of which were deemed to violate the Guidebook and all of which are consistent with industry practice—would discriminate against *Amici* in derogation of ICANN's Bylaws, and thus be contrary to the terms of submission under the Bylaws of this IRP to the Panel (¶ 195, *infra*).

A. Verisign's Decision To Acquire A New gTLD And Enter The DAA

89. The time to file an application for a new string as part of the new gTLD Program expired in June 2012. By 2014, when Mr. Livesay was investigating opportunities for Verisign, an active secondary market for new gTLDs had developed, in which hundreds of new gTLDs ultimately were transferred to third parties. Applicants entered into many varied transactions to monetize new gTLDs within the secondary market, including agreements to finance auction bids in exchange for a future assignment of a registry agreement (Section VI.C.2, *infra*).

90. Ms. Willett is the former Vice President of gTLD Operations for ICANN. She managed the new gTLD Program, managing a large staff at ICANN, publishing Program materials on the ICANN website, and speaking at industry conferences concerning Guidebook processes and requirements. As Ms. Willett explained, "applicants had agreements with a variety of vendors and third parties regarding all sorts of aspects of their application and future gTLD operations. There were applicants -- more than a handful of applicants who signed a Registry Agreement and then immediately transferred a TLD to another registry operator, requested such an assignment from ICANN."[177] As a result, *hundreds of new gTLDs were transferred by assignment with ICANN's consent following delegation*.[178] These arrangements generally were not subject to evaluation or review by ICANN until a request for assignment of a

[177] Hrg. Tr., Vol. IV (Aug. 6, 2020), 708:12–20 [Willett].
[178] ICANN's Opposition to Request for Emergency Panelist (Dec. 17, 2018), ¶¶ 25–30.

registry agreement was made. As Ms. Willett also explained, "[T]here 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."[179]

91. Prior to the close of the new application period, Verisign had applied only for new gTLDs that were internationalized versions or variants of its existing TLDs.[180] In mid-2014, Mr. Livesay, a senior transactional lawyer and businessman, Redacted - Third Party Designated Confidential Information .[181] Mr. Livesay explained that Verisign was completing a reorganization in 2014, as part of which Verisign had sold off its non-TLD businesses, which had comprised roughly half of Verisign's revenues.[182] Verisign had decided to invest returns from these divestitures in its core business as a registry operator and was looking for opportunities to grow that business.[183] Among other reasons for Verisign's decision, Redacted - Third Party Designated Confidential Information

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92. Mr. Livesay did not have experience in the TLD side of Verisign's business prior to his return to Verisign in June 2014.[185] Employing his expertise as a lawyer and businessman, Mr. Livesay and others working with him at Verisign thoroughly studied the Guidebook and information on ICANN's website regarding the Program,

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[179] Hrg. Tr., Vol. IV (Aug. 6, 2020), 775:21–24 [Willett].
[180] Livesay Stmt., ¶ 4.
[181] Hrg. Tr., Vol. VII (Aug. 11, 2020), 1125:17–24 [Livesay]; Livesay Stmt., ¶ 4. Upon examination by Afilias counsel, Mr. Livesay testified that he had not worked for Verisign since 2018, did not have an agreement with Verisign for providing testimony in this matter, and was not being compensated for his testimony. Hrg. Tr., Vol. VII (Aug. 11, 2020), 1123:15–1125:16 [Livesay].
[182] Hrg. Tr., Vol. VII (Aug. 11, 2020), 1262:17–1263:19 [Livesay].
[183] *Id*. at 1264:7–11 [Livesay].
[184] *Id*. at 1262:17–1264:19 [Livesay]; Livesay Stmt., ¶ 4.
[185] Hrg. Tr., Vol. VII (Aug. 11, 2020), 1132:2–7 [Livesay].

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93. Verisign and NDC modeled the DAA on other agreements with which they were familiar. The DAA was structured to provide for Verisign to finance NDC's bid at the auction for .WEB and, if NDC was successful in acquiring the rights to .WEB, for NDC to assign the .WEB registry agreement *upon consent* by ICANN.[187] Based on Verisign's review of the Guidebook and industry practice, Mr. Livesay was satisfied that the DAA fully complied with the Guidebook. Mr. Livesay explained during cross-examination by Afilias:

> I looked at other transactions going on in the market. I saw disclosures of different companies having funded other activities of other applicants. I see elsewhere in the guidebook where it encourages parties to resolve without changing their application so as to not delay or have the string -- I guess "delay" is the right word, or put on hold. So there's a lot of factors that went into this.
>
> But at the end of the day, the path we took is *we are not looking to become the applicant*. We are looking to become the registry of this domain and to try to *help fund NDC to win the auction.* And if they ended up winning and we successfully signed a Registry Agreement, *they would then apply to have it assigned to us*, and we would be evaluated at that time.
>
> So I don't think there's anything -- we were following -- we had a lot of different things, both through what we see in the marketplace and what the guidebook suggests, and *we think we did it correctly*. * * * Like I said, the way we approached this is we are reading the rules. We are looking at activities in the marketplace. We are looking at what other strings and how other contention sets get resolved. We look at other information in the guidebook itself that suggests, recommends parties reorganize themselves in a way that doesn't require reevaluation, and we think we did that correctly.[188]

94. Verisign likewise received representations by NDC in the DAA that the

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[186] *Id.* at 1191:7–1192:5 [Livesay]; Livesay Stmt., ¶¶ 12–14. Although repeatedly mischaracterized by Afilias, Mr. Livesay testified that a concern he had with a premature disclosure of Verisign's interest in acquiring a new TLD was that competitors would manufacture claims to interfere or delay with Verisign's plans—which is precisely what happened. Hrg. Tr., Vol. VII (Aug. 11, 2020), 1279:18–1280:5 [Livesay]. *See infra* note 291. While Verisign may have intended to maintain its interest in acquiring a new TLD confidential—as is common for commercial entities interested in expanding a competitive business—it is unclear when .WEB contention set members may have learned of Verisign's interest in .WEB. At least one of those contention set members contacted by Mr. Livesay, Radix, later joined Donuts and Afilias in objecting to Verisign's agreement with NDC. Hrg. Tr., Vol. VII (Aug. 11, 2020), 1192:22–1193:1 [Livesay].

[187] There were "hundreds or thousands" of varying relationship among applications and third parties. Hrg. Tr., Vol. IV (Aug. 6, 2020), 775:21 [Willett]. In terms of assigning the applicant's rights to a third party, ICANN advised multiple applicants that "they could request such an assignment after" execution of the registry agreement. *Id.* at 775:17.

[188] Hrg. Tr., Vol. VII (Aug. 11, 2020), 1156:15–1157:11 [Livesay].

agreement fully complied with the Guidebook and all obligations of NDC under its Application. As Mr. Livesay explained, NDC had more experience in the new gTLD secondary market than Verisign. "[W]e were looking for their expertise and their honesty as we are figuring it out on our own."[189] The DAA gives you "information as to how NU DOT CO views it and whether they have the same understanding of the ecosystem and the guidebook that we had come to."[190]

95. Consistent with admonitions in the Guidebook, Verisign and NDC sought to avoid structuring the DAA so as to interfere with the contention set or cause delays in its resolution. In response to a question by Arbitrator Bienvenu, Mr. Livesay testified:

> Q. Was it a concern to you, as you were considering on behalf of Verisign the potential of striking a deal with NDC, that the agreement not trigger a notice of change to information under Section 1.2.7 of the guidebook.
>
> A. So yes, it was a concern that we not trigger or do anything to change the application that would trigger a reevaluation because we knew that that -- couple of things. One, the guidebook suggests, one, to try and resolve things without triggering reevaluation. Two, if it did trigger reevaluation, that might actually delay the string in getting resolution. So yeah, it was a concern of ours not to trigger that.[191]

96. The Guidebook itself suggests that applicants seek to structure transactions with respect to their applications "to avoid being subject to re-evaluation."[192] ICANN explained during the hearing at least one reason it encouraged applicants to structure transactions so as to avoid re-evaluation: "the mechanism for reevaluation was not fully understood and there were significant concerns that reevaluation would be *extremely onerous and time-consuming.*"[193]

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[189] *Id.* at 1250:5–7 [Livesay].
[190] *Id.* at 1250:13–16 [Livesay].
[191] *Id.* at 1162:6–23 [Livesay].
[192] Section 4.1.3 of the Guidebook provides, for example:

> It is understood that applicants may seek to establish joint ventures in their efforts to resolve string contention. However, material changes in applications (for example, combinations of applicants to resolve contention) will require re-evaluation. This might require additional fees or evaluation in a subsequent application round. *Applicants are encouraged to resolve contention by combining in a way that does not materially affect the remaining application. Accordingly, new joint ventures must take place in a manner that does not materially change the application, to avoid being subject to re-evaluation.* (**Ex. C-3**, Guidebook, *supra* note 49, at Module 4, § 4.1.3 (emphasis added)).

The application of this provision is not limited to contention set members, but applies also to resolution of a contention set with non-applicants. Hrg. Tr., Vol. III (Aug. 5, 2020), 575:16–577:1 [Willett]; Hrg. Tr., Vol. VII (Aug. 11, 2020), 1158:4–7 ([Livesay:] "the guidebook itself . . . recommends parties reorganize themselves in a way that doesn't require reevaluation").
[193] Hrg. Tr., Vol. III (Aug. 5, 2020), 577:14–17 [Willett].

Mr. Livesay summarized during cross-examination: "So our main thing was trying to follow the guideline, the guidebook in a way that did not put things on hold or possibly delay the auction. We think we complied with that, yeah."[194]

97. Although it had ample opportunity to do so, Afilias made no attempt to dispute these conclusions. Rather, Afilias simply argues, without support, that NDC violated the Guidebook by transferring control over the Application to Verisign. Ms. Willett expressly rejected Afilias' claim.[195] After Afilias' own counsel presented the facts to her on cross-examination, Ms. Willett testified:

> Q. Is it your understanding -- do you have an understanding as to whether Verisign acquired ownership or control over NDC the entity?
>
> A. Well, that's not my understanding. * * * [NDC] couldn't transfer their application to another entity, no. But applicants all the time had engaged third parties to act on their behalf . . . as part of the application processing.[196]

98. Ms. Willett continued: "what ICANN was looking at was that the applying entity continued to retain responsibility for the application."[197] "Essentially they couldn't change the applying entity."[198] "You couldn't sell your application in total to someone else."[199]

99. The DAA did not change the applying entity or NDC's responsibility for the Application. Redacted - Third Party Designated Confidential Information

[200] "NU DOT CO is and always was in control of our application. There was never—Verisign never controlled our application and never controlled NU DOT CO."[201] In response to a question from Arbitrator Bienvenu, Mr. Rasco stated:

> The way that I understood the DAA was that none of the elements of the DAA

[194] Hrg. Tr., Vol. VII (Aug. 11, 2020), 1247:5–8 [Livesay].
[195] Hrg. Tr., Vol. IV (Aug. 6, 2020), 665:2–666:1 [Willett].
[196] *Id.* [Willett]. "[A]pplicants all the time were assigning rights or designating third parties to operate on their behalf." Hrg. Tr., Vol. III (Aug. 5, 2020), 567:25–568:2 [Willett].
[197] Hrg. Tr., Vol. IV (Aug. 6, 2020), 756:23–757:1 [Willett].
[198] Hrg. Tr., Vol. III (Aug. 5, 2020), 576:17–18 [Willett].
[199] *Id*. at 568:7–8 [Willett] (Section VI.C.1, *infra*).
[200] Rasco Stmt., ¶ 49. *See also* Hrg. Tr., Vol. V (Aug. 7, 2020), 823:7–9 ([Rasco:] "[W]e never transferred anything to Verisign, rights or the application.").
[201] Hrg. Tr., Vol. V (Aug. 7, 2020), 859:4–8 [Rasco].

> really touched the application. We were not transferring anything to Verisign at this time in entering into the DAA. . . . [F]rom my standpoint, there was never any doubt as to whether or not we were violating the guidebook because we would never -- we would never do something that violated the guidebook.[202]

As Mr. Livesay explained:

> I have no interest in it. If I showed up at ICANN and said -- I can pound my fists on the table, "you need to recognize me as having an interest in this application," they would say, *"Go away. Who the hell are you."*[203]

B. The Parties Agree That Section 10 Requires An Intention To Make A Present—Not Future—Transfer Of Ownership Of An Application

100. Section 10 provides:

> 10. *Applicant understands and agrees that it will acquire rights in connection with a gTLD only in the event that it enters into a registry agreement with ICANN*, and that applicant's rights in connection with such gTLD will be limited to those expressly stated in the registry agreement. In the event ICANN agrees to recommend the approval of the application for applicant's proposed gTLD, applicant agrees to enter into the registry agreement with ICANN in the form published in connection with the application materials. * * * *Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application.* [204]

101. According to the Guidebook, the applicant thus has no rights with respect to the gTLD until after the execution of a registry agreement with ICANN, which defines the registry operator's rights in the gTLD. Additionally, prior to execution of a registry agreement, an applicant is prohibited from reselling, assigning or transferring its application to a third party.

102. The provisions of the Guidebook, established principles of contract interpretation, and its application by the entity that promulgated and administers it, all require that the phrase "resell, assign or transfer" be interpreted to mean a present intention to transfer the ownership of rights and obligations under the application. The legal authorities establishing these principles are set forth in detail at Paragraphs 2–5 and 15–20 of Verisign's Pre-Hearing Brief. [205]

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[202] *Id.* at 897:4–17 [Rasco].
[203] Hrg. Tr., Vol. VII (Aug. 11, 2020), 1232:3–8 [Livesay].
[204] **Ex. C-3**, Guidebook, *supra* note 49, at Module 6, § 10 (emphasis added).
[205] The terms "resell, assign or transfer" are not defined in Section 10 nor any other section of the Guidebook, or any ICANN policy, Bylaw or documentation. These terms are found only in a single phrase in the Guidebook at the end of Section 10. Both in the Guidebook and common usage, the terms are used interchangeably, without distinction. *See* Verisign's Pre-Hearing Brief, ¶ 16 and authorities at fn. 21. In its exhaustive response to *Amici*'s brief, Afilias never disputes that the Guidebook uses the terms resell, assign and transfer interchangeably to mean the same thing. ICANN agrees that it applies the terms interchangeably under the Guidebook. (Hrg. Tr., Vol. III (Aug. 5, 2020), 567:25–568:8 [Willett]; Section VI.C.1, *supra*).

103. Afilias not once disagrees with the legal standard or cases cited by Verisign interpreting Section 10's prohibition of a resale, assignment or transfer of rights in the entirety of its 109-page Response to the *Amicus Curiae* Briefs ("Afilias Response"). To the contrary, Afilias agrees that, to violate Section 10's prohibition on a "resale, assignment or transfer," applicable law requires that the parties intend that title to the right be transferred presently, without further action. According to Afilias, "[f]or an assignment to be effective [under Section 10], it 'must include a 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."[206]

104. There is no dispute between *Amici* and Afilias that a violation of Section 10 would require, among other things, an intention presently to transfer full and unconditional title to a right or obligation. Once such a transfer has occurred, the transferor would be divested of ownership or control of the right, and the transferee would stand in the shoes of the transferor. It is fundamental that "[o]nce an assignment has been made, 'the assignor no longer has a right to enforce the interest because the assignee has obtained *all* rights to the thing assigned.'"[207]

105. Under applicable legal standards, the DAA could not transfer any rights or obligations with respect to the Application.

106. Redacted - Third Party Designated Confidential Information

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[206] Afilias' Response to the *Amicus Curiae* Briefs, ¶ 79 (emphasis added). *See* **AA-31**, *See also Springfield Int'l Rest., Inc. v. Sharley*, 44 Or. App. 133, 140 (Or. Ct. App. 1980) ("A contract to assign a right in the future is not an assignment.") (citing **AA-26**, *Restatement (First) of Contracts*, § 166(1) (1932)). "To 'assign' ordinarily means to transfer title or ownership of property, but an assignment, to be effective, 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." **AA-18**, *McCown v. Spencer*, 8 Cal. App. 3d 216, 225 (Cal. Ct. App. 1970) (emphasis added) (internal citation omitted).

[207] **A-24**, *One Call Prop. Servs. Inc. v. Sec. First Ins. Co.*, 165 So. 3d 749, 752 (Fla. Dist. Ct. App. 2015) (quoting **AA-11**, *Continental Cas. Co. v. Ryan Inc. E.*, 974 So. 2d 368, 376 (Fla. 2008)) (emphasis added). *See also* **AA-19**, *Merchants Serv. Co. v. Small Claims Court of City & Cty. of San Francisco*, 35 Cal. 2d 109, 114 (Cal. 1950) (an assignment contemplates that the former "extinguished his right … and this right was transferred to the company, so that it thereafter stood in the place of" the assignor); **AA-21**, *Modern Law of Contracts* § 21:6 ("An assignor must show an intention to divest himself of a property interest and to vest indefeasible title to that property interest in an assignee. . . Once the assignment is made, the assignee stands in the shoes of the assignor and may assert rights under the contract the same as the assignor. The assignor no longer has the right or power to enforce the assigned interest."); **AA-29**, *Sierra Equity Grp., Inc. v. White Oak Equity Partners, LLC*, 650 F. Supp. 2d 1213, 1227 (S.D. Fla. 2009) ("'An assignment is a transfer of all the interests and rights to the thing assigned. Following an assignment, the assignee 'stands in the shoes of the assignor' and the 'assignor retains no rights to enforce the contract' at all.").

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.[209] These express provisions of the DAA are dispositive. "In determining whether an assignment has been made, the intention of the parties as manifested in the instrument is controlling."[210]

107. Second, the rights and obligations established under the DAA are fundamentally inconsistent with an assignment or transfer of rights or obligations with respect to the Application. Following execution of the DAA, NDC retained all rights to enforce its interests under the Application and remained fully obligated to ICANN to comply with obligations under the Application.[211] If, as Afilias contends, NDC had assigned or transferred rights under the Application to Verisign, Verisign would instead own those rights and obligations, including the right to execute the .WEB registry agreement on its own behalf.[212] It plainly has no such rights. At most, Verisign has a right to sue NDC for damages if the latter were to breach the DAA.[213]

108. Third, although never addressed by Afilias in its Response to *Amici* or at the hearing—and, indeed, as previously asserted by Afilias in this IRP—the DAA could *not* transfer any rights to Verisign because any attempted transfer, by operation of law, would be void.[214] In

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[208] **Livesay Ex. H**, Domain Acquisition Agreement Supplement ("DAA Supplement") (July 26, 2016), ¶ D.
[209] **Livesay Ex. D**, Domain Acquisition Agreement ("DAA") (Aug. 25, 2015), Ex. A, §§ 1(k), (g) and (h).
[210] **AA-9**, *Cal. Ins. Guarantee Assn. v. Workers' Comp. Appeals Bd.*, 203 Cal. App. 4th 1328, 1335 (Cal. Ct. App. 2012).
[211] Redacted - Third Party Designated Confidential Information **Livesay Ex. D**, DAA, *supra* note 209, at Ex. A, § 1(k). Further, if the Guidebook or Application required NDC to take any action, Redacted - Third Party Designated Confidential Information **Livesay Ex. H**, DAA Supplement, *supra* note 208, ¶ F.
[212] *See, e.g.*, **AA-19**, *Merchants Serv. Co.*, 35 Cal. 2d at 114, *supra* note 207; **AA-21**, *Modern Law of Contracts* § 21:6, *supra* note 207.
[213] The DAA is a separate and independent legal agreement between different parties from the agreement comprising the Application, establishing distinct rights and obligations between Verisign and NDC (only). There is no change in ownership of the Application by reason of the DAA.
[214] *See* **AA-36**, UNIDROIT Principles of International Commercial Contracts at 314 ("The assignment of a right . . . is ineffective if it is contrary to an agreement between the assignor and the obligor limiting or prohibiting the assignment.") Redacted - Third Party Designated Confidential Information

Afilias' own words, "*Verisign has no rights in NDC's .WEB application*, nor can it: the application's Terms and Conditions specifically prohibit NDC from reselling, assigning, or transferring any of NDC's rights or obligations in connection with its application to any third party . . . and thus ***all rights in the Application remain with NDC***."[215]

109. As of the present date, NDC continues to own all rights in connection with the Application and remains fully responsible for its performance.[216]

C. The DAA Is Consistent With ICANN And Industry Practice

110. The DAA is consistent with ICANN's interpretation of the Guidebook under the new gTLD Program, as applied across hundreds or thousands of transactions: It prohibits only the sale of an application. The DAA likewise is consistent with industry practices—including those in which Afilias itself has repeatedly engaged.[217]

1. *The DAA Is Consistent With ICANN's Interpretation And Application Of The Guidebook*

111. According to ICANN—which drafted and administers the Guidebook—Section 10 prohibits only a sale of the gTLD application itself. Not even Afilias alleges the Application was sold to Verisign. ICANN, who authored the Guidebook and was charged with the responsibility for managing the gTLD program, did not consider other, lesser pre-delegation arrangements between third parties, to violate the Guidebook. As Ms. Willett testified:

> So applicants all the time were assigning rights or designating third parties to operate on their behalf. But the way we -- like, from an operational or transactional perspective, *we viewed this Paragraph 10 about not assigning rights*

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[215] Afilias' *Amici* Opposition, ¶¶ 83–85 (emphasis added).

[216] Afilias' only qualification with respect to *Amici*'s position is contained in footnote 134 of its Response to *Amici*. In that footnote, Afilias states that U.S. law recognizes "partial assignments of 'rights or obligations under [a] contract." Afilias' point is inapposite. Here, there was no intention to make a present transfer of title to any right or obligation, and NDC at all times was the only party with rights or obligations under the Application. Further, Afilias' authority for even this limited proposition has no application here. **CA-48**, *Vir2us, Inc. v. Sophos, Inc.* addresses choses in action and states that a chose in action *cannot* be divided by partial assignment. 2019 WL 8886440, at *9 (E.D. Va. Aug. 14, 2019). The other cases cited by Afilias address intricacies of U.S. bankruptcy rules (while noting that "as a general matter, 'bidding is not improperly chilled by the mere fact of an association of persons formed for the purpose of bidding at a sale since this may be not only unobjectionable but oftentimes meritorious . . . ". **CA-49**, *In re Hat*, 310 B.R. 752, 760 (Bankr. E.D. Cal. 2004); and the Department of Justice merger guidelines, *U.S. v. Smithfield Foods, Inc.*, Case 1:10-cv-oo120 (D.D.C. 2010) [**CA-50**].

[217] Not surprisingly, Afilias withdrew as witnesses the very witnesses in its employ who knew ICANN and industry practices. Afilias clearly had people in its employ who could, if it were the truth, dispute these facts.

> *and obligations of the application to be of the* ***total application. You couldn't sell your application in total to someone else.***[218]

112. Consistent with and in reliance on ICANN's interpretation of the Guidebook, a myriad of third party contractual relationships developed under the new gTLD Program, including agreements for third-party financing and support of applicants, and post delegation assignments of registry agreements. As Ms. Willett observed:

> So applicants had agreements with a variety of vendors and third parties regarding all sorts of aspects of their application and future gTLD operations. There were applicants -- more than a handful of applicants who signed a Registry Agreement and then immediately transferred a TLD to another registry operator, requested such an assignment from ICANN.[219]

113. Indeed, ICANN often suggested to applicants that they defer assignments until after delegation. In response to a question from Arbitrator Kessedjian, Ms. Willett testified that ICANN advised applicants that post-delegation transfers would comply with the Guidebook:

> [W]e became aware of a variety of plans, future plans for their operation, what they wanted to do with the TLD . . . We couldn't and didn't undertake to evaluate all those third party relationships, whether it was for marketing or back-end registry operation or in some cases *we became aware of intention to assign a TLD to a third party*.
>
> Applicants asked us to do that before contracting with some frequency, and we reminded them of the rule that that wasn't possible, that *they could request such an assignment after contracting*.
>
> . . . 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*.[220]

As Ms. Willett further explained:

> I have the experience of having *managed 1,930 applications and many different scenarios* between applicants and third parties and consultants. So my answers are informed not just based on these applicants for .web, but I am informed by -- in regards to how many applicants behaved and *how ICANN interacted with them and conducted the program* as a result.[221]

114. Consistent with Ms. Willett's testimony, the Guidebook and Auction Rules themselves expressly authorize pre-auction agreements providing for "post-Auction ownership

[218] Hrg. Tr., Vol. III (Aug. 5, 2020), 567:25–568:8 [Willett].
[219] Hrg. Tr., Vol. IV (Aug. 6, 2020), 708:12–20 [Willett].
[220] *Id.* at 774:25–775:24 [Willett].
[221] *Id.* at 773:24–774:6 [Willett].

transfer arrangements."[222] The rules provide only that applicants cannot agree to such post-delegation assignments during the Blackout Period.

115. It could hardly be clearer that the DAA is consistent with the Guidebook and industry practice.[223] It is a fundamental principle of contract law that the Guidebook, like any contract,[224] must be interpreted in light of the parties' intentions and course of conduct.[225] The evidence that the DAA is consistent with ICANN and the industry practice is undisputed.

116. Mr. Rasco also addressed these issues. He described the many alternative arrangements entered between applicants and third parties, including Afilias, to monetize new gTLD applications:

> Other companies, including Afilias, . . . ultimately treating gTLD applications as a form of arbitrage in which each application was an asset to be leveraged for profit without ever intending to actually operate any, or most, of the gTLDs . . . I believe ICANN was aware of these practices and, to my knowledge, did not object to them. I believed that these practices were acceptable to ICANN, which sought only to ensure that the ultimate operator was qualified and technically and financially capable of operating each respective gTLD.[226]

In response to Arbitrator Bienvenu's question, Ms. Willett confirmed that ICANN was aware of

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[222] **Ex. C-4**, Auction Rules for New gTLDs (Feb. 24, 2015), § 68; **Ex. C-3**, Guidebook, *supra* note 49, at Module 4, § 4.1.3. *See supra* note 192. For example, the Auction Rule 68 states that applicants may discuss and negotiate "settlement agreements or post-Auction ownership transfer arrangements" for the gTLD so long as those discussions do not take place during the Blackout Period. *Id.*

[223] ICANN has stated in these proceedings that there have been hundreds of post-auction transfers of new gTLDs as part of the new gTLD program under the Guidebook. (¶ 90, *supra*).

[224] Afilias' Response to the *Amicus Curiae* Briefs (July 24, 2020), ¶ 77 and fn. 139.

[225] **AA-63**, 11 *Williston on Contracts* § 31:11 (4th ed.) ("The goal of contract interpretation is to give effect to the parties' reasonable expectations which must be gleaned not only from the contract language, but also from extrinsic evidence, including evidence of the parties' conduct, goals sought to be accomplished, and surrounding circumstances when the contract was negotiated."); **AA-80**, *Employers Reinsurance Co. v. Superior Court*, 161 Cal. App. 4th 906, 922 (Cal. Ct. App. 2008), *as modified* (Apr. 22, 2008) ("The very purpose of the admission of course of performance is the commonsense belief that when the parties perform under a contract, without objection or dispute, they are fulfilling their understanding of the terms of the contract. This is true *regardless* of the actual language of the contract, as long as the parties' interpretation is reasonable." (emphasis in original)); **AA-69**, *Ass'n of Flight Attendants-CWA v. United Airlines, Inc.*, No. 19-CV-2867, 2020 WL 2085003, at *2 (N.D. Ill. Apr. 30, 2020) ("Arbitrators and courts recognize that '[c]ourse of performance when employed to interpret a contract is an . . . expression of the parties of the meaning that they give to the terms of the contract that they made."); **AA-89**, *Hanifin, Inc. v. Mersen Scotland Holytown, Ltd*., No. CIV.A. 2010-11695, 2012 WL 1252999, at *2 (D. Mass. Apr. 12, 2012) ("Evidence as to how the course of conduct between the parties informs the interpretation . . . ."); **AA-81**, *Entergy Servs., Inc. v. F.E.R.C*., 568 F.3d 978, 984 (D.C. Cir. 2009) ("The reasonableness of FERC's interpretation is further confirmed by reference to the parties' course of conduct. *See* **AA-100**, *S.D. Pub. Utils. Comm'n v. F.E.R.C*, 934 F.2d 346, 351 (D.C. Cir. 1991) (observing that course-of-performance evidence 'of course is probative' in the context of a FERC contract interpretation dispute)."

[226] Rasco Stmt., ¶ 37.

these practices and did not object to them:

> Q. But what I just wanted to know is whether a person in your position, an important position in relation to that program, whether you were aware of these practices?
>
> A. So I was aware that a variety of resolutions was taking place, and the way we became aware of that is because applicants would withdraw their applications from ICANN, essentially leaving one remaining applicant, and it would resolve contention. That is how the program team came to understand that a private resolution had occurred, but I don't recall anyone specifically telling me of their strategy about an arbitrage strategy. But *over many years of observing it, I think it is easy to form conclusions how certain applicants were treating certain applications and what was being resolved*.[227]

117. When specifically asked by Afilias about Verisign financing NDC's bid in exchange for a subsequent assignment of the .WEB registry agreement, Ms. Willett testified:

> [M]y general 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 understood from the press release that they had committed funds that were put forward towards the auction. So to me that was akin to and *consistent with the auction rules* and an applicant being able to designate a bidder to apply -- to act on their behalf in an auction and submit bids and do the bidding during an ICANN auction.[228]

118. ICANN has consented to hundreds of assignments of new gTLDs under the program (¶ 90, *supra*). It has never rejected a transfer request on the ground that the agreement to assign the registry agreement was executed prior to resolution of the contention set or because the intended purpose of the gTLD would change following the assignment.[229]

119. In response to Arbitrator Kessedjian's question whether ICANN would have been concerned to learn that Verisign was "involved with NDC's application," Ms. Willett testified:

> It was a matter of what ICANN had a right to and trying to treat this applicant and this contention set the same way we had treated the other 1,900 applications before it. * * * [T]here was no favoritism . . . .[230]

2. *The DAA Is Consistent With Industry Practice Under The Guidebook*

120. The Guidebook must be interpreted consistent with industry custom and

[227] Hrg. Tr., Vol. IV (Aug. 6, 2020), 758:25–759:17 [Willett].
[228] *Id.* at 707:16–708:3 [Willett].
[229] Willett Stmt., ¶ 18 (emphasis added).
[230] Hrg. Tr., Vol. IV (Aug. 6, 2020), 778:2–21 [Willett].

practice.[231]

121. A summary of the extensive evidence of industry practice consistent with the DAA is set forth at Paragraphs 35–46 of *Amici* Verisign's Pre-Hearing Brief. Evidence of industry practice is also set forth in the Rasco Witness Statement (¶ 42), Livesay Witness Statement (¶¶ 8–9), and the hearing testimony of Ms. Willett (Section VI.A and VI.C.1, *supra*), Mr. Rasco (Hrg. Tr., Vol. V (Aug. 7, 2020), 822:14–19) and Mr. Livesay (Hrg. Tr., Vol. VII (Aug. 11, 2020), 1187:3–1191:11, 1248:14–17).

122. Afilias tried to deflect from this evidence by arguing with witnesses, and offering a few sleights of hand, rather than offering any evidence of its own.

a. Donuts and Demand Media. This agreement is precedent for the DAA. Donuts and Demand Media entered into a pre-auction agreement for Demand Media to finance 107 new gTLD applications in exchange for a post delegation assignment of the registry agreements. Numerous new gTLDs subsequently were assigned to Demand Media pursuant to this agreement with ICANN's consent.[232]

Afilias acknowledges that "Demand Media entered into a partnership with Donuts with respect to 107 of 307 gTLDs applied for by Donuts."[233] However, in an attempt to mislead the Panel, Afilias claimed that "Donuts' various New gTLD applications—unlike NDC's .WEB application—*expressly disclosed its partnership with Demand Media*. For example, Donuts applied for .CITY through its subsidiary Snow Sky LLC."[234] Afilias' statement is false. The

[231] **AA-98**, *S.E.C. v. Johnson*, 525 F. Supp. 2d 66, 70 (D.D.C. 2007) ("[T]estimony will be allowed in order to aid the jury in understanding the meaning of terms employed in the contract and industry practice with respect to such contracts"); **AA-96**, *Meyer Grp., Ltd v. United States*, No. 12-488C, 2014 WL 12513422, at *2 (Fed. Cl. Apr. 23, 2014) ("Evidence of industry practice and custom helps the Court determine a contract's meaning. . . Expert testimony on the meaning of contract terms according to industry practice and custom, therefore, may assist the Court in determining how it should interpret a contract."); **AA-86**, *Fox Film Corp. v. Springer*, 273 N.Y. 434, 437 (NY Ct. App. 1937) ("To find out that intent from the language used the court must place itself in the position of the parties when they made the contract. It must be informed of the meaning of the language as generally understood in that business, in the light of the customs and practices of the business."); **AA-66**, *Aceros Prefabricados, S.A. v. TradeArbed, Inc*., 282 F.3d 92, 102 (2d Cir. 2002) ("Thus, standard industry practices are always relevant when interpreting contracts governed by the UCC, and Aceros failed to rebut TA's assertion that arbitration provisions are commonplace in the steel industry.").

[232] Verisign's Pre-Hearing Brief and evidence cited at ¶ 41.

[233] Afilias' Response to the *Amicus Curiae* Briefs, ¶ 122.

[234] *Id.*, ¶ 124 (emphasis in original).

only reference to Demand Media in the application is to a garden variety backend services arrangement, not a partnership, financier, co-applicant or future assignee.[235] Afilias' citation only serves to underscore Donuts' lack of disclosure to ICANN of its financing and assignment agreement with Demand Media.

Afilias tried to repeat this deception during the hearing. In its examination of Mr. Livesay, without showing the Donuts' application to him, Afilias attempted to elicit from Mr. Livesay a false characterization of the Donuts "disclosure." It was only when *Amici*'s counsel objected that there was a lack of foundation for the questions that Afilias was forced to show the application to the witness and the true description of the relationship between Donuts and Demand Media.[236] Upon reviewing the application, Mr. Livesay immediately recognized Afilias' false characterizations for what they were, testifying that "Demand Media is simply . . . not represented as a co-owner, but a back-end registry provider, which is a different matter."[237]

Afilias' argument of a Donuts' disclosure is false. More importantly, however, even if true (which it is not), it would simply underscore that an applicant's agreement for pre-delegation financing in exchange for post-delegation assignments is perfectly acceptable under the Guidebook. ICANN's inaction proves that such an agreement is *not a transfer in violation of Section 10 of the Guidebook*.

b. .BLOG. WordPress confidentially bid for .BLOG using Primer Nivel's application in exchange for a subsequent assignment of the new gTLD. WordPress subsequently disclosed that it "wanted to stay stealth in the bidding process and afterward in order not to draw too much attention."[238] *Amici*'s evidence was in the form of public reports on the bid and assignment. Afilias was part of the .BLOG contention set. Afilias did not object to WordPress' secret bid then nor offer any evidence contrary to that offered by *Amici* in this IRP.

c. .TECH. Radix acquired the rights to the .TECH gTLD by means of a pre-auction

[235] Verisign's Pre-Hearing Brief, ¶ 41.
[236] Hrg. Tr., Vol. VII (Aug. 11, 2020), 1176:5–1177:12 [Afilias cross-examination of Livesay].
[237] *Id.* at 1179:9–13 [Livesay]. *See also id.* at 1175:15–19, 1177:7–13, 1178:21–1179:13 [Livesay].
[238] Verisign's Pre-Hearing Brief and evidence cited at ¶ 40.

agreement to acquire one of the gTLD's applicants, Dot Tech, LLC ("Dot Tech"), contingent upon Dot Tech subsequently prevailing in an auction for the TLD.[239] Dot Tech won the auction and the transfer was completed. Dot Tech's application was updated to add Radix personnel and to substitute Radix for Dot Tech's former parent company *after* the auction. ICANN consented to the transfer.[240] There is no relevant difference between the .TECH agreement and the DAA. Afilias offered no evidence before or during the hearing concerning this transaction.

d. .MEET, .PROMO, .ARCHI, .BIO, .SKI. These new gTLDs were all assigned to or from Afilias, notwithstanding changes in the "Mission/Purpose" of the new gTLD from that in the application. ICANN consented to each transfer.[241] As ICANN notes in Ms. Willett's witness statement (¶ 18), these examples show that ICANN agrees to assignments even when the purpose of the gTLD changes radically. The evidence offered by *Amici* and ICANN with respect to these new gTLDs demonstrates that assignments of new gTLDs are common and, contrary to its position throughout most of these proceedings, Afilias knows this.

e. .WEB. Afilias tried to accomplish with .WEB the same result that it claims in this IRP is a violation of the Guidebook. Specifically, Afilias tried to acquire—in Afilias' terms—NDC's application rights to .WEB through a pre-auction agreement that NDC would appear to participate in the auction, but lose the auction, in exchange for a payment by Afilias to NDC of $17.02 million. In substance—again ***in Afilias' terms*—Afilias tried to *buy NDC's application rights*** to .WEB prior to an auction or delegation. Afilias even offered to pay NDC virtually the same amount of money that NDC ultimately will receive under the DAA if ICANN approves an assignment of .WEB to Verisign. At bottom, there is *no relevant substantive difference* between what Afilias tried to do to acquire rights to .WEB and what it alleges Verisign did in the DAA. The difference, of course, is that Afilias violated the Blackout Period when it made its offer.

[239] Livesay Stmt., ¶ 14; Rasco Stmt., ¶ 44.
[240] Verisign's Pre-Hearing Brief and evidence cited at ¶ 42.
[241] Verisign's Pre-Hearing Brief and evidence cited at ¶ 38.

123. In the end analysis, Ms. Willett testified in response to questions from Arbitrator Bienvenu:

> I know there's all sorts of creative arrangements that could be made, but as long as the applying entity still was *managing the application,* that would have been *consistent with the rules.*[242]

NDC always retained title to and responsibility for its Application.[243]

D. Afilias' Argument That Particular Terms Of The DAA Violate The Guidebook Are Without Merit

1. *Afilias Am. Request 64: NDC Violated The Guidebook By Agreeing That It* Redacted - Third Party Designated Confidential Information

124. Afilias' argument is based on a misreading of the DAA. Section 4(b) of the DAA

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[244]

Contrary to Afilias' argument, the DAA expressly provides that

Redacted - Third Party Designated Confidential Information as required under the Application or Guidebook.[245] This provision was confirmed in the DAA Supplemental Agreement, which also provides that in the event of any conflict between the DAA and Guidebook, NDC shall Redacted - Third Party Designated Confidential Information

[246]

2. *Afilias Am. Request 65: NDC* Redacted - Third Party Designated Confidential Information *In Violation Of The Guidebook*

125. Mr. Rasco's testimony was clear that he and the other owners of NDC made a decision not to participate in a private auction prior to entering into the DAA. NDC knew that Verisign likely would not agree to provide funds for anything other than a public auction based

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[242] Hrg. Tr., Vol. IV (Aug. 6, 2020), 757:2–6 [Willett]. With the many variations in transactions involving new gTLD applications in the secondary market, "[Willett:] [a]s the program progressed, we had to continue to adapt our procedures to handle situations we hadn't contemplated and beyond what was expressly stated in the AGB." *Id.* at 757:23–758:1.
[243] Rasco Stmt., ¶ 49. Hrg. Tr., Vol. V (Aug. 7, 2020), 823:7–9 ([Rasco:] "[W]e never transferred anything to Verisign, rights or the application."), *id.* at 859:5–8; Hrg. Tr., Vol. VII (Aug. 11, 2020), 1232:3–8 [Livesay].
[244] Rasco Stmt., ¶ 66; Livesay Stmt., ¶ 30; **Livesay Ex. D**, DAA, *supra* note 209, at 1 (the parties shall work together "consistent with the gTLD Applicant Guidebook.").
[245] **Livesay Ex. D**, DAA, *supra* note 209, at Exh. A, § 1(k) (emphasis added).
[246] **Livesay Ex. H**, DAA Supplement, *supra* note 208, ¶ F.

on concerns regarding the legal risks of private auctions.[247] The decision to forego a private auction was made by NDC prior to signing the DAA or choosing Verisign to finance its bid.[248]

126. Mr. Livesay testified that Verisign was concerned about the legal risks of a private agreement among direct competitors pursuant to which the winning bidder would pay its competitors to lose the auction and forego their rights to .WEB. Mr. Livesay believed such an arrangement appeared "collusive," and suffered a "lack of transparency . . . between the contention set members."[249] By contrast, a public auction under the Guidebook takes place according to established rules, with oversight, and the proceeds from the auction are invested in the DNS infrastructure for the benefit of the entire Internet community.[250]

127. As Mr. Rasco correctly observed: while every applicant has a right to participate in a public auction under the Guidebook, "[t]here's no right to participate in a private auction . . ."[251] A private auction can only proceed upon the agreement of all members of the contention set. NDC simply made a decision to use Verisign's funds to make its bid and forego a private auction as it was entitled to do under the Guidebook.[252]

128. Verisign is not alone in its concern about private auctions. The Department of Justice has refused to issue a business review letter endorsing private auctions, and constituencies within ICANN have expressed similar concerns. The serious legal risks that a private auction could be viewed as an anticompetitive horizontal agreement among competitors, and treated as "bid rigging," are described in Section X.E, *infra*. Indeed, under U.S. antitrust law, a horizontal agreement among competitors on the terms of bidding is typically *per se* illegal and potentially subject to both civil and criminal penalties. There is no requirement under the

[247] Hrg. Tr., Vol. V (Aug. 7, 2020), 833:25–835:5 [Rasco].
[248] *Id.* at 873:10–15 [Rasco].
[249] Hrg. Tr., Vol. VII (Aug. 11, 2020), 1276:21–1277:12 [Livesay].
[250] *Id.* at 1276:7–1279:1 [Livesay].
[251] Hrg. Tr., Vol. V (Aug. 7, 2020), 856:22–23 [Rasco].
[252] In response to a question by Afilias whether assigning rights to decide the form of an auction might violate Section 10 of the Guidebook—a hypothetical that in any event did not occur here—Ms. Willett testified that Section 10 would only prohibit "transferring their application." Hrg. Tr., Vol. III (Aug. 5, 2020), 567:4–5 [Willett]. By contrast, "applicants all the time were assigning rights or designating third parties to operate on their behalf." *Id.* at 567:25–568:2 [Willett]. Section 10 only prohibits an applicant from selling its "application in total to someone else." *Id.* at 568:8 [Willett].

Guidebook or otherwise for Verisign to fund, nor NDC to submit, to such an arrangement given these legal risks.

3. *Afilias Am. Request 66: The DAA Violates The Guidebook As It Provides Verisign With A Right To Participate In "ICANN's Process To Move The Delegation Of .WEB Forward."*

129. The claim that Verisign's participation in moving the process forward violates the Guidebook is absurd on its face. Any support by Verisign to move the delegation forward necessarily and obviously could only be done with ICANN's knowledge and consent.[253]

130. Afilias' claim ignores its own conduct in the secondary market. As Ms. Willett testified in response to a question by Afilias:

> Q. So there are particular rights or obligations that they are not allowed to resell, assign or transfer?
>
> A. Well, so applicants, because they were in many cases not always expert in how to submit an application, they engaged with third parties to submit their applications on their behalf or they -- to provide responses to how technical registry operations would be held to essentially provide them with the technical responses to their application. I mean, in fact, *Afilias was one of those consultants. They provided and submitted applications on behalf of a couple dozen other applicants*. So applicants all the time were assigning rights or designating third parties to operate on their behalf. But the way we -- like, from an operational or transactional perspective, we viewed this Paragraph 10 about not assigning the rights and obligation of the application to be of the total application.[254]

Afilias' claim, as demonstrated by its withdrawal of witnesses to its own transactions, is disingenuous.[255]

4. *Afilias Am. Request 67: "*Redacted - Third Party Designated Confidential Information

131. This claim is false. NDC is the applicant of record and, as the winner of the

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[253] The DAA further expressly provides that Redacted - Third Party Designated Confidential Information **Livesay Ex. D**, DAA, *supra* note 209, at Ex. A, ¶ K. And, as required by the Guidebook, the process shall proceed Redacted - Third Party Designated Confidential **Livesay Ex. H**, DAA Supplement, *supra* note 208, ¶ F.

[254] Hrg. Tr., Vol. III (Aug. 5, 2020), 567:11–568:7 [Willett].

[255] **Livesay Ex. H**, DAA Supplement, *supra* note 208, ¶ F. Numerous companies—like Afilias—are in the business of providing support services to develop and process new gTLD applications, such as Valideus and FairWinds Partners, both of whom contract with applicants to provide all of these services, including serving as liaison with ICANN. *See* ¶ 130, *supra*; Verisign's Pre-Hearing Brief, ¶ 43.

.WEB auction, NDC could still operate .WEB as described in its application. Despite Afilias' many protests, these facts have never changed.

132. Indeed, Afilias *conceded* during its examination of Ms. Willet that NDC remained the applicant: "[W]e now know that VeriSign did not acquire ownership control" of NDC.[256] Afilias' counsel then began a question to Ms. Willett with that preface and continued: "Do you have an understanding as to whether VeriSign acquired ownership or control over NDC the entity?"[257] In response, Ms. Willett confirmed her understanding "that VeriSign did not acquire ownership or control over NDC the entity."[258]

133. Under the DAA, "any rights of Verisign are subject to" numerous contingencies, including:

> NDC's past and future compliance with the Guidebook and Application;[259] (ii) performance by both parties of their obligations under DAA;[260] (iii) the absence of an exercise of either parties' termination rights under the DAA;[261] (iv) the continuing validity of NDC's warranties and representations;[262] (v) the execution of a registry agreement between ICANN and NDC;[263] and (vi) ICANN's consent to a transfer of the registry agreement.[264]

NDC remains the applicant, and it ultimately may be the registry operator if any of these conditions are not fulfilled.

134. Afilias' false claim that Redacted - Third Party Designated Confidential Information apparently relies on Sections 9–10 of Exhibit A, Redacted - Third Party Designated Confidential Information of the DAA. These Sections only address what may happen in the remote event that ICANN both refuses to consent to an assignment of the registry agreement to Verisign and refuses to refund the auction proceeds. The Exhibit provides that

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[256] Hrg. Tr., Vol. IV (Aug. 6, 2020), 664:25–665:1 [Counsel for Afilias].
[257] *Id.* at 665:2–4 [Counsel for Afilias].
[258] *Id.* at 665:6–9 [Willett]; s*ee also id.* at 703:24–704:2 ("[Counsel for Afilias:] Q: Now, at this point [September 2016] ICANN, VeriSign and NDC all knew that there had been no change of ownership or control of NDC the company, right? [Willett:] A. Yes, that was my understanding.").
[259] **Livesay Ex. D**, DAA, *supra* note 209, § 4(c).
[260] *Id.* at § 4(a)(i).
[261] *Id.* at § 9.
[262] *Id.* at §§ 4, 7(a).
[263] *Id.* at Ex. A, § 3(b).
[264] *Id.* at Ex. A, §§ 3(c)–(d); Verisign's Pre-Hearing Brief, ¶ 27.

Redacted - Third Party Designated Confidential Information .[265]

.[266]

135. Contrary to Afilias' argument, there are numerous scenarios in which Redacted - Third Party Designated Confidential Informa NDC might operate .WEB. For example, Redacted - Third Party Designated Confidential Information [267] In that event, including if it were to occur today, NDC would remain the applicant with the right to pursue the application, complete a Registry Agreement, and operate the domain.

136. As a further example, NDC could breach the DAA and, instead of assigning the Registry Agreement to Verisign, retain the Registry Agreement under its own name.[268] That action might carry its own consequences, but in the event of a breach and/or termination of the DAA, NDC would continue to own the Application and any future registry agreement.[269]

137. Furthermore, were ICANN to reject the proposed assignment to Verisign, or were NDC and Verisign to modify the DAA, NDC could negotiate with Verisign to operate .WEB on the basis that NDC secured repayment to Verisign of the funding Verisign provided for the .WEB auction. Redacted - Third Party Designated Confidential Information .[270] Mr. Rasco testified at the Hearing that, "if this were to happen," he would expect to have a conversation with Verisign and determine a way to pay Verisign back rather than lose a valuable asset.[271]

138. In any of these scenarios, NDC would be free to raise financing through alternative means to repay the funds provided by Verisign. The Guidebook does not preclude

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[265] **Livesay Ex. D**, DAA, *supra* note 209, at Ex. A, §§ 9–10.
[266] *Id.* at Ex. A, § 9.
[267] *Id.* § 9(b).
[268] *See generally* **AA-91**, *Huynh v. Vu*, 4 Cal. Rptr. 3d 595, 608 (Cal. Ct. App. 2003) (explaining that "where 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 based on the benefit the promisee expected to gain by the completed contract").
[269] Verisign's Pre-Hearing Brief, ¶ 28.
[270] **Livesay Ex. D**, DAA, *supra* note 209, at Ex. A, § 9.
[271] Hrg. Tr., Vol. V (Aug. 7, 2020), 841:13–23 [Rasco].

NDC from entering into such transactions. Having repaid those funds, NDC could operate .WEB as it operated .CO—*e.g.*, in conjunction with a third party such as Neustar, Inc., as described in its .WEB application. In this event, NDC would be situated precisely as Afilias would have been had *it won* the .WEB auction—operating the domain pursuant to financing used to secure the successful auction bid.[272]

5. *Afilias Am. Request 70: NDC Violated The Guidebook As Its Bid Was* Redacted - Third Party Designated Confidential Information

139. Afilias' claim is based on a mischaracterization of both the Guidebook and DAA. NDC made the bids for itself as the applicant as required by the auction rules. Verisign participated in the auction because it was funding the bids. The DAA provisions cited by Afilias govern the mechanics of the parties' cooperation during the auction, designed to protect Verisign's role in financing the bid. (*See also* Section VI.D.6, *infra*).

140. Redacted - Third Party Designated Confidential Information

[273] Mr. Rasco understood the specific language Redacted - Third Party Designated Confidential to mean only that NDC would not undermine the DAA and protections for Verisign's financing by acting for undisclosed conflicting interests.[274] This provision was "making sure that we weren't going to

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[272] Afilias attempted to create a false impression that Verisign acquired a security interest or other present right in the Application because Redacted - Third Party Designated Confidential Information *See* Hrg. Tr., Vol. VII (Aug. 11, 2020), 1220:20–1233:6 [Afilias cross-examination of Livesay]. Specifically, in that instance, NDC and Verisign agreed that Redacted - Third Party Designated Confidential Information *See id.* at 1223:2 –1224:7 [Livesay]; **Livesay Ex. D**, DAA, *supra* note 209, at Ex. A, § 10. In exchange, Redacted - Third Party Designated Confidential Information Afilias' effort to treat this as a security interest in the Application is to no avail. As Mr. Livesay explained, although he had *analogized* those financial terms to protection received in the case of a commercial loan, and thus referred to the relevant provisions of the DAA as serving "*like* a security interest," those provisions merely reflected the parties' negotiated agreement on how to handle very remote eventualities. Hrg. Tr., Vol. VII (Aug. 11, 2020), 1225:15–23, 1231:14–1232:20 [Livesay]. They did not create a mechanism through which Verisign acquired any actual interest in .WEB—something Verisign *could not* obtain without ICANN's consent. *See id.*

[273] Rasco Stmt., ¶ 99.

[274] *Id.*, ¶ 100. Indeed, rumors were spread before the auction by Afilias and Donuts that NDC had transferred control over the company, resulting in the execution of the assurances of performance. *See* Verisign's Pre-Hearing Brief, ¶ 23.

do a deal with anyone else and do an end around Verisign."[275] NDC has owned all rights under its .WEB Application before, during and after the auction.

6. *Afilias Am. Request 71: NDC's Bid Was Invalid Because NDC*

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141. As explained more fully in the Livesay Witness Statement (¶¶ 32–33), the provisions of the DAA concerning the conduct of the auction and post-auction proceedings were intended to protect Verisign's loan of funds. As Mr. Rasco likewise testified during the hearing: "NDC was the bidder. NDC always retained control. As the one putting up the money, [Verisign] wanted to have a say."[276] "[A]s the provider of the funding, I think they wanted to make sure that we weren't going to do anything that they didn't disagree—that they didn't agree with in terms of putting their money up for something."[277]

142. The auction agreement between NDC and Verisign describes how the bidding would proceed. It was not an assignment of rights in the Application. Mr. Rasco explained:

> I think this section sets up guidelines for how we would agree on auctions, but obviously at any point I always maintained my right to do whatever I needed to do to make sure that I was in compliance with the ICANN -- with the application and the guidebook.[278]
>
> [T]his is the terms by which we would agree with how to proceed with the auction, and I always -- since I was the bidder, could always disagree with whatever they said. There obviously would be consequences, but NDC remained the bidder and in control. Never had a disagreement about how to proceed.[279]

143. In addressing Afilias' claims that the DAA violated the Auction Rules, ICANN explained:

> [T]he Auction Rules violations alleged by Afilias appear to be based on a *strained interpretation* of the text of the rules. For example, the propriety of an agreement like the DAA is not precisely addressed by the Auction Rules because the Auction Rules are *concerned only with the mechanics* of the Auction and each applicant's participation in the Auction, such as deposits that must be paid, notices that ICANN must release, the process for submitting bids, and the currency that must be used. The Auction Rules *do not* appear to be designed to *address the extent to*

[275] Hrg. Tr., Vol. V (Aug. 7, 2020), 826:2–4 [Rasco].
[276] *Id.* at 828:11–13 [Rasco].
[277] *Id.* at 827:21–25 [Rasco].
[278] *Id.* at 826:20–25 [Rasco].
[279] *Id.* at 829:19–25 [Rasco].

which a non-applicant — including a financier, affiliated entity, or contractual counter-party — *may be permitted to have an interest in a gTLD.*[280]

144. Further, Ms. Willett testified that, based on Verisign's press release and Afilias' August 2016 letter objection, "to me that was akin to and consistent with the auction rules. . . "[281] Even if Afilias' claims were correct, "the mere fact of an agreement to me and the fact that Verisign essentially acted as a bidder in the auction on behalf of NDC would not disqualify them."[282]

145. "Lots of folks participate indirectly in auctions, just as anyone financing -- I believe Afilias, I read, received a loan for their participation in the auction."[283] Indeed, Afilias admitted that its lender determined how much it would spend at the auction, ultimately limiting the amount of Afilias' bid and causing Afilias to lose the auction to NDC.[284]

146. Close cooperation during the auction obviously was required. NDC was bidding Verisign's money without a pre-determined limit for each round or a final bid. The auction process itself was very complex, including numerous rounds of bidding across two auction days.[285] While NDC and Verisign worked cooperatively, Verisign never provided NDC with a blank check to bid whatever it wanted at each step or as a final amount, nor could it reasonably be expected to do so. The provisions about which Afilias complains would be reasonably required to protect any financier of such a bidding process.

147. Finally, the provisions of the DAA were farther removed from being an assignment of NDC's Application than an agreement between NDC and Afilias to go to a private auction in exchange for a guarantee from Afilias to NDC of $17.02M. Under Afilias' proposal, NDC would have been committed to bidding a certain way—losing the auction—in a certain

[280] ICANN's Rejoinder, ¶ 85 (emphasis added).
[281] Hrg. Tr., Vol. IV (Aug. 6, 2020), 707:23–707:24 [Willett].
[282] *Id.* at 747:25–748:3 [Willett].
[283] Hrg. Tr., Vol. V (Aug. 7, 2020), 822:15–18 [Rasco].
[284] Afilias' Amended IRP Request, ¶ 35.
[285] In an ICANN public auction, a price is set in each round and applicants must enter a bid amount that is equal to or greater than the set price to continue to the next round. Although applicants know how many parties are participating in each round, they do not know which parties remain at any time or the limits of each party's financing or interest in the gTLD. *See* **Ex. C-3,** Guidebook, *supra* note 49, at Module 4, § 4.3.1.

form of auction – private rather than public.

7. *Afilias Reply 56:* Redacted - Third Party Designated Confidential Information

148. There is no requirement in the Guidebook or Application that NDC disclose Verisign's support in the resolution of the contention set. Confidentiality in such matters is common and does not constitute a resale, assignment, or transfer of the Application or other Guidebook violation. Ms. Willett testified that Section 10 prohibits only an assignment of the entire application.[286] Afilias never disclosed who was financing its bid.[287] Nor did Afilias complain when WordPress (with which Afilias was a competing bidder), Donuts, Radix—both Donuts and Radix were co-objectors with Afilias against NDC's arrangement with Verisign—and others confidentially financed winning bids as part of pre-auction agreements to transfer the new gTLD after the auction. (Section VI.C.2, *supra*.) Afilias' complaint was invented for this IRP.

149. As a threshold matter, Verisign's and NDC's decision to maintain the confidentiality of the DAA is consistent with standard and prudent business principles. Messrs. Livesay and Rasco both testified that financing and other cooperative agreements among commercial technology companies are commonly maintained as confidential.[288] From NDC's point of view, "it was a prudent business strategy to make sure that we had -- nobody knew where -- what kind of funding NDC had for this auction, just as we didn't know what our competitors -- what funding our competitors had."[289]

150. The parties followed what they observed as common practice in the industry in terms of confidentiality. As Mr. Livesay testified, "[w]e know there's going to be an evaluation period. So let's create the situation where we have seen in others where the evaluation is done

[286] Hrg. Tr., Vol. III (Aug. 5, 2020), 568:3–8 [Willett].
[287] *See supra* ¶ 145, and note 284.
[288] Hrg. Tr., Vol. V (Aug. 7, 2020), 821:9–14 ([Rasco] public companies commonly maintain their agreements as confidential); Hrg. Tr., Vol. VII (Aug. 11, 2020), 1247:23–1248:2 ([Livesay:] "I think any -- at least in the world I worked in, in Silicon Valley, keeping private commercial agreements private with confidentiality provisions is not uncommon").
[289] Hrg. Tr., Vol. V (Aug. 7, 2020), 820:9–13 [Rasco]; *id.* at 864:9–10 ([Rasco:] the DAA "never needed to be disclosed").

after the auction."[290] Indeed, ICANN has never taken the position (to *Amici*'s knowledge) that a transaction such as the DAA either should be publicly disclosed or disclosed to ICANN in advance of requesting an assignment of a registry agreement.[291]

151. Afilias fails to cite any requirement in the Guidebook publicly to disclose the DAA because there is none. (*See* Section VII.A, *infra*.) By comparison, the parties always anticipated disclosing the DAA to ICANN for its review when a future assignment would be requested, if NDC prevailed at the auction, as is customary.[292] Until then, there would not be a transfer of any rights in the Application or gTLD to Verisign.[293]

152. In response to cross-examination questions as to how Mr. Rasco would have responded if ICANN asked to see the DAA, Mr. Rasco repeated: "Well, I don't believe NDC had to disclose the DAA to preserve our rights in the application."[294] As Afilias' lawyers persisted in seeking a response to the hypothetical question, Mr. Rasco stated: "You know, I don't know what I would have done in that circumstance."[295] In fact, in late July 2016—prior to the execution of the registry agreement or request for assignment—when ICANN asked to see the DAA, NDC and Verisign immediately provided it to ICANN without objection. Neither party was trying to hid the agreement from ICANN. And after receiving the agreement, ICANN

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[290] Hrg. Tr., Vol. VII (Aug. 11, 2020), 1248:13–16 [Livesay].

[291] Mr. Livesay states that he had every motivation to study carefully the requirements of the Guidebook, as

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Livesay Stmt., ¶ 5.

In response to cross-examination attempting to turn this motivation to play by the rules into an attempt to violate the Guidebook, Mr. Livesay elaborated that confidentiality to avoid meritless attacks by competitors was purely a secondary consideration in structuring the DAA. *See* Hrg. Tr., Vol. VII (Aug. 11, 2020), 1246:9–1248:17 [Livesay]. Of course, meritless attacks from competitors came before and after the auction, in the first instance when NDC would not agree to a private auction and thus the competitors were not able to split the proceeds of the .WEB auction among themselves (rather than the proceeds being invested in the DNS infrastructure), and secondly when it was announced that Verisign had financed NDC's bid and NDC would seek an assignment of the registry agreement (*i.e.*, building .WEB into a healthy competitive registry). *Id.* at 1279:18–21 ("[Livesay:] the only way I can say it is all the alleged claims we are hearing now from Afilias, however wrong I think they are, we would have heard.") *See* Verisign's Pre-Hearing Brief, ¶¶ 23, 33.

[292] Hrg. Tr., Vol. VII (Aug. 11, 2020), 1246:18–1247:8, 1272:5–20, 1279:18–1280:5 [Livesay].

[293] Mr. Rasco did not even recall any negotiations with Verisign regarding non-disclosure. "We were not transferring anything to Verisign at this time in entering into the DAA"; "there was never any doubt as to whether or not we were violating the guidebook because we would never." Hrg. Tr., Vol. V (Aug. 7, 2020), 897:6–16 [Rasco].

[294] *Id.* at 837:20–21 [Rasco].

[295] *Id.* at 838:2–3 [Rasco].

never voiced any objection to NDC or Verisign regarding the terms of the DAA.

VII. NDC DID NOT VIOLATE ANY OBLIGATION OF DISCLOSURE UNDER THE GUIDEBOOK OR AVOID RELEVANT SCRUTINY OF ITS APPLICATION.

153. Afilias contends that NDC and Verisign, in an attempt to avoid scrutiny relevant to a review of NDC's application, violated the disclosure requirements of the Guidebook by not disclosing Verisign's contractual relationship with NDC prior to the public auction for .WEB.

154. Afilias' argument is fully refuted by the testimony of ICANN's then responsible officer, Ms. Christine Willett. Ms. Willett testified that ICANN "couldn't and didn't undertake to evaluate" third-party relationships that involved "future plans" for the operation of the TLD, and ICANN's practice of not evaluating these third-party relationships included the applicants who had "intention[s] to assign a TLD to a third party."[296] Ms. Willett explained that there were "hundreds or thousands" of these potential third-party relationships, and whenever ICANN received an inquiry from an applicant regarding assignments prior to contracting, ICANN staff informed the applicant that "*they could request such an assignment after contracting*."[297]

155. It likewise is undisputed that there is no requirement that an applicant disclose its sources of financing.[298] ICANN required disclosure only of financial information relating to an applicant's ability to *operate* a gTLD registry, not its ability to *acquire* the domain.[299]

156. Indeed, Afilias has never disclosed the source or terms of its auction financing and withdrew the very witnesses who could have shed light on this "secret" arrangement.

157. Ms. Willett's testimony makes clear that *Amici*'s conduct was consistent with ICANN's and the industry's practices with respect to transactions like the DAA that involved auction financing or "future plans" for the operation of a TLD. Further, *Amici* had legitimate reasons for keeping the DAA confidential, and always intended to disclose it in connection with

[296] Hrg. Tr., Vol. IV (Aug. 6, 2020), 775:1, 775:8–9, 775:12–13 [Willett].
[297] *Id.* at 775:14–18 [Willett].
[298] **Ex. C-3**, Guidebook, *supra* note 49, at Module 4, § 4.3.2. & Questions 48(a) – 50(b) of Application; *see also* Afilias' Amended IRP Request, ¶ 35; NDC's Pre-Hearing Brief, ¶ 32.
[299] **Ex. C-3**, Guidebook, *supra* note 49, at Module 2, § 2.2.2.2 (soliciting information "about the applicant's financial capabilities for operation of a gTLD registry and its financial planning in preparation for long-term stability of the new gTLD").

an assignment request, if the auction bid was successful. *Amici* did not avoid any scrutiny or secure any advantage in the evaluation process by maintaining the DAA confidential.

A. The Guidebook Did Not Require Disclosure Of The DAA Prior To The Auction

158. Afilias contends that Section 1.2.7 of the Guidebook required NDC to disclose the DAA. That Section provides 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 via submission of the appropriate forms. This includes applicant-specific information such as changes in financial position or ownership or control of the applicant."[300]

159. After several rounds of briefing, submission of written evidence, and an IRP Hearing, however, Afilias has not demonstrated that the DAA rendered NDC's .WEB application untrue, inaccurate or misleading in any respect.

160. First, as discussed in Section VI.B, *supra*, NDC remains the applicant, with all rights and responsibilities to ICANN of an applicant. The DAA did not transfer ownership, management, or control of NDC to Verisign, and Verisign has never had any direct or indirect legal or beneficial ownership in NDC. As a result, the DAA did not make any of the identifying information on NDC's application untrue or inaccurate.[301]

161. Second, *Amici* explained in their pre-hearing briefs why the DAA did not render NDC's description of its "Mission/Purpose" for .WEB (*see* Question 18 on the application form) inaccurate, untrue, or misleading.[302] For example, Mr. Rasco testified in his witness statement that NDC's perspective on the mission and purpose of .WEB has never changed, "irrespective of who operates .WEB."[303] In addition, unless and until ICANN approves a request for assignment to Verisign, NDC remains the applicant and NDC's stated plans for the operation of .WEB

[300] **Ex. C-3**, Guidebook, *supra* note 49, at Module 1, § 1.2.7.
[301] *See* Hrg. Tr., Vol. III (Aug. 5, 2020), 576:9–18 ([Willett:] ICANN required that the entity named on the application retain responsibility for the application); Section VI.B, *supra*.
[302] Verisign's Pre-Hearing Brief, ¶¶ 77–86.
[303] Rasco Stmt., ¶ 16.

remain the same.[304] This is particularly salient because, as discussed in Section VI.B, *supra*, there are a number of scenarios under which NDC may still operate .WEB according to those stated plans. As of today, therefore, the "mission/purpose" described in the Application remains unchanged.

162. Afilias' argument is further undermined by the fact that the responses to Question 18 are irrelevant to ICANN's evaluation of a new gTLD application.[305] As Mr. Rasco declared, the "ICANN Guidebook states that responses to Section 18 are 'not used as part of the evaluation or scoring of the application.'"[306] Instead, "the Guidebook explains that Section 18 responses are used in connection with *ex-post* reviews of the gTLD program in general and not in connection with any specific application."[307] Afilias made no attempt to cross-examine Mr. Rasco on these statements or to elicit any contrary testimony from Ms. Willett.[308]

163. To the same effect, ICANN regularly approves transfers of new gTLDs irrespective of a change in "mission/purpose." (Section VI.A, *supra*.) Indeed, ICANN's assignment documentation asks assignees if there will be any changes to a TLD's mission or purpose.[309] Any change in the registry operator, and thus any related change in the "mission/purpose," could only be made upon ICANN's consent in response to an assignment request.

164. Notwithstanding the express provisions of the Guidebook, Afilias attempted to argue, both in its Response to *Amici*'s pre-hearing briefs and at the Hearing, that NDC was obligated to disclose the DAA because Verisign had become the party "behind NDC's application."[310] Afilias' argument is flatly contradicted by the Guidebook and its application by

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[304] "NDC's Section 18 responses expressly stated that NDC's marketing and other business plans were not final and were subject to market conditions." Rasco Stmt., ¶ 16. That is, even as written those responses were subject to change and never intended, or required, to be a definitive statement of NDC's plans for .WEB.
[305] Verisign's Pre-Hearing Brief, ¶¶ 80–81; Rasco Stmt., ¶¶ 18–20; **Ex. C-3**, Guidebook, *supra* note 49, at Attachment to Module 2, A-11, A-12.
[306] Rasco Stmt., ¶ 18; **Ex. C-3**, Guidebook, *supra* note 49, at Attachment to Module 2, A-11, A-12.
[307] Rasco Stmt., ¶ 19; **Ex. C-3**, Guidebook, *supra* note 49, at Attachment to Module 2, A-11, A-12.
[308] *See generally* Hrg. Tr., Vol. III (Aug. 5, 2020) [Willett]; *id.* at Vol. IV (Aug. 6, 2020) [Willett]; *id.* at Vol. V (Aug. 7, 2020) [Rasco].
[309] *See* **Ex. R-3**, Application for Assignment – Registry Agreement for .MEET, *supra* note 26.
[310] Afilias' Response to the *Amicus Curiae* Briefs, ¶ 40; Hrg. Tr., Vol. V (Aug. 7, 2020), 859:1–3 [Rasco].

ICANN. Indeed, Ms. Willett emphatically rejected Afilias' argument, stating "I don't know what you mean by 'who was behind' [a given application]."[311] As she explained, ICANN required disclosure of the applying entity, management, contacts, "and any ownership interest in the applying entity greater than 15 percent."[312] "[T]hose were the people related to the application" that warranted disclosure and that ICANN made public, *and* that NDC disclosed in accordance with its Guidebook obligations.[313]

165. Ms. Willett testified repeatedly that the fact that NDC had a third-party agreement with Verisign was neither remarkable nor of particular interest to ICANN. As she explained, "applicants had agreements with a variety of vendors and third parties regarding all sorts of aspects of their application and future gTLD operations."[314] Like here, other applicants entered into such agreements *before* acquiring a gTLD and only informed ICANN *after* the fact, as there "were applicants— more than a handful of applicants who signed a Registry Agreement and then immediately transferred a TLD to another registry operator, requested such an assignment from ICANN."[315] That an applicant might have "some sort of agreement" with a third party was immaterial to ICANN's evaluation of a given application.[316] What ICANN considered material, and what it used to evaluate an application, was "the information [an applicant] had provided in the application and the subsequent questions" as required by the Guidebook.[317]

166. At bottom, ICANN was not concerned with third-party agreements or vague notions of who was "behind an application." So long as the applying entity and the information required by the Guidebook were accurate, ICANN proceeded to evaluate each application

[311] Hrg. Tr., Vol. III (Aug. 5, 2020), 550:24–25 [Willett].
[312] *Id.* at 550:25-551:7 [Willett].
[313] *Id.* at 551:11–12 [Willett]; *see also id*. at 551:18–19 ([Willett:] stating that the purpose of ICANN's public disclosure was "to inform the public of the [applying] entity").
[314] Hrg. Tr., Vol. IV (Aug. 6, 2020), 708:12–15 [Willett].
[315] *Id.* at 708:16–20 [Willett].
[316] *See id.* at 773:8–774:6 [Willett] (rejecting the notion that "if Verisign had been involved with NDC's application, that would suggest a resell, transfer or assignment of NDC's rights and obligations in the application" because applicants contracted with third parties, including Verisign, for many different reasons).
[317] *Id.* at 708:24–709:1 [Willett].

according to that enumerated criteria.[318] As Ms. Willett testified in response to a question from Arbitrator Kessedjian, "absent a change to the applying entity itself," it did not "fall within the scope . . . of the evaluation criteria that we applied within the guidebook."[319]

167. Nor did Afilias elicit any testimony during the hearing establishing that NDC misled ICANN, notwithstanding its repeated representations that it would do so.[320] Afilias presented no evidence that NDC's management or ownership had changed, leaving unrebutted Mr. Rasco's witness statement on those points. Afilias likewise did not elicit any testimony that Mr. Rasco had lied to ICANN—in violation of NDC's Guidebook violations—in response to pre-auction inquiries from ICANN. Mr. Rasco responded truthfully to the substance of ICANN's inquiries, which focused on allegations of changes to NDC's organization, and did not intentionally withhold information about NDC's application.[321] As Mr. Rasco explained during the hearing, that is because "[n]othing in the application changed [after the DAA] that would require any kind of disclosure to ICANN."[322]

B. Confidentiality Of The DAA Did Not Provide *Amici* Any Undue Advantage Nor Allow The DAA To Avoid Any Relevant Scrutiny

168. Verisign and NDC did not gain any undue advantage or avoid scrutiny under the Guidebook or in the auction's administration or award.[323] Afilias contends that if NDC and Verisign disclosed the DAA, or if Verisign submitted its own application, governments and the internet community *might* have submitted comments, which *could* have affected the status of the application. Afilias has not provided any evidence that these possibilities might have occurred. Further, they are contrary to the Guidebook and how it has been applied by ICANN.

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[318] Ms. Willett's statement that knowledge of the DAA "would have given my team another direction to pursue and additional questions to ask" of NDC does not change this conclusion. Hrg. Tr., Vol. IV (Aug. 6, 2020), 616:16–17 [Willett]. Rather, based on her other testimony, those questions would have established that the DAA did not change the applying entity from NDC to Verisign and, therefore, would not have raised concerns at ICANN or affected ICANN's evaluation of NDC's application under the Guidebook's criteria. In addition, Ms. Willett was speaking generally in response to a hypothetical question, and she did not testify that such information would in fact have caused ICANN to conduct an investigation or otherwise was material. *See id.* at 774:22–775:24.
[319] Hrg. Tr., Vol. IV (Aug. 6, 2020), 775:22–24 [Willett].
[320] Hrg. Tr., Vol I (Aug. 3, 2020), 73:1–22 [Afilias Opening Statement].
[321] Hrg. Tr., Vol. V (Aug. 7, 2020), 862:2–24 [Rasco].
[322] *Id.* at 863:19–20 [Rasco].
[323] Verisign's Pre-Hearing Brief, ¶ 46.

169. The DAA contemplates disclosure to ICANN at the appropriate time—*i.e.*, if NDC won the auction, a registry agreement was successfully concluded, and a consent for assignment of the registry agreement was presented to ICANN.[324] Mr. Livesay's and Mr. Rasco's testimony confirm that both parties understood that ICANN would review the DAA if and when these conditions were fulfilled and the DAA thus became relevant.[325] If ICANN approved the assignment, ICANN would then post public notice of an assignment agreement between NDC and Verisign to ICANN's website.

170. ***ICANN has followed this same practice for the hundreds of other gTLDs that previously have been assigned.***[326] Specifically, assignments of new gTLDs are reviewed by ICANN, and generally only by ICANN, after the application process is complete, a registry agreement has been executed, and a request for assignment is made to ICANN. This also was true of the assignments of new gTLDs to and from Afilias.

171. Fundamentally, Afilias' complaint is about the process laid out by ICANN in the Guidebook and *not* with its adherence to that process in this particular instance. As such, Afilias' claim is an attack on the Guidebook itself, and any such attack is long time-barred.

172. Ignoring industry and ICANN Guidebook practices, Afilias argues that Verisign did not submit an application for .WEB in order to avoid scrutiny by ICANN and the internet community, believing that it had a better chance of obtaining .WEB through another company's application. Afilias' unsupported view of history is pure fiction. As explained in detail in Section VI.A, *supra*, the DAA was not an attempt to avoid public scrutiny, but rather was an

[324] **Livesay Ex. D**, DAA, *supra* note 209, at Ex. A, § 3(c) (emphasis added); Verisign's Pre-Hearing Brief, ¶ 25.
[325] Livesay Stmt., ¶ 18; Hrg. Tr., Vol. VII (Aug. 11, 2020), 1246:18–32 ([Livesay:] ". . . [W]e knew that it would be evaluated eventually at some point, should NDC win the auction and should they sign a Registry Agreement, there would naturally be an evaluation where it would be disclosed that we were seeking to have the Registry Agreement assigned to us."); Rasco Stmt., ¶ 49; Hrg. Tr., Vol. V (Aug. 7, 2020), 822:25–823:3 ([Rasco:] "[NDC] would obviously have to seek ICANN's approval to transfer the Registry Agreement to [Verisign], if we ever got to that point.)"
[326] *See* ICANN Registry Agreement Assignment, *available at* https://www.icann.org/resources/pages/registry-agreement-assignment-direct-changes-of-control-2017-01-27-en.

attempt by the company to "find ways to grow and sell more domains" through the New gTLD Program at a time when the window for submitting new applications already had closed.[327]

173. Also contrary to the evidence, Afilias next argues that the non-disclosure of the DAA violated the Guidebook and permitted Verisign to avoid public scrutiny that might have blocked any amendment to the .WEB application disclosing NDC's and Verisign's plan for NDC to seek an assignment of the registry agreement. Again, this argument is baseless.

174. *First*, as established above, the Guidebook did not require disclosure of the DAA or an amendment to the Application. In the hundreds of other assignments of new gTLDs (i) the transferee did *not* file a new or amended gTLD application, (ii) the transfer to the registry operator was *not* subject to any public scrutiny, and (iii) the only review of the assignment was *by ICANN* in response to precisely the type of transfer application that is contemplated by the DAA. Section VII.A, *supra*.

175. *Second*, *Amici* did not avoid relevant scrutiny by not disclosing the DAA prior to the .WEB auction. This is because there is no evidence that any formal or informal objection would have been appropriate or, under the Guidebook, could have resulted in ICANN's rejection or reevaluation of the application. Indeed, the evidence is to the contrary.

176. The formal objection process under the Guidebook is limited to objections on the following grounds, none of which is relevant here: (i) string confusion objections, (ii) legal rights objections, (iii) limited public interest objections, and (iv) community objections.[328] As explained in the Guidebook, formal objections may be made only on these four "limited grounds."[329] Such objections are then considered by special panels and are not considered during the normal evaluation process for applications.[330] Afilias' complaints regarding *Amici* do not fall within any of these four objection categories, and Afilias has never claimed that they do.

177. Outside the identified objection grounds, the public may submit comments to

[327] Hrg. Tr., Vol. VII (Aug. 11, 2020), 1264:10–11 [Livesay].
[328] **Ex. C-3**, Guidebook, *supra* note 49, at Module 3, § 3.2.1.
[329] *Id.* at Module 1, § 1.1.2.3.
[330] **Ex. C-3**, Guidebook, *supra* note 49, at Module 1, § 1.1.2.3. Formal objections are reviewed by "a panel of qualified experts." *Id.* at Module 3, § 3.2.

ICANN via its website with respect to any published new gTLD application.[331] These comments can be considered as part of the application's evaluation.[332] However, there is no obligation otherwise to take steps or do anything in response to a public comment.[333] As explained in the Guidebook, application comments have "a very limited role in the dispute resolution process."[334]

178. Over 12,000 comments or objections were posted by the Internet community under the new gTLD Program.[335] But Afilias did not point to a single instance where any action was taken in response to such a public comment or objection. Counsel for *Amici* also did not find any example of such an action.

179. A review of certain potentially relevant public comments in response to new gTLD applications indicates that the informal objection process has not resulted in disqualification of applications. Thus, the claim that NDC and Verisign somehow avoided scrutiny or any meaningful review by not submitting an application for .WEB or disclosing the DAA is utter speculation and baseless. For example, Jeffrey Stoler, a partner at McCarter & English, LLP, submitted a 24-page public comment for each of Donuts' 333 gTLD applications.[336] In this letter, Mr. Stoler details seven grounds for why the applications from Donuts should be denied, including that Donuts and Demand Media Group were acting for the benefit of one another (Section VI.C.2.a, *supra*), and that there were numerous related "problematic, questionable and/or illegal Internet business activities."[337] Despite the objections to these applications raised by Mr. Stoler, ICANN awarded the 333 gTLDs to Donuts, over a hundred of which Donuts subsequently assigned to Rightside.[338]

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[331] ICANN New gTLD Applications Comments Forum, *available at* https://gtldcomment.icann.org/.
[332] *Id.*
[333] *Id.* (the evaluation panels only "review[ed] and consider[ed]" the comments as part of the evaluations).
[334] **Ex. C-3**, Guidebook, *supra* note 49, at Module 1, § 1.1.2.3.
[335] ICANN New gTLD Applications Comments Forum, *supra* note 331.
[336] **AC-53**, Letter from Jeffrey Stoler, McCarter & English, to ICANN, "gTLD Applications of Demand Media, Inc. and Donuts, Inc. (July 28, 2012); *see, e.g.*, Stoler objection to Ruby Glen, LLC's (a subsidiary of Donuts) .WEB Application, *available at* https://gtldcomment.icann.org/applicationcomment/commentdetails/5272.
[337] **AC-53**, Letter from Jeffrey Stoler to ICANN, *supra* note 336, at 2.
[338] Verisign's Pre-Hearing Brief, ¶ 41; **AC-50**, Demand Media SEC Filing (May 10, 2013), at 19; **AC-51**, Rightside SEC Filing (2014).

180. In an attempt to show that Verisign avoided scrutiny from objections and comments by not submitting its own application, Afilias introduced a single comment concerning a Google application, which also apparently led to no action. The Australian Government objected to an application from Charleston Road Registry Inc. ("Google") for .BLOG based on Google's intention to operate .BLOG as a special purpose registry.[339] This objection does not support Afilias' claim. First, even government notifications are not formal objections qualifying for special treatment.[340] Second, Australia's objection to Google's .BLOG application apparently had no impact on ICANN's consideration of that application. Certainly Afilias adduced no evidence in this IRP of any action by ICANN in response to the objection to Google's .BLOG application. Afilias' .BLOG example only further demonstrates that Verisign did not avoid any meaningful review in the application process.

VIII. COMPETITION CLAIM

181. Afilias commenced this IRP contending that ICANN's entry into a registry agreement with NDC, while knowing that the agreement may be assigned to Verisign, would violate ICANN's mandate to promote competition.[341] In its pre-hearing Reply Memorial, Afilias elaborated further, asserting that ICANN is a competition regulator with the power and obligation to prevent Verisign from operating .WEB. Afilias further contended that Verisign intends to acquire .WEB to shut it down and/or limit its competitive potential in order to preserve Verisign's purported monopoly in domain names and that ICANN must prevent Verisign from operating .WEB on the basis of this purported concern.[342] Afilias based these assertions solely on the opinions of two "industry experts," George Sadowsky and Jonathan Zittrain, neither of whom has expertise in economics or antitrust and neither of whom offered an economic analysis

[339] **Ex. C-183**, Australian Government Notification for Charleston Road Registry Inc.'s .BLOG Application.
[340] Contrary to Afilias' suggestion during the Hearing, this notice was only submitted by the Australian Government and was not on behalf of the entire Government Advisory Committee ("GAC"). ICANN Board Member J. Beckwith Burr confirmed in her testimony that the Australian notification for .BLOG "is not GAC advice, this is an individual member of the GAC expressing a concern." Hrg. Tr., Vol. II (Aug. 4, 2020), 314:3–5 [Burr].
[341] Afilias' Amended IRP Request, ¶¶ 79–83.
[342] Afilias' Reply Memorial, ¶¶ 122–24, 136.

of the alleged competitive impact of .WEB on the TLD market.[343]

182. Notwithstanding its pre-hearing bluster regarding ICANN's purported violation of its competition mandate, Afilias effectively abandoned its competition claim during the hearing. Afilias devoted less than four minutes of its over two hour opening to the subject of competition, and most of that was spent to notify the Panel that it would not be cross-examining *Amici*'s experts John Kneuer and economist Kevin Murphy. Several days later, Afilias advised the Panel that it also would not cross-examine ICANN's economics expert Dennis Carlton. In response, ICANN withdrew its request to cross-examine Afilias' experts George Sadowsky and Jonathan Zittrain. As a consequence, the IRP hearing concluded without Afilias presenting *any* additional evidence regarding its competition claim. The *only* witness during the IRP hearing who addressed ICANN's competition obligations was Ms. Burr, who testified that ICANN is not a competition regulator and defers to competent competition authorities on such matters.[344]

183. Having failed to adduce any evidence in its favor at the IRP hearing, Afilias' competition claim remains defective for the reasons articulated in *Amici*'s and ICANN's pre-hearing briefs. *Amici* will not restate those reasons in full here, but summarize below the deficiencies in Afilias' competition claim that remain unrebutted following the IRP hearing.

184. **ICANN Is Not An Economic Regulator.** Prior to bringing this IRP, Afilias agreed with *Amici* and ICANN that "[n]either ICANN nor the GNSO have the authority or expertise to act as anti-trust regulators."[345] Afilias' current contrary position, adopted for the purpose of obtaining .WEB for itself, fundamentally misstates the scope of ICANN's authority and its competition mandate and is contradicted by the undisputed evidence.

185. Afilias' counsel claimed during his opening statement that the U.S. government "transferred virtually all regulatory authority over the DNS to ICANN."[346] The U.S. government did nothing of the sort, and Afilias introduced no evidence to support this sweeping assertion.

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[343] *See* Murphy Report (May 28, 2020), ¶¶ 4, 38, 49.
[344] Hrg. Tr., Vol. II (Aug. 4, 2020), 349:9–350:8 [Burr]; *see also* Burr Stmt. (May 31, 2019), ¶¶ 25, 30–31.
[345] **Ex. R-21**, Afilias' 2006 Registry Operators' Submission.
[346] Hrg. Tr., Vol. I (Aug. 3, 2020), 14:4–5 [Afilias Opening Statement].

As explained by Ms. Burr in her witness statement, ICANN was created as part of a plan by the United States government to remove itself from direct administration of the DNS and instead to have the technical infrastructure of the DNS administered by a private, non-governmental entity.[347] That plan did not include any transfer of regulatory authority to act as a competition regulator.[348] Ms. Burr reiterated this testimony during the IRP hearing, testifying that "ICANN is not a regulator, and ICANN does not have competition law competence, whether it is U.S. or otherwise."[349] Consistent with this limited transfer of authority, ICANN's Bylaws make clear that "ICANN does not hold any governmentally recognized regulatory authority."[350]

186. Further, Afilias' claim that ICANN possesses vast regulatory authority contradicts ICANN's Bylaws, which are clear that ICANN may only exercise authority within the scope of its mission. "ICANN shall not act outside its mission."[351] ICANN's mission "is to ensure the stable and secure operation of the unique identifier systems,"[352] *not* to supplant existing competition authorities. Afilias introduced no evidence to the contrary either prior to or during the IRP hearing.

187. Afilias' competition argument also rests on its false assertion that "one of the principal purposes" for ICANN's formation was to "break VeriSign's monopoly."[353] Afilias introduced no evidence supporting this assertion. Afilias also introduced no evidence at the IRP hearing to support its claim that Verisign is a "monopoly," and its pre-hearing claims that Verisign holds a dominant position were thoroughly refuted by the expert report of Kevin Murphy,[354] which stands unrebutted due to Afilias' failure to offer any contrary evidence

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[347] Burr Stmt., ¶ 25.
[348] **Kneuer Ex. S**, Department of Commerce ("DOC"), Statement of Policy on the Management of Internet Names and Addresses (the "White Paper"), 63 Fed. Reg. 31741, at 6 (June 5, 1998), *available at* https://www.ntia.doc.gov/federal-register-notice/1998/statement-policy-management-internet-names-and-addresses (ICANN was "not intended to displace other legal regimes (international law, *competition law*, tax law and principles of international taxation, intellectual property law, etc." (emphasis added)).
[349] Hrg. Tr., Vol. II (Aug. 4, 2020), 350:6–8 [Burr].
[350] **Ex. C-1**, Bylaws, *supra* note 3, §§ 1.1(c), 1.2(b)(iii).
[351] *Id.*, § 1.1(b).
[352] *Id.*, § 1.1(a).
[353] Afilias' Amended IRP Request, ¶ 79.
[354] Murphy Report, ¶¶ 14–34.

whatsoever or to cross-examine Dr. Murphy.

188. Afilias likewise introduced no evidence to support its claim that ICANN exercises regulatory authority over Verisign. As discussed in the Kneuer Report, the DOC, not ICANN, has always retained authority over competition matters with respect to the .COM registry.[355] This authority is reflected in Verisign's Cooperative Agreement with DOC and Verisign's .COM registry agreements with ICANN.[356] Afilias did not cross-examine Mr. Kneuer, and has introduced no evidence of its own regarding DOC's exercise of regulatory authority over Verisign. In short, the undisputed evidence is that the U.S. government exercises regulatory authority over Verisign, not ICANN, which has no such authority under law or agreement with Verisign. Afilias' assertion that ICANN's Bylaws permit or require ICANN to exercise regulatory authority contradicts the record in this IRP.

189. **Competition Is Not A Review Criteria Under The New gTLD Program.** Afilias' competition argument presumes that, under the New gTLD Program, ICANN could reject NDC's application because of the alleged effect on competition from Verisign's potential operation of .WEB. Again, the undisputed evidence is to the contrary. If Afilias were correct, one would expect that the Guidebook would say something about competition being an applicant evaluation criteria, or prohibit or say something regarding Verisign's participation in the New gTLD Program. *But the Guidebook does not even mention competition or Verisign*. Instead, the New gTLD Program is open to *all applicants* who qualify to apply for a new gTLD.[357]

190. The new gTLD application sets forth a discrete list of information required from applicants.[358] Missing from this list is any criteria based on the impact on competition from the registry or operation of the registry by the applicant. This is underscored by the fact that application Question 18, which requests information regarding a TLD's "Mission" and

[355] Kneuer Report, ¶¶ 4–5, 28, 30–34.
[356] **Kneuer Ex. D**, Cooperative Agreement, NCR 92-18742, NSF-NSI, (Jan. 1, 1993), *available at* https://archive.icann.org/en/nsi/coopagmt-01jan93 htm & **Kneuer Ex. J**, .COM Registry Agreement (2006) ICANN-Verisign, § 3.1(d)(iv)(E) (Mar. 1, 2006, amended Sept. 22, 2010), *available at* https://www.icann.org/resources/unthemed-pages/registry-agmt-com-2020-09-22-en.
[357] **Ex. C-3**, Guidebook, *supra* note 49, at Module 1, § 1.2; Hrg. Tr., Vol. II (Aug. 4, 2020), 308:25–309:6 [Burr].
[358] **Ex. C-3**, Guidebook, *supra* note 49, at Attachment 2 to Module 2, "Evaluation Questions and Criteria."

"Purpose," is intended only to "inform the post-launch review of the New gTLD Program" including whether the "expansion of gTLDs has promoted competition," and is explicit that "[t]his information is not used as part of the evaluation or scoring of the application."[359]

191. The Guidebook, itself an action of the ICANN Board,[360] reflects ICANN's decision *not* to include competition as an applicant evaluation criteria. Afilias' competition argument effectively is that the Guidebook *should* have included competition as an evaluation criteria, even though it does not. That is an attack on the Guidebook itself, not ICANN's conduct with respect to .WEB, and is time barred.[361] Furthermore, as discussed *infra*, evaluating NDC's application on competition grounds not considered for any other applicant would violate ICANN's commitment to avoid discrimination in the application of its documented policies.[362]

192. **ICANN's Competition Mandate Was Fulfilled By The DOJ Investigation.** As Ms. Burr testified during the hearing, ICANN historically has referred competition concerns to a competent competition authority.[363] An example of this process is set forth in ICANN's Registry Services Evaluation Policy ("RSEP"), which is a mechanism registry operators use to request ICANN's approval to change Registry Services.[364] Under the RSEP process, ICANN's authority with respect to a service that may pose competition concerns is limited to a referral of the issue

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[359] *Id.*
[360] Hrg. Tr., Vol. II (Aug. 4, 2020), 307:1–8 [Burr]; *see also* ICANN, "About the Program," *available at* https://newgtlds.icann.org/en/about/program.
[361] **Ex. C-23**, Bylaws (as amended Feb. 11, 2016), Art. IV, §3.3, *available at* https://www.icann.org/resources/pages/bylaws-2016-02-16-en ("A request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation.").
[362] **Ex. C-1**, Bylaws, *supra* note 3, § 1.2(a)(v) (ICANN shall "[m]ake decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties")).
[363] Hrg. Tr., Vol. II (Aug. 4, 2020), 350:1–5 ([Burr:] "ICANN's role is setting a table where competition can take place. ICANN's role, as it says in the – as the RSEP process with respect to competition, is to refer issues where competition is a concern to relevant authorities.") & *id.* at 356:7–12 [Burr].
[364] *See* **Kneuer Ex. AA**, ICANN, "Registry Services Evaluation Policy," *available at* https://www.icann.org/resources/pages/registries/rsep/policy-en. ICANN's New gTLD Registry Agreement describes "Registry Services" in Section 2.1 of Specification 6 to that agreement. *See* **Ex. C-26**, New gTLD Registry Agreement.

to an appropriate competition authority.[365] The Guidebook similarly provides for a referral to a competition authority in the event that a registrar's—not a *registry*'s—potential operation of a new gTLD registry raises competition concerns, stating that "ICANN reserves the right to refer any application to the appropriate competition authority relative to any cross-ownership issues."[366] Nothing in ICANN's policies or the Guidebook authorizes or requires ICANN to assess competition issues itself.

193. The evidence before this Panel is undisputed that, with respect to .WEB, the appropriate competition authority did review the acquisition and declined to take action. In January 2017, the U.S. Department of Justice ("DOJ") commenced an investigation of Verisign's proposed acquisition of rights to operate .WEB, and subsequently closed that investigation without action. The DOJ focused on the potential competitive effects of Verisign's operation of .WEB.[367] Having evaluated the very concerns now raised by Afilias in this IRP, the DOJ's investigation and decision not to pursue action should conclusively resolve any claim that ICANN's consent to a .WEB assignment would violate ICANN's Bylaws.

194. In its pre-hearing briefing, Afilias asserted that the DOJ's decision to close its investigation of .WEB without action is "irrelevant" to the Panel's analysis because a U.S. federal court hearing an antitrust claim would not be bound by the DOJ's decision not to take action.[368] Afilias misunderstands *Amici*'s and ICANN's argument. *Amici* and ICANN do not contend that the DOJ's decision would necessarily bind a court in some hypothetical antitrust case, although of course it could be informative. Notably, neither Afilias nor anyone else has brought an antitrust action against Verisign with respect to .WEB .

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[365] **Kneuer Ex. AA**, "Registry Services Evaluation Policy," *supra* note 364, § 2.5 (ICANN "shall refer the issue to the appropriate governmental competition authority with jurisdiction over the matter . . ."); Burr Stmt., ¶ 24.
[366] **Ex. C-3**, Guidebook, *supra* note 49, at Module 1, § 1.2.1; *see also id.* at Module 5, § 5.1(4).
[367] **AC-31**, Letter from Kent Brown, U.S. Department of Justice, Antitrust Division, to Thomas Indelicarto, Executive Vice President, Verisign, "Civil Investigation Demand No. 28931," (Jan. 6, 2017) at 13 (defining the "Transaction," under investigation as "the agreement, and all conduct undertaken in furtherance of that agreement, between the Company [Verisign] and Nu Dot [NDC] according to which the Company would assign the .WEB registry agreement to the Company upon the consent of ICANN.").
[368] Afilias' Response to the *Amicus Curiae* Briefs, ¶¶ 210–213.

195. Rather, *Amici* and ICANN contend that review by a competition authority is the policy chosen by ICANN as a balance between its commitment to enable competition and its lack of regulatory authority as stated in the same Bylaws, and that ICANN's non-discrimination obligation under the Bylaws requires ICANN to treat *Amici* in the same fashion as it would any other party. Under ICANN's established policies, competition concerns are referred to a competition authority, and that referral is sufficient for ICANN to fulfill its obligation to consider the competition impact of particular transactions. A competition authority reviewing the transaction is precisely what occurred here. Treating *Amici* differently simply because Afilias so demands would itself be a Bylaws violation.[369]

196. **The Economic Evidence Establishes That There Is No Substantial Or Reasonable Cause To Bar Verisign From Operating .WEB On Competition Grounds.** Afilias contends that ICANN may discriminate against Verisign and prevent it from operating .WEB on competition grounds.[370] Afilias neglects to mention that ICANN may not "single out any particular party for disparate treatment *unless justified by substantial and reasonable cause* . . . ."[371] At a bare minimum, "substantial and reasonable cause" should require an evidentiary basis grounded in competition law for ICANN to take action against *Amici* on competition grounds. Yet, there is *no economic evidence* in this IRP that would establish any cause, much less substantial and reasonable cause. In fact, all the economic evidence, which is unrebutted by Afilias, demonstrates unequivocally that no such harm exists.

197. **The Evidence In This IRP Establishes That Verisign Is Not A "Monopoly".** Afilias contends that Verisign has a "dominant position" in the industry, and asserts that this supposed "fact" justifies barring Verisign from future operation of .WEB.[372] The evidence presented by *Amici* and ICANN establishes that Verisign has far less than a 50% share of a properly defined relevant market, which is insufficient as a matter of law to support monopoly

[369] *See supra* ¶ 88.
[370] Afilias' Reply Memorial, ¶ 124; Hrg. Tr., Vol. I (Aug. 3, 2020), 77:3–10 [Afilias Opening Statement].
[371] **Ex. C-1**, Bylaws, *supra* note 3, § 2.3 (emphasis added).
[372] Sadowsky Report (Mar. 20, 2019), ¶ 32.

power. Current market conditions—with over 1,200 gTLDs, globally marketed ccTLDs, and competition from TLD-agnostic channels, such as Google Chrome's search box, social media platforms and mobile applications—demonstrate that Verisign lacks the ability to control market wide output and prices or entry and expansion.[373] Verisign likewise cannot increase prices above competitive levels, because .COM pricing is capped by DOC and the Cooperative Agreement includes specific provisions as to when and by how much Verisign can raise prices.[374] Afilias has introduced *no economic evidence* to dispute these conclusions.

198. **.WEB Is Unlikely To Have A Significant Impact On Competition**. The economic evidence demonstrates that Verisign's acquisition of .WEB is unlikely to have any substantial impact on competition. The new gTLD Program has resulted in over 23.8 million new domain name registrations on top of the large domain name bases of other legacy gTLDs and 150 million registrations for ccTLDs.[375] As discussed in the Murphy Report, .WEB is unlikely to add a significant number of new registrations to the existing thriving and diverse domain name space.[376] Afilias has introduced *no economic evidence* to dispute these conclusions.

199. **.WEB Is Not Uniquely Positioned To Compete Against .COM**. As discussed in the Murphy and Carlton Reports, the alleged characteristics of .WEB (*i.e.*, universality, availability, and identity) are shared by multiple other new gTLDs, some of which have proven successful and some of which have not.[377] Moreover, .WEB's purported potential for success is purely subjective opinion, not objective, economic evidence that .WEB would have a significant competitive impact on the domain name industry.[378] Hearsay is not a substantial or reasonable basis for ICANN to ignore the objective economic evidence to the contrary.

[373] Murphy Report, ¶ 32.
[374] Verisign's Pre-Hearing Brief, ¶¶ 113–18.
[375] *Id.*, ¶¶ 123–24.
[376] Murphy Report, ¶¶ 54–57; Carlton Report (May 30, 2019), ¶¶ 31–32.
[377] Verisign's Pre-Hearing Brief, ¶¶ 125–131; Murphy Report, ¶¶ 38–48; Carlton Report, ¶¶ 35–41.
[378] Verisign's Pre-Hearing Brief, ¶ 13; Murphy Report, ¶¶ 38–39.

200. **.WEB's Valuation Shows It is Not Particularly Competitively Significant.** The Murphy Report models multiple economic scenarios to assess Afilias' claim that the $135 million price paid for .WEB at the public auction shows that .WEB will be a substantial competitor.[379] *None* of these scenarios indicate that .WEB is likely to gain a significant market share. Instead, each scenario shows that .WEB is likely to have no more than a 2–3% market share.[380] While Afilias wildly speculates that .WEB could be a substantial competitor to .COM, it submitted no economic evidence to support those claims, or to rebut *Amici*'s evidence.

201. **Verisign Has Every Incentive To Grow .WEB Aggressively.** Afilias' Amended IRP Request asserts without evidence that Verisign seeks to acquire .WEB in order to eliminate a potential competitor for .COM and that Afilias would make a better operator of .WEB.[381] Afilias presented no evidence to support this claim prior to the IRP, and none was presented at the hearing. In fact, the evidence before this Panel refutes Afilias' claims. The undisputed evidence is that Verisign needs a TLD like .WEB for growth given the decreased name availability in .COM.[382] Even Afilias' own experts concede that the .COM TLD now has limited name availability.[383] Moreover, the undisputed evidence establishes that Verisign is well-positioned to maximize .WEB's potential, while Afilias' recent track record suggests that it would be a less effective operator of .WEB.[384]

202. **The Garza Letter Does Not Support Afilias' Competition Claim.** During the hearing, Afilias cross-examined Ms. Burr regarding a 2008 letter from Deborah Garza, then Acting Assistant Attorney General for the DOJ, to Meredith Baker of the U.S. National Telecommunications and Information Administration ("NTIA").[385] Afilias seems to believe that Ms. Garza's 2008 letter supports its claim that ICANN's obligation to promote competition under its Bylaws, and specifically under the New gTLD Program, requires it to bar Verisign

[379] Murphy Report, ¶¶ 49 *et seq.*
[380] Verisign's Pre-Hearing Brief, ¶¶ 132–34.
[381] Afilias' Amended IRP Request, ¶ 82.
[382] *See* Verisign's Pre-Hearing Brief, ¶¶ 135–39.
[383] Zittrain Report, ¶ 47; Sadowsky Report, ¶ 22; *see also* Murphy Report, ¶ 74.
[384] *See* Verisign's Pre-Hearing Brief, ¶¶ 138–39.
[385] Hrg. Tr., Vol II (Aug. 4, 2020), 361:20–372:23, 376:5–383:5 [Afilias cross-examination of Burr].

from operation of the .WEB gTLD. Afilias is wrong.

203. First, in her letter, Ms. Garza takes the position that new gTLDs are not competitive with .COM.[386] This view *refutes* Afilias' claim that .WEB—a new gTLD—would have a competitive impact on .COM.

204. Second, Afilias questioned Ms. Burr regarding ICANN's alleged failure to follow DOC's recommendations regarding consideration of competition issues that may arise during the approval of new gTLDs. Afilias' criticism appears to be that the New gTLD Guidebook did not follow DOC's purported advice concerning an approach to competition issues.[387] Afilias' argument attacks the ICANN Board's decision not to include competition issues as an evaluation criteria in the application process, rather than any subsequent action or inaction by ICANN with respect to .WEB. That decision was made by ICANN's Board in 2012,[388] and it is far too late for Afilias to challenge that decision in this IRP.[389] Even if the Guidebook was inconsistent with Ms. Garza's recommendations, and that inconsistency could be challenged in an IRP, Afilias has not raised that claim here and any attempt to do so would be time barred.

205. Third, as Ms. Burr repeatedly testified, the focus of Ms. Garza's letter was not competition for domain name registrations in general, but rather the implications of the New gTLD Program for trademark holders. As Ms. Burr testified, "[i]n creating rules, fostering a competitive environment to the greatest extent possible, for example, in this case, this is largely 2008, this is largely about trademark concerns and the implication for consumers through the introduction of new top-level domains."[390] Ms. Burr also testified that ICANN did take DOJ's concerns into consideration and made numerous revisions to the Guidebook to reflect them.[391]

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[386] **Ex. C-125**, Letter from Deborah Garza, U.S. Department of Justice, to Meredith Baker, U.S. Department of Commerce, "ICANN's Draft RFP for New gTLDs" (Dec. 3, 2008), at 1–3.
[387] Hrg. Tr., Vol II (Aug. 4, 2020), 381:3–383:5 [Afilias cross-examination of Burr].
[388] *Supra* ¶ 191.
[389] *Supra* note 361.
[390] Hrg. Tr., Vol. II (Aug. 4, 2020), 367:1–7 [Burr].
[391] *Id.* at 367:8–14 ([Burr:] "And before the new gTLD Program launched, there were any number of steps taken to address the kinds of issues she is talking about in here, such as the Trademark Clearinghouse and stuff. So it is – so, you know, this is a letter that ICANN received and fed into the policy and implementation process.") & *id.* at 372:8–20 ([Burr:] "To me this letter is really about pressures on trademark owners who will feel compelled to register in new TLDs and that ICANN should analyze that issue, the trademark issue, and proceed cautiously in authorizing

Thus, the Garza letter is irrelevant to the present dispute, both because it concerned matters not pertinent to the present dispute and because ICANN addressed the DOJ's concerns before finalizing the Guidebook in 2012.

IX. AFILIAS DID NOT DISPROVE ITS BLACKOUT PERIOD VIOLATION

206. In its pre-hearing brief, NDC described how Afilias actively participated in the very activity it complains of in this IRP and how Afilias—not NDC—breached ICANN's rules.[392] For example, NDC outlined how Afilias violated the Guidebook's Blackout Period, a serious breach that subjects it to financial penalties and forfeiture of its .WEB application.[393] As set forth in Clause 68 of the Auction Rules, during the Blackout Period, applicants within a Contention Set are, *inter alia*, "prohibited from cooperating or collaborating with respect to . . . each other's, or any other competing applicants' bids or bidding strategies, or discussing or negotiating settlement agreements." Here, unable to convince NDC to accept over $17 million to *lose* a private auction *before* the Blackout Period began, Afilias' John Kane again texted Mr. Rasco *within* the Blackout Period requesting to "Talk?" and proposing "If ICANN delays the auction next week would you again consider a private auction? Y-N."[394]

207. NDC did not respond.[395] As Mr. Rasco testified in his witness statement, he "understood [Mr. Kane's] message to be an attempt to discuss resolution of the .WEB Contention Set by settlement during the Blackout Period and thus viewed it as a direct inquiry regarding NDC's strategy for the upcoming auction, in violation of the Blackout Period."[396] Mr. Rasco further testified that he "also understood Afilias' text message to refer back to" Afilias' prior proposal "under which Afilias attempted to induce NDC to agree to a private auction for .WEB by guaranteeing NDC over $17 million if NDC lost that auction."[397]

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new gTLDs, attempting to assess both the likely costs and benefits of any new gTLD. To me what this letter is about is – it's possible that new top-level domain operators will be able to impose costs on trademark owners who feel compelled to protect their marks, and you need to do this analysis before you proceed with new gTLDs.").

[392] NDC's Pre-Hearing Brief, ¶¶ 108–19.

[393] *Id.*, ¶¶ 114–19.

[394] **Rasco Ex. R**, Text message from J. Kane (Afilias) to J. Rasco (NDC), *supra* note 42.

[395] Rasco Stmt., ¶ 96.

[396] *Id*.

[397] *Id.*, ¶ 97.

208. Afilias has not rebutted NDC's allegation. First, Afilias contends that it did not violate the Blackout Period because "the plain language of Mr. Kane's text (a) did not discuss a bid for .WEB, (b) did not discuss bidding strategies for .WEB, and (c) did not discuss or negotiate a settlement agreement concerning .WEB."[398] There is no question that Mr. Kane's text concerned .WEB, given that the "auction next week" referenced in his message was the .WEB ICANN auction.[399] Moreover, the only plausible purpose of Mr. Kane's message was to revive Afilias' prior attempt to prevent an ICANN auction, *i.e.*, to settle the contention set, as expressly prohibited by the Auction Rules within the Blackout Period.

209. Second, Afilias contends there "is nothing in Mr. Kane's text that remotely suggests a renewal of any offer made in the context of the private auction discussions prior to the Blackout Period."[400] That, too, is implausible. In asking NDC to "again consider a private auction," Mr. Kane implicitly promised that NDC would leave that private auction with, at a minimum, its "losers' share" of the winning bid—exactly what Afilias had attempted to guarantee to NDC before the Blackout Period began. And even if Mr. Kane did not intend to renew his *prior offer*, he undeniably intended to make *an offer* to dissuade NDC from proceeding to the ICANN auction, again in violation of the Auction Rules.

210. Third, Afilias contends that "the offer that Afilias [previously] made (and that NDC had rejected) was made in the context of the private auction; it could have no application to an ICANN Auction."[401] Afilias misses the point. Mr. Kane did not send his July 22, 2016 message in the context of an ICANN auction; he sent it to *avoid* an ICANN auction in favor of a private auction. In fact, if Afilias were correct, then there could never be a violation of the Blackout Period, as all communications within that Period would constitute permissible conversations about the upcoming ICANN auction. That is not what the Auction Rules provide.

211. Furthermore, Afilias' response consists entirely of attorney argument without

[398] Afilias' Response to the *Amicus Curiae* Briefs, ¶ 182.
[399] *See* **Rasco Ex. R**, Text messages from Kane to Rasco, *supra* note 42.
[400] Afilias' Response to the *Amicus Curiae* Briefs, ¶ 183.
[401] *Id.*

supporting evidence. In particular Afilias *withdrew Mr. Kane's witness statement and chose not to call Mr. Kane as a witness at the Hearing*.[402] That decision has consequences. First, as discussed in Section II, *supra*, the Panel should draw an adverse inference and *conclude that Afilias did violate the Blackout Period*. Second, because Afilias did not call Mr. Kane and chose not to question Mr. Rasco on the Blackout Period, Mr. Rasco's testimony, together with Mr. Kane's text message itself, is the only evidence on that issue and stands unrebutted.

212. Finally, Afilias' lack of any affirmative witnesses, such as Mr. Kane, further illustrates how Afilias seeks to exploit the one-sided nature of this IRP. While it accused Mr. Rasco of malfeasance and lies, Afilias shielded Mr. Kane from cross-examination. Similarly, while it claimed Verisign's funding of NDC's auction bid violated ICANN's rules and constituted an improper assignment of rights in NDC's application, Afilias shielded all evidence concerning how it funded its own $135 million bid. After conceding that it obtained funding from an outside source *that restricted its bid to $135 million*,[403] Afilias prevented the Panel, ICANN, and *Amici* from exploring how that engagement compared to Verisign's funding of NDC's auction bid. For example, Afilias' witnesses could have testified regarding the specifics of its financial arrangement, *including* any terms similar to those in the DAA that Afilias falsely claims evidence a transfer of rights by NDC in its application.

213. *Amici* raised these points in their pre-hearing briefs and in their opening statements; Afilias said nothing, failing to respond and failing to dispel the conclusion that Afilias came to the Hearing with unclean hands.[404] It is telling that Afilias has repeatedly leveled baseless accusations against *Amici*—and demands extreme relief—while purposefully keeping the Panel, ICANN, and *Amici* in the dark about its own questionable conduct.

214. This issue also illustrates the importance of ICANN, rather than the Panel, determining whether or not NDC violated the Guidebook by entering into the DAA, as Afilias

[402] *See* Section II.
[403] Afilias' Amended IRP Request, ¶ 35; Mohan Stmt., ¶¶ 25, 35.
[404] *See* NDC's Pre-Hearing Brief, ¶¶ 108–19.

contends. As *Amici* discuss *supra*, that determination is within ICANN's proper exercise of discretion under the Guidebook, and should be made based on ICANN's experience administering the Guidebook, industry practice, and Afilias' own conduct in the New gTLD Program. Afilias' unclean hands from violating the Blackout Period is yet another fact that ICANN should consider in reaching its conclusions regarding Afilias' allegations.

X. RESPONSES TO PANEL'S QUESTIONS

A. Question No. 1: The Parties have cited a number of prior IRP decisions. What is the precedential value of these decisions on questions such as time limitation, the applicable standard of review, the remedial powers of IRP Panels, and other questions of principle in light of changes that may have been made to ICANN's Bylaws after the date of the decisions?

215. *Amici*'s response to Question No. 1 is set forth at Section III.A, *supra*.

B. Question No. 2: What is the legal effect of the Board's adoption of the CCWG Report (C-122) insofar as the later-adopted (amended) Bylaws (C-1) contain provisions contrary to or inconsistent with the Report? Is the CCWG Report relevant to the interpretation of the provisions of the Bylaws relating to the accountability mechanisms of ICANN?

216. *Amici*'s response to Question No. 2 is set forth at Section III.B, *supra*.

C. Question No. 3: What is the effect on the claims in issue in this case of the timing of the adoption of Rule 4 of the Interim Supplementary procedures (25 October 2018), as it affects the timing of bringing the claims that have been advanced in this proceeding (4 months and 12 months repose period)?

217. *Amici*'s response to Question No. 3 is set forth at Section X.G, *infra*.

D. Question No. 4: What is the scope of the litigation waiver (Terms and Conditions of Module 6 in the Guidebook): "Applicant agrees not to challenge in court . . . any final decision made by ICANN with respect to the Application . . . or any other legal claim . . . with respect to the application"? What link, if any, exists between the litigation waiver and the scope of the jurisdiction of IRP panels under the Bylaws, in light of ICANN accountability obligations? Does the litigation waiver have any relationship to the specific claims advanced in the Claimant's Amended Request?

218. *Amici*'s response to Question No. 4 is set forth at III.C *supra*.

E. Question No. 5: Please comment on Verisign's stated concern that the private resolution of contention sets may involve collusion in light of ICANN's stated preference for the private resolution of contention sets.

219. The facts regarding the proposed terms of a private auction for .WEB, and NDC's

decision to forego a private auction, are set forth at Section VI.D.2, *supra* at pages 53–55. The bases for Verisign's concerns regarding the legal risks in funding a private auction for .WEB are set forth in this section.

220. Private auctions are a product of agreements among the members of a Contention Set. The members of the .WEB Contention Set are direct horizontal competitors to operate .WEB. Any agreement among competitors raises antitrust risk and the proposals for the terms of the private auction here were particularly suspect.

221. Private auctions generally involve the winning competitor for rights in a gTLD paying money to the losing competitors for the gTLD. The antitrust laws prohibit anticompetitive agreements among competitors. Yet the gravamen of this IRP is Afilias complaining that it was required to participate in a *public* auction—under transparent rules and oversight—because NDC refused to participate in a private agreement among competitors that involved one competitor paying off the other competitors.

222. Specifically, Verisign's concern was that a "private auction" for .WEB could be viewed as an anticompetitive agreement among competing bidders whereby some bidders agreed not to participate in a public auction in exchange for a "pay off" from the winner. Verisign's position is not that private resolutions of contention sets necessarily violate the antitrust laws in all cases. Instead, Verisign's position is that its involvement in a private auction would have created unacceptable and unnecessary antitrust risks. That is especially true given that a public auction that would entirely avoid these antitrust risks was available.

223. Under the U.S. antitrust laws, unreasonable restraints of trade are illegal.[405] Agreements among competitors are the most likely type of agreements to raise antitrust concerns. Many agreements among competitors are "per se" illegal, meaning they are illegal on their face without any need to prove anticompetitive effects and without any opportunity to offer justifications for the agreement.

[405] **AA-99**, Sherman Act, 15 U.S.C. § 1.

224. The .WEB Contention Set is a group of entities that could be viewed as competitors each seeking to operate the same TLD. Thus, a private resolution among these competitors could be viewed as an agreement among competitors. Specifically, it could be viewed as a form of "bid rigging" among competing bidders seeking to win the same contract. "Bid rigging" is ordinarily treated as a "per se" violation of the antitrust laws, and "bid rigging" is often prosecuted criminally because it is such a serious violation.[406]

225. Indeed, multiple cases have held that agreements among competing bidders were "per se" illegal where the bidders held a "private auction." *See, e.g.*, **AA-103**, *United States v. Joyce*, 895 F.3d 673, 676 (9th Cir. 2018) (per se illegal for bidders to "agree[] not to compete to purchase selected properties at public auctions" and to instead "hold[] second, private auctions, to determine the payoff amounts and choose the conspirator who would be awarded the selected property."); **AA-70**, *Benigno v. United States*, 285 F. Supp. 2d 286, 289 (E.D.N.Y. 2003) (per se illegal where "after the official auction ended, the co-conspirators would then hold a second, private auction known as a 'knock-out' auction" and where "[d]uring the 'knock-out' auctions, the co-conspirators would bid competitively against each other to acquire the property at a price higher than the price paid at the official auction.").

226. ICANN and Verisign have both previously been sued for allegedly eliminating competitive bidding. In *Coalition for ICANN Transparency, Inc. v. VeriSign, Inc.*, 611 F.3d 495 (9th Cir. 2010) [**AA-76**], the plaintiffs alleged that ICANN and Verisign violated the antitrust laws by eliminating competitive bidding to operate a gTLD. These allegations were false. Nevertheless, the court held that "concerted action between co-conspirators to eliminate

[406] *See, e.g.*, **AA-78**, DOJ, Antitrust Division *Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For* (2007) ("bid-rigging schemes are *per se* violations" and that "bid-rigging schemes have one thing in common: an agreement among some or all of the bidders which predetermines the winning bidder and limits or eliminates competition among the conspiring vendors."); **AA-105**, *U.S. v. W.F. Brinkley & Son Const. Co.*, 783 F.2d 1157, 1161 (4th Cir. 1986) ("Where two or more persons agree that one will submit a bid for a project higher or lower than the others or that one will not submit a bid at all, then there has been an unreasonably restraint of trade"); **AA-102**, *U.S. v. Bensinger*, 430 F.2d 584, 589 (8th Cir. 1970) (bid rigging "is a price-fixing agreement" and thus a "per se violation[] of the Sherman Act.").

competitive bidding for a contract is an actionable harm to competition," *id.* at 502, and refused to dismiss the claim. The plaintiffs later abandoned their claim without consideration.

227. The DOJ Antitrust Division has refused to endorse private auctions when requested to do so. The DOJ has a "business review letter" process whereby parties concerned about the legality under the antitrust laws of proposed conduct can request a statement of the Antitrust Division's current enforcement intentions.[407] In 2012, Uniregistry requested a "business review letter" on the legality of private auctions under the antitrust laws. The DOJ declined to issue the business review letter and advised Uniregistry that "arrangements by which private parties agree to resolve gTLD string contentions solely to avoid a public auction present antitrust issues."[408] While the DOJ declining to issue a letter does not necessarily mean that private auctions are illegal, it indicates there is antitrust risk.

228. Verisign is not alone in having concerns about private auctions. In addition to Uniregistry, other stakeholders including ICANN working groups have raised concerns about private auctions, including the following:

- In 2019, an ICANN working group discussion noted "[c]ollusive private auctions could be very problematic in the eyes of competition authorities."[409]
- In 2018, Mr. Cherine Chalaby, Chair of the ICANN Board, sent a letter to GNSO SubPro where he expressed the Board's concern on the "abuse of private auction."[410]
- Following Mr. Chalaby's letter, the GNSO in its supplemental report noted that the community expressed concerns about private auctions: "Some have asserted that applicants involved in numerous contention sets have purposely lost in certain private

[407] *See* **AA-64**, 28 C.F.R. § 50.6, Antitrust Division Business Review Procedure; DOJ Antitrust Division, *What is a Business Review* (last updated on June 25, 2015), *available at* https://www.justice.gov/atr/what-business-review.
[408] *See* **AC-57**, Kevin Murphy, Domain Incite, "DOJ Says New gTLD Private Auctions Might Be Illegal" (Mar. 19, 2013), *available at* http://domainincite.com/12308-breaking-doj-says-new-gtld-private-auctions-might-be-illegal.
[409] New gTLD Subsequent Procedures ("SubPro") Working Group, Notes from "2019-10-17 New gTLD Subsequent Procedures PDP" Call (Oct. 17, 2019), *available at* https://community.icann.org/display/NGSPP/2019-10-17+New+gTLD+Subsequent+Procedures+PDP.
[410] Letter from Cherine Chalaby, Chair of ICANN Board of Directors, to Cheryl Langdon-Orr and Jeff Neuman, Co-Chairs of GNSO New gTLD Subsequent Procedures PDP Working Group, "New gTLD Subsequent Procedures PDP WG Initial Report" (Sept. 26, 2018) at 2, *available at* https://www.icann.org/en/system/files/correspondence/chalaby-to-langdon-orr-neuman-26sep18-en.pdf.

auctions, collected their portion of the proceeds, and then leveraged those funds for private auctions of other higher priority TLD applications."[411]

- The ICANN At-Large Advisory Committee commented that "the community does not know enough about abuse that may have occurred in the 2012 round of auctions . . . Even the legality of private auctions is in question."[412]
- RysG commented that "[t]he SubPro WG has never considered the legality of private auctions. Some members of the RySG think SubPro WG should consider the legality of such auctions as part of its work going forward" and that "private auctions have permitted competitors to split among themselves hundreds of millions of dollars that might otherwise have been put to use for the public benefit if such auctions were held by ICANN as auctions of last resort."[413]

229. The specific conduct of the applicants for the .WEB TLD suggested active coordination among the other bidders and heightened the concerns about collusion. Multiple bidders sought to pressure NDC into a private auction, indicating coordination and communication among these bidders. Bidders—*including Afilias*—offered NDC "guaranteed" payoffs for acquiescing to a private auction. *See* Section IX, *supra.* Another bidder emailed NDC explaining that a private auction would divide bidders into different tiers, with "stronger" and "weaker" players receiving different payouts and categorized as "winners" and "losers."[414]

230. For these reasons, Verisign would not agree to fund bidding by NDC at a private auction. It believed that the private auction presented significant antitrust risks.

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[411] GNSO, *Supplemental Report on the New gTLD Subsequent Procedures Policy Development Process (Additional Topics)*, (Nov. 1, 2018) at 14, *available at* https://gnso.icann.org/sites/default/files/file/field-file-attach/supplemental-report-01nov18-en.pdf.

[412] ICANN At-Large Advisory Committee ("ALAC"), "ALAC Statement on the Initial Report on the New gTLD Subsequent Procedures Policy Development Process (Overarching Issues & Work Tracks 1-4)" (Oct. 3, 2018), Response to Question 2.7.4.e.2, *available at* https://community.icann.org/pages/viewpage.action?pageId=88573813.

[413] RySG, "The gTLD Registries Stakeholder Group Comment on the Initial Report on the New gTLD Subsequent Procedures Policy Development Process (Overarching Issues & Work Tracks 1-4)" (Sept. 2018), Response to Question 2.7.4 (pp. 57–58), *available at* https://mm.icann.org/pipermail/comments-gtld-subsequent-procedures-initial-03jul18/attachments/20180926/4c5d6de6/RySGCommentsonSubProInitialReport-26September2018-0001.pdf.

[414] **Rasco Ex. C**, Email from O. Mauss (1 & 1 Internet) to J. Calle (NDC) (July 5, 2016).

F. Question No. 6: Please comment on the fact that NDC and Verisign deliberately sought to keep the DAA confidential until after the auction, and that Verisign's support was essential to NDC winning the auction, in light of ICANN's commitment to transparency and accountability

231. Section VII.A, *supra* at pages 64–67, explains that there is no obligation under the Guidebook to disclose the DAA, and it addresses why *Amici*'s decision to maintain the DAA as confidential until after the .WEB auction was: (i) consistent with general commercial practices; (ii) no different in kind than Afilias' decision not to disclose or amend its .WEB application to advise ICANN or third parties of the financial obligations it entered into with its outside lender in connection with the .WEB public auction; (iii) consistent with ICANN's interpretation and application of the Guidebook; and (iv) consistent with DNS industry practice.[415]

232. The Panel's question references ICANN's Bylaws commitment to "transparency and accountability."[416] This policy applies to *ICANN*'s own conduct, not the conduct of gTLD applicants or other participants in the domain name system. Furthermore, transparency is one of a number of generalized goals in ICANN's Bylaws. It is not a preemptive requirement for all ICANN operations or a requirement in the specific circumstances here.

233. In contrast, the disclosure obligations of applicants for new gTLDs are specifically set forth in writing in the Guidebook, including the criteria enumerated in the Guidebook by which ICANN evaluates each application.[417] Were obligations on applicants not specific and in writing, the uncertainty would be damaging to the new gTLD Program and a likely source of continuous disputes and litigation.

234. The separate and varying obligations of ICANN and others in the Internet community, respectively, cannot be conflated. Stated differently, ICANN's general "commitment to transparency and accountability" is irrelevant to whether NDC had any obligation to disclose the DAA prior to the .WEB auction. Rather, that commitment relates

[415] Although the Panel question refers to a deliberate effort to keep the DAA secret prior to the auction, there is a significant question as to the extent to which Verisign's agreement with NDC in fact was secret. *Supra* note 186; Hrg. Tr., Vol. IV (Aug. 6, 2020), 667:18–668:23 [Willett]; Afilias' Amended IRP Request, ¶¶ 32, 78.
[416] **Ex. C-1**, Bylaws, *supra* note 3, §§ 3.1, 4.1.
[417] *See* Section VII.A, *supra*; **Ex. C-3**, Guidebook, *supra* note 49, at Module 2.

exclusively to ICANN's own conduct; it does not govern the conduct of applicants or others participating in the New gTLD Program. Most pertinent here, ICANN's general Bylaw commitment to transparency does not require applicants to disclose confidential commercial arrangements, apart from the requirements for disclosure set forth in writing in the Guidebook. For example, there is no dispute that information regarding the financing of a competitor's auction bid may be of substantial interest to a competing bidder seeking to maximize its profits, but such information is commonly regarded as highly confidential and is not required under the Guidebook to be disclosed to other bidders. The Guidebook regulates what participants must disclose; that is not the function of generalized commitments of ICANN contained in its Bylaws. Article 3 of ICANN's Bylaws sets forth ICANN's commitment to "Transparency." Section 3.1, titled "Open and Transparent," for example, outlines how ICANN "shall operate:"

> *ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner* and consistent with procedures designed to ensure fairness, including implementing procedures to (a) provide advance notice to facilitate stakeholder engagement in policy development decision-making and cross-community deliberations, (b) maintain responsive consultation procedures that provide detailed explanations of the basis for decisions (including how comments have influenced the development of policy considerations), and (c) encourage fact-based policy development work. ICANN shall also implement *procedures* for the documentation and public disclosure of the rationale for decisions made by the Board and ICANN's constituent bodies (including the detailed explanations discussed above).[418]

235. Each of these "procedures" concerns actions *ICANN* should take "in an open and transparent manner" and "to ensure fairness," to the "extent feasible." These are not rules for prospective registry operators applying for a new TLD. These procedures *do not* refer to actions gTLD applicants must take. The same is true of the other sections within Article 3 of the ICANN Bylaws,[419] such as sections concerning *ICANN*'s maintenance of a public website (§ 3.2), *ICANN*'s employment of a "manager of public participation" (§ 3.3), *ICANN* posting documentation before and after ICANN Board meetings (§§ 3.4–3.5), *ICANN* giving notice and

[418] **Ex. C-1**, Bylaws, *supra* note 3, § 3.1 (emphasis added).
[419] *See id.* §§ 3.1–3.7.

opportunity to comment on Board policies (§ 3.6), and *ICANN* facilitating translation of published documents (§ 3.7).[420]

236. Afilias spent considerable time at the Hearing examining Ms. Burr and Ms. Willett on the ICANN Bylaws' transparency guidelines. The testimony only confirms that those guidelines are directed exclusively to ICANN, not to gTLD applicants.

237. Both Ms. Burr and Ms. Willett specifically rejected Afilias' strained suggestions that anything but the Guidebook dictated what information an applicant must disclose. For example, Ms. Burr testified that "the applicant guidebook speaks for itself in terms of what you're required to produce and what will be made public."[421] Similarly, Ms. Willett refused to accept Afilias' suggestion that principles of transparency required the disclosure and publication of "who was behind each application."[422] As she testified, ICANN required disclosure of the applying entity, management, contacts, "and any ownership interest in the applying entity greater than 15 percent."[423] As Ms. Willett made clear, "those were the people related to the application" that warranted disclosure and that ICANN made public.[424] *ICANN* and the Internet community, through years of drafting and revisions, determined what information was required of applicants and set forth those specific requirements in the Guidebook.[425] To the extent ICANN translated its commitment to transparency into applicant disclosure requirements, it did so through the Guidebook.[426] Accordingly, outside of the Guidebook's requirements, there is no "ICANN commitment to transparency" that governs the conduct of applicants or under which this Panel might judge NDC's actions.

238. If Afilias is attacking the provisions of the Guidebook as not consistent with ICANN's commitment to transparency, Afilias is years too late. The Guidebook was adopted in

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[420] *See id.*.
[421] Hrg. Tr., Vol. II (Aug. 4, 2020), 384:17–20 [Burr].
[422] Hrg. Tr., Vol. III (Aug. 5, 2020), 550:19–551:12 [Afilias cross-examination of Willett].
[423] *Id.* at 551:5–7 [Willett].
[424] *Id.* at 551:11–12 [Willett]; *See also id.* at 551:18–19 (stating that the purpose of ICANN's public disclosure was "to inform the public of the [applying] entity" [Willett]).
[425] *See* Section VII.A, *supra*. **Ex. C-3**, Guidebook, *supra* note 49, Attachment to Module 2.
[426] *See* Hrg. Tr., Vol. IV (Aug. 6, 2020), 682:8–17 (stating that ICANN's Bylaws on transparency were "intended to describe ICANN's approach to policy implementation") [Willett].

2012. The applicable limitations period ran long ago.[427]

239. It would be a dramatic overreach of the Panel's remit to judge NDC under a different standard than ICANN itself has established in the Guidebook. To judge NDC under a general "commitment to transparency" would improperly subject NDC to obligations that are not enumerated in the Guidebook, that NDC could never have anticipated, that ICANN itself has never demanded, and that, if applied retroactively, would affect countless other applications and auctions. The ICANN Bylaws do not authorize this Panel to impose such *ex post* obligations on NDC and the Panel should not do so.

240. To the extent principles of transparency are incorporated into the new gTLD program or application process, those principles have been set forth as Guidebook rules for applicants, such as those rules addressed elsewhere in this brief regarding, for example, information to be included in an application, prohibitions on assignment of applications, and updating applications. The Guidebook further states with specificity the information in applications that ICANN shall make public.

241. The Guidebook thus already reflects ICANN's and the community's determinations regarding the requirements on applicants, consistent with ICANN's "commitment to transparency," to provide information in connection with their applications.[428] Accordingly, were the Panel to reach the merits of Afilias' arguments concerning the DAA—over *Amici*'s objection—Afilias' claims must be measured against the Guidebook's specific written

[427] **Ex. C-23**. Bylaws (as amended Feb. 11, 2016), *supra* note 361, Art. IV, § 3.3, ("A request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation.").

[428] We focus here on ICANN's "commitment to transparency." Although similarly directed inward to ICANN, ICANN's "commitment to accountability" is not relevant to *Amici*'s disclosure of the DAA. Rather, as set forth in Article 4 of ICANN's Bylaws, the enumerated principles of accountability concern how ICANN "shall be accountable to the community for operating in accordance with the Articles of Incorporation and these Bylaws." **Ex. C-1**, Bylaws, *supra* note 3, § 4.1. As Ms. Burr testified in her witness statement, "ICANN has several Accountability Mechanisms built into its Bylaws that help ensure ICANN's accountability and transparency in all of its practices." Burr Stmt., ¶ 12. Those mechanisms are intended to review whether ICANN adhered to its rules and policies, not whether applicants conformed to disclosure requirements set forth in the Guidebook. *See* Section III, *supra*. Accordingly, the Panel cannot judge *Amici*'s conduct under accountability standards directed exclusively at ICANN's conduct. *See* Section IV.A, *supra*.

requirements, not against broad, and in this context overly vague, principles of transparency that otherwise might be applicable to ICANN under its Bylaws. In other words, ICANN's obligations under its Bylaws apply to ICANN, not to independent, individual registries, registrars, registrants and others in the Internet community.

G. Question No. 7: Is there an inconsistency between the contention that Afilias' claims are time barred and ICANN's position that it has not yet addressed the fundamental issue that Afilias complains of in this IRP? Please comment on the Respondent's observation that the Claimant's claims are in one sense premature and in another sense overdue (Respondent's Response, para. 7).

242. The Panel asks whether there is "an inconsistency between the contention that Afilias' claims are time barred and ICANN's position that it has not addressed the fundamental issue that Afilias complains of in this IRP." In *Amici*'s view, there is no inconsistency because these positions relate to different facts and circumstances.

243. Rule 4 of the Interim Procedures requires a claim to be brought within 120 days from the date on which a claimant "becomes aware of the material effect of the *action or inaction* giving rise to the DISPUTE" and no later than "twelve (12) months from the date of such *action or inaction.*"[429] The actions or inactions identified in Afilias' Amended IRP Request as the basis for its claims, and Afilias' awareness of those actions or inactions, both occurred prior to one or both of these limitations periods. It is these actions or inactions that ICANN contends are time barred. ICANN also contends in this IRP that ICANN's Board has not yet made a determination whether or not NDC should be disqualified from participating in the .WEB contention set, *i.e.*, the "fundamental issue that Afilias complains of in this IRP." Because this decision has not been made, an IRP with respect to any such future decision is premature.

244. Afilias' contention that NDC should be disqualified because of the DAA illustrates the distinction between the actions and inactions that Afilias has pleaded as the basis for its claims and the fundamental issue that ICANN has not yet decided. Afilias contends that, because the DAA purportedly transferred NDC's rights in its .WEB application, "ICANN

[429] **Ex. C-59**, Interim Supplementary Procedures, *supra* note 15, Rule 4 (emphasis added).

violated its Articles and Bylaws when it failed to disqualify NDC's bid and application upon receiving the DAA in August 2016."[430] The premise of Afilias' claim is that ICANN was under an immediate duty to disqualify NDC in August 2016. Even if ICANN were under such a duty (which it was not), then Rule 4 required Afilias to bring that claim no later than 120 days after Afilias became aware of the material effect of that inaction. Afilias knew of the material effect of the inaction of failing to disqualify NDC no later than September 9, 2016, when it complained to ICANN that "NDC violated Paragraph 10 of the Terms and Conditions in Module 6 . . . which expressly prohibits any applicant for a gTLD to 'resell, assign or transfer any of the applicant's rights or obligations in connection with the application.'"[431] Because Afilias did not file the IRP until more than two years later, Afilias' automatic disqualification claim is untimely.

245. The fundamental issue in the IRP is whether ICANN should exercise discretion to disqualify NDC. But, according to ICANN, its Board has not done so.[432] To do so, the Board must first decide whether or not NDC actually violated the Guidebook and whether Afilias' own uncontroverted rule violations should be disqualifying. Moreover, even if ICANN were to determine that NDC violated the Guidebook or any other applicable rule (which NDC did not), the Guidebook provides that the "decision to review, consider and approve an application to establish one or more gTLDs . . . is *entirely at ICANN's discretion*."[433] Indeed, the Guidebook makes clear that violations "*may* result" or "*may* cause" ICANN to deny an application, but requires no such result.[434] Likewise, the specific remedy for an alleged violation of the Guidebook is entirely within ICANN's discretion, and can include remedies short of disqualification.[435] Finally, if ICANN's Board decides to exercise its discretion in the future to award .WEB to NDC, then Afilias may file an IRP challenging *that* decision, even if the alleged bases for this IRP are time barred under Rule 4 of the Interim Procedures. In such a proceeding,

[430] Afilias' Reply Memorial, ¶ 86.
[431] **Ex. C-49**, Letter from S. Hemphill (Afilias) to A. Atallah (ICANN) (Sept. 9, 2016).
[432] ICANN's Response to Amended IRP Request, ¶ 81 ("As an initial matter, ICANN has taken no position on whether NDC violated the Guidebook . . . .").
[433] **Ex. C-3**, Guidebook, *supra* note 49, at Module 6, § 3 (emphasis added).
[434] *Id.* at Module 1, § 1.2.7, and *id.* at Module 6, § 1 (emphasis added).
[435] ICANN's Rejoinder Memorial, ¶¶ 23, 79, 81.

the Panel could "not replace the Board's reasonable judgment with its own."[436] Until the Board exercises its judgment to award .WEB to NDC notwithstanding Afilias' allegations, however, there is no Board judgment for this Panel to review.[437]

246. The recent interim decision in *Fegistry, LLC, et al. v. ICANN*[438] is instructive. In a prior IRP (the "*Despegar* IRP"), the Claimants alleged that ICANN improperly gave community priority to HTLD's application for .HOTEL.[439] While the *Despegar* IRP was pending, Claimants added a claim that HTLD's application should be rejected because individuals associated with HTLD exploited ICANN's website to improperly access confidential data of competing applicants (the "Portal Configuration issue").[440] The *Despegar* Panel ruled against the Claimants on the propriety of awarding community priority to HTLD.[441] The *Despegar* Panel also found that "serious allegations" had been made that the Board's approach "so far" with respect to the Portal Configuration issue did not comply with the Bylaws.[442] However, the Panel deferred ruling on the Portal Configuration issue because "the matter was still under consideration by the Board" and because the Board's ultimate decision "remain[ed] open to be considered at a future IRP should one be commenced in respect of this issue."[443] After the *Despegar* IRP, the Board found that HTLD engaged in over 60 unauthorized searches but that the cancellation of HTLD's application was not warranted because the unauthorized searches were immaterial to HTLD's success on the application.[444] Soon thereafter, the Claimants brought the *Fegistry* IRP, and the Emergency Panelist found that the Claimant's

[436] **Ex. C-1**, Bylaws, *supra* note 3, § 4.3(i)(iii).
[437] *Cf.* **AA-92**, *I.N.S. v. Orlando Ventura*, 537 U.S. 12, 16 (2002) ("[A] court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands.").
[438] **AA-84**, *Fegistry, LLC v. ICANN*, Decision on Request for Interim Measures of Protection, ICDR Case No. 01-19-0004-0808 (Gibson) (Aug. 7, 2020), *available at* https://www.icann.org/en/system/files/files/irp-fegistry-et-al-emergency-panelist-decision-interim-measures-protection-07aug20-en.pdf.
[439] *Id.* ¶¶ 3–33.
[440] *Id.* ¶ 34.
[441] *Id.* ¶ 35.
[442] *Id.* ¶ 38.
[443] *Id.*
[444] *Id.* ¶ 41.

challenge to the Board Decision on the Portal Configuration issue was timely, even though the underlying improper accesses of confidential data occurred well before the limitation period.[445]

247. As in *Despegar*, the fact that Afilias has raised arguments that a future Board decision to award .WEB to NDC would violate the Bylaws is not sufficient to make those contentions ripe for review. Whether NDC violated the Guidebook and whether any alleged violation merits disqualification is "still under consideration by the Board."[446] Once the Board takes action and if Afilias is dissatisfied with the Board's decision, Afilias may file a claim within the limitations period of Rule 4.[447] Afilias' claims that ICANN was required to automatically disqualify NDC in 2016, however, are long overdue under Rule 4. There is no contradiction between the position that a claim that ICANN was required to automatically disqualify NDC in 2016 is untimely and the position that the Panel cannot review a discretionary Board decision that the Board has not yet made.

H. Question No. 8: The Claimant is invited to comment on article 4.3(o) of the Bylaws as it relates to the remedies it is seeking in this IRP.

248. *Amici*'s response to Question No. 8 is set forth at Section III, *supra*.

I. Question No. 9: The Claimant is asked to clarify what is left to be decided in connection with the Claimant's Rule 7 claim given the disposition of those issues in the Decision on Phase I and the conduct of the IRP in accordance with that ruling. The Claimant is also asked to identify the source of its alleged entitlement to a cost award for the expenditure of effort because of VeriSign and NDC's participation in the IRP, on account of the alleged "wrongful" adoption of Rule 7.

249. The Panel asks what is left to be decided on Afilias' Rule 7 claim given the disposition of the issues in Phase I and the conduct of the IRP in accordance with that ruling. The Panel also asks Afilias to identify the source of its alleged entitlement to a cost award because of *Amici*'s participation, which Afilias contends was the result of ICANN's "wrongful" adoption of Rule 7. *Amici* believe that the only remedy with respect to Rule 7 that is within the Panel's jurisdiction is a declaration pursuant to Section 4.3(o) of the Bylaws whether or not

[445] *Id.* ¶ 136.
[446] *Id.* ¶ 38.
[447] **Ex. C-59**, Interim Supplementary Procedures, *supra* note 15, Rule 4.

ICANN violated the Bylaws in adopting Rule 7. Regardless of the Panel's decision on whether ICANN should have adopted Rule 7, there is no basis for Afilias' alleged entitlement to costs.

250. The Panel permitted Afilias' Rule 7 claim to move to Phase II based on Afilias' allegations of a conspiracy between ICANN and Verisign to adopt language in Rule 7 that grants *amici* status to either (1) a member of a contention set or (2) a person whose actions are significantly referred to in the IRP.[448] NDC and Verisign, respectively, fit these two categories. Thus, the Panel commented, in light of Afilias' gloss on the documentary evidence, that it would be "surprising" if the articulation of these categories were wholly unrelated to Afilias' CEP and impending IRP.[449] The Panel noted, however, that the written declarations before it "directly contradict the inference that the Panel is asked to draw from the documentary evidence."[450] The Panel allowed Afilias' Rule 7 claim to survive because it was not "prepared to make findings of fact that are inconsistent with the declarations affirmed by witnesses whose evidence has not been subject to cross-examination."[451]

251. Afilias has now had an opportunity to cross-examine the declarants—Samantha Eisner and David McAuley—and Afilias' conspiracy theory was not supported at the hearing. In particular, both Ms. Eisner[452] and Mr. McAuley[453] testified, consistent with their witness statements, that the language creating the two categories of *amici* at issue was drafted by Ms. Eisner. Ms. Eisner is an ICANN employee, not a Verisign or NDC employee, and Afilias presented no evidence whatsoever that Ms. Eisner had a motivation to draft language for the purpose of harming Afilias or for any other improper purpose.[454]

252. Furthermore, neither Ms. Eisner nor Mr. McAuley had specific knowledge of Afilias' CEP or impending IRP. Ms. Eisner explained that "CEP discussions are confidential, and we [ICANN] also consider them confidential within ICANN. So as I am not on the team

[448] Decision on Phase I (Feb. 12, 2020), ¶ 174.
[449] *Id.* ¶ 175.
[450] *Id.* ¶ 177.
[451] *Id.* ¶ 180.
[452] Hrg. Tr., Vol. III (Aug. 5, 2020), 465:21–466:8 [Eisner].
[453] Hrg. Tr., Vol. VI (Aug. 10, 2020), 1079:13–1080:7 [McAuley].
[454] Eisner Decl. (Jan. 16, 2019), ¶ 1.

that participates in those, I don't participate in those discussions."[455] Thus, Ms. Eisner was not aware of Afilias' offer to provide ICANN with a draft of its IRP request.[456] She also was unaware of Afilias' draft IRP when it was provided on October 10, 2018.[457] And she was unaware that ICANN terminated the CEP approximately 19 days after receiving the draft IRP.[458] Nor did anyone at ICANN communicate an intention to terminate the CEP to Ms. Eisner.[459]

253. Mr. McAuley testified that no one at Verisign ever sought to discuss the topics covered by Rule 7 with him or even suggest what topics he should discuss or consider with the IOT.[460] He was not even aware at the relevant time that NDC had a contract with ICANN concerning .WEB or that Verisign and NDC had a contract with each other.[461] He also was not made aware that Afilias had filed a CEP with ICANN or that it had threatened to file an IRP by Ms. Eisner or by any other source.[462] Thus, the testimony at the hearing confirms the documentary evidence and the previously submitted witness statements: The articulation of the language in Rule 7 had nothing to do with Afilias' IRP. Because Afilias' conspiratorial allegations were not supported at the hearing, the Panel should reject Afilias' claim.

254. In any event, the Panel's determination of the Rule 7 claim is, as a practical matter, an academic point. Because the Panel has already permitted *Amici* to participate, albeit in a limited manner well short of party participation, there is no prospective relief that could benefit Afilias. Furthermore, Rule 7 is only an interim rule, and the IOT is currently drafting a final version of Rule 7 for the Board's consideration.[463] Thus, the Board will have the opportunity to adopt or modify the disputed language in a context where it could have no effect

[455] Hrg. Tr., Vol. II (Aug. 4, 2020), 415:2–6 [Eisner].
[456] *Id.* at 414:24–415:6 [Eisner]
[457] *Id.* at 415:7–416:2 [Eisner].
[458] *Id.* at 416:3–10 [Eisner].
[459] Hrg, Tr., Vol. III (Aug. 5, 2020), 456:13–19 [Eisner].
[460] Hrg. Tr., Vol. VI (Aug. 10, 2020), 1035:21–1037:1 [McAuley].
[461] *Id.* at 1067:23–1068:13 [McAuley].
[462] *Id.* at 1093:17–1094:9 [McAuley].
[463] ICANN's Independent Review Process- Implementation Oversight Team ("IRP-IOT", Rule 7 Markup (Sept. 8, 2020) (containing the current draft of Rule 7), https://community.icann.org/download/attachments/144377599/Rule%207%20markup%20v1%5B3%5D.docx?version=1&modificationDate=1599590653000&api=v2.

on this IRP because the IRP will already have been completed.

255. Finally, Afilias' assertion that it is entitled to costs with respect to Phase I is frivolous. Under the Arbitration Act of 1996 applicable to arbitrations in which London is designated as the seat,[464] a tribunal's discretion to award costs is "subject to any agreement of the parties."[465] The Bylaws' accountability mechanisms—which are incorporated into the Terms and Conditions of Module 6[466]—permit cost shifting in only one situation: The "losing party" may be required to pay costs if the Panel identifies its "Claim or defense as frivolous or abusive."[467] Afilias has never claimed ICANN's defense of Rule 7 is abusive or frivolous, nor could it plausibly make such a claim. Instead, Afilias argued "the wrongful adoption of Rule 7 has significantly increased Afilias' costs associated with prosecuting this IRP."[468] The Bylaws, however, only permit the Panel to "[d]eclare whether a Covered Action . . . violated the . . . Bylaws."[469] While declaratory relief is permitted, the Bylaws do not permit the Panel to award a Claimant damages for harm allegedly resulting from an alleged violation of the Bylaws.

256. Even if the Panel's jurisdiction were not so limited, Afilias would still not be entitled to damages for the allegedly wrongful adoption of the Bylaws because the adoption of the Bylaws did not cause Afilias' costs in responding to *Amici*. "Conduct does not 'contribute' to harm if the same harm would have occurred without such conduct."[470] Here, the Panel held that the scope of participation it granted *Amici* was appropriate "whether it be under the provisions of Rule 7, properly interpreted, as an exercise of the Panel's discretion under Section 4.3(o)(V) of the Bylaws, *or* under relevant principles of international law."[471] Because *Amici* would have been granted the same scope of participation under unchallenged portions of the Bylaws and principles of international law—even if Rule 7 had not been adopted—the adoption

[464] **AA-50**, English Arbitration Act 1996, *supra* note 47, § 2(1).
[465] *Id.* § 61(1).
[466] **Ex. C-3**, Guidebook, *supra* note 48, at Module 6, § 6.
[467] **Ex. C-1**, Bylaws, *supra* note 3, § 4.3(r).
[468] Afilias' Amended IRP Request, ¶ 88.
[469] **Ex. C-1**, Bylaws, *supra* note 3, § 4.3(o)(iii).
[470] **AA-94**, *Mayes v. Bryan*, 139 Cal. App. 4th 1075, 1095 (Cal. Ct. App. 2006) (internal quotation omitted).
[471] Decision on Phase I (Feb. 12, 2020), ¶ 184 (emphasis added).

of Rule 7 was not a but for cause of *Amici*'s participation in the IRP or Afilias' costs.

257. For all these reasons, the Panel should find that ICANN did not violate the Bylaws in adopting Rule 7 and reject Afilias' demand for an award of costs.

J. Question No. 10: Please comment, in light of the relevant provisions of the Bylaws, on ICANN's decision not to disclose to Afilias, the *Amici* and the general public its Board's November 2016 decision regarding .WEB. The Respondent is asked to explain the reason why this Board decision was disclosed allegedly for the first time in the Respondent's Rejoinder?

258. The Panel asks Respondent to explain the reasons why the November 2016 Board decision regarding .WEB was disclosed allegedly for the first time in Respondent's Rejoinder. *Amici* acknowledge that this question is directed to Respondent. *Amici* do not know the reason for ICANN's decision beyond what ICANN has testified to at the hearing and in witness statements. Accordingly, *Amici* direct the Panel to ICANN's testimony regarding this decision. (*See, e.g.*, Hrg. Tr., Vol. I (Aug. 3, 2020), 109:10–25, 111:1–17 [ICANN Opening Statement]; Hrg. Tr., Vol. V (Aug. 7, 2020), 919:7–10, 975:9–976:8 [Disspain]; Disspain Stmt., ¶¶ 10–11).

XI. CONCLUSION

259. For the reasons set forth herein, and as demonstrated during the IRP hearing and in ICANN's and *Amici*'s pre-hearing briefs, Afilias' claims are meritless and should be rejected.

Dated: October 12, 2020

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